

Should You Hire A 72t Professional To Get An Opinion Letter?

In reality there are several questions here: Should I go get one? How can I effectively select a professional? How much should I pay that professional? What should I receive when it's all done? Let's take each question in turn.

SHOULD I GET AN OPINION LETTER?

Short answer — Yes. Long answer — Yes. The question is not: do I need an opinion letter? That's a very different question which is most likely driven by a taxpayer's risk tolerance matched against SEPP plan(s) complexity as well as financial exposure. Said another way, we are advocating that taxpayers get an opinion letter even if that same taxpayer says they don't need it.

We don't advocate getting an opinion letter in any self-serving sense (as we do offer that service); we do so because we think it is a good idea as well as a cost-effective method of risk transfer.

Why is it a good idea? Unfortunately, the penalties for errors in SEPP design and SEPP execution are nothing short of draconian — a minimum of the 10% surtax plus intervening statutory interest on 100% of the distributions. So, usually by year six to seven of a SEPP plan the penalties equal a full year of distributions. Further, there are no provisions for any types of: do-overs; prior year fixes; corrections or apologies. It's actually rather simple; either an error has or has not occurred; if it has — PAY. Therefore, we are really in the business of error avoidance as well as risk transfer. An opinion letter can solve most but not all potential for error:

- (1) Theory, meaning plan design, errors are transferred from the taxpayer to the professional; e.g. the professional is opining that the plan design is correct / compliant with the law; most specifically Notice 2022-6. As a result, if there is a theory error, the professional ultimately pays the damages, not the taxpayer.
- (2) The IRS does not issue SEPP plan design opinion letters¹; instead it leaves taxpayers to their own defenses.
- (3) Good news — fewer than 2% of all tax returns get audited. Bad news — if examined there is a 100% probability that the taxpayer's SEPP plan will be scrutinized in minute detail.

¹ Technically, this is not true. Any taxpayer is free to apply for their own Private Letter Ruling for their specific plan which necessarily would include all of the plan design decisions. There are only two problems: time and money. PLRs take on average 6 to 12 months to process to conclusion which may be substantially longer than the taxpayer wants to wait. Money is more serious. The IRS charges a filing fee of \$10,000 (going up to \$12,500 on 7/1/2022) to read and process the request. In addition, the taxpayer will need to hire a professional to build and write the PLR submission, effectively a legal brief, which is usually 40 to 80 pages in length. Professional fees equaling the IRS submission fee would not be out of line.

- (4) The IRS, as part of information gathering, correspondence audit or physical audit, may declare that the taxpayer's SEPP plan is non-compliant. Whether this is true or not is entirely a different matter².
- (A) In the absence of an opinion letter, the taxpayer has two choices: pay the 10% surtax plus interest; or, quickly hire a professional to build a defense and represent the taxpayer before the IRS or in court as might be necessary. This would appear to be rather costly.
- (B) In the presence of an opinion letter, the taxpayer would immediately assert that they have executed in 100% compliance of the dictates of that letter; therefore the taxpayer says: "IRS, I am in compliance. Further, IRS, you are now in the business of proving that I am non-compliant³." The rules of evidence have effectively been reversed.
- (5) Execution errors are the toughest because they are almost always caused by the taxpayer or the trustee/custodian of the IRA. However, all is not lost. We always recommend that taxpayers communicate with their trustees/custodians in writing, so that evidence of taxpayer intent can be clearly established; then the taxpayer can rely upon a number of federal court cases⁴ which will create an ability to correct executionary errors that are contrary to taxpayer intent.

HOW TO SELECT A 72t PROFESSIONAL?

First, who is a professional? CPAs and tax attorneys. No one else. Unfortunately there are a variety of other professionals: (certified) financial planners, stock brokers, insurance people, enrolled agents, actuaries and so forth; all of whom are likely to be expert within their respective professions. These same professionals will all claim: to be expert in 72(t) matters; certified and/or licensed; able to provide tax advice; and that they are insured. All of these professionals have just done you a disservice. Each of them views 72(t) issues as an extension of their fundamental knowledge base; that they are therefore qualified in this arena as well as insured for professional errors and omissions. Each of these professionals has neglected to read their insurance policy as each of those policies has a "uninsured acts" clause that prohibits the

² This author is not suggesting that the IRS would arbitrarily and capriciously deem a taxpayer's SEPP plan non-compliant. That would border on being illegal as an abuse of power. Conversely, might an IRS auditor say: "I don't understand what is going on here so we are going to start with the position that the 10% surtax should apply and you, the taxpayer, are now in the uphill battle of demonstrating the contrary to us."

³ The implication here is straight-forward. An opinion letter represents a wall. One is really saying to the IRS: "We are right; you are wrong; do you really want to expend your resources to fight me and my tax professional on this issue in an uphill battle or would you rather move on to more fruitful areas of additional tax collection?"

⁴ See Wood v. Commissioner.

provision of tax advice and tax opinions. Only licensed CPAs and tax attorneys are permitted to offer tax advice and tax opinions.

So, we now have it narrowed down to 1,330,000 attorneys and 669,000 CPAs⁵. Seems like we need to further narrow the field to get to the professional you need. As usual, there is good news and bad news. The bad news — there are very few real 72(t) experts in practice — best guess is 50 or fewer — worse news — true experts are hard to find. One needs to read between the lines when reading the 100,000 hits you will get when searching for “72(t) expert” on the internet. First tip: if they sell anything other than 72(t) planning and opining, they are not experts.

