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The goal of our monthly QDRO Newsletter is to keep you informed of Hot Topics regarding all aspects of QDROs. If you find our newsletter valuable, please forward it to a colleague. We hope you enjoy this month's topic.

BEWARE OF MODEL QDRO LANGUAGE

Plan administrators sometimes make model QDROs available. A model QDRO is a sample QDRO that conforms to federal QDRO requirements. Plan administrators provide model QDROs to control the plan's administrative expenses. Streamlining the QDRO review and approval process using a generic model QDRO is much easier and more cost-effective than reviewing QDROs prepared in different ways on different forms. By providing a model QDRO of this type, plan administrators try to reduce the number of times a QDRO is reviewed, which reduces the back and forth with QDRO preparers that becomes financially expensive for retirement plans.

Using a model QDRO means one is relying on work done by the plan's attorney, who works for the plan. The plan's attorney does not protect a client's interests, nor have the client in mind when writing the model QDRO. Since the plan administrator's primary concern is cost control and not the best interest of the participant or the alternate payee it can be detrimental to use a plan-provided model. Worse yet, some model QDROs are skewed to favor the plan participant.

However, there are some model QDROs that are written with alternative language options that may alert an attorney to opportunities available for tailoring the provisions to best fit his or her client's interest. A QDRO containing alternative language is a better model, but unfortunately most model QDROs do not provide alternative language options. Instead, model QDROs are often drafted with default language choices preselected by the plan.

For example, if it is easier and less expensive for the plan administrator to process QDROs in which the alternate payee does not have a right to earnings and losses (for example, less cost in calculating and allocating those earnings and losses on a pro-rata

basis), then the terms of the model QDRO will probably contain that outcome in its default language. In this case, changing that provision of the model QDRO to include those earnings and losses would be required. Default language is usually found in provisions related to the treatment of outstanding loans, certain death benefits, beneficiary designation, and other issues.

Although plan administrators have the obligation to follow the terms of the plan and to establish reasonable QDRO procedures, they cannot force the participant or alternate payee to have specific terms in the QDRO.

Plan administrators may require the parties to explicitly address key issues in the QDROs, such as survivorship, earnings, losses, COLA adjustments, loans, and beneficiary designations, but they cannot dictate the way key issues are resolved, such as in favor of the participant, or the alternate payee, or in a neutral way.

A model QDRO does not take into account the specific terms of a client's marital settlement agreement (MSA). A model QDRO may offer different options for calculating and determining the amount of the assigned benefit, but the more detailed the MSA, the more tailoring the QDRO may require. QDRO terms and condition should not vary from those of the MSA, but discrepancies between a QDRO and the divorce decree are often overlooked until later, when the retirement benefits are distributed and the client realizes that he or she will not receive the expected benefits.

Many MSAs have minimal language about the division of retirement assets, and most MSAs even fail to accurately name the retirement plan to be divided. Moreover, many facets of the division of retirement benefits -- earnings and losses, survivor benefit rights, death benefits guarantees, beneficiary designation rights, and others--are left undecided and unallocated between the parties. As a result, the QDRO itself is the only remaining opportunity to control the division of retirement assets. If a model QDRO is not tailored, either the default language will apply, whether it serves the best interests of the client or not, or options offered through alternative language in the model QDRO will be left unresolved. This often causes delays in the QDRO approval process.

When the other party in the divorce prepares the QDRO, an attorney's duty to protect his or her client's interests remains intact and alive. It would be a mistake to assume that if the other side is using the model QDRO, a client's interests are safeguarded. Plan administrators do not concern themselves that a QDRO is equitable or fair to both parties or whether the QDRO complies with the terms of the MSA. In fact, the law precludes the plan administrator from reviewing for conformity, any underlying documents.

Model QDROs often allocate tax consequences by default, assigning to each party the

obligation to pay taxes on their respective benefit portions, but parties can negotiate a different allocation of taxes via gross-up provisions, which means that if there is a mandatory withholding or deduction by operation of law the paying party shall "gross up" the payment so that the receiving party receives the same net amount. For example, if the alternate payee plans to take a cash distribution and the parties have agreed that he or she will receive a specific amount, the parties may wish to gross-up the assigned benefit amount to account for the tax withholding. Also, if a party has stipulated certain other payments to be offset against the assigned benefit, tax consequences of those arrangements should be taken into consideration. Such special circumstances would not be contemplated in a model QDRO.

--Conclusion--

If you have any questions regarding our Newsletter or [QdroDesk.com](http://www.QdroDesk.com), please let me know and thank you for giving us the opportunity to share our Newsletter with you. We appreciate your business, and the confidence you have placed in us.

For more QDRO information and online QDRO preparation services, please visit us online at: <http://www.QdroDesk.com>

Sincerely,

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