Ethics In Depth: TPAs and outside actuaries

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Agenda

- Brief review of current events
- Introduction: TPAs and outside actuaries
  - Beginning
  - Middle
  - End
- Bonus Case Studies (time permitting)

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Current and Not So-Current Events

- Circular 230
- New version of ASOP 27 adopted
- New version ASOP 4

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Introduction

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Introduction

Consider questions and issues from three different points of view:

- General business ethics
- IRS guidance: JBEA regulations/ Circular 230
- Requirements of professional organizations: Actuarial and other Codes of Conduct, ASOPs, Qualification Standards

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Introduction

- Common industry practice for TPAs to use an outside actuary instead of having an actuary on staff.
- Business models and relationships vary
  - EA may be super involved, or
  - Just signing Schedule SBs

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Introduction

- Who is the EA's client?
  - The TPA
  - The Plan
  - The Plan Sponsor

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JBEA

§ 901.2Eligibility to perform actuarial services.(a)*Enrolled actuary.* Subject to the standards of performance set forth in subpart C of this part, any individual who is an enrolled actuary as defined in § 901.1(g) may perform actuarial services required under ERISA or regulations thereunder. **Where a corporation, partnership, or other entity is engaged to provide actuarial services, such services may be provided on its behalf only by an enrolled actuary who is an employee, partner or consultant.**

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Actuarial code of conduct

--Principal – employer or client of Actuary

--Look at precepts and compare where it references Principal and where it references intended audience

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Introduction

What would your average business owner think?

--That actuary works for them

--That actuary works for TPA

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Introduction

- Analogous relationships??
  – Party 1 (EA) owes a duty to party 3 (Plan)
  – Party 1 (EA) is paid and retained by party 2 (TPA)
  – Party 3 (Plan) engages party 2 (TPA)

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- Analogous relationships – certain medical relationships
  – Party 1 (Anesthesiologist) owes a duty to party 3 (Patient)
  – Party 1 (Anesthesiologist) is paid and retained by party 2 (surgeon)
  – Party 3 (Patient) engages party 2 (surgeon)

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- Analogous relationships – home closings
  - Party 1 (surveyor) owes a duty to party 3 (home purchaser)
  - Party 1 (surveyor) is paid and retained by party 2 (title company)
  - Party 3 (home purchaser) engages party 2 (title company)

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What would your average business owner think?

--That actuary works for them

--That actuary works for TPA

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Introduction

- Pluses from a policy standpoint,
  - TPAs using outside enrolled actuaries increase availability of defined benefit plans
  - Lowers average price of defined benefit plans because TPAs can offer services without having a full-time actuary

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- Concerns from a policy standpoint,
  - Gaps in services delivered
  - Same level of service/communication
  - Consumer knows what they are buying

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Beginning of the relationship…

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In the beginning…

- TPA/Actuary
- TPA/Plan Sponsor

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TPA/Actuary

- Prudence in selecting actuary
- Prudence in agreeing to work with TPA
- Contract
- Joint Marketing

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Prudence in selecting an EA

- Does a TPA have a duty to prudently select an EA?
- If so, what are considerations in selecting an EA?

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Agreeing to work with TPA

- What factors should an enrolled actuary consider when agreeing to work with a TPA?
  - Knowledge of defined benefit plans
  - Business practices
  - Relationship

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Agreeing to work with a TPA

901.20(b)(2) An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes, or has reasonable grounds to believe, may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

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Contract between TPA and EA?

- Fees/when paid
- Scope of services/EA role
  - Plan documents
  - Testing
  - New laws
- Maintenance of E&O insurance

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Contract between TPA and EA?

- Timing
- Data transmittal
- Marketing support
- Non-compete/non-solicit

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TPA/Plan Sponsor

- Does TPA have a duty to disclose that the EA is not on staff? That data, plan documents and confidential information will be transmitted to a third party?

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TPA/Plan Sponsor

- Does TPA have a duty to disclose the identity of the EA that they plan to use?

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TPA/Plan Sponsor

- Does EA have 408(b)(2) or other obligation to disclose amount or source of compensation directly to the plan sponsor?

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TPA/Plan Sponsor

- From the very beginning, does the EA have a conflict of interest (ie plan sponsor vs TPA)?

