GIFTS, GRATUITIES, FRIENDSHIPS, AND DISCLOSURES: WHAT THE ASPPA CODE OF PROFESSIONAL CONDUCT REQUIRES

BY LAUREN BLOOM

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The holidays have come and gone and, with them, the season for professional thank you gifts. It's the time of year when many consultants both give and receive tokens of appreciation for professional business opportunities. Those gifts are often relatively modest—fruit baskets or candy—and unlikely to have a significant impact on the recipient's business decisions in the year to come. When a gift rises to the level of a Rolex or front row seats to a sold-out Broadway show, however, they may have more lasting influence.

Gifts and goodies aren't the only compensation that plan consultants may give or receive. The retirement plan community is large and diverse, made up of accountants, attorneys, investment advisors, TPAs, and others. Inevitably, plan consultants form professional friendships with peers in related professions, and frequently end up recommending their friends to the clients they serve. Plan consultants may receive commissions, finders' fees, or other compensation if the clients accept their recommendations. Improperly disclosed, such compensation can look suspiciously like a kick-back.

Recent news stories about "pay to play" scandals in public retirement plans have demonstrated how important it is for ASPPA members to disclose to their principals (*i.e.*, clients and employers) all sources of compensation they receive in relation to an assignment. Clients expect their advisors to be objective, and to offer their best advice in the clients' interest. They don't want advisors whose opinions and advice are influenced by undisclosed payments from third parties. Failing to disclose outside compensation to a client can seriously undermine a plan consultant's credibility and, if publicized, can harm the reputation of retirement plan professionals overall.

For ASPPA members, Section Four of the *ASPPA Code of Professional Conduct* offers specific guidance on when and how to disclose gifts and other sources of compensation:

> An ASPPA member shall make full and timely disclosure to a principal of all sources of compensation or other material consideration that the member or the member's firm may receive in relation to an assignment for such principal. A member who is not financially and organizationally independent concerning any matter related to the performance of professional services shall disclose to the principal any pertinent relationship which is not apparent.

In many situations—for example, where an ASPPA member is producing a work product or recommendation exclusively for a single client—it will be apparent to everyone involved that the ASPPA member is being compensated only by that client. In such a situation, no additional disclosure is needed because there are no other sources of compensation associated with the assignment.

In other situations, however, an ASPPA member might be compensated by several principals for the same work product. For example, an ASPPA member who is an investment advisor might have a company newsletter to which clients could subscribe for a fee. In that situation, the ASPPA member is wise to make clear to all of his clients that the newsletter is not produced exclusively for them, but is available for purchase by all of the ASPPA member's clients. Similarly, an ASPPA member who has designed proprietary software to facilitate annual testing can offer it to all of her clients for a fee but should not pretend that the software was individually developed for each client. (If the ASPPA member customizes the software for each plan, however, she can certainly say so.)

GIFTS AND GRATUITIES

As we've seen, not all of the compensation that an ASPPA member might receive in relation to an assignment is necessarily in cash. In a field where relationships are often the key to professional success, gifts and invitations to events are frequently given. So, for example, that same ASPPA member who is an investment advisor might receive invitations to "educational meetings" at resort hotels from fund managers, or gifts from fund managers with the expectation, explicit or implicit, that the ASPPA member would make favorable recommendations to his clients.

If the ASPPA member accepts the gift, he'll need to decide whether the gift or invitation was sufficiently material to warrant disclosure to his clients. Before making that decision, the ASPPA member would be smart to consider relevant factors such as the size of the gift, its intended purpose, whether he believes the gift could compromise his ability to offer independent advice, and whether an objective observer would be likely to agree with his belief. An invitation to a casual lunch probably would not qualify as "material consideration," but a week-long golf trip to Scotland probably would.

