Questions – Ethics Webinar – 12/17/2019

1. As a rank and file employee of a TPA is there an obligation under 230 to report the TPA for potential ethical violations regarding positions taken in administration (such as failures that are not addressed with the client)?

   Circular 230 does not obligate you to report a suspected violation to the IRS.

2. Is there any privilege in the relationship between ERPA and Client?

   No. None. If you want privileged communications, become a lawyer or a priest.

3. An investment company is reporting late/missed payroll deposits to the DOL. They are not the TPA so not responsible for the 5500 nor a discretionary Trustee on the plan. Is that appropriate?

   There is nothing to prevent them from reporting the issue, other than the loss of business.

4. If a 5500 has been filed under the wrong EIN, can you fix on the next 5500? There was a change in ownership and the 5500 was filed under the prior company EIN, not the new EIN.

   The EIN is so fundamental, I'd be strongly inclined to file an amended return.

5. Regarding Slide #29 - What about taking over work from another TPA? We did not supervise, train, or evaluate that person.

   Taking into account the nature of the relationship means just that. It doesn't mean you have to forge a relationship.

6. If a plan is filing VCP for multiple years of compensation/eligibility and right before they were going to file, we discovered their payroll company has never reported group term life, which means we weren't including it in the testing/contributions. If they don't add that correction to the VCP are they not compliant with penalty of perjury b/c they are not fully correcting?

   I'd say you have a valid concern.

7. When marketing - such as mailing a 5500 saying "this may..." how is that misleading? If it is something that could trigger an audit then the sender should be fine. Saying "this will..." is misleading as it may not cause an audit and the sender knows that.

   But does the recipient? A half-truth can be as misleading as an outright lie. Having said that, it is true that the DOL and IRS use Form 5500 for targeting audits, and a "worrisome" answer on a Form 5500 is exactly that … it could be an audit target. Our hesitation is just that these types of communications tend to be intended to mislead a potential client into thinking that their current service provider is doing something wrong, which is not necessarily the case and could be a form of false or misleading advertising.

8. On the controlled group and affiliated service group issues, if you educate the employer on what this is, why you think it is, and recommending consulting an ERISA attorney, but the client comes back and signs off that they do not wish to add the company(ies) is the TPA covered? The employer is the fiduciary, the TPA cannot force them to comply; they can only consult. Insisting takes on fiduciary roles OR should you not accept employer direction?

If competent counsel opines that a controlled group does not exist, and, based on due diligence, you rely on that opinion, then you perform testing on that basis. If the employer refuses to seek counsel, the question of how to test the plan is not a fiduciary decision. I don't think you are making yourself a fiduciary by saying you believe it is a controlled group and you choose not to do the testing incorrectly. If you've advised the client that it is a controlled group, and the employer disagrees, without rationale or counsel, and you perform the testing based on the employer's instructions, when you believe those instructions are flawed, I think you have potential ethical problems with the IRS. Remember, too, that the client who won't listen to you is frequently the one most likely to sue you.

9. I thought the 5500 was an information return?

   Yes. So? You cannot lie on an information return. You must use due diligence in the preparation of an information return. You cannot take unreasonable positions on an information return.

10. What if it is a takeover case and your firm didn't prepare the document and you are provided with a document that you feel is back-dated?

    You aren't allowed to close your eyes. And if there are facts that lead you to challenge a document, Circular 230 requires you not to accept it at face value. With apologies to Disney, you've got to dig a little deeper. Having said that, what is the basis for your feeling that the document is backdated? Do you have articulable evidence or is it just that you distrust the client? If the former, then digging deeper is the way to go. If the latter, you don't trust your client, and perhaps you should fire him/her.

11. Can you self-correct when a participating employer failed to adopt the plan?

    No.

12. What if a late signature situation needs to go through VCP for complete correction, but after hearing an explanation from the TPA, the client decides not to back date, but also decides not to do a VCP filing. Has the TPA met the ethical obligation and could/should they continue to service the plan?

    So, suppose you have a plan with a 1/1/18 effective date, that started accepting deferrals 1/1/18, but wasn't signed until 3/15/19. (Yes, those dates were deliberately chosen to avoid the new SECURE Act grace period for plans with employer contributions.) Should you prepare a return for 2018? I would feel very uncomfortable doing so. And, if you do, be sure to put into writing your concerns that the plan is not qualified and the potential penalties involved if this is the case. Remember that, if you know the client has not done something that is required, you are required to let them know that this is so and what opportunities they have for repair. If this blows up down the road, without a written record, the client can blame you and sue you.

