



## How to Say Sorry Without Saying You're Sorry

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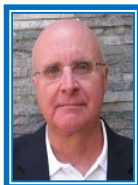
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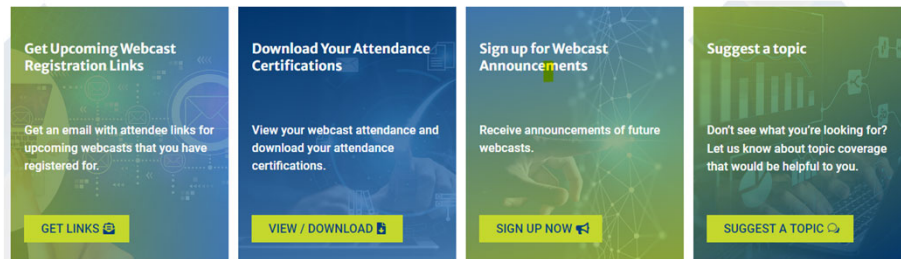
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## Your Presenters Today



Alison J. Cohen



Adrienne I. Moore



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## Agenda

- Identifying liability
- Fiduciary status
- How to use your E&O insurance
- Prepare for what you need to say
- Say it so they understand it
- Make sure it sticks



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## RISKY BUSINESS



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## Where Do You Think You Have Your Biggest Liability?

1. In our 3(16) practice?
2. Distributions?
3. Clerical mistakes that lead to compliance problems (e.g., mis-entering ADP info)?
4. Document preparation?
5. Controlled groups?



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## In Working with Our Practitioner Clients, We Find:

- Many of the liability areas are not technical, but conceptual
  - The liability arises because what the practitioner thinks is the right way to operate is flawed
  - The liability arises because the practitioner doesn't know what actions are dangerous

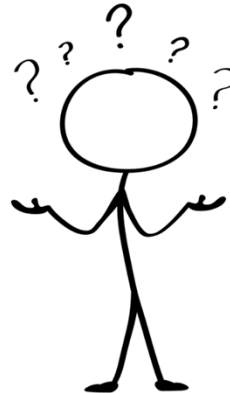


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## In Other Words ...

- Many of the business risks stem from practitioners not knowing:
  - What is really risky
  - What makes sense
  - What others are doing
  - What the government or the courts expect



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## WHAT IN THE FIDUCIARY?



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## Who is a Fiduciary?

- Named in the plan document or other paperwork
  - E.g., Plan Administrator, Investment Fiduciary, Plan Sponsor
- Anyone else who:
  - **Exercises** (i) discretion/control over plan assets or plan administration or (ii) any authority or control over management or disposition of assets
  - **Has** discretionary authority/responsibility for the plan's administration
  - Gives investment advice for a fee or other compensation



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## DOL Regs Say ...

- If you hold yourself out as a fiduciary, you are a fiduciary
- If you act as a fiduciary, any disclaimer of your fiduciary status in your service agreement is ineffective



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## The DOL and Some Courts Say ...

- If you have the ability to handle the money, you are a fiduciary
  - This includes check-writing authority
- Think about this ... Can you, on your own authority, do something with the plan's money?



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## What Controls Your Fiduciary Authority and Duties?

- If you are a named fiduciary under the Plan, the Plan does
  - E.g., you are the named Plan Administrator
  - The plan says, “The Plan Administrator shall ...”
- If you are a named fiduciary under the Plan, the Code, ERISA, regulations, and other guidance may
  - E.g., you are the named Plan Administrator
  - ERISA regs say, “The Plan Administrator shall ...”



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## What Does ERISA §3(16) Say About P.A. Duties?

- ERISA §3(16) says: “The term ‘administrator’ means– (i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor ...”
- It doesn’t say anything about what duties are outlined
- So, if you take on this job and say, “we do what section 3(16) says we’ll do” ... what does that mean?



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## Key Elements Defining Liability

- Obligations:
  - Did the TPA agree to do this and then fail to do so?
  - Did the TPA do this for some time (creating an expectation) and then stop doing it without notice?
  - Was this task explicitly excluded from what the TPA agreed to do?
- Character of the Obligations:
  - Was the task fiduciary in nature or ministerial?
    - Classified by the DOL as ministerial?
    - Did it involve the exercise of discretion?



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## Why Do We Care if it's Fiduciary or Not?

