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Can You Keep A Secret? Attorney-Client Privilege and the Work-Product Doctrine in the ERISA/Fiduciary Context

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Overview

ERISA attorneys often assume that they work in a zone of privacy—their communications and output protected by the attorney-client privilege and the work-product doctrine. These protections are well-known, but their details—and exceptions—are not. Relying on what they recall from law school or a recent seminar, far too many ERISA practitioners find their most sensitive and potentially damaging communications, those having to do with thorny and troubling issues, exposed when litigation occurs.

The purpose of this report is to briefly describe some of the more important details of these rules and, in particular, the fiduciary exception that so often exposes ERISA attorneys' advice and communications to the scrutiny of their clients' adversaries. First, the basic rules of the attorney-client privilege and the work-product doctrine are briefly examined. Next is a review of the cases that established the fiduciary exception in the context of ERISA, followed by analysis and discussion of the most recent cases that have attempted to refine and clarify the scope of what protection, if any, remains.

General Framework of the Attorney-Client Privilege and the Work-Product Doctrine

Attorney-Client Privilege

The attorney-client privilege generally protects the attorney and client from having to make involuntary disclosures regarding confidential communications between them. "The attorney-client privilege is the oldest of the privileges for confidential communications known

to the common law."¹ It is intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."² It protects the giving of professional advice to those who

¹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961)(hereinafter WIGMORE ON EVIDENCE).

² *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

can act on it, and the giving of information which enables the lawyer to offer sound and informed advice.³

While the privilege applies to such communications, it does not shield against the compulsory disclosure of the underlying facts. The privilege can also “extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client.”⁴ The policy of the privilege “rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”⁵

Elements of the Attorney-Client Privilege

The burden of proving that a communication falls under the attorney-client privilege rests on the proponent of the privilege.⁶ The “classic test” for determining the existence of the attorney-client privilege is as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.⁷

Once established, the privilege is absolute and cannot be overcome by any amount of need.⁸

Scope of the Attorney-Client Privilege

The scope of the attorney-client privilege is relatively narrow.⁹ It attaches once a communication is made that

seeks legal advice or services.¹⁰ Although the privilege usually covers communications from the attorney to the client, as well as communications to the attorney from the client, not all such communications are “privileged” per se.¹¹ Rather, to fall within the privilege the communication must be intended to be confidential and it must be made for the purpose of obtaining legal advice.¹² In other words, incidental communications are not privileged.

Practice Tip: As mentioned in footnote 11, some jurisdictions do not include communications from the attorney to the client (i.e., the advice rendered) within the privilege, unless the communications reveal confidential information or communications from the client. Thus, unsolicited advice (e.g., proactive memoranda or client advisories) may not be protected. Thought should be given to the analysis, particularly any suggestions or instructions, contained in such communications. Follow-up with the client(s) may be necessary if such communications advise clients to take action. Opponents might refer to such communications, particularly if the advice has not been implemented by the client, as evidence of an alleged breach of fiduciary duty.

Loss of the Attorney-Client Privilege

A number of circumstances exist under which the attorney-client privilege may be lost. First, a client may waive the protection of the attorney-client privilege ei-

¹⁰ *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124, n.1 (3d Cir. 1986) (“The attorney-client privilege protects conversations between prospective clients and counsel as well as conversations with retained counsel.”).

¹¹ *Green v. I.R.S.*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (“The privilege is applicable to communications from the attorney to the client, as well as communications to the attorney from the client . . .”). *But see Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (“ . . . the privilege protects both client communications to their attorneys and communications from the attorney to the client which include legal advice or reflect information provided by the client in confidence.”); *United States v. (Under Seal)*, 748 F.2d 871, 877 (4th Cir. 1984)(privilege “may also be extended to protect communications by the lawyer to his client...if those communications reveal confidential client communications”; finding no privilege as to certain documents “because they do not reveal client communications”); *Republican Party v. Martin*, 136 F.R.D. 421, 426-28 (E.D.N.C. 1991)(finding no privilege as to many documents because they “do not arguably reveal Governor Martin’s confidential communications”); *Thomas v. Pansy Ellen Prods. Inc.*, 672 F. Supp. 237, 243 (W.D.N.C. 1987)(“It is client confidences, not attorney advice, that are protected by the privilege”); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 522, 524 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) (“[u]nless the legal advice reveals what the client has said, no legitimate interest of the client is impaired by disclosing the advice”; no privilege because “[t]hey do not reveal facts communicated by the client in confidence”).

¹² *Hawkins*, 148 F.3d at 383-84 (“the attorney-client privilege does not protect all aspects of the attorney-client relationship, it protects only confidential communications occurring between the lawyer and his client. For the privilege to apply, ‘the communication claimed to be privileged must have been made in confidence.’”) (citing 26 CHARLES ALLEN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE & PROCEDURE § 5722 at 514-15 (1992)).

³ *Id.* at 389-90.

⁴ *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995).

⁵ *Trammel v. United States*, 445 U.S. 40, 51 (1980).

⁶ *See Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000); *In re Grand Jury Proceedings*, 616 F.3d 1172, 1183 (10th Cir. 2010).

⁷ *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see also Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998); *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501-02 (4th Cir. 2011); *Stoffels v. SBC Communications, Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009).

⁸ *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493-94 (9th Cir. 1989).

⁹ The attorney-client privilege is to be narrowly construed because it “impedes [the] full and free discovery of the truth” *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984)(quoting *Weil v. Investment Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981); *see also United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1993) (noting narrow construction of privilege); *Teachers Ins. & Annuity Ass’n of Am. v. Shamrock Broadcasting Co.*, 521 F. Supp. 638, 641 (S.D.N.Y. 1981) (“We begin by noting that the privilege is not a favored evidentiary concept in the law since it serves to obscure the truth, and it should be construed as narrowly as is consistent with its purpose.”).

ther expressly or by implication.¹³ As a general rule, implied waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege (typically the attorney and/or the client).¹⁴

Second, an implied waiver may also occur when the holder of the privilege places the privileged communications “at issue” in the litigation.¹⁵ For example, a defendant who intends to testify as to his “good faith” reliance on legal advice cannot prevent the plaintiff from cross-examining him on the advice he received from counsel. Once waived, the attorney-client privilege cannot be reasserted.¹⁶ Moreover, the waiver is construed broadly as to the entire subject matter of the communications.¹⁷

It is also well established that communications that otherwise would be protected by the attorney-client privilege are not protected if the communications are “in furtherance of contemplated or ongoing criminal or

¹³ *United States v. Cote*, 456 F.2d 142, 144-145 (8th Cir. 1972) (citing 8 WIGMORE ON EVIDENCE § 2327).

¹⁴ Nonetheless, “the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party’s participation is to improve the comprehension of the communications between attorney and client.” *United States v. Ackert*, 169 F.3d 136, 139-140 (2d Cir. 1999). See also *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (the attorney-client privilege may cover “communications made to certain agents of an attorney . . . hired to assist in the rendition of legal services”). The attorney-client privilege applies not only to individuals, but also to corporate entities. See *Upjohn*, 449 U.S. at 391-92. *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943-44 (2d Cir. 1992). Therefore, although dissemination of privileged information to third parties generally waives attorney-client privilege, the distribution within a corporation of legal advice received from its counsel does not, by itself, vitiate the privilege. See *Upjohn*, 449 U.S. at 391-92.

¹⁵ *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), is a good example of the “at issue” waiver. Under *Hearn*, the privilege is waived where: (1) assertion of the privilege was the result of some affirmative act; (2) through this affirmative act, the asserting party placed the protected information at issue by making it relevant to the case; and (3) application of the privilege would deny opposing party access to information vital to its defense. *Id.* at 581. Accord *In re von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *Resolution Trust Corp. v. Massachusetts Mut. Life Ins. Co.*, 200 F.R.D. 183, 191-92 (W.D.N.Y. 2001). *Contra Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660, 663 n.1 (D. Col. 1994); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 413 & n. 4 (D. Del. 1992) (stating that *Hearn*’s “expansive language for determining implied waiver leads to a type of ad hoc determination that ignores the system-wide role of the attorney-client privilege and undermines any confidence that the parties can place in that privilege”).

¹⁶ See, e.g., *United States v. Blackburn*, 446 F.2d 1089, 1091 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972); *Drimmer v. Appleton*, 628 F. Supp. 1249, 1251-52, (S.D.N.Y. 1986); *United States v. Krasnov*, 143 F. Supp. 184, 190-91 (E.D. Pa. 1956), *aff’d*, 355 U.S. 5 (1957); 8 WIGMORE ON EVIDENCE § 2328 at 638 (“A waiver at one stage of a trial should be final for all further stages. . .”).

¹⁷ *In re Grand Jury Proceedings*, 219 F.3d 175, 183 n. 4 (2d Cir. 2000) (citing 8 WIGMORE ON EVIDENCE § 2327, at 638).

fraudulent conduct.”¹⁸ “[A]dvice in furtherance of such goals is socially perverse, and the client’s communications seeking such advice are not worthy of protection.”¹⁹ This rule is commonly known as the “crime-fraud exception” to the attorney-client privilege.

