Bad Things You Should Avoid As A 401(k) Plan Provider

By Ary Rosenbaum, Esq.

I worked for about 12 years before I started my practice. Most of my co-workers were wonderful people, who I still see from time to time. Yet I always think of the handful of co-workers who would get some sort of joy by being a snitch or backstabber. I will never understand why people got joy by hurting others. As Judge Elihu Smails said to Danny Noonan in Caddyshack, the most important decision you can make right now is what do you stand for? Goodness... or badness? As a 401(k) plan provider, the correct answer is goodness, so these are bad things you should avoid doing.

Don't steal

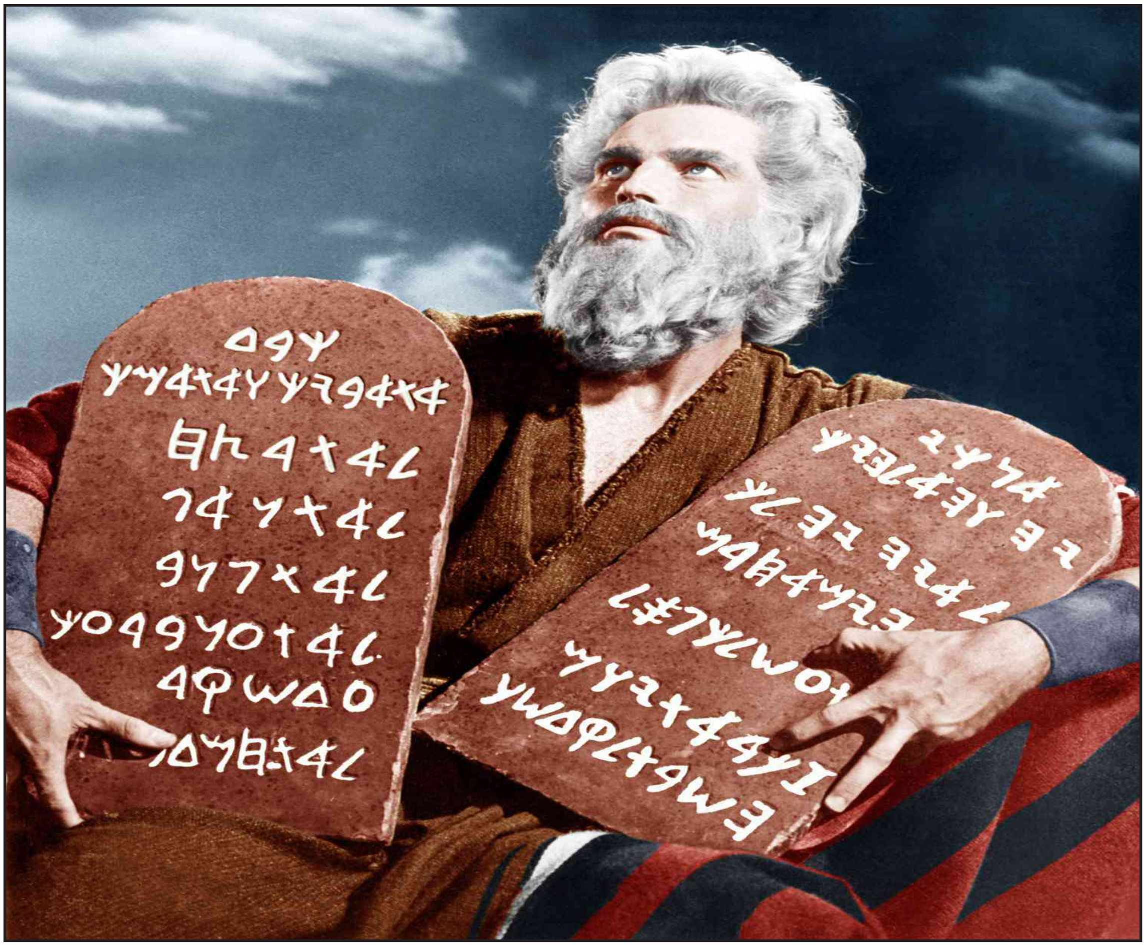
Don't steal, kind of obvious, right? It's one of those commandments that Charlton Heston speaks about every time it's around Passover in a movie. Yet, I know two plan providers in federal prison for stealing plan assets. I'm a lawyer and I'll give you some advice here: you have a better chance of getting away robbing a bank by putting a panty house on your head than stealing plan assets. The reason is that retirement plans have trust accounts and any withdrawal has the fingerprints of the person making the withdrawal. While it took some time for retirement plans to figure out that Matt Hutcheson and Jeff Richie steal millions from plans, the evidence of the theft was very hard to refute. Stealing from your clients in my mind is worse than robbing a stranger on the street corner because you're stealing by betraying plan sponsors who entrusted you. So don't do it.

