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Everyday Attorney-Client Privilege and Work-Product Ethics for Labor, Employment, and Employee Benefits Attorneys

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This article reviews recent developments that attorneys practicing in the labor, employment, and employee benefits areas must address to effectively advise and represent their clients and to facilitate their clients' ability to claim that certain attorney-client communications are protected by the attorney-client privilege and work-product doctrine. [1] While these protections are the client's to claim, the attorney advising the client is best able to assist the client in documenting privilege and exemption claims and to advise the client when communications may be at risk of nonprotection based on (i) application of the fiduciary exception to the attorney-client privilege or work-product doctrine; and (ii) other ways the client's privileges and exemptions may be at risk. This article reviews recent developments in attorney-client privilege and the work-product doctrine in the context of the labor, employment, and employee benefits practice areas. As discussed below, these practice areas frequently overlap factually. As a result, the failure to consider the impact of factual nuances in each practice area may create risks when an attorney seeks to protect the client's privilege or to rely on the attorney work-product exemption. Moreover, attorneys must carefully consider the ethical implications of their actions when performing tasks and communicating with clients so as to protect and preserve a client's claim of attorney-client privilege or work-product exemption. A checklist for preserving attorney-client privilege can be found here.

[1] All references to privilege are to the attorney-client privilege.

To be sure, the party or person claiming the privilege or work-product exemption bears the burden of proving that the privilege applies. Accordingly, the claiming party should document when the privilege or exemption is applicable to documents, statements, communications, or other work products that are part of litigation, investigations, audits, or other disputes. Preparing such documentation at the time the document or communication is prepared:

- helps to refresh memories later when litigation arises,
- provides a record of the claimed protection for use in the privilege log, and

- serves as a reminder to those in receipt of the communication of the special nature of the document or communication and the care that must be taken to protect it from disclosure.

Merely placing a claim of privilege or work-product protection on every communication or document may raise questions as to the authenticity of the claim and place it in jeopardy when reviewed.

Furthermore, the rules of the various jurisdictions require an attorney to maintain client confidences and to protect and secure the attorney's legal advice. The Model Rules of Professional Conduct (Model Rules) require attorneys to keep legal advice secure, and this requires preservation of the privilege. For example, Model Rule 1.6 requires an attorney not to reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted under one of seven other enumerated exceptions [2] . And while the American Bar Association has published the Model Rules, each state modified those rules when it adopted its own rules of professional responsibility.

[2] (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

In addition to the individual state modifications, courts have interpreted the Model Rules in a variety of ways in different jurisdictions and in a host of factual situations. Accordingly, an attorney must carefully review the applicable rules in the jurisdiction in which the attorney practices as well as in the jurisdiction in which the client operates and may be subject to lawsuit. Moreover, employers operating in multiple jurisdictions may be sued in multiple jurisdictions, not only under a plethora of labor and employment laws but also under the Employee Retirement Income Security Act. Consequently, in the labor, employment, and ERISA context, lawyers should be cognizant that, while they may be advising their client in one jurisdiction, the rules that may ultimately apply to whether their communications are privileged or protected as work product may be determined under a separate jurisdiction's interpretations of the attorney-client privilege, work-product doctrine, the fiduciary exception to the attorney-client privilege, or other privileges and exemptions.

This paper now turns to a few background examples of the overlapping privilege and work-product ethical issues in the employment and employee benefits setting.

Benefit Plan Considerations When Discharging Employee

Given an employer's multiple roles in the employment and benefits context, an attorney must consider who is the client, the role in which the client is acting, and whether the attorney's advice is privileged or subject to disclosure under the fiduciary exception to the privilege. This is because an employer's decision to terminate an employee may not only invoke employment and labor laws, but may also trigger issues under retirement, health and welfare, severance, or equity compensation plans. Consequently, during the course of an employer's decision to terminate an employee's employment, the employer may act not only as the employer, but also as a plan settlor or fiduciary. Determining which role the employer is acting is important because an attorney's advice to an employer acting as a fiduciary to an employee benefit plan may not be protected by the attorney-client privilege or work-product doctrine. It is also important to determine whether the plans are subject to ERISA because plans not covered under ERISA may or may not carry fiduciary obligations. [3] As discussed in more detail later in this paper, it may be necessary for an attorney to segregate communications to a client who is acting in the employer role, such as the decision to terminate an employee's employment, from communications to the client acting in an ERISA fiduciary capacity who will make decisions concerning

the same employee/plan participant's entitlement to benefits under an ERISA-qualified severance pay plan.

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[3] For example, state and local government plans and church plans exempt from ERISA are not subject to ERISA's fiduciary duties, but may be subject to fiduciary duties under state laws.

Advising an ERISA Plan Administrator

As discussed in the preceding example, labor and employment attorneys often provide advice concerning employee benefits in an employment separation context, which may also include disputes regarding rights to severance payments and to other employee benefits, privileges, or rights. The employment lawyer working with an employer regarding an employment termination dispute may not realize that, when the client moves to address ERISA benefit claims, the client is no longer acting in the role of employer, but has switched to a new role of a plan administrator, a fiduciary. Moreover, an ERISA plan administrator who seeks legal advice regarding communications to plan beneficiaries is also acting in a fiduciary capacity.

As discussed in "The Fiduciary Exception" section below, the advice the administrator receives may not be protected by the attorney-client privilege because, when the employer acts as an ERISA plan fiduciary, the legal advice the employer seeks may be discoverable by a plan participant or beneficiary because the employer—as plan administrator—is acting in a fiduciary capacity under ERISA and must act in the best interest of plan participants. Thus, what may have been thought to be advice to the employer, in a retrospective review by a court, may be viewed as advice to a fiduciary that must be disclosed to all plan participants and beneficiaries should a dispute arise.

