

TRACING: WHAT TO EXPECT



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WHAT IS A TRACE ANALYSIS AND HOW DOES IT AFFECT MY QDRO?

A Qualified Domestic Relations Order (QDRO or DRO) simply assigning 50% of the *marital portion* of a 401(k) is likely to be rejected by the plan—or even worse—approved but misinterpreted. **WHY?** Most plans will not make calculations between two dates (marriage and divorce), and no plan will calculate returns on a non-marital balance. A Trace Analysis determines *what exactly the marital portion is, in terms of dollars*, for purposes of drafting the QDRO. Tracing ‘grows’ a specified plan balance over a defined time-period based on market activity or returns, contributions, loans, and distributions.

WHAT SITUATIONS REQUIRE A TRACE ANALYSIS?

- ***If a party contributed to a defined contribution plan before the marriage*** (such as a 401(k), 403(b), 457(b), ESOP, or profit-sharing plan), tracing the account balance from the date of marriage to current is necessary to calculate what pre-marital contributions are worth today. A Trace Analysis establishes the investment return on the pre-marital balance that should be excluded from the marital portion for purposes of equitable division.
- ***If a plan changes custodians and no longer has account history*** to calculate returns after the divorce. Tracing post-marital balances is necessary to calculate the current values subject to equitable division.
- ***If a party contributes to an IRA or TIAA account***, because these custodians won’t calculate returns at all. Tracing pre- or post-marital balances is necessary to calculate the current values subject to equitable division.

WHY & WHEN DO I NEED A QDRO ATTORNEY TO PERFORM A TRACE ANALYSIS?

Retirement benefits are often the largest marital asset and tracing can produce significant monetary results. Bringing in an expert is about risk avoidance. Get your QDRO attorney involved as soon as you’ve identified one of the above situations.

- Tracing demands the multi-disciplinary experience of a QDRO attorney who understands your client’s best interests. A financial background alone falls short; tracing requires a full understanding of domestic relations law and its impact on the benefits, federal regulatory law, plan mechanics, and careful review of individual plan terms.
- A proper Trace Analysis involves more than just entering numbers into a spreadsheet. *Every person’s work history and overlapping marital timeline is unique, and every plan is different.* Some plans may even transfer custodians once or more over the course of the participating spouse’s employment, or there may be a rollover between plans, or plan mergers.
- A QDRO attorney will know how to obtain historical account information, what to ask for, and what to do when there are gaps. A QDRO attorney will also ensure that the Trace Analysis meets the specific evidentiary burdens set forth under the law based on the parties’ filing jurisdiction. Such expert review is critical to ensure that reasonable assumptions are made, and that accuracy is achieved to the highest degree possible.

The right QDRO attorney will give you and your client peace of mind, knowing it’s getting done right.

WHO IS EILEEN ZELL?

Eileen's entire practice is devoted to consulting with family law attorneys on a variety of QDRO-related matters, including settlement negotiations, mediation, collaboration, and litigation. Her practice focuses exclusively on the division of retirement benefits and other forms of deferred income in domestic relations matters.

Eileen is the author of "QDROs and Similar Assignments of Income/Retirement Assets," published as part of the nationally acclaimed Bloomberg Tax & Accounting Tax Management Portfolios. Eileen has been qualified as an expert witness on retirement benefits and other forms of deferred compensation for family courts in Ohio and Kentucky. She presents regularly for local and state bar associations, judges, and other professional organizations.

Working with hundreds of attorneys on both sides of the Ohio River, Eileen successfully negotiates and promotes creative settlement solutions, accomplishes client goals, and navigates even the most difficult litigation issues.



Check out our EZ QDRO Law Blog, a proprietary QDRO database of case law and legal research library for attorneys.

HOW DOES THE TRACE ANALYSIS & QDRO PROCESS WORK?

- (1) Eileen is engaged through counsel to evaluate the case;
- (2) Plan documents are obtained, including account history, governing plan documents, and the plan's written QDRO procedures;
- (3) Eileen performs the Trace Analysis;
- (4) Eileen drafts the QDRO and submits it to representing counsel;
- (5) Counsel reviews the Trace and QDRO with the parties;
- (6) Counsel submits the QDRO to the Court for entry into the Court record and then submits to the plan for approval; and
- (7) The plan reviews the QDRO (or a draft, for pre-approval) and determines whether it 'qualifies' under federal law and plan terms.

HOW LONG DOES THE TRACE ANALYSIS & QDRO TAKE?

It depends on how fast the parties can gather needed information and documents. The parties control the timeline here, and getting this quickly can allow the next phase to begin immediately. The timing to perform the Trace Analysis will vary with each project, based on specific account history and the time period involved. Depending on Eileen's caseload, the actual 'QDRO drafting' may take around 5-10 business days, and is typically the shortest part of the process. As for the plan's review, federal law only requires that it be completed within a "reasonable time." Keep in mind, the nonemployee-spouse has no ownership rights under federal law prior to the plan's approval of the QDRO, and may be restricted by plan terms from an immediate distribution or commencement of benefits thereafter.

HOW DO I GET STARTED?

Eileen will identify the needed plan information, and representing counsel will gather this and complete the Hourly Contract for the Trace Analysis and Intake Contract for the QDRO.

Tracing is subject to Eileen's hourly fee. Most QDROs or similar orders are drafted for a flat fee, and are subject to the terms of Eileen's Intake Contract. Attorneys representing the parties will incur their own expenses, related to any negotiation or discussion of the Trace Analysis and QDRO's terms with other counsel or their client, review of the Trace Analysis and QDRO, other preparation, and entry and submission of the QDRO.

Eileen is a third-party consultant to family law attorneys, and does not represent parties directly. This document is intended to aid with attorney-client discussions related to the Trace Analysis and QDRO processes, only.