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TPA/Plan Sponsor

- Is the EA in any way responsible for proposals issued by the TPA?

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Signatures

- With new clients, how should outside EA handle
  - PPA elections
  - Plan document signatures

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Case Study 1.1

TPA calls EA Jay and asks him to setup a new cash balance plan. Jay looks at the illustrations and realizes that the TPA had another EA prepare them. Jay asks TPA, and the TPA says that he had the other EA do the illustrations because the other EA does not charge a fee for illustration and Jay does, but that TPA really wants for Jay to be the ongoing EA. Should Jay take the case?

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Case Study 1.2

TPA calls EA Jay and asks Jay to be the behind-the-scene-actuary on a 1000 life case. Jay has experience working on such plans, but the TPA does not have that experience and does not seem to understand why big plans are different than small plans. Should Jay take the case?

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Case Study 1.3

Acme TPA issues a proposal prepared by EA Jay. ABC TPA comes to Jay a few weeks later with the proposal and asks EA Jay to be their EA and they present evidence that they have been retained to do the plan. Should Jay take the case?

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Case Study 1.4

Acme TPA asks EA Jay to serve as EA on the Pillow Factory DB plan. The TPAs represents that there are only two employees – the two owners. TPA is sincere in their belief, but Jay drives by the Pillow Factory site every day and sees at least 50 cars in the parking lot. Does Jay have an obligation to inquire further? What if it just sounded funny but Jay did not drive by the site?

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Case Study 1.5

ABC TPA emails EA Jay the final salary for the owner. No census form is filled out. Jay originally received the DOB and DOH for the owner in an email during the proposal stage.

Should EA Jay ask for a completed and signed census, or at least in year one?

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During the relationship…

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Reasonableness of Data

- What steps do the EA need to take to validate the participant data supplied by TPA?
- What does EA need to do to validate controlled group, employer information?
- Does EA need to required signed plan documents and amendments?

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Work Quality

What duty does an EA have to review work product prepared by TPA?
- Plan documents
- Valuations
- Nondiscrimination testing

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Work Quality

- When we sign something as an enrolled actuary, we are responsible?
  - 901.20(b) – professional duty
  - 901.20(e) – assumptions, calculations, and recommendations
  - 901.20(f) – due diligence

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Duty to Supervise

Precept 3

Actuarial Code of Professional Conduct

- An Actuary shall ensure that Actuarial Services performed by <u>or under the direction of the Actuary</u> satisfy applicable standards of practice.

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AFTAP Delivery

Can an actuary who does work for a TPA simply deliver the AFTAP certification to the TPA? If so, does the actuary need to get confirmation that the AFTAP was timely delivered?

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Proof of contributions

May an EA rely on TPA's statements regarding date and amounts of employer contributions for Schedule SB purposes?

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Benefit Calculations

Does an EA have a duty to review benefit calculations prepared by TPA?

What is an EA's duty if the EA has a reasonable basis to believe that benefit calculations done by a TPA are substantially underpaying people?

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PBGC

May the EA rely on the TPA's determination of whether a plan is PBGC covered?

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Case study 2.1

EA Jay has been working with Acme TPA for several years. Acme TPA is usually a good client, but they have not paid EA Jay for work on the ABC Cash Balance Plan for two years. May Jay withhold the Schedule SB when Jay has not been paid by the TPA for the last two years? Does it matter if the TPA has been paid?

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Case study 2.2

EA Jay advises Acme TPA that benefit restrictions apply to the ABC cash balance plan for 2015. When the census is submitted to EA Jay for the ABC Plan for 2016 he notices that several large lump sums were paid even though restrictions applied. What should Jay do?

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Case study 2.3

EA Jay is the EA for the ABC Cash Balance plan through the Acme TPA Firm. One day Jay gets a call directly from ABC Cash Balance Plan. Jay has never spoken to anyone from ABC and does not really want to. Does Jay have a duty to answer questions/calls from ABC?

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Case study 2.4

EA Jay is working with 123 TPA which is a new relationship for him. Different TPAs have very different styles and levels of trust accounting. Some of Jay's TPAs do extensive transaction detail and others provide a net gain/loss. 123 TPA sends Jay a very brief email stating the asset value as of the valuation date. Is an email with the valuation date asset value enough to proceed? What level of detail is required? Does it make a difference if the plan is 'owner only' or has employees (ie potential for missed participant distributions?)