Settling a Claim

Tricky issues also arise when an attorney attempts to settle a benefits claim under an ERISA plan. An attorney must consider the impact of (i) various potentially applicable statutes and rules; and (ii) the privilege/fiduciary exception when handling an employee's dispute. If the dispute relates to a plan for a member of a collective bargaining unit, governed by the Railway Labor Act, the attorney must consider not only the plan, but the collective bargaining agreement and whether the dispute involves a collectively bargained plan and the terms of the collective bargaining agreement. [4] Settling the claim with the plan is settling the claim with an entity other than the employer. [5] This involves a plan administrator decision or potentially a fiduciary act. If, however, the employer offers to settle the dispute outside the plan, other issues arise.

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[4] While ERISA claims clearly belong in the ERISA claims process under the Labor-Management Relations Act (LMRA) (See *NLRB v. Amex Coal Co.*, 453 U.S. 322 (1981) and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)), this issue has not been finally decided under the Railway Labor Act (45 U.S.C. §151 *et seq.*) which contains its own preemption provision for handling disputes.

[5] ERISA §502(d)(1), 29 U.S.C. §1132(d)(1).

If the employer settles the claim outside the plan, the employer is not acting as a fiduciary of the plan, but as the employer. While this may help to preserve the attorney-client privilege by removing the communications from the fiduciary exception to the privilege, it nevertheless raises additional issues. For example, direct settlement outside of the plan with a represented union member may constitute negotiating directly with a represented individual, potentially in violation of the collective bargaining agreement. This could also result in the settlement being viewed as additional compensation paid to the represented employee beyond the terms of the collective bargaining agreement and, in some cases, in violation of the agreement or a requirement to maintain the status quo under the agreement.

As each of the preceding examples demonstrates, given the interrelationship of the labor, employment, and employee benefits practice areas and how the changing roles of the same employer may result in different legal obligations, attorneys need to be particularly mindful of the impact of the advice they render.

Attorney-Client Privilege

The next sections of this article look at recent case law developments related to the attorney-client

privilege and work-product doctrine protections and the limits on these protections.

Privilege Basic Requirements

The attorney-client privilege belongs to the client, and the client must claim that the privilege applies to a communication. To claim the attorney-client privilege, a party must satisfy an eight-part test that requires the record to show that:

- legal advice of any kind is sought,
- the advice is from a professional legal adviser in his capacity as such (this requires licensure as an attorney),
- the communications relate to or are for the purpose of seeking legal advice from the professional legal adviser,
- the communications in question for which protection is sought were made in confidence between the client and the legal adviser,
- the communications requesting legal advice from the legal adviser were made by the client,
- the communications were made at the client's instance,
- the communications are permanently protected from disclosure by the client or by the legal adviser, and
- the privilege protecting the communications is not subject to waiver.

In the simplest form, the client must request legal advice from a lawyer in confidence, and the lawyer must provide the requested legal advice in confidence to the client. In turn, the advice must not be disclosed beyond those working for or representing the client who needs to know. When privilege is claimed, the party claiming the privilege must demonstrate that all of the above elements are satisfied concerning each communication for which the privilege is claimed. The requirements should be established and demonstrated in the record of the communications to best protect the client's claims of privilege and work-product protection. It is duty of the party claiming the privilege to establish in its privilege log (if in litigation) that the requested communications are privileged. [6] Thereafter, the party seeking disclosure must overcome the privilege claims or demonstrate that the fiduciary exception applies. [7]

[6] Fed. R. Civ. P. 26(b)(5)(A); *see also King v. Univ. Healthcare Sys.*, 645 F.3d 713, 52 EBC 2454 (5th Cir. 2011); *NLRB v. Interbake Foods LLC*, 637 F.3d 492 (4th Cir. 2011).

[7] *Clarke v. Unum Life Ins. Co.*, 799 F. Supp. 2d 527 (D. Md. 2011).

Only Legal Advice Is Protected

The attorney-client privilege requires that the advice must be legal advice. Business advice is not protected. This an area of particular risk for in-house counsel who are frequently asked for business advice in addition to legal advice or for a mixture of legal and business advice on a problem the business faces. [8] One strategy, while good theoretically, is to separate the business advice from the legal advice; however, practically this may not always be an alternative. For example, in the context of an employee's separation in which an employer may be acting as the employer and also as a plan fiduciary, the attorney may need to segregate advice regarding the employer's actions as an employer from advice to the employer regarding its actions as an ERISA plan fiduciary related to the same termination of employment.

[8] *Fisher v. U.S.*, 425 U.S. 391 (1976).

