When Your Fired 401(k) TPA Takes Things Personally

By Ary Rosenbaum, Esq.

Aside from Airplane!, my favorite movie of all time is The Godfather and the underpinning is the complete and utter transformation of Michael Corleone from "college boy" war hero to mob boss. A very important scene in that transformation is when Michael suggests to Sonny and Tom Hagen that he kills Virgil Sollozzo and Captain McCluskey, the people behind the attempted assassination of their father, Don Vito Corleone. Sonny, the normal hothead starts laughing it off and suggests that Michael is taking things too personally. Michael convinces everyone in Don Vito's office that "it's not personal, it's strictly business." When you have to fire the third-party administrator (TPA) for your 401(k) plan, it should be business, not personal, and most of the time it is. However, the TPA may not take that way and I've spent 23 years helping plan sponsors with their soon-to-be former TPAs, who take things personally.

Realize why you're doing it.

There. are many reasons why you may have to fire your TPA. A TPA that makes too many mistakes and puts you in danger with compliance errors has to go. A TPA that charges too much for a substandard service needs to go too. But don't fire a TPA for the wrong reasons, such as this was something that the advisor wants. Also, don't be passive-aggressive and just fire a TPA without giving them a chance to fix things. Changing TPAs requires a de-conversions process by the soon-to-be-former TPA and a conversion process by the new TPA. The period can take months and there is nothing fun about it. So when deciding to fire a TPA, figure out if it's a good reason to do so.

Before you fire them, read the contract

I don't like surprises. It's why I've never had a surprise party and needed to know the sex of my children when they were in the womb (I mean, it's one or the other). When you're about to fire your TPA, read the contract. Look for the termination clause and what kind of notice you need to provide. Failure to abide by the notice requirement might require you to be the soon-to-be-former TPA's client for a little bit longer than you expected. I will say that you shouldn't jump the gun and make sure that any notice to fire your TPA, is done in conjunction with hiring one. I just dealt with a situation where the plan sponsor jumped the gun without the new TPA knowing, causing an issue where there was a 3 month period between when the old TPA was no longer providing services to the plan and when the new TPA was going to be ready to service the plan. To steal a line from pro wrestling and my buddy Jim Ross: "don't go into business for yourself." Every change of a TPA has to go to plan because again, many TPAs will take the termination of their services as a personal affront. Again, it's business, not personal, but they don't see that. You should look at any type of costs that the TPA reserves the right to charge for a de-conversion process. Hopefully, it's something that is clear and that you could understand. From experience, this is a huge problem between the soon-to-be-former TPA and the plan sponsor. Costs for the de-conversion process should be spelled out in the agreement. I'm not saying there should be a specific dollar amount, but there should be some sort of formula that describes what the charges might be for a de-conversion process. You need cost certainty to determine whether a change to a new TPA is cost-effective. If the formula for the costs of the de-conversion process isn't there and the soon-to-be-former TPA just seems to be using the process and cost as a punitive measure, I suggest reaching out to ERISA counsel (cough, cough). Aside from one sit-

uation with an obstinate TPA (more on that later), I've been fairly lucky in dealing with TPAs who think the power to charge for a de-conversion process is the power to destroy

Pay what you owe

When I left my last synagogue, I made sure to leave like a "mensch." I paid what I owed and I left with my head up high. Whatever fees have been incurred in the past and are due, pay it. If you're unhappy with the TPA services, that's fine, but you should pay what's owed. That doesn't mean you should pay for excessive de-conversion fees or the ultimate chutzpah, asking you to pay for services that you have already paid for.

Don't pay for what you already paid for

I remember when my parents would buy a car and it just seemed that in those days, the scams by the car dealers were difficult to spot. I think the Internet and the passing of information have certainly powered the car buyer with enough knowledge to spot the scam. The big scam is when a TPA tries to get paid for something they've already paid for. How is that possible? They find a "mark" in a plan sponsor that may not understand the timing of how things work with 401(k) plans. If you sign on for a TPA contract and it's on an annual basis, a Form 5500 and valuation should come with it. The problem is that if you terminate a TPA's services as of December 31, the 5500 and valuation are probably not going to get done by the following July. So if you already paid for it and the soon-to-be-former TPA collected the fee, make sure they do the work. Otherwise, the new TPA will do the work and charge you for it. I think it's a breach of your fiduciary duty to willingly pay twice for one 5500 and the valuation since the money is likely taken out of participants' accounts to pay for it. On the flip side, the soon-to-be-former TPA may refuse to do the work that they were paid for and attempt a shakedown. That happened to me when the former TPA took things personally on a plan where I served as a fiduciary. They were paid for Form 5500 and valuation since it was specifically in their contract for annual services. We terminated services as of February 2021 and they claimed they weren't being paid for work in July, even though they contractually were. This TPA tried to shake us down for the 5500 and valuation by demanding $80,000, after being paid $130,000 for annual administration in 2020. Even if you would agree with the TPA's position that they weren't paid, $80,000 for a 5500 and valuation isn't reasonable, as it relates to $130,000 a year in fees in day-to-day plan administration. While most TPAs won't act as immature as the one I dealt with, I think like a fielder calling for a flyball, it's important to identify who will complete the 5500 and valuation after terminating the TPA, especially if you paid them for it.

If you are paying for de-conversion fees, make sure the old TPA cooperates with the new one

Since most TPAs reserve the right to charge for de-converting the plan to a new TPA after being terminated, the chances are you will be charged. If you're paying these fees (again, what other business essentially charges you for firing them?), make sure the current TPA cooperates with the new TPA. The old TPA must cooperate with the new one. The conversion process is one of the most difficult parts of a 401(k) plan being administered, so you need to make sure that there is a level of cooperation.

Problems? Who are you going to call? Not Ghostbusters

As an ERISA attorney, I've had to help a lot of plan sponsors deal with some unruly TPAs, especially those that take their termination a little too personally. Working with an ERISA attorney (cough, cough) can certainly alleviate any issues. TPAs are often wary when a soon-to-be-former client is represented by counsel. In addition, a good threat to report the TPA to the Department of Labor (DOL) often does wonders. For the unruly TPA, I discussed above, the DOL threat didn't work So I did have to report them to the DOL for the excessive charges they want to levy on my plan. I treat people the way I wanted to be treated and most of the time it works, sometimes it doesn't and I have to play hardball. Be nice and cooperative with the terminated TPA until you can't afford to and they don't want to do the right thing,

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