

From the files of

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Southern California's largest firm exclusively practicing employee benefits law

BRUCKER



MORRA

A Professional Corporation

HOW TO MAINTAIN CONFIDENTIALITY

Self defense from the start

What could have gone wrong:

This conundrum began like a palindrome: A man, a plan* The man owned a business. One of his employees contacted the Department of Labor, which ultimately triggered a letter from the DOL to the man alleging a fiduciary breach in his corporate pension plan. Ever resourceful, or so he thought, the man Googled his problem and found a lawyer with related experience. Thinking that the source of funding for the retainer didn't matter (and that he could save himself a few bucks), he wrote a check from the plan account. The lawyer duly registered the plan, not the man, as his client. The lawyer then, correctly, addressed all correspondence — his analysis of the problem and the possible solutions — to the man, the plan and the DOL. Believing that all conversations with the lawyer were confidential, the man disclosed every detail about what he had done and why he had done it. When the man realized that the lawyer distinguished between him and his plan, he hired Brucker & Morra to protect his personal interests. The plan, represented by the original lawyer, had been well served. The DOL, thanks to the original lawyer, was itching for the meeting with the man . . .

What we did:

Meredith J. Sesser went to work on damage control, the only option given that the DOL had all the pertinent facts and figures in the case.

Comment from Meredith:

One issue here is confidentiality. The DOL claims its intention is to help you, but a DOL (or IRS) investigation is an adversarial proceeding. Anything you say or do can be used against you. You never want the other side to see all your cards. As attorneys, we have the privilege of confidentiality. When employees in the plan are represented by other counsel, and we represent the personal interests of a plan fiduciary or trustee, our client's conversations with us are not subject to discovery. This shield gives us discretion about what we reveal to whom, including plan participants, and that discretion expands our options for resolving the problem at hand. Confidentiality is distinct from trust. Accountants and third party administrators have fiduciary responsibilities and are trustworthy, but they have to fess up when legal or government authorities demand information.

The other issue here is obvious: Use personal money to solve personal pension problems; use plan money to solve participants' problems. Legally, there's a Panama Canal's worth of difference between a man and a plan.

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*"A man, a plan, a canal, Panama!" reads the same forward and backward.

As experts in every tax and labor aspect of the Employee Retirement Income Security Act (ERISA), we at Brucker & Morra are challenged by our clients to devise creative solutions to a wide range of problems. Peoples' lives, unlike pension law, can be imprecise and messy. We know that. Our job is to bring legal order to personal chaos.

In this newsletter, we open our files (while reserving the right to change names and facts to maintain confidentiality) to present cases and client predicaments that we find intriguing and, we admit, a little entertaining. We concur with Mark Twain, the quintessentially American writer, who once observed, "It's no wonder that truth is stranger than fiction. Fiction has to make sense."

If you wonder whether your pension or profit-sharing plan seems strange to participants or regulators, we invite you to contact us. The attorneys at Brucker & Morra are skilled at interpreting and applying the strange-but-true provisions of pension law so your plan complies with regulations or expectations. We will also work with you to prevent problems from ever arising. We pledge to resolve your issue in the most efficient and cost-effective manner because we believe, as did Mark Twain, that by doing right, you gratify some people and astonish the rest.

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PROPER PLAN STRUCTURE

Putting right imprecise post mortem payouts

What went wrong:

All who knew the husband and wife thought of them as forces of different natures, yet soulmates whose two hearts beat as one. He: strong as a hawk and a titan of business. She: soft as a dove and a musician of exquisite sweetness. One horrendous day, an accident cruelly stopped both hearts on the same beat. Who could fail to see the poetry of such bittersweet fate? Here's who: The State of California, the trustee of their joint pension plan, the executor of their estate, and two of the nation's highest-profile nonprofits. Here's why: Husband and wife each named the other as primary beneficiary of their pension plans; each then named a different charity as secondary beneficiary. With no clear primary survivor beneficiary, the plan trustee was left to puzzle over the proper path for the money. The powerful nonprofits, meanwhile, went on the warpath. Each, uncharitably, wanted it all.

What we did:

Alex Brucker wrote an opinion letter clearing the way for the plan trustee to determine the ultimate beneficiary of his clients' pension assets. He said that while pension plans operate under federal law, ERISA rules were inapplicable here because the couple's plan had no employees. With the beneficiary forms voided, the trustee could seek disbursement guidance elsewhere. He chose the executor of the couple's wills. The State of California insists that wills specifically include contingency plans for simultaneous death. The couple's wills gave "absolute discretion" about murky survivorship to their common executor, who then gave absolute discretion to the plan trustee.

Comment from Alex:

The trustee wanted to flip a coin to decide which charity would get the money, but that would have been imprudent for a fiduciary. Pension professionals can eliminate problems for trustees by taking cues from estate planners and using survivorship language as specific as this: "If my spouse and I should die simultaneously, or under such circumstances as to render it difficult or impossible to determine who predeceased the other, then..." We have never seen a plan document come into our office with language about simultaneous death. This case ended well. The trustee, Solomon-like, decreed that the two charities would each get half the money. Unlike Solomon, he actually sliced the payout down the middle.

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FAMILY LAW

Putting right improper post mortem payouts

What went wrong:

The pension payee died, leaving four ex-wives. The most recent ex, a rather congenial woman, had agreed in settlement to accept community property and forego her status as beneficiary of her ex-husband's Joint and Survivor Annuity pension. But the ex-husband had no business making such an offer: He had retired while married, so the pension terms became irrevocable. Of course he failed to mention his pay status to his divorce lawyer, a whiz at property division, but no pension expert. Ex #4 got an unexpected windfall: property AND survivor annuity payments. The deceased's son, the intended recipient, got a sad thank you.

What we did:

Linda Morra, the originator of the interim qualified domestic relations order (QDRO), essentially went back in time to fix the problem for her client, the distressed son. Working with the affable #4, she convinced the court to reform the divorce decree, substituting the son as the pension beneficiary. The son agreed to a key provision: his checks would stop with the death of Stepmother #3 (Ex #4). Linda explained to the pension administrator that the deceased had paid for the change when he relinquished community property. What's more, she emphasized, the plan would remain whole: The change incurred no additional cost to the plan because payments would end upon the death of Ex #4, the original beneficiary.

Comment from Linda:

I recommend having a pension lawyer review all divorce settlements involving pensions so intended beneficiaries are the actual beneficiaries. This story has a Tinseltown ending: Everyone lived happily ever after — especially the son, who is 20 years older than his father's fourth wife.

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