

# 2022 WICPA BUSINESS & INDUSTRY FALL CONFERENCE

YOUR SOURCE FOR KEY UPDATES & INSIGHTS ON TIMELY ISSUES

**TUESDAY, SEPT. 13**  
BROOKFIELD CONFERENCE CENTER  
& WICPA CPE LIVESTREAM



# 2022 WICPA BUSINESS & INDUSTRY FALL CONFERENCE

## MATERIALS AT A GLANCE

The following materials are from the afternoon sessions of the 2022 WICPA Business & Industry Fall Conference held on Tuesday, Sept. 13, including:

- Keys to being an Excel-lent Leader
- Accounting Update: Focus on Leases
- How to Get the Most Out of Social Security to Help Maximize Your Retirement Income
- Rethinking the Employee Feedback Loop
- CPA Ethics: How to Successfully Navigate Disputes

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### **Business & Industry Fall Conference**

Tuesday, Sept. 13

Brookfield Conference Center, Brookfield

Wednesday, Oct. 26

Glacier Canyon Lodge, Wisconsin Dells

### **Not-for-Profit Accounting Conference**

Tuesday, Sept. 20

Brookfield Conference Center, Brookfield

### **Tax Conference**

Thursday, Nov. 3 - Friday, Nov. 4

Brookfield Conference Center, Brookfield

### **Accounting & Auditing Conference**

Wednesday, Nov. 16

Brookfield Conference Center, Brookfield

### **Accounting Technology Conference**

Thursday, Dec. 8

Brookfield Conference Center, Brookfield



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Recipients will be announced in January and honored at the Member Recognition Banquet & Annual Business Meeting on May 5, 2023.



3:30 – 4:30 p.m.

# CPA Ethics: How to Successfully Navigate Disputes

**Mark Schmidt, J.D.**, *Shareholder, von Briesen & Roper, s.c.*

**Steve Szymanski, J.D., MBA**, *Shareholder, von Briesen & Roper,  
S.C.*

# **CPA Ethics: How to Successfully Navigate Disputes Between Shareholders & Members of Closely Held Businesses**

**WICPA Business and Industry Fall Conference**

September 2022



## **Overview**

- This session will focus on the ethical duties of CPAs that are implicated when disputes arise between owners of closely held corporations and limited liability companies (LLCs).
- The program identifies real-world scenarios and offers practical suggestions to help CPAs bolster a successful and ethical practice.
- This session will qualify for Ethics CPE credits.



## About the Presenters

**Steve Szymanski, Shareholder**  
**Corporate and Mergers and Acquisitions**



*Specialty Practice Areas:*

- Represent privately-held businesses and their owners
- Negotiation of business divorces and exits
- Collaborate with litigation colleagues on business divorces and exit options



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## About the Presenters

**Mark Schmidt, Shareholder**  
**Litigation**



*Specialty Practice Areas:*

- Shareholder and LLC Member Litigation – business divorces and exit options
- Minority shareholder oppression – squeeze outs and freeze outs
- Non-competes, confidential information, trade secrets



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## Why Does This Matter?

- Negative consequences for ethical problems include:
  - Negative publicity / loss of professional standing
  - Malpractice claims
  - Revocation or suspension of license



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## CPA Risks and Rewards

“CPA’s responsibility . . . has given rise to the appellation of *‘the most trusted professional’*. This is the hallmark of the CPA profession; it its core is the concept of always placing adherence to the code, professional standards, and the exercise of due care and reasonable judgment above commercial interests.”

Vincent J. Love, CPA, and John H. Eickemeyer, JD,  
“Fiduciary Duty, Due Care, and the Public Interest,”  
*The CPA Journal*, April 2020



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## Interest in CPA Ethics

- Accountants are typically the first responder in a business dispute
- Accountants typically provide advice to the business and all of its owners
- A business dispute is often adversarial and creates trust issues among disputing owners
- Disputing owners are attempting to determine who is on the owner's side
- Lawyer ethical rules differ from accountant ethical rules



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## Multifaceted Role of CPAs

CPAs occupy a special and essential role for their clients:

- ✓ Financial advisers
- ✓ Business advisers
- ✓ Tax preparers
- ✓ Compliance with IRS and DOR regulations
- ✓ Succession planners
- ✓ Retirement planners



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## CPA Risks and Rewards

- Accounting practice grows organically: a CPA often begins by representing an individual, then the individual's business, then the shareholders of the business, then their family members, and so on
- This is a natural progression that reflects positive growth as one's network and professional acumen grows
- Increased demand for a CPA's services is a good thing – usually
- CPAs often find themselves caught in the middle when disputes arise among clients serviced by the CPA



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## Ethical Challenges

- Conflicts of interest can arise unexpectedly
- Conflicts are often created by actions of clients beyond the control of the CPA
- CPAs have a professional responsibility to avoid conflicts
- What duties are implicated?



