

Tales of a Former TPA Attorney

By Ary Rosenbaum, Esq.

I was very lucky that when I started as an ERISA attorney in 1998, I worked as a staff attorney for third party administrators (TPAs) because it gave me insight and experience that I could never have gotten as an attorney working for a law firm. Over the first 9 years as an attorney, I was able to see the good, the bad, and the ugly of the retirement business, so that knowledge can be used to help my plan sponsor and retirement plan provider clients. I always compared myself to my late uncle who worked for a meat provision company who we trusted for advice in which hotdogs to eat, so I can tell you which TPA a plan sponsor should use. This article is about some of the many things I saw with advice on what plan sponsors should be avoiding in using a TPA.

Many TPAs don't properly train their employees

I used to say that my role as an ERISA attorney working for a TPA was that of a fireman. I had to put the fires out of our new plan sponsor clients who had issues and the fires created by our very own administrators. The really good TPAs out there properly train their employees who serve as plan administrators and there are those who don't. Anyone working in the day-to-day administration of retirement plans needs a high level of training because retirement plans require technical knowledge of the Internal Revenue Code and ERISA. I've seen too many college graduates who are not ready for prime time players who were thrust into a position into working with retirement plans even though they had little or no knowledge. It should also be noted that I have seen administrators who have had decades in the retirement plan busi-

ness who made costly plan errors because they didn't have the proper continuing education that they needed because retirement plan laws change over time. What these well-experienced administrators knew in 1999 may do little now because of changes over the last 15 years. Make sure the TPA you select has the requisite training for their plan administrator. Any administrator you talk to that is accredited by the American Society of Pension Pro-



fessionals & Actuaries usually has more training than an administrator that does not. Training provided by the TPA doesn't guarantee that your plan won't suffer error at their hands, but it's far less likely than a TPA who recruits their main plan administrators straight out of college.

Many TPA salespeople couldn't spell 401(k)

I have worked with many TPA sales-

people and I have met some great salespeople like the late great Richard Laurita who I worked with at those TPAs I was employed at. While many TPA salespeople have a knowledge of retirement plans, many do not. Richard Laurita was one of my greatest mentors, yet he knew very little about how retirement plans worked. Richard was in the relationship business, he was such a great salesman he could have sold sand to the Bedouins. How-

ever, Richard had very little knowledge about how retirement plans worked and he really didn't care because he would eventually introduce the potential clients to the retirement plan professionals who did know. The reason I was able to start my own practice was because of the confidence I gained from the many client meetings that Mr. Laurita dragged me to. Not many TPA salespeople who have little retirement plan knowledge don't have the foresight that Richard did and may try to substitute the expertise of retirement plan professionals with their own limited knowledge. TPA salespeople with limited retirement plan knowledge can be a problem when they promise something that the TPA could never deliver. I

remember hearing about one TPA's client who was guaranteed that they would pass their 401(k) discrimination testing and this was a plan that wasn't safe harbor. That's impossible. By TPA salespeople promising the new client things that they could never deliver, it causes problems in servicing the new client from the get go. A running joke of mine is that there are TPA salespeople can't spell 401(k) if you spot them the 4, the 0, the 1, and the (k).

If you can't fully understand TPA fees, they could be hiding something

At one TPA I worked at, there was an actuary who not only wasn't very good, he would stutter and offer a long response when a short one was required by a boss who just wanted a simple answer. The boss just wanted the bottom line answer. When a plan sponsor needs to understand the fees being charged to the plan's assets, they also need to understand the bottom line. Even with fee disclosure, many TPAs still obfuscate their fees because they can't give the plan sponsor the bottom line or because they are trying to hide something. The problem is that plan sponsors need to understand their fees because they have a fiduciary duty to determine whether their plan's fees are reasonable or not. So a plan sponsor can't afford to have a TPA that can't spit out the fees they charge in a language that plan sponsors will understand.



Some TPAs can't be nice and say good-bye

The MTV Show, the Real World would start its intro with this voiceover: "the true story of seven strangers, picked to live in a house, work together and have their lives taped, to find out what happens when people stop being polite... and start getting real." When many TPAs stop being polite is when clients have decided to fire them and replace them with another. That is when it starts getting real with the TPA. Many TPAs take this change of status with their clients personally and as Michael Corleone said, "it's business, it's not personal." The reason that many of these TPAs take this personally is because they need to get their pound of flesh from their clients and that usually comes through fees charged through a de-conversion process to another TPA. How does this usually work? I worked for a TPA that never explained their termination (de-conversion) fee. What was the termination fee? There was no set amount; it was at the whim of the Chief Operating Officer who was a very petty man. He would charge based on the size of the plan or who the advisor was or maybe how he felt that day. The

problem for the client who fired us, that termination fee put them at their mercy because without a de-conversion, a plan can't convert to a new provider. Aside from mentioning three letters that get any TPA's attention (D, O, and L (DOL for Department of Labor)), there is not much a plan sponsor could do. In addition if the TPA is using an insurance company based

platform or is an insurance company, there may be surrender charges if the plan sponsor terminates the service agreement before a specified amount of time. Too often, plan sponsors aren't aware of any termination or surrender charges until it's time to change the TPA and the trading platform.

Be cautious of producing TPAs

Producing TPAs are TPAs that also have an affiliated financial advisor service or brokerage firm where they also will serve as the financial advisor to the Plan. I worked for a producing TPA, so I am sensitive to this subject. I'm not going to say producing TPAs are bad, I'm just going to say you need to be cautious in using one. The reason is that the investments that a financial advisor picks could have an effect on reducing the plan expenses of the TPA because of revenue sharing, where some mutual fund companies may pay a TPA a fee to reduce plan expenses because the plan sponsor selected that fund within their plan. Prior to fee disclosure, the use of revenue sharing paying funds were higher as TPAs and other plan providers didn't have to disclose the amount of revenue sharing they received,

often confusing plan sponsors on how much they were being charged for plan services. Many producing TPAs heavily pushed revenue sharing paying funds because it gave the appearance that their expenses on the TPA were lower even though revenue sharing paying funds tend to have higher investment expenses than funds who don't. It was a nice game of

Three Card Monte because plan sponsors never considered the investment expenses of their plan investments as something they should count and consider. I remember working for one TPA where one employee had the task of reviewing every plan on a particular mutual fund platform with the goal of adding more revenue sharing paying funds so that plan sponsors would think they were getting a break in TPA fees, they weren't. The reason I am cautious about producing TPAs is two fold: 1) I like a degree of independence between other providers as a check and balance and

2) recent litigation against plan sponsors indicate that selecting mutual funds based on the fact that they pay revenue sharing maybe a breach of a duty of prudence that all plan sponsors must abide by. I certainly will get flack for saying it, but plan sponsors need to watch a producing TPA more carefully.

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