

Hi, My Name is Alison and I Fix Broken Plans (The Twelve Steps of Handling a Failure)



Alison J. Cohen, J.D., APA, APR



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Webinar Co-Hosts

- We are NOT Alison:

Chuck Gouge



Joanne Pecina



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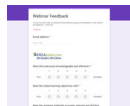


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Your Presenter Today (Her name is Alison)

- Alison J. Cohen, J.D.
Partner, Ferenczy Benefits Law Center



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The Twelve Steps of Handling a Failure

- Accept Imperfection and Work to Fix It
- Understand the Difference Between Micromanagement and Management
- Believe in the Power of EPCRS
- Make an Impartial Inventory of Failures
- Do Not Admit Fault (Sorry Can Be the Hardest Word)
- Make Amends When You Have To



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The Twelve Steps of Handling a Failure

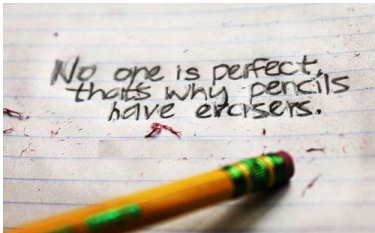
- Have the Wisdom to Know Your Boundaries
- Ensure That You Have Capacity
- Do Not Be Afraid of Pricing Appropriately
- Know How to Properly Calculate Earnings
- Find Yourself a “Sponsor”/Expert You Can Ping
- Remember – You’re Not a Priest or Surgeon!



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Accept Imperfection and Work to Fix It



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Accept Imperfection & Work to Fix It

- When the Failure Is the Client’s Fault
 - The Messenger often gets shot – be prepared
 - Are you prepared to have them fire your firm?
 - Finger pointing isn’t just for kindergarten anymore
 - Is there any possible way your firm could have prevented the failure?
 - Do the analysis before talking to the client
 - Understand the politics and parties involved before you speak
 - Dynamics of every entity are different, so don’t assume everyone behaves rationally
 - What if you suspect possible criminal activities?
 - Are you also a 3(16)?



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Accept Imperfection & Work to Fix It

- When the Failure Is the Client's Fault (cont.)
 - Communications need to present all options
 - Must present pros and cons of all options
 - Ok to put your finger on the scale – influencing is good
 - “How much will it cost me?” - #1 question
 - What if it means I have to bite the hand that feeds me?
 - What if your referral source/financial advisor is at fault?
 - Is there an auditor that missed this failure?





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Accept Imperfection & Work to Fix It




- When the Failure Is Our Firm's Fault
 - “Don't Panic!” – Hitchhiker's Guide
 - Do you have an office culture that promotes honesty without fear?
 - How are employees treated when they make a mistake?
 - Evaluate whether the issue is one-off or systemic
 - Systemic issues may need you to consult legal counsel and decide about the option of a group submission
 - When in a hole, stop digging!
 - If you did 2017 testing wrong, don't do 2018 wrong just to be consistent





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Understand the Difference Between Micromanagement and Management


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Understand the Difference Between Micromanagement and Management

- Annie has been working for you since 1996 and is a key member of your team. She reviews other employee's work and maintains her own caseload of some of your most valuable clients.
 - Do you need to review Annie's work since she's a senior employee?



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Understand the Difference Between Micromanagement and Management

- **Case Study –**
 - Annie has been working for 30 years at TPA
 - Client DB Plan gets audited by the IRS. IRS finds:
 - Payments done in years where AFTAP was below 80%
 - Owner-employee takes in-service distribution that doesn't meet 110% funding requirement
 - Distribution packages prepared for participants don't have all forms of payment options
 - TPA Owner was surprised by failures. Another client gets IRS audit letter and it appears similar problems may have occurred. What should the TPA Owner do now?



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Understand the Difference Between Micromanagement and Management

- Is there ever a point where a person's work doesn't need to be reviewed?
 - Do laws change? Do systems change?
 - Have you ever known anyone impervious to life events?
 - Can anyone know everything?
- Curse you, Alison. Did you just give me something else to do?
 - Peer review is a good thing





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Believe in the Power of EPCRS









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Believe in the power of EPCRS

- Employee Plans Compliance Resolution System (“EPCRS”)
 - Revenue Procedure 2019-19 (released 4/19/19)
 - Current fees found in Rev. Proc. 2019-4 (look for annual updates)
 - Remember to warn clients pending VCP submissions in December
- Provides not only programs to use (SCP, VCP, and Audit CAP), but is the “cookbook” for corrections
 - Outlines all flavors of correction options – i.e., eight options for fixing an excluded employee
 - Highly recommended to keep a hard copy for tabbing, highlighting, and taking notes









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Believe in the Power of EPCRS (cont.)

