

How You Can Stay Out Of Trouble As A Retirement Plan Provider

By Ary Rosenbaum, Esq.

There is a running joke I've had for the past 25 years where someone tells me or I tell them to stay out of trouble. When someone tells me to stay out of trouble, I tell them I can't. There are two types of trouble, one trouble where you get entangled in a dispute for what is right and trouble for doing wrong. As someone who is very vocal and willing to stand up for what I believe in that is right, I can never stay out of that kind of trouble. This article is all about the bad kind of trouble and the stuff you could do, to avoid it and avoid harming your business.

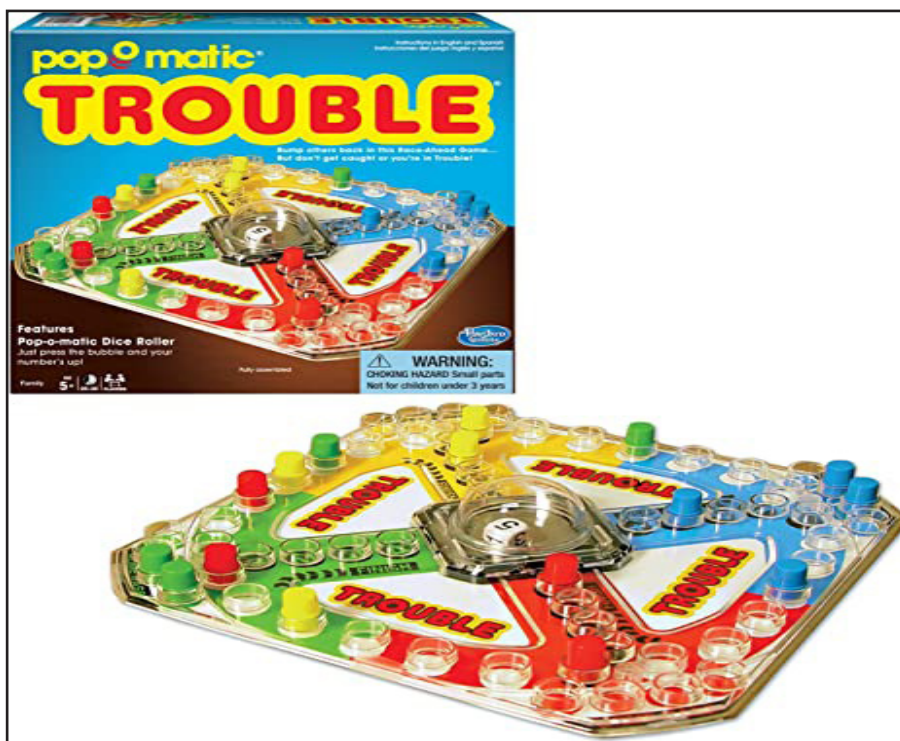
Don't be an a**hole

I'm sure someone will send me an email and say that I was wrong to use this word in an article, published on a legal website. I'm almost 49 years old and I have been an ERISA attorney for 22 ½ years, so censoring myself is of no use. I think the most important rule in my life is not to be an a**hole. I'm sure the cleaner version is that I treat people the way I want to be treated and most of the time, that philosophy works. Even when I treat people well and they treat me badly, I will never stoop to that level because I have too much respect for myself, my clients, and I have too much respect for this retirement plan business and the people in it. Recently, I talked to a former co-worker who recently took a voluntary buyout and is seeking employment. Our scorecards were very similar to those co-workers that were great to work with and those you wouldn't want to turn your back on because the proverbial knife

may be coming through. You never forget the people who helped you and you will have a better memory of those people that didn't. While I'm a positive person most of the time, I always talk about the ways I was treated poorly. The reason I do that because it's just as easy (in my mind, easier) to act professionally than not. The retirement plan business is relationship-driven and having zero skills in dealing with people isn't going to help you. Yes, articles like these have

shouldn't be a thief would be rather simple, but it isn't Thieves aren't just the plan fiduciaries who embezzle money from 401(k) plans like the two plan providers I came across that are currently sitting in a federal penitentiary. There are plenty of providers that steal from clients that don't serve time in jail or get arrested because theft has different definitions when it comes to retirement plans. Fee disclosure regulations implemented in 2012 was a

much-needed change in the retirement plan industry because it required transparency in a business that needed it when plan fiduciaries had a duty to only pay reasonable plan expenses. Plan sponsors couldn't properly fulfill that duty when they didn't know how much they were being charged by their plan providers. Fee disclosure regulations made a lot of profound changes to the retirement plan business. It made many providers decide to vacate the retirement plan space and more importantly, it eliminated many of the abuses when it came to



certainly made me a little well-known in the retirement plan business, but it's my relationships and connections that have made me somewhat successful. If I treated people like they didn't matter, I assure you that word would travel fast. People talk and the way you poorly treat people will get back to you. You may not realize it, but your business and your reputation will suffer.

