

# Don't Be Like These 401(k) Plan Providers

By Ary Rosenbaum, Esq.

**T**he beauty of being an ERISA attorney is that when you think you've seen it all, you've seen something new. While most plan providers are professional, ethical, and competent, it's the outliers that I'm fascinated about. Also, 401(k) plan sponsors using these ineffective plan providers need my help, not the ones who hired good providers. So these "horror stories" are things you shouldn't become and if some of these stories may describe you, you have time to change your behavior.

## **If you broke it, pay for it**

If you go to a gift shop and you break something, you're expected to pay for it. Would you expect the gift store to pay for it? No, but there are plan providers who make mistakes and want to charge the clients extra for it. A perfect example of that was an ERISA attorney working for years on a pension plan. The pension plan was in existence before ERISA came into effect in 1976 and the ERISA attorney-drafted at least two restatements. When the actuary reviewed the previous plan documents, they saw a whole host of issues that needed to be fixed in the current plan document, some issues dating back from previous restatements that didn't get carried into the current plan document. Rather than fixing the plan document through a plan amendment and waiving the fee, the ERISA attorney charged \$30,000 for an amendment. When I saw the fee, I realized that maybe my flat fee practice may need a second look. Then again, I have to sleep at

night. If you cause an error or make a mistake, you shouldn't have the 401(k) plan sponsor pay for it. Sure, 401(k) plan sponsors might pay to fix the error because you tell them they need to and they don't know otherwise. However, you know what you did and what's worse, another plan provider or the firm that succeeds you might know what you did. Your reputation in this business is everything and if you're charg-

plan industry isn't infinite. You may go out of business, you may be bought out, the point is that things may happen. Same on the client-side, they may go out of business or bought out. Sometimes, the client will fire you because they were bought out or a new decisionmaker wanted a change or they wanted a change for a cheaper fee or their payroll provider convinced the client that being their TPA was a great idea. Like

your business, your relationship with a particular client isn't infinite, it will end at some time too. So if you get fired, don't take it personally. Like they said in *The Godfather*, "it's not personal, it's strictly business." As someone who has been fired before, I can tell you that it's not fun. How you handle being clipped says a lot about you as a business professional in the retirement plan industry. If you handle it with class, people will remember that. If you handle it like a petulant child, people will remember that too. If there is a transition between you and the succeeding



ing a plan sponsor to fix your mistakes, that reputation is going to get tarnished.

## **If you get fired, it's not personal**

I always remember the time a Mets fan called WFAN sports radio and asked then beleaguered Mets manager Davey Johnson if "he is hired to be fired?" I loved the question because it stands for the proposition that no matter what, any business relationship will conclude one way or another. As a plan provider, your place in the retirement

plan provider, handle it professionally with grace because there are many times where you are the succeeding plan provider, and how you deal with competing plan providers will be remembered if you act unprofessionally. Too often, plan providers act professionally and are attentive to their client's needs until they get fired and then they act as if they were admitted into the Witness Protection Program. Don't think of it personally when you get fired and maintain your professionalism. Speaking

of administrative and termination costs, there are issues that I believe that the Department of Labor is currently looking at.

### **Don't fire a client because they're not happy with your work**

I was contacted by a plan sponsor with an interesting dilemma. Their financial advisor advised them to change investments, namely a stable value fund, that kicked in a market value adjustment that the advisor was unaware of. Not wanting to disappoint the plan sponsor over this charge, the advisor offered to pay the market value adjustment.

When the advisor found out that compensating the 401(k) plan and its participants would be in the thousands of dollars, the advisor started ghosting the client and eventually fired the plan sponsor as a client. You should fire a client because they're in the way of doing your job, such as failing to provide census information or failing to file the Form 5500 you prepared. You shouldn't fire a client because they're not happy with your work. I was just hired by a plan sponsor that had issues over their TPA consistently making errors for the new comparability allocation part of their safe harbor 401(k) plan. This client was dissatisfied by these errors, as well as the constant turnover of the TPA's employees handling the plan. Rather than deal with this client, the TPA fired them. They say that you may need to eliminate the negative people in your life, but I don't think that extends to clients that are negative about your bad work.

### **Your contract has to be clear**

Speaking of taking things personally, I had a certain TPA take things personally and acted the most unprofessional I've seen a provider act outside of those plan providers sitting in Federal prison, I'm the fiduciary of a \$100 million-plus multiple employer plan. For 7 years, we used a certain Florida TPA and for most of the time, things were great. They were great until this TPA was bought out by a New Jersey TPA and many of the people we worked with, were no longer there. The advisor and I decided to make a change. The owner of



this New Jersey TPA took things personally. While his firm collected \$130,000 annually in fees, he claimed that since we were terminating our service on February 28, 2021, he claimed that his firm didn't have to complete the annual valuation and 2020 Form 5500 because that work would be completed after February 28th. The problem is that the contract drafted by that TPA, based fees on annual services, which stated that it would include the valuation and Form 5500. Charging a plan sponsor on an annual fee without including a valuation and Form 5500 is like selling a car without a steering wheel. Your contract has to be clear because the interpretation of vagueness in a contract will be held against you if you drafted the contract. What the TPA didn't understand is that even if we accepted their argument that we had to pay for deconversion fees, the valuation, and Form 5500, the proposed \$80,000 to complete that work was excessive and obscene. Another vagueness about the contract was deconversion fees, there was no formula (such as per hour charges or estimates on costs). Clearly, this TPA wanted their pound of flesh from us because we made a change. As I said, don't take things personally. As a plan fiduciary with the duty to only pay reasonable plan expenses, I refused to pay that \$80,000 invoice. I was willing to negotiate and they were not. Instead, the TPA owner made wild threats including a proposed complaint to the New York Attorney Grievance Committee that was so laughable that they either didn't send it or the

Grievance Committee just laughed it out without contacting me. All contractual terms including a termination provision and any deconversion fees should be clear to the plan sponsor. Vague terms and charges shouldn't be used to punish clients who fire you (again, it's not personal, it's business). Don't be like this TPA that has multiple complaints against them by former clients that were assessed punishing termination costs and duplicative fees, just because they fired them.

### **Pay your bills**

As a plan provider, you want clients to pay their bills. Clients that don't pay your

bills really aren't clients. They're deadbeats who want you to provide free retirement plan work. As a 401(k) plan provider, dealing with other plan providers, you should pay their bills. Your reputation means everything and you will develop a very poor reputation very quickly if it's known that you don't pay the bills of other plan providers. I know plan providers that go through the trouble of changing corporate entities and names to avoid paying bills, switching back and forth every 6 months. As a plan provider, you're dealing with the retirement assets of your clients and it's not good for your reputation if you don't pay bills because you can't or worse, you don't want to.

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