Living With Precept 10

PRECEPT 10 OF THE CODE OF PROFESSIONAL CONDUCT deals with courtesy and cooperation. It states: ***An Actuary shall perform Actuarial Services with courtesy and professional respect and shall cooperate with others in the principal's interest.***

Issues related to Precept 10 most commonly come before the ABCD when a client for actuarial services elects to replace one actuary with another. For example, the administrator of a defined benefit pension plan might have engaged an actuary continuously for several years to serve as "plan actuary" (an ERISA-defined term). Suppose this administrator then elects to engage a new plan actuary to replace the original one. Suppose also that the original and successor actuaries are employed by different firms.

As a threshold matter, the plan administrator (the principal) has an indisputable right to make this replacement. Annotation 10-2 to Precept 10 confirms this.

Commonly, the replacement will occur because the replacing actuary has established closer rapport with the principal or because the replacing actuary has proposed a more attractive fee arrangement.

Occasionally, the replacement will occur because the principal has concluded that the original actuary failed to act competently. The ABCD would be interested in having such an alleged failure brought to its attention. However, such failure isn't relevant to Precept 10 issues.

On other rare occasions, the replacement will occur because the principal asked the original actuary to take an action the original actuary considered improper. A replacement for this reason might be of great interest to the regulators. If the requested action was indeed improper and the successor actuary agreed to take it, the ABCD would be interested in hearing about this, too. However, even this impropriety, like incompetence, isn't relevant to Precept 10.

Commonly occurring issues that are relevant to Precept 10 often involve giving the successor actuary access to reports the original actuary had rendered to the principal and raw data the principal had sent to the original actuary.

Reports

Almost inevitably, the successor actuary will be able to serve the principal more effectively with these reports than without them. Some reports, such as those underlying previously filed Schedules B for pension plans, involve additional imperatives. Without access to these reports, it would be extremely difficult for the successor actuary to serve the principal adequately on any reasonable basis.

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On the other hand, the original actuary has a legitimate professional reason to see that previously prepared reports aren't misused. Prudent avoidance of liability exposure is probably reason enough. However, Precept 8 of the Code, which covers control of the actuary's work product, reinforces any legitimate, business-related reason. It requires actuaries to take reasonable steps to see that their work product isn't misused.

Consider, again, a pension plan. A particular report might have been prepared to develop contributions necessary to satisfy statutory funding requirements. In most cases, it would be inappropriate to use values taken from this report as a basis for merger or spinoff negotiations.

These factors can lead to a Precept 10 conflict. On one hand, the original actuary has a legitimate need to avoid

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misuse of the work product. On the other, the original actuary has an obligation under Precept 10 to give the successor actuary access to this same work product, provided there is some assurance that it won't be misused.

Clearly, a tension exists. Many actuaries and their firms have attempted to sidestep this tension with written advance understandings. The nature of any such understanding is an issue for the actuarial firm and its legal counsel. However, certain concepts are normally relevant:

- An unmodified restriction under which the principal may not share the actuary's reports under any circumstances seems to lay the groundwork for a possible Precept 10 violation.
- A restriction under which the principal may not share reports without the actuary's permission, "which shall not be unreasonably withheld," might or might not lead to a Precept 10 violation. It would ultimately depend on how the expression "unreasonably withheld" might be applied in practice.
- It seems unlikely that a restriction under which the principal may not use a report for any purpose other than the one stated in the report would lead to a Precept 10 violation. Depending on the facts, however, this simple written restriction may not be enough to avoid a Precept 8 violation.
- In any event, it's normally prudent to provide that if the report is to be shared, it will only be shared in its entirety, to reduce the risk that information will be taken out of context.
- As required by Actuarial Standard of Practice No. 41, the report should identify the actuary. The actuary may want to take this requirement one step further and request that, if the principal makes the report available to a successor actuary (or any other third party), the principal will agree to make it clear that the original actuary is available to answer any questions.

Data

The files of the original actuary will almost always contain data required by the successor actuary. Historically, the principal gave this information to the original actuary. However, the principal may now find it difficult (or impossible) to reproduce it for use by the successor actuary. In these circumstances, the principal will often ask the original actuary to transmit the required data to the successor actuary.

