

An Ounce of Prevention The First Step

ACTUARIES, LIKE ALL PROFESSIONALS, are subject to possible public discipline by their profession if they fail to live up to its standards of conduct, qualification, or practice. Further, in our litigious society, they face an increasing risk of professional liability suits involving even the most spurious of claims of malpractice or professional negligence. Actuaries who stand accused in such cases can pay enormous costs, not only in financial terms but also in time and the possible loss of professional prestige or livelihood.



Actuaries are well advised to take precautions to reduce the likelihood of having a claim of actuarial malpractice brought to the Actuarial Board for Counseling and Discipline or to the courts and, in the event such a claim is brought, being subject to an adverse finding.

One of the most important precautions an actuary can take to avoid potential problems is the exercise of appropriate care in evaluating, defining, and accepting assignments. Too often, this is the precautionary measure most likely to be ignored.

Much of the litigation involving actuaries centers on assignments that should not have been undertaken, that were poorly defined, or that developed problems that could have been avoided with better planning and foresight. The actuary should take reasonable steps to determine the acceptability of an assignment before agreeing to assume responsibility for it. These steps should involve not only a consideration of applicable laws, regulations, and professionalism standards, but also the application of sound business practices and common sense.

It's better to turn down or modify a potentially problematic assignment than to be faced with possible adverse consequences that might develop later. An ounce of prevention expended in this effort can be worth much more than a pound of cure later.

The following are a few brief guidelines that may help in evaluating and selecting potential assignments. While most of these guidelines relate to consulting actuarial assignments, some apply to in-house actuarial assignments as well.

Review the assignment for conflicts of interest.

This can be a difficult situation to deal with because the *appearance* of a conflict can often be as problematic as an *actual* conflict. Remember, plaintiffs' attorneys often operate in reverse of the Society of Actuaries' motto by substituting appearances for facts and impressions for demonstrations.

Try to imagine how the situation might appear if you were called upon to explain it on the witness stand. The potential for conflicts of interest is greater for large firms with multiple offices and may require a diligent effort to determine that none exists.

Where the potential for a conflict of interest exists, your

JACK TURNQUIST, a member of the ABCD, is retired and lives in Dallas.

MASTERFILE

Clients with reputations for questionable ethics and shady business practices tend to get sued more often, and so do the professionals working for them.

unimpaired ability to act fairly, full disclosure to all affected principals, and their express agreement to the performance of the assignment are minimum requirements. Make sure these agreements are in writing.

Review the significant details of the assignment with the prospective principal.

A discussion with the prospective principal should cover the background and scope of the assignment so both of you have a clear understanding and agreement about the purpose of the assignment and the intended use of the results. The discussion should cover relevant details and known or potential problem areas such as timing, availability and quality of data, restrictions, reliances, limitations, use of results, confidentiality, and ownership of records. This is also a good time to discuss cost estimates, fee bases, and billing and payment schedules. Make sure the budget or fee estimate is adequate to allow for the proper completion of the assignment.

The discussion and review should be designed to ferret out common assignment pitfalls, such as opinion shopping. Determine if you'll be replacing another actuary or if another actuary has turned down the assignment. If so, ask for permission to talk to that actuary. If permission is withheld, this should be an incentive to decline the assignment.

Assess the background, reputation, and motives of the parties involved.

As they say, "If you swim with sharks, expect to be eaten." Clients with reputations for questionable ethics and shady business practices tend to get sued more often, and so do the professionals working for them. Even if you're not sued, working for a client with an unsavory reputation doesn't help your reputation as a professional. Such clients are more likely to try

to exert pressure on you to opine beyond your competence, to take positions beyond reasonable advocacy, and to otherwise act unprofessionally.

Determine your competency and ability to perform the assignment.

You must be comfortable with your qualifications and ability to perform the assignment. This includes not only satisfying the qualification standards but also passing the "look-in-the-mirror" test (see "Up to Code," *Contingencies*, September/October 2006). If you have any doubts about your abilities in any area of the assignment, make sure you have someone on your team who has the requisite qualifications.

In addition, carefully assess your commitments and the adequacy of your available resources to perform the assignment comfortably within the specified time frame. The lack of adequate time is probably responsible for the majority of problems encountered in an assignment, frequently leading to cut corners, poor workmanship, and errors.

Prepare a detailed proposal, engagement letter, or memorandum of understanding.

While this would appear to make good business sense, it's one of the most frequently ignored or inadequately performed functions in accepting assignments. The documentation should show what you and the principal have agreed to at the outset of the assignment and can help eliminate later misunderstandings and problems. The documentation should include all relevant agreements and understandings relative to the assignment, including those previously identified for your discussion with the prospective principal.

If appropriate, obtain an indemnification agreement.

High-profile assignments, such as ap-

praisals and the provision of opinions for inclusion in public-offering documents, carry with them a corresponding high risk for potential litigation. Even the more routine actuarial opinions for statutory and GAAP financial statements are now frequently the subject of litigation when an insurance company becomes insolvent. In most situations, any professionals associated with the company, including the actuaries, are usually named in the litigation regardless of whether they were at fault. In such situations, it can be quite costly to mount the necessary legal defense.

An indemnification agreement can help mitigate the financial consequences of defending against such allegations. Very briefly, an indemnification agreement says that the principal agrees to defend and hold the actuary harmless and pay reasonable costs for the actuary's time in defense of any lawsuit that may be brought as the result of the assignment. It further provides that, should a court of competent jurisdiction find that the actuary improperly performed his or her responsibilities, the actuary agrees to reimburse the principal for such amounts expended in the actuary's defense.

Use the services of an attorney.

Attorneys can be valuable in reviewing or assisting in the drafting of documents such as proposals, letters of engagement or understanding, and indemnification agreements to make sure you're not leaving yourself exposed. You may also want to consult with an attorney if a proposed assignment involves any unusual requirements or features.

Choose an attorney who has experience in actuarial matters. You should consider this to be a form of preventive maintenance. Whether you pay the attorney today or later, it's going to cost you a lot more once litigation has ensued. ●