ETHICS

The Professional and Ethical View: (b) the Best

There is an expectation that 403(b) advisors will act professionally and ethically. But what does that really mean? Let's take a close look at professional and ethical standards.

BY SHELDON H. SMITH

Integral to participation in the retirement plan industry is a strong sense of professional ethics. The retirement plan industry is under constant scrutiny by government agencies, employers that sponsor plans, plan fiduciaries, politicians and, of course, plan participants. After all, almost $19 trillion are being held in retirement plan vehicles today. A significant portion of that amount is held in 403(b) plans, and much of that is money that educators and their employer institutions have set aside for teacher retirement.

Needless to say, there is an expectation that those providing services to the plans holding all of these assets will act professionally and ethically. This article focuses on professionalism and ethical obligations for NTSAA members — all of whom are subject to the ASPPA Code of Professional Conduct (which we'll refer to as the Code).

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The Code provides:

Compliance

An ASPPA member shall be knowledgeable about this Code, keep current with Code revisions and abide by its provisions. Laws may impose binding obligations on a Member. This Code is not intended to supplant, contradict or supersede Law or other Codes of Conduct that establish professional standards for Members in the rendition of Professional Services and that have been sanctioned by the federal or a state government.

Professional Services: *Services provided to a Principal by a Member, including the rendering of advice, recommendations, findings or opinions related to a retirement or other employee benefit plan.*

Principal: *Any present or prospective client of a Member or the employer of a Member where the Member provides retirement plan services for their employer's plan.*

Professionalism

A NTSAA member servicing 403(b) plans expects to be viewed as a retirement plan professional. A professional is identified by behavior, knowledge and various ethical considerations that are integral to being a professional. Professionalism is based on the conduct, aims or qualities that characterize a profession or a professional person. That conduct is a standard of personal behavior based primarily on moral principles.

A professional is someone who conforms to the technical and ethical standards of a profession and who exhibits a courteous, conscientious and generally businesslike manner in the workplace. A profession is a calling that requires specialized knowledge and typically intensive academic preparation. A retirement plan professional is someone with technical skills who has engaged in an educational process to learn the complexities of the business and the technical requirements for creating and operating retirement plans and is polite and courteous with co-workers, clients, plan participants and competitors. And, of course, the retirement plan professional acts in an ethical manner and exhibits morally appropriate behavior.

Personal Behavior

The Code states:

A Member shall perform Professional Services with courtesy and shall cooperate with others in the Principal's interest. . . . A Member shall perform Professional Services, and shall take reasonable steps to ensure that Professional Services rendered under the Member's supervision are performed with honesty, integrity, skill and care. A Member has an obligation to observe standards of professional conduct in the course of providing advice, recommendations and other services performed for a Principal.

Personal behavior for a retirement plan professional means that the professional has a solid moral sense to do the right thing for plan sponsors and plan participants, avoids conflicts of interest, is transparent in her dealings, and does not place personal gain above what is right for her clients. In addition, being a true professional requires specialized knowledge that may involve degrees, certifications and continuing education.

Education and Experience

The Code mandates:

A Member shall render opinions or advice, or perform Professional Services, only when qualified to do so based on education, training and experience.

In the 403(b) plan universe, it is important to understand many of the complexities of ERISA. Many 403(b) plans are not subject to ERISA, and the professional needs to be able to understand which plans are subject to ERISA and which are not. She also needs to have sufficient knowledge to help her clients whose plans are subject to ERISA with an understanding of the requirements that are imposed by it. This level of knowledge is critical to being a true retirement plan professional. NTSAA's mission is to provide high quality related education, technical support and information resources, as well as to offer a professional networking forum. NTSAA membership and participation will assist a person in the 403(b) plan business to be a true retirement plan professional. NTSAA and ASPPA offer a credential that can be earned after some intensive study, the Tax-Exempt & Governmental Plan Consultant (TGPC) credential.

Black's Law Dictionary defines "ethical" as follows:

1. Of or relating to moral obligations that one person owes another.... 2. In conformity with moral norms or standards of professional conduct

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This age-old definition can almost be equated with the Golden Rule. In the retirement plan business, one would be deemed to be acting ethically when she treats others properly and professionally.

The consequences of failing to act ethically for anyone engaged in the retirement plan industry can be severe. It could lead to an actionable claim against the practitioner. It could result in loss of various licenses, sanctions and disbarments. In other words, it could cost someone her ability to earn a living in the industry — and in many others as well.

Conflicts of Interest

Retirement plan professionals need to pay particular attention to conflicts of interest. The Department of Labor is gunning for those who are involved on the investment side of the business and who engage in conflicts of interest. The current battle over the Department of Labor's effort to redefine "fiduciary" is indicative of the concern over conflicts of interest. The same is true with the Department's efforts to effect disclosures by covered service providers to responsible plan fiduciaries that must make it clear when a conflict of interest is present.