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Case study 2.5

ABC TPA is adopting compliance amendments on behalf of all of its DB Plan Sponsors at the document sponsor level. Should Jay review the amendment?

What if ABC TPA is using more than one actuary and the other actuary has different ideas of various optional language?

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Case study 2.6

ABC TPA sends EA Jay a census that was input into excel by the TPA staff. Is that enough? Should Jay require a copy of the census provided by the Plan Sponsor to ABC TPA?

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Case Study 2.7

The Plan Sponsor is a Sole Proprietor.

ABC TPA emails you the final Schedule C amount. Should Jay require a copy of the Schedule C?

Going one step further, should Jay require a copy of the Schedule SE to confirm no unrelated W-2 wages and to check the self-employment tax calculation?

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In the end of the relationship…

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End of the relationship

Ways the relationship can end…

- TPA is still retained, but new EA retained
- Both TPA and EA are let go
- Client wants to keep EA, but get rid of TPA
- Plan terminates

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Maintaining records

Who is responsible for maintaining records?

Who has a duty to supply them to the plan sponsor? IRS? PBGC?

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Case Study 3.1

EA Jay is the enrolled actuary for the ABC Cash Balance plan and he has just found out that Acme TPA firm and he are being replaced by a new TPA. Does EA Jay have to answer questions from the new TPA or can he direct those questions to Acme? Do the topic or payment arrangements matter?

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Case study 3.2

EA Jay is the EA for the XYZ plan with the 123 TPA. This is the only plan Jay has with 123 TPA. Jay cannot get in touch with anyone at 123 TPA – this has been going on for months and deadlines are approaching. Jay has not received any information to issue an AFTAP. Jay has no idea what is going on. He does not know if he has been fired by the TPA or if the TPA is out of business. Does Jay have an obligation to reach out to the plan sponsor?

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Case study 3.3

EA Jay is the EA for the XYZ plan with the 123 TPA. Jay cannot get in touch with anyone from 123 TPA so Jay (in good faith) takes on the XYZ client as a direct client. Shortly after the AFTAP deadline 123 TPA calls Jay and is really mad and says he violated his non-solicitation agreement with them. Jay talks to XYZ and they say that under no circumstances are they going to use 123 TPA any longer. Can Jay keep the client or should he resign?

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Bonus Case Studies

(time permitting)

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Case Study 4.1– Takeover

You are hired to run the valuation and sign the SB/AFTAP for an owner only DB plan that has over $4,000,000 in assets.

After much back and forth you are provided what is supposed to be the highest 3 years of compensation average that works out to $5,600 per month.

Based on these facts minimum funding is clearly -0- and no 436 issues.

Are there any ethical issues in attached to not knowing what happened in the past to create such an unreasonable situation?

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Case Study 4.2 – Trust Accounting

The DB plan has rollover assets. The TPA is doing a pro-rata split on the assets based on the beginning trust values including the prior year contribution receivable.

Given the implementation of using time weighted returns with the calculation of the Actual Rate of Return is this a sufficient way to split assets?

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Case Study 4.3

As the actuary you are told to redesign the DB plan for higher benefits, which you do. An amendment is prepared and you have an unsigned copy in your file.

At what point in the valuation/SB/AFTAP process do you require a signed copy of the amendment?

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Case Study 4.4

As the actuary you prepare a voluntary election to reduce a funding balance during the year and provide it to the TPA.

At what point in the valuation/SB/AFTAP process do you require a signed copy of the PPA election?

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Case Study 4.5

You are testing the DB plan with a PS plan for nondiscrimination.

- Are deferrals (and match) amounts listed on the census enough?
- Do you require signed documents for the PS plan?
- If the PS Plan is a Safe Harbor 401(k) do you require a copy of the Safe Harbor Notice?
- Do you require proof of deposit for the PS plan to provide the testing reports?

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Case Study 4.6

Restated Documents

It is time for the DB restatement. What level of input do you provide to ensure that the plan document has the correct provisions?

If the TPA is preparing the document do you review before it goes to the Plan Sponsor?

At what point in the valuation/SB/AFTAP process do you follow up for a signed copy?

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