When it comes to determining whether a gift or other consideration is "material," a plan consultant is wise to keep in mind that appearances matter. In today's environment, even modest gifts can seem material to a client and call the plan consultant's independence into question. ASPPA members are usually wise to avoid situations that appear as though a gift is being offered under the table. An invitation to an "all expenses paid seminar" set in an expensive Hawaiian resort with only morning classes followed by golf, spa, and other amenities probably seems to be more of a gift than an educational opportunity. The very fact that the sponsor tried to disguise the trip by calling it a "seminar" might suggest that the sponsor intended to deceive outside observers and improperly influence the ASPPA member. If an ASPPA member is uncomfortable disclosing a gift to a client, it's probably a good indication that the ASPPA member's judgment has been affected by the gift.

Section Four of the ASPPA Code refers to consideration paid not only to the ASPPA member, but also to anyone else in her firm. One way for an ASPPA member to comply with this requirement is to obtain access to a full list of her firm's clients and take reasonable steps to ensure that she knows whenever anyone in the firm is being paid with regard to a particular transaction. Many firms fulfill this requirement by maintaining a database of clients and holding periodic management meetings to discuss pending projects. Such practices can help ASPPA members in the firm satisfy Section Four of ASPPA's Code.

Firms also frequently have gift policies that can make it easier for ASPPA members to avoid accepting presents, invitations, or other

consideration without due regard for Section Four of the ASPPA Code. These policies may prohibit firm employees from accepting gifts at all, or from accepting gifts with a dollar value beyond a specified limit, or require all gifts to be shared within the firm. ASPPA doesn't enforce private firms' gift policies, but careful compliance with them can help keep an ASPPA member in compliance with Section Four.

DISCLOSING RELATIONSHIPS

Gifts and gratuities aren't the only potential pitfalls under Section Four; relationships count, too. An ASPPA member's personal or professional relationships may also need to be disclosed to a principal if they're not already apparent. For example, suppose an ASPPA member is an investment advisor and that his wife works as a vice president of a large investment fund that the ASPPA member wants to recommend to a client as an investment vehicle. The ASPPA member's wife will receive a bonus if the client invests in the fund. Again, the ASPPA Code wouldn't prohibit the ASPPA member from recommending that the client invest in the fund, but the ASPPA member would be wise to disclose his wife's position with the fund to the client—and the possibility that his wife will receive a bonus—before recommending that his client invest in the fund.

A professional relationship may also need to be disclosed. For example, if an ASPPA member has worked frequently and developed a friendship with a particular TPA, it would normally be a good idea for the ASPPA member to disclose the existence of the friendship to the client before recommending that the client use the TPA's services. The principal could then make an informed decision about whether the ASPPA member's recommendation was influenced by the friendship, and the ASPPA member would be

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in compliance with Section Four of ASPPA's Code.

While Section Four of the ASPPA Code allows ASPPA members some discretion in determining whether a particular gift, gratuity, or relationship is material, it's generally a good idea for ASPPA members to err on the side of disclosure to satisfy Section Four. Individuals' ideas of materiality can differ substantially, but it's usually more prudent to disclose too much than too little. A client will usually appreciate an ASPPA member's candor and attention to professionalism if she is scrupulous about disclosing all sources of compensation and relationships.

If, however, the ASPPA member fails to disclose something that proves to be material later, her credibility can come into serious question. Disclosure need not always be formal—a casual conversation ("Since you're looking for a new attorney, I'd like to recommend my friend Ralph Jones. I've done business with him for years, and he's very skilled.") may be enough. Recognizing, however, that memories fade, the ASPPA member may want to follow up with the client in writing to make sure that the disclosure was clear. An email ("Joan, it was great to see you today. Here's the contact information for my friend Ralph Jones. As I mentioned, I've worked with him for years and think highly of him.") may well be enough.

Section Four of ASPPA's Code doesn't require ASPPA members to decline third-party compensation or withdraw from personal friendships or business relationships. Section Four simply requires sufficient *disclosure* to maintain transparency in ASPPA members' dealings with their clients. With thought and care, ASPPA members can usually meet Section Four's requirements with little trouble and, in the process, strengthen their clients' trust and their own reputation for professionalism. PC

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