Identification of the Client

To protect the attorney-client privilege, an attorney must identify who is the client and the capacity in

which the client is acting. This is important because the role in which the client is acting may change whether an attorney's advice is protected by privilege or the work-product doctrine. This is further complicated by the factual scenarios in which the same client may act in many different roles. In *Varity Corp. v. Howe,* [9] the Supreme Court recognized that the same entity may act in multiple roles, including acting as employer, settlor, or fiduciary to plan participants, which carries other special obligations. In *Varity Corp.*, the corporation sought to reduce its obligations with respect to retirees by spinning off the retiree benefits to a separate subsidiary. The subsidiary taking over the retiree benefits was insolvent from its inception; nevertheless, Varity Corp. told the employees and retirees that this was a good transaction and their benefits would be fine. Shortly after the spinoff, the spun-off entity filed for bankruptcy, the retiree medical benefits terminated, and the retirees brought an action against Varity Corp. The Supreme Court recognized that, although some of Varity Corp.'s actions were settlor functions, its communications to the retirees and employees about the to-be-spun-off entity assuming their benefit plans and about their benefits prospects were functions performed as a plan administrator and fiduciary. The Supreme Court found that Varity Corp. acted in multiple capacities as employer and plan administrator and as plan administrator it lied to its participants when communicating as a fiduciary and thus was liable for breach of fiduciary duty. Hence, one party may act in multiple capacities, some of which are fiduciary.

[9] *Varity Corp. v. Howe*, 516 U.S. 489, 19 EBC 2761 (1996).

Identifying who is the client can be critical in other situations, such as in internal investigations. In a recent stock-options backdating investigation, attorneys for the company explained to employees that they represented the entity in the investigation and not individual employees, who were free to seek their own counsel. [10] An employee later was unable to claim attorney-client privilege in a subsequent criminal prosecution based on his statements made during the investigation because the attorneys had clearly stated that they represented the company and not any of the individuals. Thus, it is important that your client and any party who might believe he or she is part of the client is plainly identified and documented. Identifying who is the client is also important so the employees know if they need to seek their own representation.

[10] *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

Identifying who is the client and the role in which the client is acting also becomes important to preserving privilege by preventing waiver through disclosure to nonclients. For example, in *Steelworkers v. IVACO Inc.*, [11] a union's in-house counsel provided the union members his memorandum prepared for the union on the union's potential causes of action against the employer for terminating its retiree medical plan. The union's in-house counsel failed to recognize that his client was the union, not the individual union members. Accordingly, his disclosure of the memorandum to the union members was disclosure to nonclients, and privilege no longer applied to the memorandum after it was disclosed to persons who were not his client. Thus, failure to identify the client and to limit disclosure of the advice to the client resulted in the loss of privilege.

[11] *United Steelworkers of Am., AFL-CIO v. IVACO*, No. 1:01-CV-0426-CAP, 29 EBC 2897 (N.D. Ga. Jan. 13, 2003) (17 PBD, 1/28/03;30 BPR 285, 2/4/03).

The Fiduciary Exception

The fiduciary exception to the attorney-client privilege developed to address situations in which a party acts in a fiduciary capacity with respect to a plan or trust. Under these circumstances, courts view the advice to the fiduciary as advice to benefit the beneficiaries; thus, this advice is available to the beneficiaries under the fiduciary exception to the attorney-client privilege. For example, an ERISA plan administrator who seeks legal advice regarding communications to plan beneficiaries is acting in a fiduciary capacity; thus, the advice the administrator receives would be discoverable pursuant to the fiduciary exception to the attorney-client privilege. The U.S. Supreme Court recently recognized the fiduciary exception to the attorney-client privilege in the context of a non-ERISA trust. [12] The case considered the fiduciary capacity of the United States in holding funds for the Jicarilla Apache Nation as an Indian tribe. The high court recognized the existence of the fiduciary exception; however, the court did not apply the exception to the U.S. government because the interests of the beneficiaries (the members of the Jicarilla Apache Nation) diverged from the government and the government was not acting as a representative of the tribe when it received advice of counsel.

[12] *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

Consequently, if the party in question is acting in the capacity of a fiduciary and the communication would otherwise meet the requirements for attorney-client privilege, the next step is to determine whether the fiduciary exception would apply. Courts have interpreted and applied the exception in a variety of ways since the U.S. Court of Appeals for the Second Circuit decided the primary decision involving ERISA plans and privilege, namely, *In re Long Island Lighting Co.* [13] Whether the fiduciary exception applies varies by the types of documents the court reviews and the point at which the dispute arises in the claims adjudication process, in appeals, or in a litigation context.

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

As a threshold matter, the fiduciary exception applies when the client is acting as a fiduciary. The client may be acting as a fiduciary when an ERISA plan administrator makes decisions on claims and, in some jurisdictions, on appeals. For instance, a client may be acting as a fiduciary when it is part of an ERISA plan committee making decisions on plan claims, plan investments, a self-directed retirement plan's designated investment alternatives, or communications to plan participants. The client could be part of the employer's human resources department or any other department or division of the employer involved in communications to participants. This may include an employee relations department when making communications regarding employee benefit plans subject to ERISA or responding to inquiries regarding transactions, window programs, and other events impacting benefit plans. Moreover, a client may engage in a fiduciary action outside the ERISA plan context, such as when a company board acts in a fiduciary capacity with respect to the company's shareholders. [14] Thus, the role in which the client is acting is key to determining whether privilege or work-product protections apply.

[14] *Weiser v. Grace*, 683 N.Y.S.2d 781 (N.Y. Sup. Ct. 1998).

However, not all advice to a fiduciary is subject to the fiduciary exception and discoverable. Fiduciaries may receive advice that is protected by privilege in certain circumstances—these limits to the fiduciary exception were developed to define those situations in which a fiduciary may seek legal advice and rely on the attorney-client privilege to protect that advice from disclosure and are discussed later in this article. Some courts, however, have not applied the limitations to the fiduciary exception when the employer could not establish that the documents in question were fully unrelated to plan administration and had not been used in connection with a defendant's role as plan administrator. [15] All the elements for claiming the privilege and avoiding the application of the fiduciary exception are fairly similar in most jurisdictions concerning fundamental requirements, but there are some variations.

