



The Discretion Decision: 3(21) Versus 3(38), What to Know about Annuities, and Cybersecurity in Retirement Plans

Episode 29

In episode 29 of *Revamping Retirement*, Jennifer Doss and Scott Matheson are joined by Jenny Eller, principal and chair of Groom Law Group's Retirement Services Practice Group and Fiduciary Practice. Jenny shares her perspective on plan sponsor considerations for selecting a nondiscretionary or discretionary advisor, the reasons behind the trend toward 3(38) investment manager discretionary services, and how outsourcing investment responsibilities can impact—or even mitigate—risk in this litigious environment.

In *Minute with Mike*, Mike Webb discusses what plan sponsors need to know about in-plan annuities. Later, Jon Meyer, CAPTRUST's chief technology officer, provides some actionable steps based upon the DOL's recent guidance that retirement plan sponsors can take to protect themselves and their participants from cybersecurity threats.

Episode 29 at a Glance—Why More Committees Are Handing the Keys to a 3(38)

Hosts Jennifer Doss and Scott Matheson sit down with Groom Law Group powerhouse Jenny Eller to unpack the fast-growing shift from “co-pilot” 3(21) advisory relationships to full-discretion 3(38) investment-manager mandates—and what that means for fiduciary risk, litigation defense, and committee workload.

3(21) vs. 3(38): Same ERISA Standard, Different Job Descriptions

3(21) advice fiduciary – Do-it-with-me. Gives recommendations; committee retains final say and must probe, document, and ultimately decide.

3(38) investment manager – Do-it-for-me. Takes legal discretion over fund lineup, share-class changes, and manager hires/fires; committee's duty shifts to prudent selection and monitoring of the 3(38).

Why Sponsors Are Upgrading to 3(38)

Time & focus: Committees want to spend meetings on plan design, financial-wellness, and cybersecurity—not debating small-cap manager swaps.

Target-date dominance: Defaults now hold 60-70 % of assets; sponsors see value in delegating glide-path oversight to specialists.

Litigation heat: More than 100 ERISA fee suits filed last year, many against sub-\$1 billion plans. Courts generally shield appointing fiduciaries from investment-loss claims if they can prove prudent 3(38) selection/monitoring.

“We follow you anyway.” If a committee always rubber-stamps its advisor’s recommendations, formal discretion may better reflect reality—and tighten documentation.

Avoiding Common 3(38) Pitfalls

Document the hand-off. RFP the role, vet experience, insurance, and conflicts; minutes should show why the manager was hired.

Let them drive. Second-guessing every trade erodes liability protection; monitor process, not individual picks.

Watch proprietary funds. Recent cases (e.g., Molina) show extra scrutiny when a 3(38) uses its own products; demand robust benchmarking and fee parity.

Confirm indemnification. Contracts should spell out the manager’s duty to defend and reimburse the plan for investment-related claims.

Quick Hits from the Episode's Bonus Segments

Minute with Mike: In-plan annuities can be costly and lack inflation protection; they tend to fit “middle-income” participants who fear outliving savings—not low- or high-earners.

Tech Talk with Jon Meyer: Beyond DOL’s cybersecurity checklist, sponsors must dig into vendors’ fraud-prevention playbooks and participant-indemnification terms; annual SOC-2 reviews and breach-response drills are now table stakes.

Key Takeaways for Committees

Decide where your time is best spent, then match the fiduciary model—3(21) for collaborative control, 3(38) for true delegation.

If you outsource, monitor the manager’s process (staff, resources, methodology) rather than second-guessing individual fund moves.

Solidify cyber and fraud defenses the same way: vet vendors rigorously, document reviews, and keep participants engaged with their accounts.

Listen to the full discussion for practical questions to ask in an RFP, real-world litigation lessons, and a lighter-side peek at Eller’s own “pool-side” retirement vision.

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