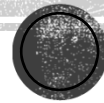


THE CPA'S ROLE IN BUSINESS LITIGATION

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TODAY'S GOALS

- Understand the business litigation life cycle.
- Understand your professional/legal duties during the business litigation life cycle.
- Understand practical issues related to the business litigation life cycle.
- Understand the issues related to document production.
- Understand the issues related to testimony.



WHAT IS BUSINESS LITIGATION?

- A dispute arising from differing opinions over obligations, rights, duties, responsibilities and facts between transacting parties.
- Various contractual and tort claims.
- Involves entities and/or individuals.
- Federal courts, State courts or arbitration.



BUSINESS LITIGATION LIFE CYCLE

- The Dispute
- Pre-Litigation
- Complaint/Answer/Reply
- Discovery
- Post Discovery - Pre-trial/hearing
- Trial/hearing



BUSINESS LITIGATION LIFE CYCLE

- The Dispute
 - The phase where the disagreement among parties transacting in the marketplace arises from the parties differing opinions over obligations, rights and facts.



BUSINESS LITIGATION LIFE CYCLE

- Pre-Litigation
 - The phase where the parties gather information to support their positions regarding the dispute. May include pre-litigation demands.



BUSINESS LITIGATION LIFE CYCLE

- Complaint/Answer/Reply
 - The phase where the plaintiff formally files a complaint asserting its causes of action. The defendant answers the complaint and may assert its own causes of action in response (aka counterclaims). The plaintiff responds to any counterclaims.



BUSINESS LITIGATION LIFE CYCLE

- Discovery
 - The phase where the parties exchange/develop information (interrogatories, request for documents, inspections, expert reports, request admissions, affidavits and depositions). The parties may also agree on facts (stipulations).



BUSINESS LITIGATION LIFE CYCLE

- Post Discovery - Pre-trial/hearing
 - The phase where the dispute may be resolved as a matter of law based on the facts developed in the discovery phase. If not fully resolved, the issues to be resolved at trial have been narrowed. The parties begin preparing for trial.



BUSINESS LITIGATION LIFE CYCLE

- Trial/hearing
 - The phase where the parties present their evidence to the **trier of fact** resulting in a verdict, judgment or opinion.



PROFESSIONAL / LEGAL DUTIES

- Protecting Client Information
- Complying with Subpoenas
- Complying with Discovery Requests



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PROFESSIONAL / LEGAL DUTIES

- Protecting Client Information
 - 21 NCAC 08N .0205
 - (a) Nondisclosure. A CPA shall not disclose any confidential information obtained in the course of employment or a professional engagement except with the consent of the employer or client.



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PROFESSIONAL / LEGAL DUTIES

- Protecting Client Information
 - 21 NCAC 08N .0205
 - (b) Exceptions. This Rule shall not be construed: (2) to affect in any way the CPA's compliance with a **validly issued** subpoena or summons **enforceable** by this Board or by order of a court; or ... (7) to affect a CPA's disclosure of confidential information when such disclosure is required by state or federal laws or regulations.



PROFESSIONAL / LEGAL DUTIES

- Protecting Client Information
 - AICPA Rules 1.700.001.01
 - A member in public practice shall not disclose any confidential client information without the specific consent of the client.



PROFESSIONAL / LEGAL DUTIES

- Protecting Client Information
 - AICPA Rules 1.700.001.02
 - This rule shall not be construed ... (2) to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations...



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PROFESSIONAL / LEGAL DUTIES

- Complying with subpoenas:
 - North Carolina Rule of Civil Procedure 45 governs Civil Subpoenas in State Court.
 - Federal Rule of Civil Procedure 45 governs Civil Subpoenas in Federal Court.



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PROFESSIONAL / LEGAL DUTIES

- Complying with subpoenas:
 - NCRCP 45 and FRCP 45:
 - Both allow for a party to command persons to attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control.
 - Subject to objections under the respective rules.



PROFESSIONAL / LEGAL DUTIES

- Complying with Discovery Requests:
 - NCRCP 30 and FRCP 30:
 - Deposition upon oral examination.
 - NCRCP 33 and FRCP 33:
 - Interrogatories to parties.



PROFESSIONAL / LEGAL DUTIES

- Complying with Discovery Requests:
 - NCRCP 34 and FRCP 34:
 - Production of documents, electronically stored information, and things...
 - NCRCP 36 and FRCP 36:
 - Request for admission; effect of admission.



PROFESSIONAL / LEGAL DUTIES

- Complying with Discovery Requests:
 - “It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.” NCRCP 26(a)(1)



PRACTICAL ISSUES OF LITIGATION

- The Dispute
 - Identify points of friction.
 - Unless you are certain of your legal rights and responsibility, consult counsel.
 - Preserve documents (including ESI).
 - Wear the white hat.



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PRACTICAL ISSUES OF LITIGATION

- Pre-Litigation
 - Bring counsel into the loop.
 - Gather information and documents to fully understand the facts surround the dispute.
 - Analyze strength and weaknesses.
 - Conduct a cost-benefit analysis.
 - Be reasonable in communications.