[15] *Everett v. US Air Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995).

Fiduciary Acts ersus Settlor Acts

In attempting to preserve the privilege after establishing that the attorney-client privilege applies, an attorney must not only know who the client is, but also understand in what capacity the client is acting when the advice is sought. This is because an ERISA plan sponsor may act in more than one capacity with respect to a plan. [16] The nature of the party's actions and the capacity in which the party acts will determine whether the fiduciary exception may apply to advice that otherwise is protected by attorney-client privilege. The client, however, must be acting in a fiduciary capacity for the fiduciary exception to apply. Plan amendment, design, and modifications constitute settlor functions and are not fiduciary acts. [17] Thus, if the individual or entity is acting as a settlor, the fiduciary exception should not apply. [18]

[16] *Varity Corp. v. Howe*, 516 U.S. 489, 19 EBC 2761 (1996).

[17] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 22 EBC 2265 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 20 EBC 1257 (1996); *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 34 EBC 1875 (7th Cir. 2005)(51 PBD, 3/17/05;32 BPR 681, 3/22/05).

[18] The fiduciary exception does not apply to the amendment or termination of a benefit

plan. *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 34 EBC 1875 (7th Cir. 2005)(51 PBD, 3/17/05;32 BPR 681, 3/22/05); *see also Beesley v. International Paper Co.*, Civ. No. 06-703-DRH, 44 EBC 2837 (S.D. Ill. June 3, 2008).

In turn, if the plan is not an ERISA employee benefit plan, a fiduciary duty may not apply. Executive compensation plans are frequently not plans subject to ERISA and, therefore, do not carry with them the fiduciary duties under ERISA. This was recognized in a recent case in the U.S. Court of Appeals for the Seventh Circuit in which an executive asserted that the fiduciary exception should require disclosure of all legal advice provided to the company; the court, however, concluded that the fiduciary exception did not apply because top-hat plan administrators were not subject to the fiduciary requirements of ERISA. [19] Absent any fiduciary duties related to a non-ERISA severance plan, the advice was not for the benefit of the beneficiaries of the non-ERISA plan. [20]

[19] *Marsh v. Marsh Supermarkets, Inc.*, No. 1:06-cv-1395-JDT-TAB, 41 EBC 1110 (S.D. Ind. Mar. 29, 2007)(76 PBD, 4/20/07;34 BPR 1024, 4/24/07).

[20] Some non-ERISA plans may still have fiduciary obligations under other laws, such as state laws for nonfederal governmental plans.

Limits on the Fiduciary Exception

While the recognition of the fiduciary exception to the attorney-client privilege seems to be increasing, courts are also recognizing a number of limits on the fiduciary exception. The next sections consider some limitations and permutations on the fiduciary exception.

The Fiduciary s Personal Civil or Criminal Liability

The fiduciary exception likely will not apply when the fiduciary is seeking advice to defend itself or to avoid civil or criminal liability. [21] The U.S. Court of Appeals for the Ninth Circuit limited the application of the fiduciary exception and did not permit discovery of legal advice sought by the trustee to defend itself against allegations by plan beneficiaries that the trustee had personally stolen from the pension plan.

[21] *United States v. Wiseman*, 274 F.3d 1235 (9th Cir. 2001); see also *United States v. Mett*, 178 F.3d 1058, 23 EBC 1081 (9th Cir. 1999)(26 BPR 1545, 6/7/99).

When Interests Diverge

Additionally, the fiduciary exception is limited when interests diverge, and this divergence occurs at varying points in the claims process. [22] Courts vary on when interests diverge enough to be sufficiently adverse. Several courts have looked to whether counsel has been retained by either party, the timing of the appeal, whether the initial claim was denied, and whether an appeal has been denied. For example, in *Geissal v. Moore Medical Corp.*, [23] the appeals court addressed *when* in the claims process an attorney's advice concerning whether to extend Consolidated Omnibus Budget Reconciliation Act coverage was discoverable. The *Geissal* decision followed extensive litigation regarding whether Geissal's deceased husband was entitled to COBRA continuation coverage under Moore Medical Corp.'s group health plan. After Geissal won the coverage issue, she sued again and sought to discover in the subsequent litigation the advice Moore Medical Corp.'s counsel had provided regarding her husband's initial claim. The court examined the advice both before the initial denial of her husband's claim and after the denial. The district court found the interests of the plan beneficiary and the plan administrator were adverse after the plan administrator determined to deny her husband's initial claim for COBRA continuation coverage; therefore, the post-denial advice was protected by the attorney-client privilege.

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

[23] *Geissal v. Moore Med. Corp.*, 192 F.R.D. 620, 24 EBC 2805 (E.D. Mo. 2000) (27 BPR 1035, 4/18/00).

In contrast, in *Stephan v. Unum Life Ins. Co.*, [24] the Ninth Circuit recently held that the fiduciary exception applies until the final denial upon the appeal of the claim is issued. The Ninth Circuit's decision will impact in-house counsel who frequently provide advice to plan administrators or

fiduciaries during the claim and appeal process, and before the final adverse benefit determination is issued. Some other recent interpretations on when interests diverge are explored below because, while the Ninth Circuit has adopted a "final denial" standard for determining when interests diverge sufficiently to stop application of the fiduciary exception to the attorney-client privilege, not all circuit courts have established such a bright-line rule. It is unclear how this final denial-upon-appeal standard will work with health care reform's mandated external review process for some medical plan claims. Will the external review be the final denial upon appeal or will the final appeal prior to the external review be the final denial upon appeal?