- ERISA §410 provides that you cannot contractually limit your liability for losses due to a fiduciary breach
- You CAN contractually limit your liability for nonfiduciary functions
- If you are providing both fiduciary and nonfiduciary services, this is something you should think about



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## ERRORS & OMISSIONS INSURANCE: ARE YOU SURE YOU ARE COVERED?



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## Situation #1

- TPA realizes that he/she made an error in a client's document
- Unfortunately, TPA realizes this just as the IRS has issued a notice that it will be auditing the plan
- The error is obvious; the IRS will raise it and the plan will end up in CAP



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## Situation #1 (cont.)

- Questions:
  - What should the TPA do to preserve the client relationship?
  - What should the TPA do to protect the E&O coverage?
  - How should the TPA handle the IRS auditor?



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## Situation #1 (cont.)

- Surprise!
  - TPA is owned partially by a large CPA firm and uses the firm's E&O insurance
  - The deductible on the E&O insurance is \$250,000 – which makes sense for the CPA part of the firm, which is large enough to self-insure part of its loss
  - But the CPA part of the firm does not intend to self-insure the TPA's error



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## Lessons from Situation #1

1. Know what you need to do under your E&O policy to report a potential claim
2. Know when you need to report the claim to preserve coverage
3. Know what your coverage is ... and what is not covered



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## Situation #2



- TPA has longstanding client for whom design work was done several years ago
- TPA gets a letter from the client saying that the TPA made a mistake on a calculation at that time, and that there is a claim for benefits now, and the client wants the TPA to pay the additional cost



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## Situation #2 (cont.)

- Even though it believes it made no mistake, TPA offers to split the cost to preserve the relationship. On advice of counsel, the communication makes it clear that this is an accommodation and not an admission of fault
- Also on advice of counsel, TPA notifies E&O insurer of possible claim



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## Situation #2 (cont.)

- Client writes back: we were ready to accept, but we've now found other mistakes. After investigation, we believe you messed up a whole passel of stuff, and we want \$100,000+ in damages or we'll file suit
- TPA turns this over to E&O insurer
- A few things to know about E&O insurers:
  - They usually have a “panel” of lawyers that they use to handle cases, so you won't usually use your lawyer once you get E&O involved
  - They will always look for ways to reserve judgment as to whether they cover your problem



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## Situation #2 (cont.)

- In this case, the insurer asked for various information about the client and the matter. One of those was the engagement letter with the client
- TPA said: longstanding client; we never got an engagement letter signed
- Insurer said:
  - Check your policy, page X, item XYZ: you are only insured if you have an engagement letter with your client
  - We deny coverage. You're on your own, kid



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## Lessons from Situation #2

- Know what your policy says about what is covered and what is not
- Know what you need to do to be covered
  - Even if the E&O insurer does not require service agreements, many give you discounts if you use them
  - There are other reasons to use service agreements for every client, too



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## Situation #3

- Client gets audit letter from IRS
  - TPA represents client in audit
  - During the audit, the IRS finds and raises an issue
  - Recognizing that the issue may be its fault, the TPA notifies its E&O insurer
- E&O insurer says: you needed to notify us as soon as the plan got a notice of audit. Since you didn't do so, we are not covering this error
  - What??? Just because a client is audited doesn't mean that there is a potential claim!
  - TPA fought and insurance company backed down.



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## Lessons from Situation #3

- Again, know what you need to do to protect your coverage
- Just because the insurer claims you're not covered doesn't make it so
- If this happens to you, get it resolved then get a new insurer



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## Other General Comments

- Does your policy cover ...
  - Fiduciary activities (if you are doing 3(16) work)?
  - Plan document work?
  - Investment advice (if you do that)?
  - Cybersecurity losses?
  - Services you provide that are not covered by your service agreement?



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## Other General Comments (cont.)

- Is the maximum coverage for losses only, or for legal representation and losses?
  - E.g., you have a \$1 million policy, but the \$1 million of coverage is for both representation and losses
  - You lose the lawsuit and have damages you need to pay of \$700,000. Unfortunately, your legal fees are \$450,000. You are \$150K in the hole

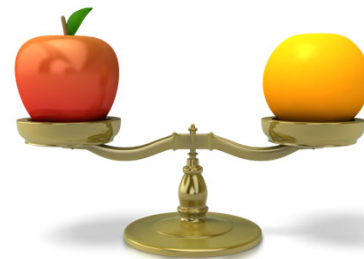


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## Fiduciary Insurance

- Fidelity Bond vs. Fiduciary Liability Insurance
  - Fidelity bond is required
  - Fiduciary liability insurance is not required
  - What is the difference?
- Coverage from fiduciary liability insurance
  - Required contributions?
  - Attorney fees?
  - Earnings?
  - Identity theft?