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PRACTICAL ISSUES OF LITIGATION

- Complaint/Answer/Reply
 - Immediately notify counsel when you receive a complaint.
 - Clearly identify objectives/strategies.
 - Understand the costs and risks of litigation.
 - Work with counsel to ensure all allegations are factually accurate.
- Tell your story.



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PRACTICAL ISSUES OF LITIGATION

- Discovery
 - Initial Disclosures (Fed Ct. only).
 - Identify all sources of information.
 - Work on written discovery responses as soon as received.
 - Work with counsel to identify best 30-B-6 deponent(s).
 - Over prepare for depositions.
 - Educate your counsel on your areas of expertise.



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PRACTICAL ISSUES OF LITIGATION

- Pre-trial/hearing
 - Review and analyze information and documents produced by all parties.
 - Identify gaps in information and documents that support your position.
 - Assess settlement options.
 - Be patient.



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PRACTICAL ISSUES OF LITIGATION

- Trial/hearing
 - Be prepared by reviewing information and documents produced by all parties; especially your documents / deposition.
 - Remember the jury is always watching you.
 - Always be courteous and respectful.



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DOCUMENT PRODUCTION ISSUES

- Time for Compliance
- Privilege / Confidentiality / Work Product
- Expense of Production
- Format (especially ESI) of Production
- Scope of Production



DOCUMENT PRODUCTION ISSUES

- Time for Compliance (Generally)
 - Document Subpoenas
 - Date stated in Subpoena
 - Request for Admissions
 - 30 days
 - Interrogatories and Request for Production
 - 30 days with automatic additional 30 days upon request



DOCUMENT PRODUCTION ISSUES

- Privilege / Confidentiality / Work Product
 - No CPA-Client Privilege in NC
 - Attorney-Client Privilege applies to:
 - CPA Employee to counsel communication
 - CPA engaged through counsel
 - Work Product / Working Papers
 - Attorney/Attorney's agent work product
 - CPAs working papers



DOCUMENT PRODUCTION ISSUES

- Expense of Production
 - Generally the party producing bears the expense.
 - Third party subpoenaed may object on the grounds that the document request creates an undue expense. NCRCP 45 & FRCP 45.
 - Parties may object on the grounds that requested ESI creates undue burden or expense. NCRCP 34.
 - If the parties cannot agree on who carries the burden of the expense, the courts may determine.



DOCUMENT PRODUCTION ISSUES

- Format (especially ESI) of Production
 - “A party must produce documents as they are kept in the usual course of business or must label them to correspond to the categories requested.” NCRCP 34(b)(1).
 - If a request does not specify a form for production of ESI, a party must produce it in a reasonably usable form. NCRCP 34(b)(2).



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DOCUMENT PRODUCTION ISSUES

- Format (especially ESI) of Production
 - ESI includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. NCRCP 26(b)(1).
 - Courts have broad discretion to allocate the costs or limit the scope of ESI based on the needs of the case, amount in controversy, limitations on parties resources and importance of the issues at stake in the litigation. NCRCP 26(b)(1a) and (2).



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DOCUMENT PRODUCTION ISSUES

- Scope of Production
 - Documents
 - Volume
 - Accessibility
 - Document retention policies
 - ESI
 - Key word searches
 - Date ranges
 - ESI retention policies
 - Data servers
 - Email servers



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TESTIMONY ISSUES

- Deposition Testimony
 - You cannot over prepare.
 - You cannot start preparing too early.
 - You cannot convince the deposing attorney that your client is right.
 - You cannot win the case in a deposition.
 - You **CAN LOSE** the case in a deposition.



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TESTIMONY ISSUES

- Deposition Testimony
 - Understand the question asked.
 - Answer the question asked.
 - Do not volunteer information.
 - Be careful with documents (especially if not your documents).
 - Take your time and be courteous; remember you are making a record that can only be used to impeach you in court.



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TESTIMONY ISSUES

- Deposition Testimony
 - “I do not know” v. “I do not recall”.
 - Binding effect of a 30-B-6 deposition.
 - The attorney is never “almost done”; take breaks as needed.



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TESTIMONY ISSUES

- Trial Testimony
 - You cannot over prepare.
 - You cannot start preparing too early.
 - Review your deposition thoroughly
 - Answer consistent with your prior testimony
 - Understand the difference between open ended questions and leading questions



TESTIMONY ISSUES

- Trial Testimony
 - Look at the attorney asking the question and make sure you understand the question.
 - Respond to the jury (they are the sole judge of credibility and the facts).
 - Use plain language (avoid acronyms and jargon).
 - Do not talk down to the jury.



TESTIMONY ISSUES

- Trial Testimony
 - Tell your clients story.
 - Make eye contact with the jurors.
 - Do not be surprised.
 - Always look like you or your client are winning.



QUESTIONS?

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