[24] *Stephan v. Unum Life Ins. Co.*, No. 10-16840, 54 EBC 1887 (9th Cir. Sept. 12, 2012) (177 PBD, 9/13/12;39 BPR 1767, 9/18/12).

In *Theis v. Life Insurance Co. of North America*, [25] an email sent after the claim was denied but before the appeal was filed is subject to the fiduciary exception, even though the plaintiff had consulted an attorney in the appeal process. Similarly, in *Holmes v. Bethlehem Steel Corp. Pension Plan*, [26] a memorandum prepared by an attorney in the claims administration process regarding whether interest should be credited on a delayed payment of a pension benefit was not privileged. The court applied the fiduciary exception and concluded that the memorandum was also not protected as work product because it was not prepared in anticipation of litigation.

[25] *Theis v. Life Ins. Co. of N. Am.*, 769 F. Supp. 2d 908 (W.D. Ky. 2011).

[26] *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F. 3d 124, 24 EBC 2243 (3rd Cir. 2000)(27 BPR 1353, 5/30/00).

In *Clarke v. Unum Life Insurance Co. of Am.*, [27] a participant was receiving long-term disability benefits when the insurer stopped the benefit payments. The participant appealed the cessation of benefits and brought a declaratory action that she was entitled to the benefit, during which she sought discovery of the insurer's administrative record on the claim. The documents in question were communications between the insurer and its counsel before the filing of the lawsuit seeking the declaratory judgment. Nevertheless, the court found that the privilege log established these documents were privileged and that the plaintiff failed to demonstrate that the fiduciary exception applied to them. In contrast, in *Moss v. Unum Life Insurance Co. of Am.*, [28] the court concluded that communications after the claim was denied and that were related to the litigation were not subject to the fiduciary exception because they were prepared in anticipation of litigation.

[27] *Clarke v. Unum Life Ins. Co.*, 799 F. Supp. 2d 527, 52 EBC 2179 (D. Md. 2011)(190 PBD, 9/30/11; 38 BPR 1831, 10/4/11).

[28] *Moss v. Unum Life Ins. Co.*, 5:09-CV-209, 50 EBC 1984 (W.D. Ky. Jan. 28, 2011)(21 PBD, 2/1/11).

Litigation Exception

The U.S. Court of Appeals for the Fifth Circuit has established that, after a complaint is filed in court following the internal claims review and appeal process under ERISA, the communications between in-house and outside counsel with the plan committee are protected under the attorney-client privilege because there is no longer any mutuality of interest between the participants suing the plan and the plan fiduciaries. [29] The fiduciary exception also does not apply to communications between a fiduciary and litigation counsel involving the litigation counsel's advice to the fiduciary to defend the lawsuit because the advice relates to defense of the action and not to plan administration. [30] Therefore, litigation counsel should strive to keep advice regarding ongoing litigation segregated from other advice litigation counsel may provide to the employer acting as a plan administrator concerning ongoing plan administrative issues that may be subject to the fiduciary exception.

[29] *Wildbur v. Arco Chem. Co.*, 974 F.2d 631, 16 EBC 1235 (5th Cir. 1992).

[30] *Id.*

Similarly, the court in *Belluardo v. Cox Enterprises Inc. Pension Plan* concluded that, once litigation was filed against a plan administrator, the communications between counsel and the plan

administrator were protected as privileged. [31] Several courts, however, have not applied this "litigation" limitation on the fiduciary exception when the employer could not establish that documents were wholly unrelated to plan administration and had not been used in connection with defendant's role as plan administrator. [32]

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[31] *Belluardo v. Cox Enterprises Inc. Pension Plan*, 157 F. App'x 823, unpub'd, 36 EBC 1742 (6th Cir. 2005) (225 PBD, 11/23/05;32 BPR 2594, 11/29/05).

[32] *Everett v. U.S. Air Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995).

Select Cases Applying the Fiduciary Exception

Several district courts have reviewed the factual circumstances when the fiduciary exception to the attorney-client privilege applies, thus requiring disclosure of otherwise protected attorney-client privileged communications or attorney work product. Courts conduct their review and analysis on an individualized document/communication basis and examine several factors to determine whether any limitations on the fiduciary exception may apply. These factors include:

- who requested the advice,
- whether legal advice was provided and maintained as confidential,
- when the legal advice was requested,
- at what point in the proceedings it was requested, and
- how adversarial the relationship was between the plan participant and plan fiduciaries.

For example, the fiduciary exception was applied in a recent case related to disputed pension plan calculations requiring a number of actuarial valuations. [33] The court examined numerous communications to decide whether they were protected by the attorney-client privilege or the work-product doctrine. In reviewing the privilege log, the court concluded as follows: (i) emails conveying legal advice with respect to terminated vested plan participants and their potential litigation fell within the litigation limitation and were not discoverable; but (ii) an attorney's communication to a committee member regarding benefit overpayments and a request to have those amounts repaid were only considered accounting issues related to the administration of the plan and, therefore, were not covered by the attorney-client privilege because they related to plan administration, a fiduciary function. [34]

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[33] *Cotillion v. United Ref. Co.*, 279 F.R.D. 290 (W.D. Pa. 2011).

[34] *Cotillion v. United Ref. Co.*, 279 F.R.D. 290 (W.D. Pa. 2011); *see also Trs. of Elec. Workers Local No. 2 Pension Trust Fund v. Trust Fund Advisors Inc.*, 266 F.R.D. 1, 48 EBC 2138 (D.D.C. 2010)(30 PBD, 2/17/10; 37 BPR 420, 2/23/10).