Another recognized exception renders the privilege inapplicable to disputes between joint clients. Under this exception, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders but not as between the joint clients. Thus, as often happens, when the two original clients have a falling out that results in litigation in which the communications at their joint consultation with the lawyer may be vitally material the privilege is inapplicable. This situation is often called the “joint client exception” to the attorney-client privilege.²⁰

Practice Tip: Attorneys should advise their clients to hire and use non-attorney consultants carefully. If the attorney hires the consultant, the client may be able to shield communications with the consultant under the privilege. The rationale is that the consultant’s involvement, and the information gathered and/or provided by them, is necessary information for the attorney to consider in advising the client; thus, communications with the consultant should fall within the privilege. Where the client hires a consultant directly, it is harder (but perhaps still possible) to make such an argument for application of the privilege, particularly where the attorney is not a party to the communications at issue.

Work-Product Doctrine

The work-product doctrine is distinct from and broader than the attorney-client privilege.²¹ The work-product doctrine, as established and described by the Supreme Court in *Hickman v. Taylor*²² and later codified in Fed. R. Civ. P. 26(b)(3),²³ is intended to “preserve

¹⁸ *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997)

¹⁹ *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984).

²⁰ *In re Long Island Lighting Co.*, 129 F.3d 268, 21 EBC 2025 (2d Cir. 1997); *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 936-38 (D.C. Cir. 1984); 8 WIGMORE ON EVIDENCE § 2312 at 603-09. As discussed below, the “joint client” exception is one of the predecessors of the ERISA fiduciary exception.

²¹ *Hickman v. Taylor*, 329 U.S. 495, 508 67 S. Ct. 385, 91 L.Ed. 451 (1947); *United States v. Nobles*, 422 U.S. 225, 238 n.11, 95 S. Ct. 2160, 45 L.Ed.2d 141 (1975); see also, *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000).

²² *Hickman*, 329 U.S. 495.

²³ Rule 26(b)(3) provides in relevant part: “Ordinarily, a party may not obtain discovery of documents and tangible things otherwise discoverable that are prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative . . . [except] those materials may be discovered if . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. . . . If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a

a zone of privacy in which a lawyer can prepare and develop legal theories and strategy ‘with an eye toward litigation’ free from unnecessary intrusion by his adversaries.”²⁴ The rule is intended to promote the “adversary system by allowing attorneys to be free to prepare their cases without fear that their work product will be used against their clients.”²⁵

Work-Product Defined

In order to come within the qualified protection from discovery created by Rule 26(b)(3), a party claiming protection must satisfy three necessary elements. The material must be:

- (i) documents and tangible things,
- (ii) prepared in anticipation of litigation or for trial, and
- (iii) by or for a party or by or for a party’s representative.²⁶

Documentary evidence qualifies as work product if it is prepared “in anticipation of litigation.”²⁷ The test is whether “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”²⁸ Thus, “materials prepared in the ordinary course of business . . . or for other non-litigation purposes” are not protected.²⁹ Likewise, “[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials . . . with the work product privilege—the privilege is not that broad.”³⁰

In short, to be work product the document must come into existence because of the litigation, whether anticipated or actual, not in spite of it. If a document would have been created regardless of whether litigation was anticipated, it is not work product.³¹

Finally, under Rule 26, materials prepared in anticipation of litigation by any representative of the client are protected, regardless of whether the representative is either a lawyer or acting under the direction of a

party’s attorney or other representative concerning the litigation.”

²⁴ *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998).
²⁵ *Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 119, 128 (D.N.J. 1998) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L.Ed. 451 (1947)).

²⁶ 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2024 (2011).

²⁷ *National Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980, 984 (4th Cir. 1992).

²⁸ *Binks Mfg. Co. v. National Presto Indus. Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983) (citing 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2024 (1994)).

²⁹ *National Union*, 967 F.2d at 984.

³⁰ *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996); see also *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (“The work product rule does not come into play merely because there is a remote prospect of future litigation.”);

³¹ *In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989*, 133 F.R.D. 515, 519-20 (N.D. Ill. 1990).

lawyer.³² Accordingly, whether a document is protected depends on the motivation behind its preparation, rather than on the person who prepares it.

Practice Tip: ERISA practitioners should keep in mind that the work-product doctrine only protects litigation-related work product. Drafts of plan documents, participant communications, forms, internal memoranda, or other “work product” of ERISA counsel in the ordinary course of representation are not protected by the work-product doctrine. Although such documents may be privileged if they are communicated to the client, any such documents that are not shared with a client may be subject to discovery in subsequent litigation.

Loss of the Work-Product Doctrine

In contrast to the attorney-client privilege, the work-product doctrine is not absolute. Under Rule 26(b)(3), discovery of work-product materials is permitted when the party seeking such discovery “show that it has *substantial need* for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”³³ This standard, however, applies only to “*fact*” work-product materials. Rule 26(b)(3) also provides that discovery of the “mental impressions, conclusions, opinions, or legal theories of an attorney,” denominated “*core*” or “*opinion*” work product, is accorded a higher standard of protection.³⁴ Opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.³⁵

Work-product privilege may be waived by disclosure to adversaries, or to a third party. However, “the work-product privilege is not necessarily waived by disclosure

³² Fed. R. Civ. P. 26(b)(3), Advisory Comm. Note, 48 F.R.D. 487, 502 (1970) (“Subdivision (b)(3) reflects the trend of the case by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.”).

³³ See footnote 23, *supra*.

³⁴ See *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 643 (E.D.N.Y. 1997).

³⁵ *Upjohn v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981). *Accord Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 348 (4th Cir. 1994); *In re John Doe*, 662 F.2d 1073, 1077-80 (4th Cir. 1981). The circuits are divided on whether there is absolute protection for opinion work product. Some courts have held that opinion work product is absolutely protected; others have concluded it may be discovered under compelling circumstances. Compare *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (holding opinion work product may be discovered when mental impressions are at issue and need for material is compelling), and *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982) (requiring showing of extraordinary justification to overcome protection of opinion work product), with *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir. 1974) (holding opinion work product to be absolutely protected). The Supreme Court has not yet decided whether opinion work product is absolutely immune from discovery. See *Upjohn*, 449 U.S. at 398-99.

to any third party; rather, ‘the courts generally find a waiver of the work-product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.’”³⁶

“Fiduciary Exception” to the Attorney-Client Privilege

The “fiduciary exception” as applied in ERISA litigation emerged from two divergent legal premises. The first line of authorities adopted an exception that was based on principles drawn from shareholder derivative jurisprudence. Under these authorities, if a commonality of interests existed (between the plan fiduciary and participants) as to the legal advice at issue, the attorney-client privilege could be overcome upon a showing of “good cause.” A second line of authorities rejected the “good cause” standard in favor of a more absolute rule. Drawing from trust law, these authorities reasoned that because a plan fiduciary represents the beneficiaries of the trust, the participants are included within the fiduciary’s attorney client relationship, and the fiduciary cannot invoke the privilege against the participants.

The rule has broad implications in the ERISA context because ERISA fiduciaries are under an unwavering obligation to “discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries.”³⁷ Thus, “[as] applied in the ERISA context, the fiduciary exception provides that an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.”³⁸ As one court has explained: “[t]he purpose of the fiduciary exception to the attorney client privilege is to protect the beneficiary. Without the exception, the fiduciary could hide behind the attorney client privilege and keep the beneficiary in the dark regarding key decisions.”³⁹

³⁶ *Falise v. American Tobacco Co.*, 193 F.R.D. 73, 79 (E.D.N.Y. 2000), citing *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260, 1993 WL 561125, *6 (S.D.N.Y. Dec. 23, 1993) (citing *In re Grand Jury Subpoenas*, 561 F.Supp. 1247, 1257 (E.D.N.Y.1982)).

³⁷ See 29 U.S.C. § 1104.

³⁸ *Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 272, 21 EBC 2025 (2d Cir. 1997). Alternately, some courts reason that the “exception derives from an ERISA trustee’s duty to disclose to plan beneficiaries all information regarding plan administration.” *Id.* at 271-72. “Viewed in this light, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way in the face of a competing legal principle.” *United States v. Mett*, 178 F.3d 1058, 23 EBC 1081 (9th Cir. 1999).

³⁹ *Marsh v. Marsh Supermarkets Inc.*, 2007 WL 1021410, *2, 41 EBC 1110 (S.D. Ind. March 29, 2007); see also *Fitzpatrick v. American International Group, Inc.*, 272 F.R.D. 100, 111 (S.D.N.Y. 2010)(noting the fiduciary exception only arguably applies if the attorneys whose communications are at issue were retained to advise the company on the performance of its fiduciary duties, and not for some other reason).

Most circuit courts have adopted one variation or another of the doctrine.⁴⁰ However, some courts refuse to recognize the exception at all.⁴¹

Historical Development of the Fiduciary Exception Under ERISA

“Good Cause Standard”

The genesis of the fiduciary exception can be traced to *Garner v. Wolfinbarger*.⁴² *Garner*, a shareholder derivative action, addressed the question of whether the defendant’s corporate officers could claim attorney-client privilege relative to advice given to the corporation by its former corporate counsel. Relying on the joint client and crime fraud exceptions, the Fifth Circuit reasoned that otherwise privileged advice should not be protected if the interests of the shareholders and the corporation were common when the advice was rendered. Accordingly, the court held that the stockholders could vitiate the attorney-client privilege if they demonstrated “good cause.”⁴³

In this regard, the court identified the following factors, as relevant to the good cause determination:

[the] number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders’ claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders’ claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.⁴⁴

No single factor or combination thereof was intended to be decisive.