13. A TPA competitor recently posted a week ago on Social Media that "some TPAs shut down this time of year and we're open for business to help you with last minute solutions." I don't feel that this was an accurate portrayal. Yea, it's marketing, but some feel that it borders on unethical. What do you think?

    Do you know any that close in mid-December? I don't, but that's me. I guess if my TPA said "I'm not answering your questions this week," I might find that persuasive. If not, I'd ignore it (or be grateful my TPA is available." I'd say the comment is fairly harmless.

14. Scenario: Plan Sponsor did not withhold any loan payments and so no payments were being made. The loans should have been defaulted however the loans were not defaulted. Then, plan sponsor decided that he will pay off all of the loans so that 1099-Rs are not needed and the participant accounts are made whole. What do we do from here?

    Assuming that it happened within the 5-year repayment period, treat it as self-correction under EPCRS and let it go. The only issue is that the employer should treat the payments as a bonus (i.e., include them in W-2 compensation and gross them up for withholding).

15. What if your client is part of a parent subsidiary control group and the parent company is not your client? You provide information that the plans operating separately are not in compliance with the control group rules. The parent company is not a client. What can be done when you have a non-client plan sponsor disregarding the rules that affect your client as well?

    Yes. You tell your client that there is an issue that impacts your plan and may impact other plans as well. (Note that, if the plan can pass coverage with the parent company excluded, the plan is not in violation of the rules, assuming the plan document does not cover the parent company employees. So, you might want to chat with your client about getting the information needed to do a coverage test.)

16. Can you provide statistics to a client if they ask for the probability of an audit? Is this unethical?

    It is not unethical to answer your client's question. It is unethical in giving written advice for you to include in your advice an evaluation as to whether the issue you are discussing is likely to be discovered on audit or what the chances are of an audit – i.e., use this as input in making tax management decisions.

17. How would you recommend handling a client who insists in changing wording in a notice to participants, when you have already advised of the Regulations? They don't "break" Regs. However they are pushing it.

    Usually, government notices are not mandatory language but "safe harbor" language. So, it is not necessarily a violation for you to modify the language, so long as the modification does not alter the meaning of the notice. I'd check what the regulations say and evaluate why the client wants to change the language; if it's all innocent and not misleading, I think it is a non-issue. I would, however, put into writing that the modification of the safe harbor language could lead the government to find that the notice was deficient.

18. On Polling Question 11, if we prepare forms correctly and he modifies and files on his own, should we sever services as TPA since he's filing against our instructions?

    It would depend on what was modified. If it creates a perjurious filing, you might want to consider severing the relationship. It's a value and business judgment, but dishonesty is certainly a sign that this guy can be a problem in the future. Also, once you know he's changing your filings, there is an argument to be made that you reasonably believe that your work is being used to make perjurious filings … in that case, I would not want to be in the middle of any government action. At some point, if your antennae are waiving, you need to consider that as part of your decision to go forward with a client.

19. Do these ethics apply to Record keepers? There is a well-known record keeper that charges $1,000 - $1500 plan termination fee, and the only additional or different work from their regular administration fee was to hold all distributions and process at the same time, and then remove

the plan from their system/stop sending an invoice. So if client didn't pay the plan termination fee and everyone was paid out, the record keeper is still sending quarterly invoices even though there are no assets in the plan.

The ethical rules apply to anyone who is practicing before the IRS. Assuming that a recordkeeper does so, or has some type of government designation (CPA, Attorney, EA, ERPA, enrolled agent), a failure to follow the Circular 230 rules is problematic. Having said that, if the recordkeeper's fee schedule advised the client that there is a fee to handle a plan termination and the client signed the services contract believing such fee was reasonable, I'm not sure that anyone is in a position to second guess the fee (unless the fee is really outrageous). I would say that the recordkeeper is likely within its rights to look for payment of a fee that the client agreed to pay and the fact that the plan is paid out is not necessarily relevant. Of course, if the only person/entity on the hook for fee payments is the plan, then the recordkeeper is likely out of luck legally and probably should have gotten its fees paid before processing the final distributions. If the plan sponsor cosigned the contract agreeing to be liable for fees not paid by the plan, then the plan sponsor probably owes the money.