- Use of Self-Correction Program (SCP) doesn’t mean just fix it and forget it
 - Requirement to document the correction in case of future audit
 - Do you remember what you did three years ago?
 - SCP memo should include the evaluation of the criteria as to why self-correction was appropriate for the failure
 - Even if auditor disagrees with you, so long as the Plan Sponsor’s (your) logic was reasonable, they will give you credit
 - Attach all supporting documentation
 - Excel spreadsheets aren’t going to be a trust statement accepted by the IRS or DOL








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Believe in the Power of EPCRS (cont.)

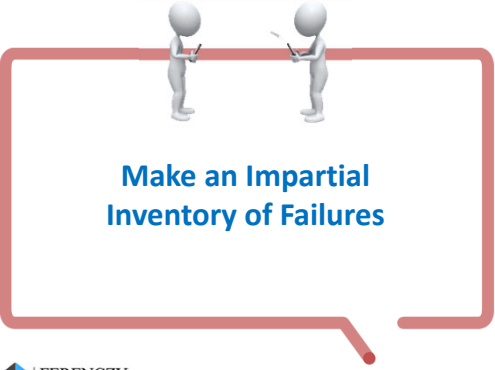
- Beyond EPCRS, it is important to understand how the DOL programs work, too
 - [Delinquent Filer Voluntary Compliance Program](#)
 - Use DFVCP if audit report isn't ready by the Form 5500 filing deadline – do NOT file Form 5500 with 'oops' letter instead
 - [Voluntary Fiduciary Correction Program](#)
 - When do you file for late deposits of deferrals/loan repayments?
 - What do I do if my client gets a letter from the DOL after the Form 5500 filing indicates late deposits?









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Make an Impartial Inventory of Failures








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Make an Impartial Inventory of Failures

- Regardless of who caused the failure, the plan should be reviewed with an impartial eye
 - Might not be so smart to have the administrator do the review
 - Have one administrator tell a senior administrator a 'bedtime' story to see how they can poke holes or spot missing pieces
 - If failure caused by TPA, human nature is to either minimize the impact or completely catastrophize
 - Neither is helpful







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Make an Impartial Inventory of Failures


- Write your findings in an outline for all future uses, such as:
 - Consulting with your attorney
 - Drafting the communication/speaking points for the client
 - Preparing SCP memo or VCP narrative
 - Serving as notes for file
 - Can be used as a training tool for other employees
- Laying out the puzzle pieces can lead you to the solution(s) available (and other possible failures you didn't previously consider!)







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Do Not Admit Fault (Right Away)



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Do Not Admit Fault (Right Away)

- Human instinct is to apologize right away
 - Just like a car accident, those words can be used against you later if the matter goes to court
- Some E&O insurance carriers will void coverage for admitted failures
 - Important to know your carrier's required procedures before you need to use them
 - There's no penalty for asking your carrier to put their policies and procedures in writing for you
- So, how to you apologize without apologizing?
- When do you apologize?








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Do Not Admit Fault (cont.)

- When do you need to notify your carrier?
 - One carrier insisted that notification needed to be made when the client received the initial IRS audit letter.....even before anything had been found!!
 - Does it hurt to notify the carrier if you don't end up actually filing a claim?
- Do I need to have a final dollar amount for the potential claim for notifying my carrier?







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Make Amends When You Have To






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Make Amends When You Have To

- What is the true cost of keeping the client?
 - Besides the annual fees, are they:
 - A great reference?
 - A client of your biggest financial advisor?
 - Abusive, hopelessly late, and/or a constant fire drill?
 - Silent and non-responsive?
 - What do you do if they are a Participating Employer in a Multiple Employer Plan?
 - Does the MEP sponsor have procedures for the "bad apples?"







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Make Amends When You Have To (cont.)

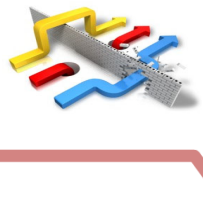
- Negotiating the cost of a correction can often include a fee offset option
 - But, then you're stuck with them for possibly years....
 - Unless you want to keep them (sometimes it's cheaper to keep her!)
- Agreeing to do any sort of cost offset should be documented in writing
 - Settlement Agreements seem formal and scary, but they can keep a client from taking several bites at the apple
 - Writing is especially important if you aren't accepting liability, but doing the fee break as a relationship concession



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Have the Wisdom to Know Your Boundaries



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Have the Wisdom to Know Your Boundaries

- Understand what you have the knowledge and skill to do
 - Circular 230 obligates us to perform work with competence
 - Getting a VCP or VFPC wrong can have critical consequences
- Case Study
 - VCP prepared by TPA for a defaulted loan using Schedule 5 (Form 14568-E)
 - Loan was for the owner
 - \$50,000 taken with no repayments made for nearly two years
 - Initial IRS reviewer threatened to reject filing – egregious failure
 - Possible threat of treating as a prohibited transaction



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Have the Wisdom to Know Your Boundaries (cont.)