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## Fiduciary Duty of CPAs?

- Fiduciary Duty is a legal concept rather than any accounting, auditing or other professional standard
- Definition: “one often in a position of authority who obligates himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor and loyalty in fulfilling the obligation: one (as an agent) having a fiduciary duty to another.” Source: *Merriam-Webster Dictionary*, (quoted in Joseph Wolfe and Cathey Whitley, “Fiduciary Duty and CPAs in Public Practice,” *Texas Society of CPAs, Today’s CPA*, Jan./Feb. 2020)
- Examples: Attorneys, Trustees, Boards of Directors
- Are CPAs also fiduciaries who are subject to fiduciary duty?



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## What Is the Duty?

- According to the AICPA, accountants are not normally considered fiduciaries
  - Why? Because a fiduciary has a legal duty to act solely in the best interests of the beneficiary
- CPAs have a duty to the public: accounting and auditing services are relied upon by lenders, investors and others – CPC section 0.300.030
- CPAs are also required to remain independent in fact and appearance when providing professional services – CPC section 1.200
- *See, e.g., Iacurci v. Sax*, 139 Conn. App. 386 (2012) (holding accountants, in their performance of tax returns for a client (and particularly where there has been a long-term accountant/client relationship with the taxpayer) do not act in a fiduciary capacity for their client)



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## CPAs As Fiduciaries

Situations where CPAs assume a fiduciary role:

- ✓ Asset management – CPAs who also serve as Registered Investment Advisers (RIAs)
- ✓ Power of Attorney for Tax Matters
- ✓ Attorney in Fact
- ✓ Registered Agent
- ✓ Trustee of Testamentary Trust

A fiduciary duty can create an ethical dilemma whenever applicable CPA ethical standards simultaneously require CPAs to be independent when providing client services



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## Legal Duties of CPAs – Competence

CPAs are subject to professional duties imposed by law:

- When providing client services, CPAs must “use the degree of care, skill and judgment that reasonably prudent accountants would exercise in like or similar circumstances.” *Cattau v. National Insurance Services of Wisconsin, Inc.*, 2015 WI App 40, ¶ 9 (citing Wisconsin Civil Jury Instruction 1023.5)
- Duty extends to third parties who detrimentally rely on CPA’s statements – *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d 376, 382, 385-86 (1983) (holding accountants can be held liable for negligent preparation of an audit report to a third party who relies upon the report, in this case for lending money to company that later defaulted on loan)



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## AICPA Code of Professional Conduct

- Scope
  - Members in Public Practice
  - Members in Business
  - Code of Professional Conduct (not legal)



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## AICPA Code of Professional Conduct

- Public Interest
- Integrity
- Objectivity
- Independence
- Due Care
- Scope and Nature of Services



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## AICPA Code of Professional Conduct

- Public Interest Principle
  - Serve the public interest
  - Honor public trust
  - Demonstrate commitment to professionalism

CPC section 0.300.030



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## AICPA Code of Professional Conduct

- Integrity Principle
  - Maintain and broaden public confidence
  - Honest and candid
  - Subordinate personal gain to service and public trust

CPC section 0.300.040



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## AICPA Code of Professional Conduct

- Objectivity Principle
  - Free of conflicts of interest
  - Impartial
  - Intellectually honest



CPC section 0.300.050

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## AICPA Code of Professional Conduct

- Independence Principle
  - Preclusion of relationships that may impair objectivity
  - Serving multiple interests
  - Avoid subordination of judgment



CPC section 0.300.050

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## AICPA Code of Professional Conduct

- Due Care Principle
  - Competence
  - Diligence
  - Observing technical and ethical standards
  - Continuous improvement



CPC section 0.300.060

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## AICPA Code of Professional Conduct

- Scope and Nature of Services
  - Observe principles of CPC in practice
  - Principles should be applied to each circumstance
  - Maintenance of objectivity and independence requires a continuing assessment of client relationships and public responsibility



CPC section 0.300.060

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## AICPA Code of Professional Conduct

- Conceptual Framework for Conflicts
  - Identify threat
  - Evaluate the significance of the threat
  - Identify and apply safeguards



CPC section 1.000.010

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## AICPA Code of Professional Conduct

- Identify threat
  - Relationships or circumstances that threaten compliance with professional conduct principles
  - Would relationship or circumstance lead a reasonable and informed third party who is aware of the relevant information to conclude that a threat exists that is not at an acceptable level?
  - Acceptable level = compliance with the rules is not compromised



CPC section 1.000.010

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## AICPA Code of Professional Conduct