⁴⁰ *Solis v. The Food Employers Labor Relations Ass’n*, 2011 WL 1663697, 50 EBC 2697 (4th Cir. 2011); *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231, 40 EBC 1545 (3d Cir. 2007); *Bland v. Fiatallis North Am. Inc.*, 401 F.3d 779, 787-88, 34 EBC 1875 (7th Cir. 2005); *United States v. Mett*, 178 F.3d 1058, 1062, 23 EBC 1081 (9th Cir. 1999); *Becher v. Long Island Lighting Co. (LILCO)*, 129 F.3d 268, 272, 21 EBC 2025 (2d Cir. 1997); *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1415-16, (11th Cir. 1994); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645, 16 EBC 1235 (5th Cir. 1992); *Fausek v. White*, 965 F.2d 126, 132-33 (6th Cir. 1992).

⁴¹ See, e.g., *Murphy v. Gorman*, , 271 F.R.D. 296, 318-19 (D.N.M. 2010) (declining to adopt the judicially-created expansion of the exceptions to the attorney-client privilege to add a fiduciary exception); *Huie v. DeShazo*, 922 S.W.2d 920, 923-26 (Tex. 1996) (refusing to recognize a fiduciary exception to the attorney-client privilege).

⁴² *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971).

⁴³ *Id.* at 1103-1104.

⁴⁴ *Id.* at 1104.

A decade later, *Donovan v. Fitzsimmons*⁴⁵ imported the *Garner* “good cause” standard into ERISA jurisprudence. In *Donovan*, the Department of Labor (DOL) brought an ERISA action for breach of fiduciary duty against former plan trustees based on improper investments.⁴⁶ The DOL moved for an order to compel the pension fund to produce various documents to which the fund had asserted the attorney-client privilege and work-product immunity. The district court held that plan trustees could not assert the privilege because as in the corporate fiduciary context, the plan trustees act not for themselves, but for plan beneficiaries. The *Donovan* court then applied the “good cause” standard set forth in *Garner* and held that the DOL needed the information to address a potential defense of the former plan trustees.⁴⁷

Under the *Garner* line of authorities, if the ERISA claimant’s interests were common with the plan fiduciary’s at the time the disputed communications were given, then the attorney-client privilege can be vitiated upon a showing “good cause.” In the ERISA context, the *Garner* “good cause” factors may include: the number of participants/beneficiaries whose interests are at stake; the facial adequacy and apparent good faith of the claims; the importance of the information and its availability from other sources; and whether the communications relate to the present litigation.⁴⁸

Moving Towards an Absolute Rule—*Washington Star*

Shortly after *Donovan* was decided, another federal district court rejected the *Garner* “good cause” standard and adopted an independent rule to govern the application of the privilege in ERISA cases.⁴⁹ In *Washington Star* the plaintiffs claimed the plan, its sponsor, and trustee breached their fiduciary duties by amending the trust to provide for the reversion of surplus assets to the sponsor, rather than to the participants, upon plan termination. During the litigation, the plaintiffs sought to introduce an affidavit given by the plan’s former counsel to the plan, which contained factual background on an earlier amendment to the trust agreement that provided for reversion of surplus assets to the participants. The employer argued that because

⁴⁵ *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 2 EBC 1393 (N.D. Ill. 1981).

⁴⁶ *Id.* at 584.

⁴⁷ *Donovan*, 90 F.R.D. at 587. The *Donovan* court also held that the Secretary of Labor’s status was sufficiently similar to the fund beneficiaries’ to enable the DOL to invoke the *Garner* rule, noting that § 502(a) of ERISA gives the Secretary the authority to sue in the interest of plan beneficiaries. *Id.*

⁴⁸ See *Martin v. Valley Nat’l Bank*, 140 F.R.D. 291, 323-24 (S.D.N.Y. 1991). See also *In re Occidental Petroleum Corp.*, 217 F.3d 293, 297-98 (5th Cir. 2000) (ESOP, as a shareholder of Occidental, was entitled to pierce the corporation’s attorney-client privilege under *Garner v.*); *Fitzpatrick v. American International Group, Inc.*, 272 FRD 100, 111 (S.D.N.Y. 2010) (holding plaintiffs “would have to show good cause for piercing whatever privilege they are challenging”).

⁴⁹ *Washington-Baltimore Newspaper Guild v. Washington Star*, 543 F. Supp. 906, 3 EBC 1741 (D.D.C. 1982).

of the firm’s dual role as general counsel and as counsel for the plan, all of the attorney’s communications with the company were privileged.⁵⁰

The court rejected this argument, stating that it “overlook[ed] the peculiar role of an attorney for an employee benefit plan.”⁵¹ Under ERISA, plan trustees are fiduciaries who owe undivided loyalty to the plan participants. Thus, “[w]hen an attorney advises [an ERISA] fiduciary about matters dealing with the administration of an employee’s benefit plan, the attorney’s client is not the fiduciary personally, but, rather, the trust’s beneficiaries.”⁵² The court further noted the fund’s status as an independent legal entity, separate from the employer, in spite of the latter’s close involvement with, and funding of, the plan.⁵³ Finally, the court noted that when an attorney represents two clients (here, the plan and the employer), and the two clients are later involved in litigation, neither client may invoke the privilege.⁵⁴ The court stated that an employer cannot, by retaining the same counsel as that used by the plan, defeat disclosure of communications between a plan trustee and the employer.⁵⁵

The *Washington Star* court explicitly rejected the “good cause” requirement, reasoning that no such showing should be required since a pension plan trustee directly serves the plan beneficiaries.⁵⁶

The Modern Trend—Towards Greater Protection for ERISA Fiduciaries

More recent cases have eroded the “absolute rule” articulated in *Washington Star*, thus resulting in the development of a stronger privilege for ERISA fiduciaries. These cases have recognized two spheres of communications that still warrant the protection of the privilege. First, a number of courts have recognized, consistent with ERISA’s statutory framework, that consultations relating to the establishment, amendment, or termination of a plan (so-called settlor functions) are shielded from disclosure because they do not involve fiduciary duty or activity. Second, the modern courts also recognize that where plan fiduciaries seek legal advice regarding potential liability to plan participants, such communications may be privileged even though it relates to plan administration.

Settlor-Fiduciary Distinction—*In Re Long Island Lighting Co.*

In re Long Island Lighting confirmed that an attorney representing the a plan fiduciary and the plan sponsor (as a single entity) can still claim privilege with respect to those communications that were unrelated to

⁵⁰ *Id.* at 910.

⁵¹ *Id.* at 909.

⁵² *Id.* at 909.

⁵³ *Id.* at 910.

⁵⁴ *Id.* at 910.

⁵⁵ *Id.* at 910.

⁵⁶ *Id.* at 909, n. 5.

fiduciary matters.⁵⁷ In *Long Island Lighting*, the plaintiffs filed a motion to compel production of documents relating to communications between Long Island Lighting's in-house attorney and a plan fiduciary. The plaintiffs' argued that Long Island Lighting, as plan fiduciary, could not assert (or waive) any privilege to shield its plan-related documents from scrutiny by the plan's beneficiaries. Relying on *Washington Star*, the district court held that use of the same attorney for advice regarding a plan amendment and plan administration waived the attorney-client privilege with respect to all such communications. The Second Circuit reversed finding that the lower court's reliance on *Washington Star* was misplaced.

The Second Circuit left undisturbed *Washington Star*'s holding that use of the same attorney for advice regarding fiduciary and nonfiduciary matters did not, because of the privilege for nonfiduciary matters, shield discoverable communications regarding fiduciary matters. This holding did not however support the opposite proposition—if an attorney advises a client on matters that are both fiduciary and nonfiduciary, the fiduciary matters do not render the communications concerning nonfiduciary matters discoverable as well.⁵⁸ Rather, the court reasoned that “[t]he employer’s ability to invoke the attorney-client privilege to resist disclosure sought by plan beneficiaries turns on whether or not the communication concerned a matter as to which the employer owed a fiduciary obligation to the beneficiaries.”⁵⁹

Thus, under *Long Island Lighting*, one attorney can represent the employer in its capacity as fiduciary in matters relating to plan administration and also represent the employer in nonfiduciary matters like plan amendment and termination. Perhaps even more significantly, *Long Island Lighting* confirms that the application of the privilege should be based on the hat worn by the client at the time of the communication. If the client is acting as a fiduciary then the communications are not privileged as to plan participants. If on the other hand the client is acting as a plan sponsor or settlor, the communications are covered by the privilege.

Practice Tip: Although *Long Island Lighting* confirmed that a single attorney can represent both plan fiduciaries and sponsor (which is often the same individual(s) with different roles at different times), clients should consider avoiding this situation by hiring separate counsel for the plan and/or the plan's fiduciaries. The distinction between advice to fiduciaries and nonfiduciaries would be clearer, and the privilege for communications between the plan sponsor and its separate counsel would be more secure. It might also be easier (and safer) to pay the plan's/fiduciary's counsel using plan assets if this distinction between counsel is made at

the outset. It is difficult to claim the privilege for communications paid for by the participants. Indeed, courts have noted that the identity of the entity paying the legal fees is a “significant factor” in determining the identity of the actual client.⁶⁰

If it is not possible to retain separate ERISA counsel for the plan, then the practitioner should set up separate filing and billing systems relative to the plan and the employer. Separate filing and billing systems will enable the practitioner to establish, more readily, who the client was relative to any disputed communication. Moreover, segregating settlor matters from plan administration matters in this manner will force the practitioner to think about who the client is and perhaps tailor the communication accordingly.

