

2011 Casualty Loss Reserve Seminar – Las Vegas, Nevada

How to Avoid Being A Defendant

Managing the Risk of Actuarial Malpractice Claims

R. Timothy Muth, Esq.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street
Milwaukee, WI 53202
(414)-298-8210
www.reinhartlaw.com

“First, sue all the consultants.”

Business Week magazine - June, 2000

Relevance to In-house Actuaries

- ⊗ While you are unlikely to personally be a defendant in a malpractice suit, you do not want to be:
 - ⊗ The central witness in a trial over a failed corporate merger.
 - ⊗ Attacked for not informing management of key material facts relevant to a securities fraud lawsuit.
 - ⊗ The opening actuary on the last statement of opinion before your employer is put into receivership by the state insurance department.

Key Steps to Legal Risk Management

- Before You Start:
 - Know Your Client
 - Evaluate Assignment Risk
 - Avoid Conflicts of Interest
 - Get a contract which protects you
- While Doing The Work
 - Know Your Client's Business
 - Limit Third Party Exposure
 - Be Careful What You Write
- If a problem arises
 - Do's and don'ts

Identifying Risk

**Risk can be managed, but only if you
learn to identify it.**

Know Your Client and Its
Business

Identifying Risky Clients Is An Important Part of Managing Litigation Risk

- ⌘ It is difficult to win professional malpractice claims when your client has defrauded policyholders or investors.
- ⌘ A client's sophistication, tendency to sue, financial situation and experience all influence the possibility of suits.

Risky Clients

- Client operating at the edge of the law
- Client/user in bad financial shape
- Inexperienced / incompetent client
- Clients "fired" by their previous professionals
- Clients experiencing rapid change in their business
- Appearance that a user needs a particular result

Different Assignments Have Different Risk Profiles

- Being an expert in securities documents
- Mergers and acquisitions
- Statutory opinions and valuations
- Complex software work
- General consulting

- Ask yourself – Is someone going to be investing, buying, selling, funding, or changing their financial position in reliance on the advice I am giving? Would they lose money if my advice is wrong?

Avoid Conflicts Of Interest

Professional Guidelines

- The actuarial profession has the Professional Code of Conduct

Jury Guidelines

- Were you loyal to your client?

“Prosecutor Ethics”

- Did you receive money from someone you recommended?

Examples of Conflicts

- ⌘ Reviewing the work of a colleague for a different client.
- ⌘ Working on opposite sides of an acquisition from a colleague.
- ⌘ Working for competing bidders.
- ⌘ Taking a referral fee from someone you were hired to evaluate for a client.

Managing Conflict Risk

- ⌘ Identify conflicts
- ⌘ Disclose to affected parties
- ⌘ Get written waivers of the conflict of interest.

A contract to protect you

- ⌘ Limitation of Liability
- ⌘ Alternate Dispute Resolution
- ⌘ Limits on Distribution of Work Product
- ⌘ Allocation of Responsibility for Data

Once the engagement begins:

Be aware of the overall context of your
client's business

An actual insurer balance sheet

Balance Sheet
December 31, 2001

ASSETS			
Current Assets			
Dreyfus Money Management	\$ 708,282.81		
National City #00199571	<1,329,105.10>		
FIMB Third Money Market	32,986.69		
FIMB Third Bank CD	101,076.78		
ICIT Equipment Money Market	1,529.58		
National City Institutional	729,674.44		
Accounts Receivable	1,449,419.06		
PR Expense from Life	<26,374.11		
Other Receivables	35,061.00		
Interest Receivable	824.81		
Total Current Assets	1,968,72		
Property and Equipment			
Autom Deprec on FF&E	<15,284.89>		
Furniture and Fixtures	12,000.00		
Equipment	448,406.90		
Total Property and Equipment	415,11		
Other Assets			
ICI Life Stock	2,000,000.00		
Accumulated earnings from ici	<77,588.85>		
Precious Stones	2,932,811.00		
Total Other Assets	4,855,222.15		
Total Assets	\$ 7,239,057.18		
LIABILITIES AND CAPITAL			
Current Liabilities			
Accounts Payable	\$ 561,713.59		
401 K Deductions Payable	5,332.18		
Prepaid Premiums	30,247.35		
Total Current Liabilities	596,389		
Long-Term Liabilities			
Claims Reserve Holding Account	6,500,000.00		
Total Long-Term Liabilities	6,500,000.00		
Total Liabilities	7,096,389.00		
Capital			
Surplus	3,872,269.47		
Net Income	<3,729,521.31>		
Total Capital	142,748.16		
Total Liabilities & Capital	\$ 7,239,057.18		

Understand what the client is doing

- Get an understanding of the client's business and its plans
- Watch for red flags – "precious stones"
- Learn how the client intends to use the work you provide

Manage Third Party Exposure

Third Party Liability exists when a professional is liable to a non-client (third party) for malpractice.

Increased Risk From Third Party Liability

1. More people to sue you
2. Increased possibility of misunderstanding by user
3. No chance to screen out unwanted clients
4. No reservoir of client goodwill

Managing Third Party Liability Risk

- ⌘ Understand client's intended use of your work
- ⌘ Prohibit distribution of work without your prior written consent -- put the prohibition in your contract and in your report.
- ⌘ The condition for your consent will be the third party's agreement not to bring suit against you.

Be Careful What You Write

Plaintiffs and prosecutors love e-mail

"Why people still send e-mails ^{or text messages} is beyond me,
but please continue - it makes my job
easier."

Elliott Spitzer

A Non-Privileged Memo from a real case

P H O N E N O T E S

From: J. Dunleavy

Date: 12/7/2003

Notes:

Received call from Mark. Discussed situation
with union pension plan. Problem is with
interpretation of plan provisions. From our review
the damage to the plan is partly our fault.

Next Action Item: Pray

More e-mail lessons

- Apply the *New York Times* test when deciding what to write – "Would I be comfortable reading this on the front page of the *New York Times*?"
- Sending an e-mail gives it immortality. It is virtually impossible to delete all evidence of an e-mail which has been sent from your computer.
- Voice mail attachments to e-mail carry the same risk. Offices which deliver voice mail through the e-mail system need to make sure employees are aware those attachments are discoverable in litigation.

What goes in the file?

- ⌘ Items necessary to meet professional documentation requirements.
- ⌘ Everything you sent to or received from the client
- ⌘ Workpapers necessary to show what you did.
- ⌘ The front page of the *NY Times* test
- ⌘ Apply these principles when you close up a project.