

Ethics for Pension Plan Professionals



ASPPA

Making Retirement Plans Work

Part of the American Retirement Association

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Ethical Framework

- Ethical framework for professionals in plan administration
- Technically, there is no one code of ethics that governs pension plan professionals. There are a number that are illustrative, for example:
 - ASPPA Code of Professional Conduct
 - IRS Circular 230
 - DOL Fiduciary Rule

ASPPA Code of Professional Conduct

- Advertising
 - Member may not engage in advertising with respect to professional services that the member knows or should know is false
- Communications
 - Member should take appropriate steps to ensure communications with respect to his/her professional services are appropriate
- Compliance
 - Member should be knowledgeable about the ethics code and compliant with it

ASPPA Code of Professional Conduct

(Continued)

- Confidentiality
 - Member must not disclose confidential information unless authorized to do so
- Conflicts of Interest
 - Member must avoid conflicts of interest. If aware of conflict, member should inform client.
- Control of Work Product
 - Member should not perform professional services when member has reason to believe it will be used to mislead or evade the law

ASPPA Code of Professional Conduct

(Continued)

- Courtesy and Cooperation
 - Member must perform services with courtesy and cooperate with others in the client's interest
- Disclosure
 - Member should make timely disclosure to a client of all sources of compensation or material consideration that member may be receiving as part of the engagement
- Professional Integrity
 - Member shall perform services with honesty, integrity, skill and care and observe professional standards of conduct

ASPPA Code of Professional Conduct

(Continued)

- Qualification Standard
 - Member may render an opinion as advice only when qualified to do so based on education, training and experience

Circular 230

- Circular 230 applies additionally to any persons practicing before the Internal Revenue Service, including:
 - Attorneys
 - Certified public accountants
 - Enrolled actuaries
 - Enrolled retirement plan agents

Circular 230

(Continued)

- Ethical components in Circular 230
 - Competency and continuing education
 - Confidentiality
 - Diligence as to accuracy
 - Avoidance of conflicts
 - Avoidance misleading solicitation

DOL Fiduciary Rules

- Department of Labor (DOL) proposed regulation defining fiduciary
 - Background
 - ERISA defines “fiduciary” among other things as including a person who renders investment advice for a fee. ERISA Section 3(21)(A)(ii)
- ERISA fiduciary duties
 - A fiduciary must exercise his or her duties with respect to the plan
 - Solely in the interest of the participants and the beneficiaries

DOL Fiduciary Rules

(Continued)

- For the exclusive purpose of providing benefits to such participants and beneficiaries in defraying the administrative costs
- With the care, skill, prudence and diligence that the prudent man when acting in a like capacity and familiar with such matters would use
- In accordance with the plan documents and
- By maintaining additional ownership of plan assets within the jurisdiction of the courts. ERISA § 404(a)(1), (b)

DOL Fiduciary Rules

(Continued)

- ERISA fiduciary duties
 - Fiduciary self-dealing is a prohibited transaction under ERISA:
 - As a result of this, a fiduciary may not do any of the following:
 - Deal with the assets of the plan in his or her own interest
 - Engage in any transactions with parties who have interests that are adverse to the plan or
 - Receive any consideration from any party that is involved in a transaction with the plan assets.

ERISA § 406(b)

DOL Fiduciary Rules

(Continued)

- New fiduciary rule
 - Defines “investment advice” as including:
 - Recommendations as to the advisability of
 - Acquiring
 - Holding
 - Disposing or exchanging securities or other property
 - Recommendations to take a distribution of benefits
 - Recommendations as to the investment or management of securities or other property to be rolled over or otherwise distributed from a plan or IRA
 - Recommendations of person who is also going to receive a fee or other compensation to do any of the things described above

DOL Fiduciary Rules

(Continued)

- Fee or compensation is defined as
 - Any fee or compensation (direct or indirect) received for the investment advice from any source
 - Or any fee or compensation incident to the transaction
 - Includes brokerage fees, mutual funds and insurance sale commissions

Ethical Framework

- Common areas in all ethical rules – six “Cs”
 - Client identification
 - Competency
 - Correct reporting
 - Confidentiality
 - Cooperation and professionalism
 - Conflicts of interest and avoidance

Client Identification

- Critical to know who the “client” is:
 - Deal with employer and the participants
 - Also brokers
 - The plan as an entity
- Best practice at onset of engagement is to determine who is retaining your services
 - Memorialize in your service agreement

Competency

- The retirement plan arena is not for the faint-hearted
 - Complex area that is ever-changing
 - Best practices are:
 - Continually upgrade competencies
 - Establish a network of competent professionals to discuss issues (formally or informally)
 - Join professional organizations

Correct Reporting and Documentation

- This can be a major area of concern
 - Plan documents
 - Accurate and timely adopted plan documents and amendments
 - Backdating?
 - EPCRS programs?
 - Takeover plan issues
 - Information from clients
 - Correct information from client
 - Timeliness of deposits

Correct Reporting and Documentation

(Continued)

- Prohibited transactions
 - Evidence of prohibited transactions discovered during administration
 - Client proposes a prohibited transaction
 - Correction of prohibited transactions

Confidentiality

- Avoid disclosing confidential client information to unrelated parties
- Can be difficult to determine who is entitled to receive the information
- May need to disclose by action of law