Application of the Doctrine to Top Hat Plans

As noted, the fiduciary exception to the attorney-client privilege is grounded in the notion that advice rendered to a plan fiduciary is provided for the benefit of the plan's participants/beneficiaries and therefore not subject to the privilege. Under ERISA, however, certain plans, such as top hat plans, stock option plans and stock purchase plans, are exempt from ERISA's fiduciary provisions.⁶¹ Because these types of plans are not subject to ERISA's fiduciary rules, the courts have recognized that the fiduciary exception to the attorney-client privilege does not apply.⁶² Thus, privileged communications with the administrators of these types of plans should generally remain privileged.

Practice Tip: Practitioners should be careful however in situations where benefits payable under a top hat, stock option or stock purchase plan are inextricably linked or intertwined with benefits payable under a non-exempt ERISA plan (typically a pension plan) as in these situations the communications may be subject to the fiduciary exception.⁶³

Advice to Plan Fiduciaries Regarding Potential Liability to Participants—*United States v. Mett*

In *United States v. Mett*,⁶⁴ the Ninth Circuit thoroughly analyzed the fiduciary exception. *Mett* involved an appeal by two ERISA fiduciaries (Mett and Wiseman) who were convicted of embezzling funds from the Center Art Galleries pension benefit plans. Mett and Wiseman, who founded the gallery, served as trustees for both plans. During early 1990 the gallery fell on hard times and Mett and Wiseman withdrew \$1.6 mil-

⁵⁷ *In re Long Island Lighting Co.*, 129 F.3d 268, 21 EBC 2025 (2d Cir. 1997).

⁵⁸ *Id.* at 272.

⁵⁹ *Id.* at 271.

⁶⁰ *In re J.P. Morgan Cash Balance Litigation*, 2007 WL 1280623, * 3 (S.D. N.Y. April 30, 2007). See also *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 234-35, 40 EBC 1545 (3d. Cir 2007);

⁶¹ 29 U.S.C. § 1101(a)(1).

⁶² *Marsh v. Marsh Supermarkets Inc.*, 2007 WL 1021410, *2-3 (S.D. Ind. March 29, 2007).

⁶³ See *Bell v. Pfizer*, 2006 WL 2529762, *2 (S.D.N.Y. August 31, 2006)(noting that exception did not apply to stock option plan, but holding that since claim related to stock option plan and pension plan, employer could not assert the privilege with respect to communications concerning pension plan.)

⁶⁴ *United States v. Mett*, 178 F.3d 1058, 23 EBC 1081 (9th Cir. 1999).

lion from the pension plans and deposited the funds into the gallery's general operating accounts. Both men were subsequently indicted in connection with the pension plan withdrawals. Although Mett and Wiseman admitted taking the funds, they claimed they were "loans" intended to carry the gallery through rough financial times.

At trial, "the defense turned on whether the defendants possessed the requisite specific intent when they arranged the withdrawals."⁶⁵ To prove the criminal intent, the prosecution introduced several legal memoranda (detailing the illicit nature of these transactions) that were prepared by attorneys who acted as legal counsel for both the plan and Mett and Wiseman. Based on these memoranda and testimony given by Mett and Wiseman's attorney, both men were convicted.⁶⁶

Prior to trial, Mett and Wiseman "unsuccessfully sought to suppress on attorney-client privilege grounds three memoranda sent to them by their then-counsel, Thomas Foley."⁶⁷ Foley at various times served as counsel to Mett and Wiseman personally and in their capacities as ERISA plan trustees. Foley also represented the gallery as a corporation and in its role as plan administrator, and to the ERISA plans themselves. The two memoranda at issue related to the potential civil and criminal consequences of the 1990 and 1991 pension plan withdrawals which had already occurred. The first memorandum, addressed to Mett and Wiseman, dated Aug. 19, 1991, explained the potential civil and criminal exposure the defendants might face in light of the withdrawals, and for their failure to report the transactions on IRS Form 5500. The second memorandum, dated Aug. 26, 1991, was a memo to the file that further detailed the civil and criminal penalties associated with transactions by ERISA and related tax laws. A copy of this memo was sent to Mett at his residence.

At trial, Foley was called to testify, and the two memoranda were admitted into evidence. Foley testified about the contents of the two memoranda, and also recalled that he spoke to Mett and Wiseman about the advice contained in the two memoranda. "He also testified that he advised both defendants that they could not continue to serve as ERISA trustees once convicted of a felony."⁶⁸ Foley also confirmed that the August 19 memorandum put Mett and Wiseman on notice that the pension plan withdrawals needed to be disclosed to the IRS on Form 5500. Finally, Foley testified that his firm was forced to withdraw from representing the gallery's plans on three occasions because of Mett and Wiseman's refusal to submit annual Form 5500s to the IRS and the potential conflict of interest arising from the pension plan withdrawals.

Mett and Wiseman appealed their convictions. They argued that the legal memoranda and Foley's testimony relating thereto should have been excluded because of

the attorney-client privilege, and that admission of these communications constituted reversible error. The government argued that the memoranda and Foley's testimony were admissible under the fiduciary exception to the attorney-client privilege. Although the Ninth Circuit recognized the application of the fiduciary exception in the ERISA context, it nonetheless sided with Mett and Wiseman.

The Ninth Circuit began by recounting the history of the fiduciary exception in American jurisprudence:

The fiduciary exception is rooted in two distinct rationales.

First, some courts have held that the exception derives from an ERISA trustee's duty to disclose to plan beneficiaries all information regarding plan administration. . . . Other courts have focused instead on the role of the trustee and have endorsed the notion that, "as a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served." Understood in this fashion, the fiduciary exception is not an "exception" to the attorney-client privilege at all. Rather, it merely reflects the fact that, at least as to advice regarding plan administration, a trustee is not the "real client" and thus never enjoyed the privilege in the first place.⁶⁹

The court went on to note that under either rationale, the fiduciary exception has its limits. Thus, "by agreeing to serve as a fiduciary, an ERISA trustee is not completely debilitated from enjoying a confidential attorney-client relationship."⁷⁰ Under principles of trust law, the court observed that a fiduciary "is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection."⁷¹ Conversely, where the legal advice is "prepared ultimately for the benefit of the beneficiaries of the trust and not for the purpose of the trustees' own defense in any litigation against themselves" the fiduciary cannot assert the privilege against the beneficiaries.⁷² Based on these authorities, the court opined that

where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact.⁷³

In light of this reasoning, the court stated that both the context and content of the Foley memoranda indicate that they were privileged. As to the context, the

⁶⁹ *Id.* at 1063 (citing Rust E. Reid, William R. Mureiko & D'Ana H. Mikeska, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541 (1996)), and quoting *United States v. Evans*, 796 F.2d 264, 266 (9th Cir. 1986), *Washington Star*, 543 F. Supp. at 909.

⁷⁰ *Id.* at 1063.

⁷¹ *Mett*, 178 F.3d at 1063 (quoting RESTATEMENT (SECOND) OF TRUSTS § 173).

⁷² *Id.* at 1063-64 (quoting *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 711 (Del. Ch. 1976)).

⁷³ *Id.* at 1064.

⁶⁵ *Id.* at 1061.

⁶⁶ *Id.* at 1061.

⁶⁷ *Id.* at 1061.

⁶⁸ *Id.* at 1061.

legal advice was dispensed in the midst of the gallery's "financial crisis and on the heels of the federal investigation that resulted in the defendants' conviction for art fraud."⁷⁴ While the court acknowledged that no legal action was then pending against Mett and Wiseman, various employees had begun asking difficult questions regarding the financial condition of the plans. Therefore Mett and Wiseman had good reason to seek advice from Foley regarding their personal exposure to civil and criminal liabilities relative to the pension plan withdrawals.

Moreover, the court found that the content of the memoranda themselves also foreclosed the application of the fiduciary exception. The "memoranda were plainly 'defensive on the trustees' part, and aimed at advising the trustees how far they were in peril.'"⁷⁵ On its face, the Aug. 19 memorandum made clear that the advice rendered was not "'on a matter of plan administration.'" Rather, this memorandum was directed at advising "Mett and Wiseman regarding their own personal civil and criminal exposure in light of undocumented withdrawals that had already occurred. In short . . . the advice here was not prepared for the benefit of the plan or the beneficiaries, nor was it advice regarding administration of the plan."⁷⁶

The government, however, argued for a more expansive reading of the fiduciary exception, stating that "the attorney-client privilege should be defeated whenever otherwise privileged legal advice 'relates to' fiduciary matters."⁷⁷

The court articulated four reasons for rejecting the government's argument. First, the court stated that "this view of the fiduciary exception threatens to swallow the entirety of the attorney-client privilege for ERISA trustees. After all, any legal advice concerning an ERISA plan could be construed as relating, at least indirectly, to the administration of the plan."⁷⁸ Under the government's reading, the fiduciary exception would extend to "communications between ERISA trustees and their trial counsel in a civil suit arising from a denied benefits claim, or even to the communications between the defendants here and their defense counsel."⁷⁹ This, according to the court, was not the state of the law.