Leaving clients to die

I have clients who call me at all hours and including weekends. As a solo attorney, the clock never stops for me. I'm always there for a client because I have situations in life where I needed help from someone, but they weren't there, and I no longer needed them. Imagine having a house flooded during a hurricane and a family living a mile away, not seeing if you were alive or dead. Heard about that once. As a 401(k) plan provider, sometimes just "holding the hand" of your client goes a long way. If you're a third-party administrator (TPA), you need to be very clear on what information plan sponsors need to provide you. Telling a plan sponsor to identify who is a Key Employee will get a wrong answer if you don't define what a Key Employee is for purposes of a Top Heavy Test. If you're a financial advisor and the market is volatile on the downside, you need to let plan sponsors that you're still alive and on top of things. They teach you in the military, not to leave a fellow soldier behind. A good plan provider doesn't leave a client behind.

Speaking badly about other providers behind their back

I have certainly known some bad plan providers out there. Those that rip off clients, those that do poor work, and that Southeastern TPA that changes names every 6 months to avoid paying other plan providers. The reason I don't name these plan providers is that it would reflect badly on me. My wife and I had a neighbor a few doors down from us that we were friendly



with because my wife and the neighbor were sorority sisters in college. We were close at the time and I was always amazed at how this neighbor spoke badly about her other friends. I figured that if she was talking badly about her better friends, she was probably talking badly about us. Heck, there is nothing I'd rather do than mention the TPA I had to report to the Department of Labor (DOL) for trying to shake us down for a valuation and Form 5500 we paid for before I fired them. The reason I don't? It would reflect poorly on me. When I was working for a New York City TPA, I interviewed for a lateral legal position on Long Island. The guy running the TPA spent a good chunk of the interview deriding my salesman who had defected from this Long Island TPA, it soured me on the interview. There are times to spill the tea (I still hate that term), but I would never do it publicly.

Taking your firing personally

Like that WFAN phone caller who asked Mets manager Davey Johnson "are you hired to be fired?", I believe that every relationship with a 401(k) plan sponsor client will end one way or another. There are many reasons you can be fired and there are certain situations where there is nothing you can do to avoid it, such as the client being bought by someone else. I've been fired before and aside from that certain semi-prestigious law firm, I don't take it personally. Yet certain plan providers take any termination personally, especially TPAs. One of the biggest abuses that most people don't talk about is the termination fee/ de-conversion fee that a TPA assesses upon their termination. It's one of the few instances in business where someone is entitled to a fee after getting fired. The problem with the de-conversion fee is that it's rarely talked about and rarely disclosed. I worked for a producing TPA where the guy in charge would asses a termination that was dependent on our relationship with the plan's financial advisor. If the plan belonged to an advisor who had no other plans with us, they would get a higher termination fee than a plan who had an advisor with multiple plans with us. As discussed before, I'm a plan sponsor and fiduciary of a multiple employer plan and the TPA took things so personally, they wanted to charge my plan for a valuation and Form 5500 that we had already paid for. An industry leader once told me that most billing disputes arise from a plan provider's termination. Getting fired stings, but having a temper tantrum over it and taking things personally on the client will do you no good.

Not valuing employees

I adore my wife, but she never understood what I went through as an ERISA attorney working for TPA firms and law firms until she started working as an attorney for law firms. Perhaps I'm a malcontent and there isn't an employer who satisfied me, but I never felt I was ever treated well by an employer not named Harvey Berman, my first boss. Whether it was the lack of raises and lack of bonuses and benefits. I was always thinking of the next job. Treating your employees poorly is a bad idea for so many reasons. It leads to turnover and turnovers cost time and money. Hiring and training employees cost time and money you could avoid by not letting your front door become a revolving door for employees. It's hard to find good, well-trained staff and a revolving door of employees doesn't give assurances to your plan sponsor clients. If you're a plan provider and a specific client's main contact changes every six months, it will become unsettling to the plan sponsor client.

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