One strategy for trying to prevent disclosure of privileged communications is to isolate communications related to plan administrator or settlor functions from those related to fiduciary functions by using separate legal counsel for each. This will likely avoid overlapping or intermingled legal advice for the different settlor, plan administration, and litigation functions so as to preserve the protection of privileged communications.

Accordingly, when representing an employer regarding changes to a plan via a plan amendment or a plan amendment necessitated by a change in the collective bargaining agreement (for example, when the collective bargaining agreement changes the way in which vacation is accrued that may impact the plan's calculation of service based on changes in the application of Department of Labor rules on service crediting), and also representing the employer on other issues related to the plan, an attorney should keep the advice related to the plan segregated from any advice regarding communications to the employees on plan benefits or changes. If the communication relates to plan amendments, an attorney should make clear that the communication relates solely to plan amendments—a settlor function—and does not relate to any fiduciary act and, therefore, is not discoverable under the fiduciary exception to the attorney-client privilege. [35]

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[35] *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 34 EBC 1875 (7th Cir. 2005) (51 PBD, 3/17/05;32 BPR 681, 3/22/05); *see also Tolbert v. RBC Capital Markets Corp.*, No. H-11-0107, 53 EBC 2549 (S.D. Tex. Mar. 28, 2012)(62 PBD, 4/2/12; 39 BPR 652, 4/3/12).

Nevertheless, the "segregation" of attorney advice is not foolproof and does not avoid judicial review of each attorney-client communication. For example, a company segregated its advice for different functions to separate counsel, and it appeared to be fairly well-segregated. Nevertheless, when the company was sued on its defined benefit plan benefit calculation and the company sought from litigation counsel an interpretation of the plan's provisions and the calculation methodology used under those provisions, the court ordered the disclosure of the communication even though it was a communication with litigation counsel. The court concluded that the advice was subject to the fiduciary exception because the advice related to plan interpretation, construction, and benefit calculations, which are all plan administration functions. [36]

[36] *Gill v. Bausch & Lomb Supplemental Ret. Income Plan I*, No: 6:09-CV-06043-CJS, 53 EBC 2851 (W.D.N.Y. June 12, 2012) (115 PBD, 6/15/12;39 BPR 1183, 6/19/12).

Fiduciary Exception and Insurance Companies

Circuits are split on an insurance company's status as a fiduciary with respect to an insured plan. The U.S. Court of Appeals for the Third Circuit in *Wachtel v. HealthNet Inc.* [37] and the Ninth Circuit in *Stephan v. Unum Life Ins. Co.* [38] considered whether an insurer making claim decisions is acting in a fiduciary role with respect to the insured plans. The Third Circuit viewed the advice from an insurer's attorney to the insurer on the usual and customary data for the reimbursement of claims as not discoverable under the fiduciary exception because the insurer is separate from the plan fiduciary. The Third Circuit further explained that the law regarding an insured plan and the insurance company's status with respect to the plan is not clearly developed. Thus, the fiduciary exception cannot currently be used in the Third Circuit to require disclosure of privileged advice from an insurer's attorney to the insurer because the Third Circuit has not found an insurer to be a fiduciary with respect to an insured plan. [39] Nevertheless, in the more recent Ninth Circuit decision in *Stephan*, [40] the appeals court concluded that the insurer was a fiduciary of a long-term disability plan and applied the fiduciary exception to permit disclosure of internal communications of the insurer's in-house attorney to the insurer's managers after the initial claim for disability benefits was denied in part. The Ninth Circuit found that the fiduciary exception applied to the insurer's in-house counsel's memorandum on how the policy should be interpreted after the plaintiff's attorneys contacted Unum but before the final denial on the appeal was issued. In the appeals court's view, the fiduciary exception applies until the final determination is issued.

[37] *Wachtel v. HealthNet Inc.*, 42 F.3d 225, 40 EBC 1545 (3rd Cir. 2007)(63 PBD, 4/3/07; 34 BPR 856, 4/10/07).

[38] *Stephan v. Unum Life Ins. Co.*, No. 10-16840, 54 EBC 1887 (9th Cir. Sept. 12, 2012) (177 PBD, 9/13/12;39 BPR 1767, 9/18/12).

[39] *Wachtel v. HealthNet Inc.*, 42 F.3d 225, 40 EBC 1545 (3rd Cir. 2007) (63 PBD, 4/3/07; 34 BPR 856, 4/10/07).

[40] *Stephan v. Unum Life Ins. Co.*, No. 10-16840, 54 EBC 1887 (9th Cir. Sept. 12, 2012) (177 PBD, 9/13/12;39 BPR 1767, 9/18/12).

In contrast, courts in the U.S. Court of Appeals for the Sixth Circuit have not considered whether an insurer can or cannot be a fiduciary with respect to a plan, and, as a result, the fiduciary status of the insurer is not frequently analyzed. But the fiduciary exception is applied in the insured plan cases. For example, in *Moss v. Unum Life Ins. Co.*, [41] the fiduciary exception was found not to apply to communications after a claim was denied, but was still in the appeal process, because the court found that there was no reason to apply the fiduciary exception to all fiduciaries in the same way. The fiduciary exception did not apply to documents created before the final benefit denial determination because the documents were prepared in contemplation of litigation; hence, they were privileged and not subject to the fiduciary exception. The *Moss* court explained in dicta that it did not adopt the reasoning of *Wachtel* and that no statutory basis existed for applying the fiduciary exception to all fiduciaries except insurers.