Second, the court reasoned that "[w]hen an ERISA trustee seeks legal advice for his own protection, the legal fiction of 'trustee as representative of the beneficiaries' is dispelled, notwithstanding the fact that the legal advice may relate to the trustee's administration of the trust."⁸⁰ Likewise, "where a fiduciary seeks legal

advice for her own protection, the core purposes of the attorney-client privilege are seriously implicated and should trump the beneficiaries' general right to inspect documents relating to plan administration."⁸¹

Third, and according to the court most importantly, "where attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure. As the Supreme Court has repeatedly cautioned, '[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'"⁸²

Finally, the court stated that from a policy perspective, an uncertain attorney-client privilege may result in "ERISA trustees shying away from legal advice regarding the performance of their duties."⁸³ This in turn could injure beneficiaries because "all else being equal, beneficiaries should prefer well-counseled trustees who clearly understand their duties."⁸⁴ Moreover, a fiduciary that fears that his lawyer will be used against him result into an "unwillingness to serve at all, or an insistence on contractual protections aimed at diluting the trustee's accountability. Neither option serves the interest of beneficiaries."⁸⁵

The court also rejected the government's argument that because the same attorney advised Mett and Wiseman in their fiduciary and nonfiduciary capacities, all of the communications were subject to the fiduciary exception.⁸⁶ Citing *Long Island Lighting*, the court stated that the "application of the fiduciary exception is not simply a question of conflict of interest, resolved 'by multiplying the number of lawyers.'"⁸⁷ Rather, the "nature of the particular attorney-client communication is dispositive. This communication-by-communication analysis, while perhaps untidy, is crucial if the attorney-client privilege and the fiduciary exception are to coexist."⁸⁸

After *Mett*, some courts struggled with determining precisely when the fiduciary exception should attach to legal advice, especially where it is rendered in the context of a disputed benefit claim. Because "the prospect of litigation is always present in decisions about whether to grant or deny benefits" many courts have rejected the argument that the exception attaches anytime there is a mere prospect of litigation.⁸⁹ What has emerged from these cases "is a [fact specific] inquiry that centers on whether the purpose of the communications was legal advice regarding the legal liability of plan administrators in imminent or pending litigation, as opposed to advice concerning a general fear of liabil-

⁷⁴ *Id.* at 1064.

⁷⁵ *Id.* (citations omitted).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1064.

⁷⁸ *Id.* at 1065.

⁷⁹ *Id.* (citing *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 645, 16 EBC 1251 (5th Cir. 1992) (fiduciary exception not applicable to counsel retained for purpose of defending the lawsuit in question)).

⁸⁰ *Id.* at 1065.

⁸¹ *Id.* at 1065.

⁸² *Id.* (quoting *Upjohn*, 449 U.S. at 39).

⁸³ *Id.* at 1065.

⁸⁴ *Id.* at 1065.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1065-66.

⁸⁷ *Id.* at 1065-66.

⁸⁸ *Id.* (quoting *Long Island Lighting*, 129 F.3d at 272.)

⁸⁹ *Black v. Pitney Bowes*, 2006 WL 3771097, * 3 (S.D. N.Y. December 21, 2006).

ity or advice concerning plan administration itself.”⁹⁰ Factors such as the timing of the advice, the identity of the party paying the legal fees and the nature of the advice are all relevant to this determination.⁹¹

Mutuality of Interest Analysis—*Martin v. Valley National Bank*

*Martin v. Valley National Bank of Arizona*⁹² further refined the analysis by examining the privileged communications by reference to a mutuality of interests between the plan entity and participants. *Valley National* involved an ERISA breach of fiduciary duty claim brought by the Secretary of Labor against Valley National Bank as trustee of the Kroy Inc. employee stock ownership plan. The Secretary’s claims were based on Valley National’s role in approving the ESOP’s leveraged buyout of the plan sponsor, Kroy Inc. Specifically, the Secretary alleged that Valley National failed to exercise independent judgment in assessing the proposal which resulted in the ESOP paying more than adequate consideration for its shares in Kroy Inc.⁹³ Shortly after the Secretary filed suit, it sought to compel production of documents held by two law firms who represented Valley National individually and as trustee of the ESOP.

The first firm, Webster & Sheffield represented the ESOP prior to Valley National becoming trustee. Although Valley National retained Webster & Sheffield as ESOP counsel after assuming the role of trustee, it did not use the firm again until nearly three years later, when the firm agreed to represent the ESOP in connection with the Secretary’s investigation. During the course of the investigation Webster & Sheffield was also consulted by Valley National regarding ESOP management issues.

The second firm, Snell & Wilmer, had represented Valley National over a period of years prior to its appointment as ESOP trustee. Although Valley National consulted this firm about its decision to act as trustee, it did not seek advice from the law firm regarding the leveraged buyout. Valley National did, however, consult with Snell & Wilmer regarding its potential liability in connection with the Secretary’s investigation. During the course of the investigation, this law firm was also consulted on matters arising from Valley National’s administration of the ESOP.

⁹⁰ *Id.* at * 3; accord, *Lewis v. Unum Corp. Severance Plan*, 203 F.R.D. 615, 620 (D. Kan. 2001).

⁹¹ *Bell v. Pfizer Inc.*, 2006 WL 2529762, * 7 (S.D.N.Y. August 31, 2006) (holding that exception did not apply to communications that occurred after the challenged benefit decision); *In re J.P. Morgan Cash Balance Litigation*, 2007 WL 1280623, * 3 (S.D. N.Y. April 30, 2007) (noting that identity of party paying fees is a significant factor in determining the identity of the client); *Shields v. Unum Provident Corp.*, 2007 WL 764298, *5 (S.D. Oh. March 9, 2007) (content of legal advice indicated it was not rendered for personal protection of administrator).

⁹² *Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291 (S.D.N.Y. 1991).

⁹³ *Id.* at 299.

Shortly after the Secretary filed suit, Valley National resigned as trustee of the ESOP. The new ESOP trustee then waived, on behalf of the ESOP, any claim of attorney-client privilege or work-product immunity for a number of law firms, including the firms of Webster & Sheffield and Snell & Wilmer. The trustee thereafter requested that both law firms turn over to DOL all documents relating to the Secretary’s investigation of the leveraged buyout. Both law firms and the bank refused to turn over the documents. Valley National argued that because Webster & Sheffield acted as its counsel following the opening of the Secretary’s investigation, the documents were protected under the attorney-client privilege and/or the work-product doctrine. Valley National and Snell & Wilmer also argued that the current ESOP trustee had no standing to waive the attorney-client privilege relative to the Snell & Wilmer documents/communications because the bank was the actual client, not the ESOP.

The court rejected Valley National’s claim of attorney-client privilege as to Webster & Sheffield, stating that Valley National lacked standing to assert the privilege because it was evident that the firm represented the ESOP and not the bank. Moreover, the court noted that even if the firm represented both entities, “this would not save Valley’s invocation of the attorney-client privilege. In such a circumstance, Valley and the ESOP Trust would have been joint clients of the firm, and it is well settled that one such client cannot invoke the privilege against the other client at a later time when the clients’ respective interests are in conflict.”⁹⁴ Accordingly, the court held that the current ESOP trustee had authority to waive any attorney-client privilege relative to such documents, unless a separate valid basis to withhold them existed.⁹⁵

The court did find, however, that Valley National had standing to assert the attorney-client privilege as to the Snell & Wilmer communications. The Secretary, however, argued that the fiduciary exception to the attorney-client privilege barred Valley National from asserting the privilege because Snell & Wilmer advised Valley National in its capacity as a fiduciary as well. The court rejected this blanket application of the exception, turning instead to the law of trusts to glean the applicable scope of the exception:

The beneficiary . . . has a right to obtain and review legal opinions given the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct. This limitation is echoed in the Restatement (Second) of Trusts in terms particularly pertinent to this case: The trustee is under a duty to the beneficiary . . . to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.⁹⁶

⁹⁴ *Id.* at 319, n. 18.

⁹⁵ *Id.*

⁹⁶ *Id.* at 325 (citations omitted).

Thus, “communications between trustees of a benefits plan and an attorney concerning how to manage the plan are not protected from scrutiny by the plan participants.”⁹⁷ Whereas, communications in which a plan trustee seeks legal advice to protect its own interests are protected.⁹⁸

Applying this rule, the court held that communications between Snell & Wilmer and Valley National regarding the Secretary’s investigation were in fact protected by the attorney-client privilege. However, even though Snell & Wilmer were hired as separate counsel, Valley National could not claim the privilege with regards to communications concerning plan administration. While the court found that the hiring of separate counsel was probative of “Valley’s implicit contention that Snell & Wilmer was hired” for [its] protection, “because the central focus is functional—that is, what role the attorney actually played—the hiring of separate counsel by the Trustee is not dispositive.”⁹⁹ Accordingly, these communications were subject to the fiduciary exception.

The court declined to reach the issue of whether the fiduciary exception applied to Valley National’s work-product claims, stating that “the normal limitations to the work-product rule and the limitations that would be imposed by the fiduciary exception, if it is applicable, [were] coextensive” in this context.¹⁰⁰ Because Valley had to demonstrate that the documents for which it claims work-product protection were prepared in anticipation of pending litigation, the documents that relate to the DOL investigation would fall within the work-product category. Likewise, the “fiduciary exception would not apply to these documents since Valley had a potential conflict of interest with the Trust beneficiaries with respect to the DOL investigation.”¹⁰¹ Conversely, the documents concerning the ESOP management were not prepared in anticipation of litigation and are thus not work product.¹⁰²

The More Recent Decisions

Several more recent court decisions further reflect the modern trend of applying the “divergence of interests” analysis and affording more protection to ERISA fiduciaries when their personal interests are the subject of the attorney-client communications.