Conflicts of Interest

- Duty of loyalty to client
 - Should not engage in activity that could potentially adversely affect the client
 - Fee disclosure brings the investment of assets issue front and center
 - Avoid self-dealing, or the appearance of self-dealing

Cooperation and Professionalism

- Obligation to treat other professionals correctly
 - Exchange information (can have professional differences)
 - Transfer of records
 - Provide timely and accurate information to government agencies

Common Scenarios

- Scenario One
 - Employer comes to you to assist in establishing a plan. You do studies and employer decides to adopt the plan for 2016. Documents are prepared and sent to employer with clear instructions to execute.
 - In 2017 you learn employer never executed document
 - Variation, in 2017 you learn employer executed documents but now does not want the plan

Common Scenarios

(Continued)

- Scenario Two

- Employer maintains a defined contribution plan. One of its employees has embezzled \$35,000 from the employer
- The employee has \$20,000 in his defined contribution plan account. The employer wants to take it to reimburse itself for the damage caused by the employee

Common Scenarios

(Continued)

- Scenario Three
 - You routinely prepare Form 5500s for the employer’s plan
 - The employer has been historically slow in getting you information. You have asked for the information, and have been told “just use last year’s numbers”

Common Scenarios

(Continued)

- Scenario Four
 - A particular investment broker has been a good referral source for you. In fact, she brought you the employer at question here
 - The employer has grown dissatisfied with the broker and has asked you for recommendations on a replacement

Common Scenarios

(Continued)

- Scenario Five
 - A problem client stopped using your services because he did not like some of your advice and, in fact, did not pay your last bill. The former client still owes you for that bill
 - Two years later, the IRS asks the former client for evidence that it filed a Form 5500 for certain years. The former client wants you to help because it believes you have the information to complete the Form 5500

Common Scenarios

(Continued)

- Scenario Six
 - During routine plan administration, you notice that a CD held by the plan has been pledged as collateral for a loan taken by the employer by the bank serving as custodian for the plan

Common Scenarios

(Continued)

- Scenario Seven
 - Employer has two companies. There is a controlled group. Rather than use a single document, the employer uses a 401(k) prototype plan document with a separate document for each company
 - One company completed the adoption agreement to be a three percent non-elective safe harbor plan
 - The second company did the same, but has never operated as a safe harbor plan and has only done discretionary matching contributions
 - You notice the issue and the employer tells you the second company filled the adoption agreement out incorrectly

Common Scenarios

(Continued)

- Scenario Eight
 - Employer sponsors a defined benefit plan and has been contemplating offering an early retirement window program
 - You have been actively involved in the planning for the program. The program has not yet been announced
 - An employee asks for the paperwork to start to receive an early retirement benefit; if the program goes into effect, she will receive a larger benefit
 - What do you do?

Common Scenarios

(Continued)

- Scenario Nine
 - You have filed a plan for the issuance of a determination letter. The IRS asks for evidence that all the required amendments have been adopted in a timely manner
 - Neither you nor the client can find a signed copy of one of the required amendments
 - Does it make a difference if your files show that the “missing” amendment was sent to the client in plenty of time to have been adopted?

Common Scenarios

(Continued)

- Scenario Ten

- You have been administering a 401(k) plan for an employer for several years
- In casual conversation with the CFO, you learn for the first time that the owners of the employer have ownership interests in several other companies. You had no previous knowledge of these entities

Common Scenarios

(Continued)

- Scenario Eleven

- You are working with a client on the termination of its 401(k) plan. As part of the process, you are participating in meetings with participants to discuss their options
- A participant asks about a rollover to an IRA
- Does it make a difference if this is a group meeting or a one-on-one meeting?
- Can you suggest IRAs affiliated with the investment advisor to the plan?

Common Scenarios

(Continued)

- Scenario Twelve
 - You do administration work for a defined contribution plan. You receive a call from the client with the following situation. A participant who was in poor health made a will leaving everything to a nephew. The participant has died. In reviewing the beneficiary designation on file you note the participant designated his wife as the beneficiary of the plan with a granddaughter listed as contingent beneficiary. The wife predeceased the participant
 - The nephew's lawyer has called and wants the benefit from the plan

Common Scenarios

(Continued)

- Scenario Thirteen
 - Your client is a physician with a small office. You prepare the Form 5500 and it is filed. You prepare the Summary Annual Report (SAR) and provide it to the physician with instructions to distribute it to participants
 - The physician says she will not distribute because employees will know how much of the plan is hers

Common Scenarios

(Continued)

- Scenario Fourteen
 - You provide services to a company with a retirement plan. The owner who also serves as the sole trustee of the plan tells you he has decided to move the plan's investment to the bank where the company is in process of establishing a new relationship
 - What if he tells you he moving the investments to a new investment advisor who happens to be his son's college roommate who is just starting out in the business?

Common Scenarios

(Continued)

- Scenario Fifteen
 - Your client's practice is to mail or hand-deliver participant statements to participants. Your office prepares the statements, addresses the envelopes, places the statements in the envelopes and arranges to mail or have hand-delivered
 - You learn that through a clerical error, statements have been placed in envelopes with the wrong name
 - What do you do?

Questions?