The good news; you are here on this website; you have downloaded the guide; you started reading the guide until it hit you in the nose. You already know more than 90% of the professionals out there in regards to the details of building SEPP plans. You are well armed. You can develop a brief set of test questions for your potential expert. I guarantee, how they answer will be enlightening.

HOW MUCH SHOULD YOU PAY A 72t PROFESSIONAL?

Let’s make a comparison to medicine. You need brain surgery. You should be willing to pay lots of money for an expert brain surgeon. What you don’t want to do is pay any money to a doctor to train themselves to become a brain surgeon on your dime. The same applies to tax professionals⁶.

There’s lots of good news here: (1) you already know how to spot and then hire the 72(t) expert; (2) 72(t) experts cost way less per hour than brain surgeons — we might suggest \$175 to \$350 per hour; (3) a 72(t) engagement is actually rather small; most likely in the range of 6 to 20 hours. Therefore, the range for the total engagement might be \$1,000 to \$7,000. We recognize that providing a dollar range at 7x is not very helpful; however, a true 72(t) expert should be willing to spend 15 to 20 minutes with you free of charge at the end of which he or she should be able to give you a much closer range estimate.

Lastly, we strongly recommend that you not pay on a percentage basis; e.g. we have heard of people who charge ½ of 1% of the value of your IRA and they are good at

⁵ This is what Google told me so it must be true. Also, why are there twice as many attorneys as CPAs? Shouldn’t it be reversed?

⁶ Just as an example, this author will not enter into a conversation about Farming income or expatriate taxation. Why? Because my knowledge base is zero in these subjects and I am unwilling to make the several hundred hour investment in time to become expert. By ethical standards, CPAs and tax attorneys are required to be expert and further to know what they don’t know and solve those situations by referring a potential client to the right place.

defending that kind of pricing. We just happen to disagree.

WHAT SHOULD I GET WHEN IT IS ALL DONE?

There is more to a 72(t) professional engagement than just the opinion letter. We would suggest that a successful engagement has four phases:

Phase I rests primarily on the shoulders of the client and has two recognizable results: (1) the ability to concisely, in a paragraph or two, describe the SEPP plan objectives in quantity, size and timing; (2) production of past revenue and expense patterns, usually 2 or 3 years worth as well as a description of anticipated material changes in those patterns looking into the future.

Phase II is a joint process of client and professional where they collaborate to design SEPP plans (think revenue building blocks) that meet the expense needs and objectives of Phase I. There is little need to design a SEPP plan that does not financially fit — everyone is just going to be unhappy in a few years. Again the outputs of phase II are very recognizable: (1) each SEPP plan is a revenue building block — the 72(t) expert can usually describe it in two sentences; (2) you, the client will have an “A HA” moment — that’s when you say: “Aha, I see it. I understand how all the pieces fit together!”. Phase II continues and repeats itself until that moment occurs; (3) tasks for the client and the professional are easy to see.

Phase III is really the execution of two separate task lists: (1) the client has tasks such as consolidating and splitting IRA accounts into the right sizes, contents and locations; (2) the professional crafts the opinion letter and delivers a draft of same to the client.

So what should the opinion letter include?

- All of the facts (in excruciating detail); accounts, amounts, dates, locations, etc.
- The SEPP plan(s) designs, again in detail.
- Future year planning / modification alternatives.
- Do’s and Don’ts for the life of the plan(s).
- The Opinion; some language that more-or-less says: “In conclusion, it is our **professional opinion** that SEPPs computed in the manner and methods described above **are in compliance** with IRC §72(t)(2)(A)(iv), and thus avoid the imposition of the 10% additional tax as described in §72(t)(1) and §72(t)(4). Additionally, it is our **professional opinion** that the computational methods, as described above, **are in compliance** with Notice 2022-6. Further, you are free to rely upon this opinion and distribute this letter in full to all other interested parties

of your choosing.

Phase IV is review of the opinion letter — it is your last checkpoint. Most readers have bought and sold a house or two in their lifetime. Have you ever actually read the 188 pages you signed closing? I haven't. My attitude has always been: show me the money and give me the keys; everything else will sort itself out. **THIS IS NOT ONE OF THOSE SITUATIONS.**

A well crafted opinion letter will range from 8 to 16 pages in length. If the expert wrote it, he or she did so for a reason. Further, the expert already knows what is in the letter, the client does not. It is the client's duty to read every word of the opinion letter, but just once. The client should take a tough and detailed attitude paragraph by paragraph. One of two things will happen:

- (1) At the end you will say: "I got it. All check marks; no questions. I know what to do."
- (2) Or, "I have questions about page 7 paragraph 3 and the 1st paragraph on page 12." Now it's time to stop: review, re-review, redo, re-write — do whatever is necessary including backing up into earlier phases until, you, the client are satisfied and have no further questions.

So at the end of Phase IV, the expert says we're done, what did you really get: (1) you have piece of mind / comfort that you are making the right financial moves; (2) you have a detailed and iron-clad opinion letter that says you are right and anyone else who challenges you is wrong.

Lastly, as SEPP plans have become more popular, creditors have been brought up to speed as to what a SEPP plan really means. Many middle aged taxpayers are choosing this route and frequently have credit needs such as a new mortgage on a home purchase. Without the SEPP plan they look like they have little or no income which makes creditors shake. Enter the SEPP plan with a professional opinion letter and now the taxpayer has both credibility and measurable income .