[41] *Moss v. Unum Life Ins. Co. of N. Am.*, 5:09-CV-209, 50 EBC 1984 (W.D. Ky. 2011)(21 PBD, 2/1/11).

Generally, communications generated before the claim is denied are subject to the fiduciary exception; however, the district court in *Bu anga v. Life Ins. Co. of N. America* concluded that documents generated after a claim was denied and in response to an appeal filed by the participant's attorney were protected by the attorney-client privilege. [42] Yet, in a later case in the same district court just 14 months later, the court found that advice provided at the same time in the ERISA claim and appeal procedure time line was not privileged. [43] The difference appears to be that in *Bu anga* the employee waited one year to file her appeal; thus, the court determined that the initial benefit denial had become a final determination. In *Carr*, however, the employee filed his appeal more rapidly (*i.e.*, on a timely basis), and advice provided in emails by the in-house counsel relating to the appeals process, which were generated after the initial claim denial, were not privilege protected, but rather were subject to the fiduciary exception, because Carr's interests were not sufficiently divergent from the plan administrator's. However, emails counsel later sent regarding the drafting of the final denial letter were privileged and not subject to the fiduciary exception because the parties' interests were then sufficiently adverse. [44] The decisions in *Carr* and *Bu anga* occurred at the same time in the appeal process, after the initial denial, but were treated entirely differently. This difference in treatment demonstrates how factually sensitive these determinations are for each communication, especially when the federal circuit court has not established a bright-line precedent for the circuit.

[42] *Bu anga v. Life Ins. Co. of N. Am.*, 76 Fed. R. Serv. 3d 794, 49 EBC 1032 (E.D. Mo. 2010) (65 PBD, 4/7/10;37 BPR 851, 4/13/10).

[43] *Carr v. Anheuser-Busch Co.*, 791 F. Supp. 2d 672, 51 EBC 2206 (E.D. Mo. 2011) (110 PBD, 6/8/11;38 BPR 1127, 6/14/11).

[44] *Id.*

Other courts reviewing insurer decisions have not always reviewed the role of the insurer and attempted to determine whether it was acting as an insurer or whether it was a fiduciary to the ERISA plan. This difference in analysis has led to different case law results. The following cases review the application of the fiduciary exception in other insured plans when a benefit plan's benefits are provided through a fully-insured insurance policy.

In *Hooper v. Unum Life Ins. Co.*, [45] the court looked at claims of privilege and the fiduciary exception in the context of plans whose benefits are provided via fully insured policies. In four communications between the insurance company and its in-house lawyers, the district court determined that the communications were made before the final decision to deny benefits was made and, as a result, were not protected. All four documents were discoverable because they were part of the claims administration process and concerned Unum's activities in deciding claims under the insurance policy in its fiduciary capacity. The case did not consider whether the insurance company is a fiduciary with respect to an ERISA plan, but solely analyzed whether the claim had been decided. [46]

[45] *Hooper v. Unum Life Ins. Co.*, No. 5-11-cv-624-Oc-10TBS, (M.D. Fla. Apr. 24, 2012) (84 PBD, 5/2/12).

[46] *Id.*

In *Bu anga*, discussed previously, the court decided that three communications generated before the claim was denied were not protected by the work-product doctrine because they fell within the fiduciary exception to the attorney-client privilege and were made while the company was acting on behalf of plan beneficiaries as a plan administrator. The fourth document, generated in response to an appeal by the participant's attorney, was protected by attorney-client privilege because the prospect of litigation at that time was sufficient to invoke the privilege, in part because counsel had been retained. [47] While this court permitted the privilege claim to stand, the court's rationale to support nondisclosure is not clear, namely whether the fiduciary exception did not apply or whether a limitation to the exception applied.

[47] *Bu anga v. Life Ins. Co. of N. Am.*, 76 Fed. R. Serv. 3d 794, 49 EBC 1032 (E.D. Mo. 2010) (65 PBD, 4/7/10;37 BPR 851, 4/13/10).

In *Moore v. Metropolitan Life Ins. Co.*, the putative beneficiary filed a lawsuit alleging she was entitled to life insurance proceeds after her common law husband died and she sought production of certain documents related to the administrative review of her claim. One of the documents she sought was prepared before the plaintiff had retained counsel. Consequently, the court determined that no inference existed and that the parties' interests had diverged before the time she retained counsel; accordingly, the document was subject to the fiduciary exception and must be disclosed.

Further, three documents were prepared after the lawsuit commenced but while the insurance company was still administratively considering the plaintiff's claim for benefits. Because making a benefits claim determination is a fiduciary act, the fiduciary exception applied. Moreover, the three documents did not reveal the authors' concern about the fiduciary's civil or criminal liability in any personal capacity, and the advice was sought on a matter of plan administration. Therefore, the documents were required to be produced even though they were prepared after litigation had commenced. [48] The court did not discuss whether the insurer was a fiduciary to the plan when making claim determinations under the insurance policy funding the plan's benefits.

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[48] *Moore v. Metro. Life Ins. Co.*, 799 F. Supp. 2d 1290 [52 EBC 1475] (M.D. Ala. 2011)(136 PBD, 7/15/11; 38 BPR 1348, 7/19/11).