- Do you have any ERPA's on staff?
- Consider creating a clear list of what sort of failures you are willing to tackle (i.e., non-amender failures)
 - Do you have management review process to decide what to take on?
 - By handling the VCP submission, have you increased your possible exposure?
- If you're not able to use a 'recipe' from EPCRS, and need to go off-script, consider passing it to legal counsel



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Have the Wisdom to Know Your Boundaries (cont.)

- What about supporting IRS audits & DOL investigations?
 - Again, do you have an ERPA on staff to represent the client?
 - Are there known issues or will this be an Indiana Jones adventure?
 - Have you been the TPA for the entire period covered by the audit/investigation?
 - Do you have the time? (We'll talk about capacity next....)
 - Does your service agreement cover the costs involved for such representation?



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Ensure That You Have the Capacity






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Ensure That You Have the Capacity

- **Case Study – would you say yes to this?**
 - Plan is balance-forward with 30 – 40 participants
 - 401(k)/3% safe harbor/specified classes discretionary PS
 - Employer-directed asset pool invested solely in CDs
 - Last valuation was done in 2012
 - No plan documents since 2001
 - No paperwork for any of the distributions done
 - 60+ participant loans are outstanding at the time you are brought into the matter
 - Last Form 5500 in 2014

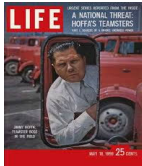







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Ensure That You Have the Capacity (cont.)

- **Case Study – would you say yes to this?**
 - Employer also has a DB Plan
 - Allegedly frozen in 2010, but no documentation
 - No plan documents except for original 2005 plan
 - PBGC premiums not paid for past three years & now in collections with U.S. Treasury
 - No valuations done in several years
 - TPA has vanished like Jimmy Hoffa









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Ensure That You Have the Capacity (cont.)

- **Case Study – What are your considerations?**
 - Do you have the personnel to cover these corrections?
 - Is there a time consideration impacting?
 - What if I told you the participants have called the DOL to complain?
 - Does your staff have the accounting abilities to reconcile the trust activities and 60+ participant loans?
 - Are you able to handle the VCP submission? Should you handle the VCP submission?
 - What about the financial impact this will have on your business?
 - Can you charge enough to actually make money on this?



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Ensure That You Have the Capacity (cont.)

- Correction of problem plans can be a specialty
 - Possible market differentiator
 - Pricing can be done to make it profitable for the firm
- What are the possible liabilities?
 - If firm takes too long, risk for DOL inquiry becoming an investigation increases
 - Participants can file a class action lawsuit and name TPA
 - Interest and penalties for lost premiums increase over time
- With this many failures, chances are good you might miss more



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Do Not Be Afraid of Pricing Appropriately

- In a Wells Fargo survey, 44% said that money is the most challenging thing to talk about ... even more than death (38%)
- Culture has taught us to be ashamed to discuss money
 - "Money is the root of all evil" (not the real quote)
 - "It is easier for a camel to go through the eye of a needle than for a rich person to enter the Kingdom of God"
 - "It's rude to talk about money"



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Do Not Be Afraid of Pricing Appropriately (cont.)

- Correction work is going to take away time from all of your other clients
 - Are you in your 'busy' season and able to charge a premium?
 - Do you have a rush fee in your service agreement?
- Are your hourly fee estimates accurate? (Hint – you're probably waaaayyyy under.)
 - What do you do when you discover that your estimate is off?
 - Lesson from the airlines – people like to think they arrived early



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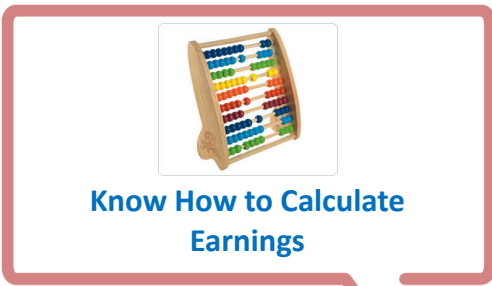
Do Not Be Afraid of Pricing Appropriately (cont.)