- Example of threats
  - Adverse threat – client threatens litigation
  - Advocacy threat – promoting client’s interests to the point of losing objectivity
  - Familiarity threat – close relationship with client
  - Management participation threat – involved in client’s management
  - Self-interest threat – financial interest in client
  - Self-review threat – unable to perform self-review
  - Undue influence threat – circumstances demonstrate undue influence



CPC section 1.000.010 25

## AICPA Code of Professional Conduct

- Significance of threats
  - Assess significance of interests or relationships
  - The more direct the connection between the service and the conflict, the more significant the threat
  - If the threat is significant, then the member is required to implement safeguards to eliminate or reduce the threat to an acceptable level



CPC section 1.000.010 26

## AICPA Code of Professional Conduct

- Safeguards
  - Safeguards are designed to partially or completely eliminate a threat or diminish the potential influence of a threat
  - Safeguard categories
    - Profession, legislation or regulation
    - Client
    - Firm



CPC section 1.000.010

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## AICPA Code of Professional Conduct

- Examples of Safeguards
  - Profession – continuing education; licensure
  - Client
    - Policies and procedures regarding financial reporting and maintaining independence (e.g., acceptance of gifts)
    - Governance committees (e.g., audit committee)
  - Firm – Internal training; rotation of personnel on clients



CPC section 1.000.010

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## AICPA Code of Professional Conduct

- Disclosure of Conflict of Interest and Consent
  - General or specific disclosure to clients and affected parties
  - Obtain consent to perform professional services
  - If consent refused,
    - Decline to perform services
    - Terminate the relevant relationships to dispose of the threat



CPC section 1.000.010

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## Shareholder Disputes Impact CPA Ethical Duties

- Disputes among owners of closely-held businesses present special challenges
- Ethical, professional and legal duties may all be implicated
- Examples and strategies



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## Shareholder Compensation Example

- CPA Function:
  - Provides monthly bookkeeping services to business
  - Provides general business advice
  - Prepares business and individual shareholder tax returns



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## Shareholder Compensation Example

- Facts:
  - 51%/49% ownership structure
  - 50%/50% governance structure
  - Business success based on the sales efforts of two owners
  - Compensation of owners tied to ownership structure and not owner's sales efforts



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## Shareholder Compensation Example

- Facts:
  - 51% owner starts and continues bringing in 80%+ of sales/profit
  - Compensation of owners continues to be tied to ownership structure and creates ownership discord
  - Accountant suggests mixture of ownership and performance based compensation



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## Shareholder Compensation Example

- Facts:
  - Accountant's proposal is communicated:
    - o Concurrently to both owners
    - o Independent and objective viewpoint
    - o Market standards
  - Owners have to determine the method to resolve the dispute



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## Shareholder Compensation Example

- Analysis:
  - Integrity and Due Care
  - Independence and Objectivity
  - Communication
  - Conflict Acknowledgment
  - Third Party Advisors



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## Shareholder Dispute #1 Example

- CPA Function:
  - Provides monthly bookkeeping services to business
  - Provides general business advice
  - Prepares business and individual shareholder tax returns



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## Shareholder Dispute #1 Example

- Facts:
  - 50%/50% ownership and governance structure
  - Two owners are brothers
  - Two owners have a difference of opinion on managing the business
  - Buy-sell agreement in place



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## Shareholder Dispute #1 Example

- Facts:
  - Negotiated buy-out occurs with third-party advisor's involvement
  - Accountant suggests items to seller which were considered as part of negotiated buy-out but are adverse to buyer
  - Accountant seeks written conflict waiver and release after services provided



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## Shareholder Dispute #1 Example

- Analysis:
  - Integrity and Due Care
  - Independence and Objectivity
  - Communication
  - Conflict Waiver and Release - Timing



## Shareholder Dispute #2 Example

- CPA Function:
  - Provides monthly bookkeeping services to business
  - Provides general business advice
  - Prepares business and individual shareholder tax returns



## Shareholder Dispute #2 Example

- Facts:
  - Ownership dispute
  - Father sold shares to son resulting in 80/20 ownership
  - Son dies and father claims sale never happened
  - Nominal sale documentation



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## Shareholder Dispute #2 Example

- Facts:
  - No buy-sell agreement in place
  - 80/20 ownership reflected on tax returns
  - Ownership changed on tax returns after pressure from father
  - Accountant advises father on sale of company



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## Shareholder Dispute #2 Example

- Analysis:
  - Integrity and Due Care
  - Independence and Objectivity
  - Communication



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## Shareholder Dispute #3 Example

- CPA Function:
  - Provides monthly bookkeeping services to business
  - Provides general business advice
  - Prepares business and individual shareholder tax returns



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## Shareholder Dispute #3 Example

- Facts:
  - Minority owner squeeze out
  - Buy-sell agreement in place
  - Majority owner wants to depress the value of the company and purchase minority owner's interest