There are a number of types of conflicts of interest that retirement plan professionals need to heed:

Actual Conflicts of Interest

A situation in which a group or individual has responsibilities or loyalties to multiple interests that could conceivably interfere with one another, possibly tempting the party entrusted with the interests to deal unfairly or corruptly.

Inherent Conflicts of Interest

Where one set of competing interests is directly related to the party itself, or, in other words, where an entity or person has to choose between doing what is best for it or doing what is best for its constituency, client or other entity it is responsible for representing.

Potential Conflicts of Interest

A circumstance or association, not a behavior, and it does not imply that one's behavior has actually been influenced by the potentially conflicting circumstance.

The Code states that an ASPPA member "shall not perform Professional Services involving an actual conflict of interest unless: (A) the Member's ability to act fairly is unimpaired; and (B) there has been full disclosure of the conflict to the Principal(s); and (C) all Principals have expressly agreed to the performance of the services by the Member. If the Member is aware of any significant conflict between the interests of a Principal and the interest of another party, the Member should advise the Principal of the conflict and include appropriate qualifications or disclosures in any related communication."

It is best, of course, to avoid even the appearance of a conflict of interest. Transparency and disclosure are more and more the required tenets of practice in the benefits arena and certainly help in avoiding the appearance of a conflict of interest.

Probably the worst and most prevalent conflict of interest occurs when the "professional" is looking out for her personal interest ahead of the interests of those to whom she owes a duty. The inherent conflict of interest is the one that can get the practitioner in trouble quickly and often irrevocably.

Duty Owed

A critical component of being a professional and acting ethically is knowing the party or parties to whom one owes duties of professional conduct. This is not always clear under ERISA since ERISA requires that many actors owe their primary duties to plan participants even though the professional may have been engaged by the plan sponsor or a plan administrator. Understanding the nature of duties and to whom they are owed, particularly fiduciary duties, is most important to the retirement plan professional. Educating one's self in this regard is part of the makeup of a true retirement plan professional.

Understanding the Internal Revenue Code requirements requires some serious educational effort. It is important to learn them and then to stay current with them in what is a dynamic, ever-changing arena.

Knowing your audience will certainly help 403(b) plan professionals do the best job they can. For example, the 403(b) professional should know that teachers are the most prevalent population of participants in 403(b) plans (77% of $882 billion in 403(b) plans in 2012 were in teacher funds). But do teachers know what to do when it comes to saving, to investing? Not many do, and the best advisor is surely the one that provides the best non-conflicted advice to this group of people who are not investment savvy.

Most participants are relying on you to do what's best for them. Therefore, you must act ethically and professionally in assisting them. Do you have a conflict of interest if the cost of an annuity program is materially greater than the cost of that 401(k) plan you could institute instead? Everyone is looking for lifetime income options, and the 403(b) plan may well justify the increased cost of providing one, but you need to evaluate that to the best of your ability. Are you doing your job to be the "(b)est" professional you can be in assisting with the comparison?

As a professional, are you taking participant interests and typical shortcomings into account in putting 403(b) plans in place or in modifying them? Are you educating plan sponsors and participants in how an annuity works? Are you making certain the principal understands the various types of annuities? Are you assisting the plan sponsor professionally in looking at plan design features such as auto-enrollment, Roth, investment advice for its participants, target date funds, lifetime income and surrender charges?

From a professional standpoint, are you a salesman or a financial planner? Are you threatened by auto-enrollment since it may cut into your commissions, even though it might increase individual savings for participants? Is the best ethical choice to be a financial planner? Can you establish a value-added position by being ethical? These are ethical and professional questions that you must consider in making certain you are being the best retirement plan professional you can be.

Plan fees are also on the battlefront today. Have you done what assists your plan sponsor client to assure that the most appropriate fee structure is in place even if it means less personal income to you? If not, have you considered the impact of engaging in this inherent conflict of interest and your potential failure to act ethically?

In the 403(b) plan world, some employers began to realize that they may well have exposure if they allow an "insurance salesman" to peddle high commission, non-consumer-oriented products to their employees. You would be well advised to step away from the fray and be someone who provides a valuable benefit at an appropriate cost.

Some best practices include:

- provide appropriate annuity products to your audience
- communicate clearly with the client regarding the terms of your engagement

- advise the client of all relevant information the client needs to make an educated decision
- put material information in writing
- act fairly and with integrity
- be the expert you need to be
- do not "run away" after the sale — assist the sponsor with the plan and its questions, assist the participants, and then follow up to make certain the ERISA and Code requirements are met
- don't take the easy way — make sure you do it right

Acting professionally in the retirement plan arena requires that we pay particular attention to the items described in this article. Ultimately, a practitioner will be far more successful and have a greater book of business if her reputation includes her professionalism and ethical behavior. b

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