• ***Solis v. The Food Employers Labor Relations Ass’n***,¹⁰³ arose out of the district court’s grant of a petition by the Secretary of Labor to enforce administrative document subpoenas. The DOL had served sub-

poenas on two multi-employer employee benefit plans as part of an investigation, and the plans objected to the production of some responsive documents claiming attorney client and work product privileges. The district court ordered the plans to produce the documents, applying the fiduciary exception.

The Fourth Circuit affirmed, and found no error with enforcement of the subpoenas. In this regard, the Fourth Circuit explicitly adopted the “fiduciary exception,” and held the exception to attorney-client privilege extends to communications between an ERISA trustee and a plan attorney regarding plan administration.¹⁰⁴ The Fourth Circuit acknowledged, however, that the fiduciary exception is “not without limits.”¹⁰⁵ The Fourth Circuit stated that the “exception will not apply, for example, to a fiduciary’s communications with an attorney regarding her personal defense in an action for breach of fiduciary duty . . . Similarly, communications between ERISA fiduciaries and plan attorneys regarding non-fiduciary matters, such as adopting, amending, or terminating an ERISA plan, are not subject to the fiduciary exception.”¹⁰⁶

Acknowledging *Garner* and the “good cause” requirement that had been developed by courts in some contexts, the Fourth Circuit went on to distinguish the fiduciary exception in this case by holding that “application of the fiduciary exception to the attorney-client privilege in the context of a subpoena issued by the Secretary of Labor under ERISA does not require a showing of good cause; instead, its application turns on the context and content of the individual communications at issue.”¹⁰⁷

Applying this analysis of the fiduciary exception to the documents at issue (Board of Trustee meeting minutes, handwritten notes distributed and taken during the meetings, and correspondence), the court concluded that all of these documents appeared to clearly “relate to the plans’ administration, [which is] information which ERISA trustees have a fiduciary obligation to disclose in response to a subpoena from plan beneficiaries provided it does not involve a trustee’s own legal defense.”¹⁰⁸

In contrast to the number of courts that have declined to apply the fiduciary exception to attorney work-product, the Fourth Circuit held that the ERISA context differs from the corporate context and, therefore, “there is no legitimate basis on which to distinguish between the two privileges in the application of the fiduciary exception in the ERISA context.”¹⁰⁹

• ***Allen v. Honeywell Retirement Earnings Plan***,¹¹⁰ analyzed the Ninth Circuit’s decision in *Mett*,

⁹⁷ *Id.* at 323.

⁹⁸ See also, *Fitzpatrick v. American International Group, Inc.*, 272 FRD 100, 111 (S.D.N.Y. 2010) (“In short, if the role of [the] attorneys was to advise AIG as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception.”)

⁹⁹ *Id.* at 325.

¹⁰⁰ *Id.* at 327.

¹⁰¹ *Id.* at 327.

¹⁰² *Id.* at 328-29.

¹⁰³ 2011 WL 1663697, 50 EBC 2697 (4th Cir. 2011).

¹⁰⁴ *Id.* at *5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citations omitted)

¹⁰⁷ *Id.* at *6.

¹⁰⁸ *Id.* at *7.

¹⁰⁹ *Id.* at *9.

¹¹⁰ 698 F. Supp. 2d 1197 (D.Ariz. 2010).

and framed a bright line test for application of the fiduciary exception based on *Mett*:

... [w]hen the fiduciary is faced with a threat of litigation and seeks legal advice for its own protection against plan beneficiaries, regardless of whether that threat of litigation occurs before, during, or after the administrative claims process, the attorney-client privilege reasserts itself. Once there is a 'divergence of interests' between a beneficiary and the plan administrator, the fiduciary exception does not apply . . . The Ninth Circuit has identified cases addressing the exception as marking 'out two ends of a spectrum' . . . First, 'where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity,' the exception applies. Second, 'where a plan fiduciary retains counsel in order to defend herself against the plan beneficiary,' the exception does not apply . . . Determining where on the spectrum particular communications fall depends on the 'context and content' of the communications.¹¹¹

In *Allen*, the court held that the plan administrator's records generated during the handling and resolution of an administrative claim generally qualify for disclosure under the fiduciary exception to the attorney-client privilege, and the court ordered defendants to "turn over all documents generated by the plan administrator, produced for the plan administrator's consideration or reviewed by the plan administrator in connection with the final administrative decision;" however "post-administrative" claim documents were not subject to the fiduciary exception because, once a final administrative decision was made, the parties' interests diverged.¹¹²

• *Stoffels v. SBC Communications, Inc.*,¹¹³ presented the issue of whether 70 documents which defendants asserted were protected from disclosure by attorney-client privilege and/or attorney work product protection were discoverable and had to be produced. The court first considered whether defendants established an entitlement to the attorney-client privilege, and if so, whether the fiduciary exception, applied as to these documents. If the Court determined that the attorney-client privilege did not apply or that the fiduciary exception precluded assertion of the attorney-client privilege, the Court then considered defendants' entitlement to the attorney work product protection. The court held a number of documents to be not privileged. With respect to a few documents the court held: (1) document consisting of two e-mails was discoverable as to e-mail originating from Vice President of Human Resources, but not as to e-mail originating from attorney; first e-mail to client representative consisted of underlying facts that were not privileged simply because they were later disclosed to attorney for purpose of obtaining legal services and because work product protection was not timely invoked it had been waived with regard thereto, but second e-mail from attorney to client representative regarding discussions with outside

legal counsel was subject to attorney-client privilege and, as it pertained to terminating and/or amending plan, was not subject to fiduciary exception; and (2) only two of three emails in document for which compelled discovery was sought were subject to attorney-client privilege; first email originated from outside counsel to in house counsel, second email was from in-house counsel to client representative and related information provided by outside counsel, and both those emails pertained to amending and/or terminating concessions and were not subject to fiduciary exception.¹¹⁴

• *Redd v. Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters*,¹¹⁵ involved a motion to compel production of documents withheld under a claim of attorney-client privilege. Plaintiffs sought documents created in the "pre-decisional" phase of the plan administrator's decision to recalculate and reduce Plaintiffs' pension benefits and prior to this decision becoming final in June 2007.¹¹⁶ The Magistrate Judge upheld the defendants' claim of privilege and declined to apply the fiduciary exception on the basis that there was a "strong indicia that the plan administrator's actions would lead to an 'adversarial situation' and ensuring litigation."¹¹⁷ The District Court overturned the Magistrate Judge's Order and held that "in this case, even if the plan administrator viewed it as likely that the recalculation of Plaintiffs' benefits would result in litigation, and even if the decision to consult with counsel was motivated in part by this likelihood of eventual litigation, this Court finds that this prospect, standing alone, is insufficient to preclude a plan beneficiary's access to pre-decisional communications between a plan administrator and counsel concerning matters of plan administration."¹¹⁸

• *Tatum v. R.J. Reynolds Tobacco Co.*,¹¹⁹ examined the fiduciary exception and its limitations in some depth. The court noted that "plan administrator may assert attorney-client privilege as to communications between the administrator and its attorneys on non-fiduciary matters, such as when the communications relate to plan sponsor or "settlor" functions of adopting, amending, or terminating an ERISA plan, and not to fiduciary functions of managing or administering the plan."¹²⁰ It further noted that "when a plan fiduciary retains counsel and seeks legal advice for his or her own protection against plan beneficiaries, the legal fiction of trustee as representative of the beneficiaries is dispelled, notwithstanding the fact that the legal advice may relate to the trustee's administration of the trust: and "[i]n these situations, the fiduciary's interests diverge from that of the beneficiaries so as to render the fiduciary exception inapplicable and protect the plan administrator's interest in the attorney-client privi-

¹¹¹ *Id.* at 1200-01.

¹¹² *Id.* at 1202-03.

¹¹³ 263 F.R.D. 406, 411 (W.D. Tex. 2009).

¹¹⁴ *Id.* at 407-408.

¹¹⁵ 2009 WL 1543325, 47 EBC 1865 (E.D. Mich. June 2, 2009).

¹¹⁶ *Id.* at *1.

¹¹⁷ *Id.* at *2.

¹¹⁸ *Id.* at *3.

¹¹⁹ 247 F.R.D. 488 (M.D. N.C. 2008).