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## Shareholder Dispute #4 Example

- Facts:
  - Accountant suggests deferred compensation agreement for majority owner – applies retroactively
  - At roughly same time majority shareholder fires minority shareholder, who has health issues
  - Majority owner stops paying distributions
  - No buy-sell agreement



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## Shareholder Dispute #4 Example

- Analysis:
  - Integrity and Due Care
  - Independence and Objectivity
  - Communication



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## Shareholder Disputes

- Other problems areas:
  - Compensation
  - Dividends (or lack of them)
  - Shareholder loans
  - Personal expenses treated as business expenses



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## Stay in Your Lane

- Providing non-traditional accounting services can create higher risk profile
- Example:
  - Accounting firm hired to market sale of company's stock or assets
  - President and VP of company signed contract with accounting firm
- Shareholder structure of client:
  - 43.75% (President)
  - 18.75% (VP)
  - 37.5% (Remaining minority shareholders)



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## Stay in Your Lane (continued)

- President obtains VP's shares, then sells majority interest to a third party
- President receives \$2.3M from buyer's lender, secured by assets of the company
- Business fails and minority shareholders sue accountants, claiming accountants: (1) originally marketed all of the company's assets but later chose to sell only the controlling interest (2) arranged for the sale secured by the company's assets, which jeopardized the company's financial integrity; and (3) withheld information from the minority shareholders to induce their inaction
- Allegation is that all of this was done so the accounting firm could collect a commission



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## Examples of Conflicts of Interest

- According to the AICPA, common conflicts of interest leading to accounting malpractice claims include:
  - Providing litigation support services for a plaintiff in connection with a lawsuit against a client of the CPA's firm
  - Providing tax planning and tax return preparation services to a partnership/corporation/LLC while also representing multiple partners/shareholders/members on an individual basis
  - Undertaking a professional service for each of two parties in a partnership employing the CPA to assist in dissolving the partnership
  - Preparing financial information for members of management of the client business who are seeking to undertake a management buy-out



CPC section 1.110.010.04; 2.110.010.04

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## If You See Something, Say Something

*Grafft v. Jensen*, 2007 WI App 203

- Company had 50-50 shareholder structure
- Accounting firm retained by the Company failed to notify one 50% shareholder that 50% owner was taking multiple paychecks
- Negligence suit filed against accountant by one 50% shareholder
- Held: "an accountant who fails to notify a fifty-percent shareholder that the other fifty-percent shareholder is embezzling money from the corporation may be held liable for the financial losses of the innocent shareholder that result when the embezzlement causes the corporation's collapse." (¶ 17)



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## If You See Something, Say Something

*Krier v. Vilione*, 2009 WI 45

- Complaint alleged accountants failed to disclose, failed to prevent, and assisted in misappropriation of funds
- Accountant accused of misconduct was brother of shareholder alleged to have embezzled \$1.2M over seven years
- The plaintiffs were companies that argued they would have stopped doing business with the company from which the funds were embezzled
- Held: accountants have a duty to third parties, but the damage must be foreseeable and there must be detrimental reliance (as in *Citizens State Bank, supra*). Here, there was no “triangular relationship,” the damage was too remote, and public policy bars liability (¶¶ 35-44)



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## How to Steer Clear of Conflicts

- Identify
- Evaluate
- Disclose



CPC section 1.110, *et seq.*



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## Best Practices

- Check for conflicts prior to every assignment
- Identify all stakeholders
- Define clearly what is or is not a conflict
- Develop a process for clearing conflicts
- Exit strategy when risk level is too high



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## Engagement Letters

- Identify the key terms
  - Who is the client?
  - What is the assignment?
  - How long does the engagement last?
  - What would be grounds for withdrawal?
  - What else should be disclosed to best set expectations?



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## Engagement Letters

Arrowhead Systems, Inc. Litigation, 2020 WI App 76

- From 2003 to 2014 client engaged accountants to perform tax services, including state and federal returns
- Client's business included international exports
- Accountants did not advise and client did not ask about tax benefits to exporters
- Client independently learned of tax benefits available to exporters in 2013 and asked accountants to calculate savings client would have had if it had used the tax strategy, which totaled \$124,500
- Client sued alleging negligence, breach of fiduciary duty, and breach of a series of annual contracts



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## Engagement Letters

Arrowhead Litigation (continued)

- Court concluded annual agreements between client and accountant governed relationship
- Annual agreements and related SOW's protected accountants against the claims and disclaimed any other duties
- Accountants did not undertake a duty to investigate potential tax saving strategies



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## Resolution of Conflicts

- Conflicts can be waived
  - Informed consent and
  - The accountant believes the service can be performed with objectivity



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## Thank you.



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