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Asserting the Attorney-Client Privilege in ERISA Cases

By Marcia S. Wagner

ERISA plans and their sponsors often seek the advice of counsel on such matters as plan design, administrative and investment matters or claims by plan participants. A spate of recent case law raises the question of which circumstances will enable advice rendered in benefits matters to be protected by the attorney-client privilege and the related work product doctrine.

The Attorney-Client Privilege

The attorney-client privilege is a judicial doctrine intended to encourage full and frank communication between attorneys and their clients, but when applied under the common law of trusts, it is limited in scope so that a trustee who obtains legal advice related to trust administration is precluded from asserting the privilege against trust beneficiaries. In the context of ERISA, this narrowing of the privilege is referred to as the "fiduciary exception" and operates to prevent the assertion of the privilege in matters of plan administration.

A Case in Point

In *Solis v. The Food Employers Labor Association*, 2011 WL 1663597 (4th Cir. 2011), the Fourth Circuit Court of Appeals became the latest federal circuit to adopt the fiduciary excep-

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When Should Attorneys Be in the Office?

Part Two of a Two-Part Article

By Sheldon I. Banoff

Last month, we identified for our readers the basic concept of what designates an attorney's "office," in a world of working at home; telecommuting; "virtual" law practices; "limited service" and "satellite" law offices; and off-site client meetings (at your local Starbucks or other neutral turf). *See* Sheldon I. Banoff, "When Should Attorneys Be in the Office? Part One," *LFPBR*, Vol. 17, No. 7 (Sept. 2011), page 1. We identified the potential ramifications of having or not having an office on topics such as state licensure, the unauthorized practice of law, multi-state tax reporting and potential tax liabilities, and the potential violation of rules of professional conduct if one's letterhead, business cards or websites mislead the public as to the existence of an attorney's "office" where no office is deemed to exist.

This month, we focus on how long, when and why a lawyer should be "in the office." Our analysis is not based on human resource or time management expertise (as your author has neither), but rather on, among other things, observations and anecdotes from our 37 years' experience as an attorney working in a medium and large law firm.

Things We Have Heard

How many of the following have been said by or about you or your lawyer colleagues?

1. "He's not in right now, but he can be reached via his e-mail or cell phone."
2. "She's not in today, but is working from home and is checking her messages regularly."
3. "This memo is due Monday morning, but I'll do it over the weekend at my local coffee shop — no need to come into the office."
4. "When I started in practice 25 years ago, you would find many associates and partners in on weekends. I came down last Saturday and the place was a ghost town."

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tion. The case involved a Department of Labor (DOL) investigation of multi-employer plans for possible mismanagement of plan assets as a result of a $10.1 million loss relating to investments in entities related to Bernard Madoff — and resistance by the plan trustees to DOL subpoenas for documents relating to the trustees' investment decisions. The documents sought by the DOL included meeting minutes of the board of trustees, documents distributed or referred to at these meetings, notes taken at the meetings, correspondence related to the Madoff investments, and certain other paperwork. Some of the documents had been produced in a redacted form that the DOL found unacceptable, while others were completely withheld. The district court's decision to apply the fiduciary exception and require production of these documents was appealed to the Fourth Circuit, which affirmed the lower court's decision.

In ruling that the trustees were required to produce the documents, the Fourth Circuit reviewed the two prevailing rationales that justify the exception to the attorney-client privilege. The first is that a fiduciary's duty to act in the exclusive interest of plan beneficiaries supersedes the fiduciary's right to assert the privilege. The second is that the ERISA fiduciary, as a representative of the beneficiaries, is not the real client in obtaining legal advice regarding plan administration. The court noted that under either rationale, the plan trustees could not invoke the attorney-client privilege against plan beneficiaries and concluded that the same result applied to the DOL's subpoenas.

The Fiduciary Exception

The fiduciary exception to the attorney-client privilege is, however, limited to "communications between an ERISA trustee and a plan attorney regarding plan administration." Acknowledging the limits of the fiduciary exception, the court indicated that it would not apply to communications with an attorney regarding the fiduciary's personal defense in an action for breach of fiduciary duty. Similarly, communications regarding non-fiduciary matters, such as adopting, amending or terminating an ERISA plan are not subject to the fiduciary exception. Nevertheless, the court concluded that all of the documents sought by the DOL clearly related to plan administration.

The Fourth Circuit also addressed the trustee's argument that the materials sought by the DOL were protected by the work-product doctrine which confers a limited privilege on documents prepared by an attorney in anticipation of litigation. However, the court found it unnecessary to address whether the fiduciary exception would preclude such protection, because the plans had failed to provide privilege logs or to identify the litigation for which specific documents were prepared.

District courts have frequently wrestled with the fiduciary exception in the context of disputes arising over administrative review of benefit claims. In these cases, the question avoided by the Fourth Circuit in the *Food Employers* case, specifically, when documents created in anticipation of litigation must be resolved. This often comes down to the timing of the communications. Thus, in *Moore v. Metropolitan Life Insurance Co.*, 2011 WL 2746234 (M.D. Ala 2011), involving a claim for benefits under a group life insurance plan, the court determined whether Met Life was required to produce four documents it had identified in its privilege log. Since litigation had commenced on March 11, 2011, a memo written before that date was not protected by the work product privilege, since the interests of the plaintiff and Met Life had not diverged at that point, even though the plaintiff had engaged counsel to represent her.

Documents written by Met Life's counsel after the commencement of the litigation presented a more difficult decision for the court, but since Met Life had continued to send correspondence to the plaintiff indicating that it was still considering the merits of her claim, the court reasoned that it was engaged in a fiduciary act involving plan administration by making a discretionary determination as to the validity of the claim. Thus, the contents of documents concerned with benefits determination, such as those sought by the plaintiff, were not protected by any privilege even if created in the context of an adversarial proceeding.

Conclusion

The *Food Employers* and *Moore* cases indicate that there are often difficult factual issues involved in applying the attorney-client and work product privileges. Further, there are technical requirements that must be satisfied in order to assert such privileges. Plan sponsors should avoid the mistake made in the *Food Employers* case of failing to identify in a log all documents sought to be protected. Further, once a benefit claim has been denied, the plan sponsor should not engage in conduct that renders the character of communications with counsel ambiguous. Thus, in contrast to Met Life's actions in the *Moore* case, once the point where the interests of a plan fiduciary and a claimant have clearly diverged (usually, a claims denial), all documentation should be consistent with defending the plan against a participant's benefit claim.

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Marcia S. Wagner, a member of this newsletter's Board of Editors, is the Managing Director of The Wagner Law Group. She was recently named as the one of the top 40 most influential people in the 401(k) industry. Ms. Wagner serves on the Internal Revenue Service Advisory Committee on Tax Exempt and Government Entities. She can be reached at 617-357-5200 or at Marcia@WagnerLawGroup.com.

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