- Do you price differently whether it is Client- versus TPA- caused failure?
 - TPAs have a tendency to be apologetic either way
- Remember – when it is a Client failure, TPA didn't create the problem, so why would the TPA agree to take the financial hit fixing the failure?
- If you give an estimate up front, you need to keep an eye on the balance as you go and adjust
 - Communicating the increase and the "why" is tough



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Know How to Calculate Earnings






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Know How to Calculate Earnings




- Understanding your “Period of Failure”
 - Period starting with the date the failure began and ends when failure fully corrected
 - So, if the Plan Sponsor accidentally excluded Sheldon starting January 1, I have to calculate earnings for all 24 payrolls?
 - NO – Appendix B, Section 3 allows you to use midpoint of the plan year (or portion of the plan year)
 - You can try using this ‘midpoint’ method with the Department of Labor if you have a VFCP submission, but you may have to explain it to them

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Know How to Calculate Earnings (cont.)



- Appendix B, Section 3 is for earnings on additional contributions only
- Reductions in account balances are based on Appendix B, Section 2.02(2)(a)(iii)(C)
 - If predominantly NHCE affected, then no gain needs to be taken into account (yep, they can keep it)
 - If predominantly NHCE affected, and the Plan Sponsor wants to take out earnings, then you are permitted to use the fund with the lowest rate of return instead of actual earnings
 - And what do you do if there has been a loss???
 - Not in EPCRS
 - Do our HCEs get such a good deal? NOPE
 - You get to calculate actual earnings for HCEs

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Know How to Calculate Earnings (cont.)




- Appendix B, Section 3 – Your Friend
 - If the plan has pooled employer-directed assets, you use the actual rate of return (ROR) for the period
 - If the plan allows for participant-direction, then the rules really kick in –
 - Actual earnings of participant-chosen assets is always best
 - Absent the actual earnings by participant, and if the affected group is predominantly NHCE, you may use the fund in the line-up with the highest ROR
 - In the alternative, if the employees were not given a chance to select investments (i.e., our accidentally excluded employees), you may use the weighted average for the plan as a whole
 - Note the underlined text – this doesn’t work if you are giving funds to folks already in the plan, but there was a contribution calculation failure

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Know How to Calculate Earnings (cont.)

- I know you're dying to ask....but what about the DOL's VFCP online calculator???
- Section 6.02(5)(a) Reasonable Estimates (also referenced in Appendix B, Section 3)
- You may use the DOL VFCP online calculator only if:
 - It is possible to make a precise calculation per the prior slide, but the probable difference between the actual earnings and the VFCP calculator is **insignificant** AND the administrative cost of the actual calculation would significantly exceed the probable difference; OR
 - It is not possible to make a precise calculation








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Know How to Calculate Earnings (cont.)

- Automatic Enrollment exclusion failures have their own rules
 - Still permitted to use Appendix B, Section 3
 - If affected participants weren't given an opportunity to select funds, then the Plan Sponsor can use the default investment alternative (Appendix A.05(8)(b))
 - One catch to this – if the use of the DIA results in a loss, the loss cannot be applied to any corrective contribution related to any matching contribution

One size does NOT fit all



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ASK AN EXPERT

Find a
"Sponsor"/Expert
You Can Ping






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Find a "Sponsor"/Expert You Can Ping

- Knowing your boundaries and capacity means that you should be able to identify when you are out of your depth
 - Although, sometimes it's just good to have someone confirm that you really know what you think you know
- There is never any harm in asking questions
 - Always good to make your office a "no judgment" zone for your employees
- What research materials do you make available to your office?
 - Creating a resource pool for employees to go to can be helpful
 - Don't let them resort to using Wikipedia/Benefitslink



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Remember, You're Not a Priest or Doctor?



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Remember, You're Not a Priest or Doctor

- No one's soul or life is on the line
- Mistakes are part of the job
 - To err is human, to forgive is divine
- If clients decide to play "Taxicab Confessionals," be prepared to need to take action
 - Co-fiduciary liability may be present if TPA provides 3(16) services
 - Knowledge of criminal action ethically requires action
 - Tax fraud is a crime – don't be caught looking like you are encouraging this behavior



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TPA's Prayer

IRS, grant me the serenity not to strangle my clients,
the courage to charge an appropriate amount for my work,
And the wisdom to know the boundaries of my sandbox.



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QUESTIONS???



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Contact Information



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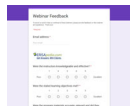


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