¹²⁰ *Id.* at 493.

lege." Applying these general guidelines, the court ultimately held that: (1) fiduciary exception to the attorney-client privilege was not applicable to documents containing communications seeking or reflecting legal advice concerning whether and how to amend ERISA plan with respect to the elimination of two stocks as options in employer's 401k plan; (2) fiduciary exception to attorney-client privilege was applicable to document insofar as it contained legal advice regarding how to communicate changes in ERISA plan to plan participants; and (3) fiduciary exception to attorney-client privilege was not applicable to communication between plan administrators and outside counsel seeking or reflecting legal advice sought to protect administrators from plaintiff's threatened suit.¹²¹

• ***Asuncion v. Metropolitan Life Insurance Co.***,¹²² involved the question of whether MetLife should be required to produce certain communications between the case manager at MetLife who handled the plaintiff's claim for benefits ("Day") and an in-house attorney at Met Life. Met Life claimed these communications were protected by the attorney-client privilege. The court first noted that MetLife failed to show that the communication even qualified for the attorney-client privilege because it did not include the seeking or rendering of legal advice. However, in analyzing the fiduciary exception, the court held the fiduciary exception did apply, and ordered production of communications because the communication was made during the administration of plaintiffs benefits claim, and "the nature of counsel's comments on [the] draft letter do not reflect advice as to the legal implications of any actions by Day, or as to the potential liability of Met Life, as the plan administrator, in imminent or pending litigation. Rather, the comments by counsel are more in the nature of general edits to the letter, directed to issues of accuracy and completeness, or to matters of phrasing and format."¹²³ The court recognized that even though Plaintiff had previously sued for benefits, "suggesting an increased likelihood that she would sue again if her benefits were not restored, the mere fact that 'an adversarial relationship existed as a general matter' as the result of the prior suit does not mean that Met Life was no longer required to act as a fiduciary with respect to any subsequently-presented benefits claim."¹²⁴ Further, the court held the "mere prospect of litigation" is not enough to "render communications between fiduciaries and counsel privileged, because the prospect of litigation is always present in decisions about whether to grant or deny benefits."¹²⁵

• ***Wachtel v. Health Net, Inc.***¹²⁶ presented the issue of whether communications between a third party

plan administrator ("TPA") and its counsel are subject to the fiduciary exception to the attorney-client privilege. *Wachtel* involved a claim by various plan participants against Health Net alleging, *inter alia*, that Health Net breached its fiduciary duties under ERISA by using outdated UCR charges in processing claims. Health Net was the parent company of certain subsidiaries that provided claim processing services to various ERISA covered health plans. Health Net conceded that the subsidiaries were ERISA fiduciaries, but only to the extent they made claim decisions under the various plans. Thus, Health Net argued that as a limited fiduciary that paid benefits out of its own assets, it was not subject to the fiduciary exception.

The Third Circuit agreed, finding that the participants were not the true beneficiaries of the legal advice rendered to Health Net. The court first noted that unlike a self-funded plan where the fiduciary must administer the trust for the exclusive benefit of the plan participants, Health Net paid the benefits out of its own general assets. Thus, the court reasoned, Health Net had a nonfiduciary interest in managing its own assets. The court next reasoned that because insurers like Health Net operate under a conflict of interest in paying claims from their own assets and because they typically owe potentially divergent duties to their different clients, there is a presumption that the interests of the TPA in administering claims is divergent from that of the participants. Finally, the court observed that because the attorneys' fees were being paid out of the general assets of the company and not from the plans, there was a strong presumption that Health Net was the true client.

The court also rejected the plaintiff's argument that under trust law a fiduciary has an unwavering obligation to provide full disclosure of counsel's advice regarding plan administration. The court reasoned that Congress could not have intended to impose this aspect of traditional trust law on insurers as evidenced by the fact that "the assets of an insurance company need not be held in trust." Thus, the court found that Congress did not intend "to impose upon insurance companies doing business with ERISA regulated plans the same disclosure obligations that have been imposed upon trustees at common law."

• ***Bland v. Fiatallis North America, Inc.***¹²⁷ added an interesting twist to the application of the doctrine to nonfiduciary claims. In *Fiatallis* the plaintiffs moved to compel production of any communications between the plan and its counsel concerning the decision to modify the employer's post-retirement medical plan. The plaintiffs had initially asserted both a contract claim and a claim for breach of fiduciary duty, but later voluntarily dismissed the fiduciary claim. The Seventh Circuit rejected application of the fiduciary exception

suror and its in-house counsel should be protected to the extent they are not related to fiduciary matters, but must be disclosed where they concern matters of plan administration).

¹²⁷ 401 F.3d 779, 34 EBC 1875 (7th Cir. 2005)

¹²¹ *Id.* at 488.

¹²² 493 F. Supp.2d 716 (S.D.N.Y. 2007).

¹²³ *Id.* at 721-22.

¹²⁴ *Id.* (citations omitted).

¹²⁵ *Id.* (citations omitted).

¹²⁶ 482 F.3d 225, 40 EBC 1545 (3d. Cir 2007). *But see Smith v. Jefferson Pilot Financial Insurance Co.*, 245 F.R.D. 45 (D.Mass. 2007) (declining to apply the reasoning of *Wachtel* in the instant case and holding that privileged communications between an in-

due in part to the fact that the documents at issue related to settlor functions. The court also observed, however, that it was questionable whether the fiduciary exception even applied given that the plaintiffs had dismissed their fiduciary claim.

The court observed that the fiduciary exception was applicable only where the plan attempts to prevent disclosure of otherwise privileged communications that are relevant to an alleged breach of fiduciary duty.¹²⁸ The court's reasoning, however, appears to be inconsistent with the rationale articulated by *In re Long Island Lighting* and its progeny, which hold that the exception is grounded in the fact that the participant is the true beneficiary of legal advice rendered to the plan or its fiduciaries. Practitioners in the Seventh Circuit should nonetheless cite to *Bland* when faced with a fiduciary exception argument in the context of a standard claim for benefits.

• *Hudson v. General Dynamics*,¹²⁹ further clarified the range of communications that fall outside the scope of the fiduciary exception. In *Hudson*, plan participants sought to compel production of documents prepared by the employer's attorney that related to future plan amendments. The court began by noting that "an employer's claimed attorney-client privilege presents the inherent tension that arises by virtue of the fact that the employer wears two hats when administering an ERISA plan."¹³⁰ In areas relating to plan administration the employer owes its employees a fiduciary duty, "while in other areas such as plan design, amendment and termination, the employer acts in its own interest as settlor."¹³¹ The attorney-client privilege only attaches to those communications that relate to the so-called settlor functions. The context and content of the communication determines which side of the line a given communication falls on.¹³²

While there was no legal action pending when the *Hudson* documents were prepared by counsel, the court noted that the "employer had good reason to seek legal advice about its responsibilities and potential liability arising from misinformation about future plan amendments . . . given recent case law [i.e., serious consideration doctrine], involving analogous contexts."¹³³ The court went on to observe that the content of the documents indicated that the legal advice was rendered for the benefit of the employer to protect itself against potential liability in connection with future plan amendments that constituted settlor activities. Accordingly, the court held that documents were protected by the attorney-client privilege. Thus, *Hudson* essentially

adopted and followed both the *Long Island Lighting* and *Mett* holdings.

• *Fischel v. Equitable Life Assurance*¹³⁴ also followed the analytical framework set forth in *Mett* and *Hudson*. In *Fischel*, the plaintiffs brought suit challenging the employer's modifications of its health plan eligibility requirements. The plaintiffs sought to compel the production of various documents that represented communications between the employer and its inside and outside counsel regarding the health plan. The court opined that the correct approach to ascertaining whether the communications were subject to the fiduciary exception was to determine the reason for which the advice was sought. If the advice was sought in relation to the administration of the plan, then the communications would fall within the fiduciary exception. On the other hand, if an issue arose in the administration of the plan that created the possibility of liability on the employer's part, then those communications relating to the potential liability would be privileged, even if they directly related to plan administration.¹³⁵

• *Geissal v. Moore Medical Corp.*¹³⁶ In *Geissal*, the plaintiff sought to depose the attorneys for the Moore Medical Corporation welfare plan who were retained by the plan to provide legal advice regarding the plan's decision to terminate plaintiff's COBRA coverage. The defendant argued that the attorney-client privilege and the work-product doctrine barred the depositions.

The court held that neither doctrine prevented discovery of the advice given by counsel to the plan administrator regarding the termination of such coverage.¹³⁷

Citing to *Mett*, the court stated that it is settled that an ERISA fiduciary that administers the plan for the benefit of beneficiaries must "disclose to plan beneficiaries all information regarding plan administration."¹³⁸ The court further stated that the beneficiaries, and not the plan trustee, are the clients of the attorney who provides legal advice for the administration of the plan.¹³⁹ Because a claim denial is an act of plan administration, the attorney-client privilege would not bar the production of attorney's communications with the plan administrator regarding the initial appeal of the plan's decision to terminate the plaintiff's COBRA coverage.¹⁴⁰ However, the court went on to add that the plan's administrative act of denying COBRA coverage ended with the initial claim denial letter, and that the attorney-client privilege did protect any subsequent advice provided to the plan administrator.¹⁴¹

¹²⁸ *Id.* at 787.

¹²⁹ *Hudson v. General Dynamics*, 73 F. Supp.2d 201, 26 EBC 1432 (D. Conn. 1999).

¹³⁰ *Id.* at 202.

¹³¹ *Id.* at 202.

¹³² See also *Halbach v. Great-West Life & Annuity Ins. Co.*, 2006 WL 3803696 (E.D. Mo. Nov. 21, 2006) (legal advice sought by plan sponsor concerning redesign of its benefits plan was not subject to the fiduciary exception.)

¹³³ *Hudson*, 73 F. Supp. 2d at 203.

¹³⁴ *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606 (N.D. Cal. 2000).

¹³⁵ *Id.* at 609-10.

¹³⁶ *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 24 EBC 2805 (E.D. Mo. 2000).