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## LET'S TALK ABOUT IT



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## Outline Your Talking Points

- Never go into a difficult conversation unprepared
  - Outlining your talking points is the best way to start
  - Eventually, you won't need to outline, but you should still prepare for the discussion
- Remember that this may be you 100th testing discussion, but it's the client's first (and most important to them!)
- Always start with bad news first!



talkingpoints



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## Create Relatable Analogies

- Come up with creative ways to explain the different tests to a non-pension person
  - For example, top-heavy testing can be compared to weighing things on a scale to make sure that key employees don't have their fingers on one side
- The best analogies relate to the client's business
  - Putting discussions in the arena the client is familiar with gains trust
  - For example, if talking to a doctor, you can refer to testing as the plan's annual physical
- Once you create a mental library of different analogies, you can reuse them with other clients



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## Speak English

- Understand that no one understands pension-ese except your colleagues
  - Avoid using acronyms – EGTRRA, QDRO, PPA, QSLOB....
  - Only undercover agents should speak in code (don't refer to it as a 410(b) test)
- To present your ideas in English, you need to make sure that you understand them yourself
  - People often refer to the technical names when they feel insecure or can't express in layman's language



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## Actively Listen

- Don't try to multitask while having your conversation
  - Being present in the discussion comes through (equally, it is obvious when you're not really there)
  - No one can truly have a conversation and multitask
    - Be present!
  - Respect the impact of what you are going to say to the client
- Practice your empathy skills
  - The person you're speaking with may have to explain it to the owner(s) and their job may be on the line



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## Adapt to Your Listener

- Don't assume – you know where that leads
- Try to gauge your listener's knowledge level
  - No one likes to be talked down to
  - Ego may prevent folks from admitting they don't understand
  - If there are multiple parties on the phone, figure out how to balance the medium
- Pay attention to see if they are still paying attention
  - Sometimes, you have to speed up or slow down



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## Ask Questions

- Don't be afraid to ask questions to gauge the listener's understanding of what you're saying
  - Add pregnant pauses in your discussion to allow the client to interject with questions
  - Create questions to make sure that the client is following the discussion
- Watch the tone you use – avoid judgment and condescending tone



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## Repeat Key Points

- Flashback to college essay writing
  - State your conclusions in the intro
  - Explain the conclusions
  - Restate the conclusions and next steps
- Focus key points on action items
  - Who is responsible?
  - What is the due date?
- Importance of clarifying the consequences of missing the due dates



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## Follow-up in Writing

- People will often tune out after hearing the bad news
- Most people don't take notes during phone conferences
- Following up in writing makes what you've said more important
- Provides you with an opportunity later on to follow-up
  - Also, provides you with a great paper trail
  - And – nothing wrong with a little CYA
- Remember those talking points? Guess what that can become!



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## Always Add Proactive Suggestions

- Anyone can deliver testing results, a true consultant adds expertise
- There are always at least 2 – 3 design options for each testing failure
  - ADP: add auto enroll, add match, consider prior year testing, etc.
  - ACP: education to teach importance of match, change formula, etc.
  - 414(s): change definition of compensation, amend bonus exclusion to be an election instead, etc.
  - General test: amend to different formula such as points allocation or integrated, change classifications, etc.



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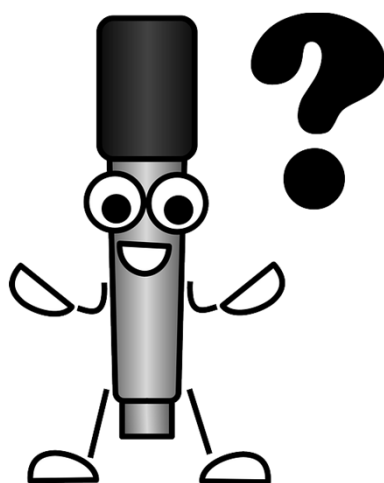


## FINAL THOUGHTS



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## YOUR QUESTIONS



Adriana\*



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## A Few Reminders

- ASPPA/NIPA and ERPA certificates will be emailed within a day or two.
- Go to ERISApedia.com WEBCAST tab to retrieve previous certificates.
- After the webcast you will be presented with a short google forms survey. Please let us know how we are doing.
- Joanne Pecina will demonstrate how to find more information on today's topic from the ERISApedia.com resources



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