In these cases, the Code states that the original actuary is entitled to reimbursement for the reasonable costs of data retrieval, duplication, and transmission to the successor actuary. As long as the principal is prepared to cover these costs, however, Precept 10 requires that the original actuary accommodate any reasonable data request in a timely manner. This requirement does not, of course, run to proprietary items such as computer programs.

Curiously, the ABCD has received many inquiries, usually from successor actuaries, regarding the perceived failure of a replaced actuary to accommodate reasonable data requests. The behavior of the replaced actuary, while not usually justifiable, is often explainable. The information being requested involves a client relationship that's terminating, frequently on a somewhat less than friendly basis. The replaced actuary has priorities involving other ongoing client relationships. In the eyes of the replaced actuary, these other priorities tend to take precedence over the needs of a former client. This line of reasoning is understandable. But the actuary should always be mindful of Precept 10.

Two positions sometimes taken by the replaced actuary deserve special attention. First, the replaced actuary may assert that the requested information has been entered into an electronic database in such a way that individual data elements can't be retrieved. Given today's emphasis on audits—governmental and non-governmental—this position seems surprising. Indeed, if the assertion were true, the replaced actuary would seem potentially exposed to a charge of failing to anticipate an audit and thus failing to satisfy the requirements of skill and care.

The second position involves historical fees and payments. The retiring actuary might assert that non-compliance with a data request is justified because the principal owes money to the actuary for prior projects. Quite commonly, this position would itself be a violation of Precept 10. Annotation 10-5 states in part:

The actuary shall not refuse to consult or cooperate with the prospective new or additional actuary based upon unresolved compensation issues with the principal unless such refusal is in accordance with a pre-existing agreement with the principal.

After consultation with the Joint Committee on the Code of Professional Conduct, the ABCD has concluded that the exception for pre-existing agreements wasn't intended to be broadly construed. Based on this intent, it seems likely that pre-existing agreements would justify non-cooperation with the replacing actuary if the agreement stated explicitly that the actuary would not forward data files to a successor actuary until all previously rendered invoices have been settled. A less explicit agreement would be unlikely to justify non-cooperation under Precept 10. (This doesn't mean, however, that the actuary is prevented by Precept 10 from recovering outstanding fees and payments from a principal through the courts or by other lawful means.)

Reasonably Delayed Reports

A principal who changes actuaries usually selects a logical effective date for the change. This might be the end of the prin-

cipal's fiscal year or, in the case of a pension plan, the end of the plan year. Sometimes, final reports related to that fiscal or plan year will be reasonably delayed for several months after the end of the relevant year.

A pension plan Schedule B is an outstanding example. Commonly, this schedule need not be filed until 9½ months after the end of the plan year. The schedule must show dates and amounts for all contributions assigned to the plan year. Payment of these contributions can be delayed by up to 8½ months after the end of the year. This means it's often impossible to prepare the final Schedule B until shortly before its filing deadline.

This time lag means valuation work for a plan year may have been completed by an actuary who was replaced long before the Schedule B for the year could be prepared. Consequently, there may be an argument over responsibility for preparation of the Schedule B.

In the absence of a contrary mutual agreement, the ABCD believes it's normally preferable that the actuary who performed the valuation work for a plan year be willing to prepare the Schedule B covering that year. This assumes, of course, that the principal is willing to pay the reasonable additional cost of preparation.

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Interestingly, the issue is often resolved without asking the retiring actuary to prepare the form. The principal frequently has no desire to interact further with the predecessor actuary. The successor actuary will often want to attempt duplicating the predecessor's calculation results just to ensure that predecessor and successor agree on methodology. Thus, it's often concluded that the successor will re-perform the valuation for the plan year in question to establish agreement with the predecessor's work. Then, the successor will move on and prepare the Schedule B. If this approach is mutually agreeable to all parties, the ABCD certainly has no objection.

On the other hand, in the absence of a clear agreement to the contrary, Precept 10 would ordinarily require that the predecessor actuary be willing to prepare the Schedule B, if this is the preference of the principal and the successor actuary. ●