¹³⁷ *Id.*

¹³⁸ *Id.* at 624.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 625.

¹⁴¹ *Id.* at 626.

• *Lewis v. Unum Corp. Severance Plan*¹⁴² also involved a motion to compel production of documents withheld under a claim of attorney-client privilege. Specifically, the plaintiff sought discovery of the documents reviewed by the plan administrator in denying his claim for severance benefits. The documents included: (1) meeting minutes from the administrative committee that denied plaintiff's claim for severance benefits; (2) written communications between in-house counsel and human resources; and (3) written communications between in-house counsel itself. Plaintiff asserted he was entitled to all such documents because they served as the basis for the denial of his severance benefits and as such were essential to his defense.

The court first dispensed with defendant's argument that the committee meeting minutes were privileged because inside and outside counsel had attended the meeting. "[T]he mere attendance of an attorney at a meeting . . . does not render everything done or said at that meeting privileged."¹⁴³ Rather, to be privileged, the communications must have related to the acquisition or rendition of "professional legal services and must have retained a confidential character."¹⁴⁴ While the court found that the committee members' deliberations among themselves were not privileged, the communications between the committee members and counsel were. The court went on to conclude, however, that the pre-decisional legal advice rendered at this meeting was subject to the fiduciary exception because this was an act of plan administration and as such the true clients were the plan participants not the committee/fiduciary.¹⁴⁵

The court rejected the defendant's contention that the exception was inapplicable because the pre-decisional advice was procured for the purpose of heading off prospective post-decisional litigation, stating that "the prospect of post decisional litigation is an insufficient basis for gainsaying the fiduciary exception to the attorney client privilege."¹⁴⁶

The court went on to find that while the communications between legal counsel and the human resources department were protected by the attorney privilege, the privilege was waived. "It is a well-established principle of law that the attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party."¹⁴⁷ Because the substance of the attorney's advice was willingly disclosed to the plan administrator (via cc's) the privilege was waived. The final category of communications, the correspondence between one in house attorney and another, and between in house counsel and the company,

¹⁴² *Lewis v. Unum Corp. Severance Plan*, 2000 WL 394859 (D. Kan. 2001).

¹⁴³ *Id.* at 619.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 620.

¹⁴⁶ *Id.* at 620.

¹⁴⁷ *Id.* at 620.

was found to be protected by the attorney-client privilege.¹⁴⁸

Application of the Fiduciary Exception to the Work-Product Doctrine

In light of the different policy concerns underpinning the work-product doctrine and the attorney-client privilege, most courts have declined to extend the fiduciary exception to work-product claims.¹⁴⁹ For example, in rejecting application of the exception to work product, the *Donovan* court stated:

The fiduciary exception carved out in *Garner*, however, does not translate so easily into the context of the work-product immunity. Unlike the attorney-client privilege, the right to assert the work-product barrier to disclosure belongs at least in part, if not solely, to the attorney and not the client. More to the point, the two privileges address different concerns. Not only does the work-product doctrine serve to protect the confidentiality in the attorney-client relationship, but it also protects the attorney from undue and unfair disclosure. . . .¹⁵⁰

The court went on to observe that because "beneficiaries . . . do not stand in the same position with respect to the attorney, for whom the work-product rule is designed to benefit, as they do to their own trustees . . . ,"¹⁵¹ the fiduciary exception cannot be readily applied to defeat the work-product doctrine.

Furthermore, in order for legal advice to be eligible for the work-product doctrine, it must be rendered "for the principal purpose of assisting in anticipated or pending litigation."¹⁵² Accordingly, such advice would not generally relate to the administration of the ongoing ERISA plan. Thus, it would appear that the communi-

¹⁴⁸ *Id.* at 621-22.

¹⁴⁹ See, e.g., *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 646, 16 EBC 1251 (5th Cir. 1992); *Strougo v. Bea Assocs.*, 199 F.R.D. 515 (S.D.N.Y. 2001)(fiduciary exception to attorney-client privilege, which provides for disclosure of communications by corporation to shareholders relating to conduct of alleged breach of fiduciary duties action, does not require disclosure of material that is protected under work-product doctrine); *Jicarila Apache Nation v. the United States*, 88 Fed.Cl. 1, 11 (2009)(refusing to apply fiduciary exception to work product privilege in action by tribe against United States for alleged mismanagement of tribal trust funds); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir.1994)(refusing to apply exception in action by union members against union); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir.1982) (refusing to apply exception in shareholder derivative action because "mutuality of interest" that existed to support attorney-client privilege was destroyed once there was "sufficient anticipation of litigation to trigger the work product immunity").

¹⁵⁰ *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587, 2 EBC 1393(N.D. Ill. 1981).

¹⁵¹ *Id.* at 587-588 (emphasis in original).

¹⁵² Fed. R. Civ. P. 26(b)(3); see also *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488501 (M.D. N.C. 2008), ("[t]he Garner exception . . . does not apply to the work product doctrine . . . This is so because the fiduciary exception is based on the 'mutuality of interests' between the fiduciary and the beneficiaries, but once there is a real anticipation of litigation, the 'mutuality is destroyed.').

cations protected by the attorney work-product doctrine would not be subject to the fiduciary exception to the attorney-client privilege.¹⁵³

However, the Fourth Circuit recently held that the ERISA context differs from the corporate context and, therefore, "there is no legitimate basis on which to distinguish between the two privileges in the application of the fiduciary exception in the ERISA context."¹⁵⁴

Practitioners' Perspectives

In analyzing whether a particular communication is protected by the attorney-client privilege and/or the work-product doctrine, attorneys may want to consider the following:

- First, who are you representing? The applicability of the attorney-client privilege depends on who is seeking to obtain the purportedly privileged communication and who is the client when the communication is made. As illustrated above, the scope of the attorney-client privilege varies depending on whether the client is the plan, a fiduciary, a plan sponsor, a nonfiduciary or some combination of the foregoing. The attorney-client privilege generally cannot be invoked by a fiduciary involved in plan administration against plan participants because they are deemed the "real clients" of the attorney. In addition, if your communications are shared with anyone other than the client, the privilege may be waived.

- Second, with respect to the communications at issue, what hat is the client wearing? As discussed above, if the communications at issue relate to "settlor functions" (i.e., amending or terminating the plan), then such communications are likely to be deemed privileged communications. Whereas, if the communications at issue relate to issues of plan administration, the fiduciary exception likely applies.

- Third, was the communication at issue conveyed for the benefit of participants, or to protect the interests

of the fiduciary? This involves perhaps the most difficult analysis, because often the answer is "both." What is good for the fiduciary is usually good for participants. Advising a fiduciary that the law requires x will usually result in benefiting the participants, but also serves to warn the fiduciary not to do y. When a fiduciary client nonetheless does y instead of x, such communications may become the focus of a discovery battle. If you are advising the fiduciary and want to protect the communications, you may have difficulty convincing the court that you were protecting the fiduciary's interest, not that of the participants. If there is doubt here, be very careful of what you say.

- Fourth, if such communications are not privileged, were they made in anticipation of litigation? A common scenario that helps illustrate this point is the plan's appeal procedures. The *Geissal* and *Lewis* decisions held that pre-decisional communications (i.e., those prior to an initial claim denial) rendered for the purpose of heading off prospective litigation are still subject to the fiduciary exception because the denial of a benefit claim is considered to be an act of plan administration. These decisions do not discuss whether the absence of a common interest between the participant involved in the appeal and all other participants should remove this situation from the fiduciary exception, permitting application of the privilege. These decisions also reject work-product protection, but their reasoning on this point is also subject to question. While the inherent discretion in the appeal process likely involves a fiduciary duty, such appeals also necessarily point to the potential for litigation. Thus, the work-product doctrine may provide more protection than the attorney-client privilege for the process involved in benefit claims/appeals.

Conclusion

Unfortunately, most of the rules and exceptions described above are both judicially created and applied. Inevitably, keeping communications with clients private, even if such communications should be protected under one or more of the cases discussed herein, does not guarantee that the judge who might ultimately decide whether to expose such communications will follow the nonbinding authority of other courts. Thus, attorneys familiar with the rules and principles described in this article should nonetheless consider that their privileged and/or protected communications *might* be exposed nonetheless, and careful thought and consideration should be given to how written communications might be perceived by a court, or twisted by their clients' adversaries.

[Updated July 2011]

¹⁵³ See, e.g., *Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291 (S.D.N.Y. 1991).

¹⁵⁴ *Solis v. The Food Employers Labor Relations Ass'n*, *2011 WL 1663697, 50 EBC 2697, (4th Cir. 2011) (declining, however, to reach the issue of whether the work product doctrine is subject to the fiduciary exception); see also *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 5 (D.D.C.1995) (finding that ERISA fund attorneys may not "shield their attorney work product from their own ultimate clients, the plan beneficiaries ... insofar as [documents] were prepared in anticipation of litigation on behalf of the plan beneficiaries"); *Valley Nat'l Bank*, 140 F.R.D. at 320-21 (rejecting work product protection claim by ERISA fund attorneys in context of DOL suit on behalf of fund participants); *Cobell v. Norton*, 213 F.R.D. 1, 13 (D.D.C.2003) (finding the work product doctrine "applicable only where the material is developed exclusively for purposes other than the benefit of trust beneficiaries, i.e., solely to aid in litigation").