Don't be a thief

You would think the advice that you

the failure of disclosing revenue sharing, and it made fees more competitive. While fee disclosure regulations eliminated so many abuses, there are still some "hustles" that remain. One hustle that remains are surrender charges for annuity-based contracts. Another big hustle is a third-party administrator (TPA) deconversion fees/termination costs. As an example, I'm in a certain range war with a TPA surrounding a multiple employer plan that I sponsor. Due to poor service since the TPA was bought,

I decided to terminate services. What I got back was a fee for deconversion fees that represented 10% of what the annual fee was, where there was no negotiation even though the contract called for an agreement between the parties. The other part was the \$70,000 they wanted for a 2020 Form 5500 and valuation. The TPA was paid \$130,000 for the entire year and the contract stipulated



that an annual fee comes with a Form 5500 and valuation. Even if you agree that they should charge for the valuation and 5500 since it's being done in July 2021 and they are no longer being paid, there is no reason that the valuation and Form 5500 should equal more than 50% of the annual fee. The contract was kind of silent on deconversion fees and fees after the plan year was over, a contract that I didn't draft. This practice happens to any 401(k) plan that terminates this TPA, acting as a punitive measure for their termination. The problem with being a plan provider with shady practices that borderline on theft (and probably crossing it) is that you might end up picking a fight with the wrong person, especially an ERISA attorney with 22 years of experience. If you intend to collect a fee, everything you do should be clear in your contract. If you think you're entitled to de-conversion and any additional fees, state it, and state a formula that is pretty explicit and not vague in a contract you drafted. I can assure you that ERISA attorneys and the Department of Labor (DOL) are very careful of these situations.

Don't be arrogant

When it comes to organizations, one of the worst personal qualities that their leadership could have is arrogance or hubris. I'm almost 49 and I certainly don't know everything, but there are quite a few plan providers who think they do, you ask them, they'll tell you. Arrogance won't allow you to change especially in a business that is constantly changing. I always bring up my old law firm as an example because the managing attorney was so arrogant. She thought that the way of getting clients in the '80s and '90s would continue. When I suggested that I wanted to explore social media, she acted as if using it was beneath the legal profession. So when I left in 2010, I knew they were in trouble

especially when the average age of their partners was in their mid-60s. You could see the trainwreck a mile away, but Lois couldn't because of her arrogance. Now it's 2021 and her successor is trying to clean up a mess that let the law firm atrophy and shrink 40 percent in size. Over the years, I've met plan providers who knew everything and almost all of them are struggling or no longer in business. The business is constantly changing and one of the ways to stay out of trouble is to not be arrogant and be open to change. If you don't change with the tide, the tide will change you.

Comply with the government

Even in the worst situations for my clients on a DOL or Internal Revenue Service (IRS), I always cooperated. There is no point in hiding and I assure you, I have seen people go to jail because they were ignoring DOL agents that were on their tail. What I find about IRS and DOL agents is that they are very knowledgeable, they may work slowly, but they end up getting done what they need to get done. I have seen the IRS and DOL take care of plan sponsors and plan providers who don't comply and it's not in a good way. Bad business can shut down your doors, but the IRS and DOL can be quicker to do that if you don't comply if you're under investigation.

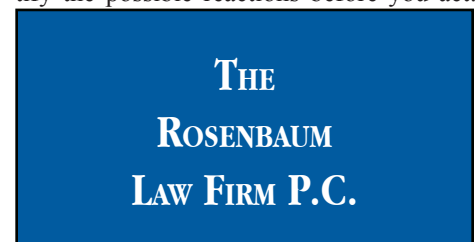
Keeping good staff

Good help in the retirement plan space is hard to come by, I see it daily with some of the plan providers that clients force me to deal with. One of the great ways in dealing with the lack of good help is treating your employees with enough respect and benefits that they won't look elsewhere for employment. I was an employee for 12 years for a handful of companies and for most of the time, I didn't feel appreciated. It could have been the less than stellar benefits or that the only bonus I ever got was \$300 for the holidays and having only started work-

ing that September. Keeping good staff will keep you out of trouble. Losing good staff will likely force you to lower the quality of your service and spend a lot of time in finding and training their replacements. Understand that staff members have feelings too and while you may think things are running perfectly and that it's a happy place to work, many of your employees may not feel the same.

The idea of Ary's game theory

Game theory is the study of mathematical models of strategy among rational decision-makers. The way I see game theory is trying to figure out what the other side might react in any given situation. For example, with that TPA that wanted to punish my plan by charging for a Form 5500 that was already paid for, I acted in a calculated manner and trying to identify how the TPA would react to emails that I didn't even write at the time. While I envisioned that the owner of the TPA was rational and back down, I did note the possibility that he was irrational and wanted some sort of confrontation. I was wrong and he was irrational (narcissistic personality disorder can do that), but I wasn't surprised as I saw that as a possible option. Every action by you will have a reaction by someone else and I think you can stay out of trouble by identifying what those reactions will be. If you take away a benefit from an employee or raise the rates on how you charge clients, you should identify the possible reactions before you act.



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