In *Harvey v. Standard Insurance Co.*, [49] the Northern District of Alabama applied a different analysis to find that an in-house attorney's documents prepared in reviewing a claim after it had been denied is part of the insurance company's administrative review of the participant's claim, thus the documents were not protected by the work-product doctrine. The court also reasoned that, even if these documents constituted work product, they were subject to the fiduciary exception because these were communications related solely to ERISA plan administration. The court again did not consider whether the insurance company was acting as an ERISA fiduciary. [50] Similarly, emails and memos from the in-house attorney created long before the disability claimant filed the action were discoverable under the fiduciary exception because they were related to plan administration. By contrast, the email communications regarding overpayments created after the lawsuit was filed were protected by the attorney-client privilege and were not required to be produced. [51]

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[49] *Harvey v. Standard Ins. Co.,* 275 F.R.D. 629, 52 EBC 2185 (N.D. Ala. 2011).

[50] *Id.*

[51] *Coffman v. Metro. Life Ins. Co.*, 204 F.R.D. 296 (S.D. W. Va. 2001)(188 PBD, 9/28/11;38 BPR 1824, 10/4/11).

Impact of Inclusion of a Third Party in Privilege Preservation

Whether inclusion of an outside party on an attorney-client communication waives privilege may depend on the relationship of the outside party to the client and to the attorney, whether the parties' interests had sufficiently diverged, and the jurisdiction hearing the case. In *Cotillion v. United Refining Co.*, [52] the district court reviewed a host of attorney-client communications, including some involving third parties, to determine whether the communications were protected under the attorney-client privilege. The court reviewed each document and communication individually to determine whether it was an attorney-client privileged communication or protected by the work-product doctrine and whether the fiduciary exception applied to each. For example, communications among the actuary, inside and outside counsel, plan committee members, and other consultants discussing an ongoing Internal Revenue Service correction submission, subsequent complaints from beneficiaries, and potential legal strategies regarding the correction submission were privileged. But documents between the actuary and outside counsel relating to communications to plan participants regarding benefits were not protected because they related solely to plan administration functions, thus fell within the fiduciary exception and were discoverable. [53] Similarly, communications from a consultant to the actuary regarding a reduction in benefits and other communications to plan participants were not privileged because no requested legal advice was involved nor were the communications prepared in contemplation of litigation. [54]

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[52] *Cotillion v. United Ref. Co.*, 279 F.R.D. 290 (W.D. Pa. 2011).

[53] *Id.* (discussing document A-45).

[54] *Id.*

The *Cotillion* court also reviewed a variety of memoranda and other communications regarding actuarial calculations performed with respect to the plan. Regarding some of these memoranda, the *Cotillion* court found:

- Advice regarding plan amendments, which had been drafted by the actuary, constituted advice regarding a settlor function and not a fiduciary function and, as a result, were privileged.

- The actuarial calculation of benefits requested by the outside attorney with respect to the litigation was protected as work product.

- Letters prepared by the outside counsel in response to a request by independent auditors were not privileged.

Thus, each document must plainly reflect that counsel is providing legal advice at the request of the client or that it is prepared by the attorney or his designee in anticipation of litigation. Each document must stand alone and independently establish it is entitled to treatment as a privileged communication or as work product.

Impact of Presence of Persons Other Than the Attorney and Client

The attorney-client privilege requires that the party request advice from a licensed attorney, that the communications must be made in confidence between the attorney and client, and that the client must not waive the privilege. Different courts have reviewed whether the presence of a party other than the client and the attorney destroys the confidential nature of the communications and the privilege. For example, in *Trustees of Electrical Workers Local No. 2 Pension Trust Fund v. Trust Fund Advisors Inc.*, [55] the client retained a consultant who filled the role an employee would have held with respect to an ERISA plan and who was present in meetings with the attorney regarding the litigation. The court reasoned that including the nonemployee consultant did not defeat the privilege because the attorney worked with the consultant in the same way the attorney worked with the client's full-time employees and because the consultant was fulfilling the role that would have been filled by the client's employee. [56]

[55] *Trs. of Elec. Workers Local No. 2 Pension Trust Fund v. Trust Fund Advisors Inc.*, 266 F.R.D. 1, 48 EBC 2138 (D.D.C. 2010)(30 PBD, 2/17/10; 37 BPR 420, 2/23/10).

[56] *Id.*

Protecting Work Product sing the Work-Product Doctrine

For a document or communication to be protected as attorney work product, it must be:

- produced in anticipation of litigation;

- produced by or under the direction or request of the licensed attorney for the litigation;

- not produced as part of something used to prepare financial statements filed with the Securities and Exchange Commission or similar government agency;

- not disclosed to a third party; and

- not subject to any exception, such as the fiduciary exception, the crime/fraud exception, or the extraordinary need exception.

[57] Work-product protection was designed to protect an attorney's thoughts, mental impressions, strategies, and work in preparation for litigation. The party claiming the protection of the work-product doctrine bears the burden of proving that the protection applies. [58]

[57] *Hickman v. Taylor*, 329 U.S. 495 (1947).

[58] *Holmes v. Bethlehem Steel Corp. Pension Plan*, 24 EBC 2243, 24 EBC 2243 (3rd Cir. 2000)(27 BPR 1353, 5/30/00).

Once a document or communication is protected by the work-product doctrine, it may either be "fact work product" or "opinion work product." Opinion work product covers those documents or communications reflecting thoughts or opinions of the attorney involved in the litigation. Nevertheless, documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents or information in preparing his report. [59]

[59] *In re Hi-Bred Int'l. Inc.*, 238 F.3d 1370 (Fed. Cir. 2001).

Several recent court decisions illustrate the work-product doctrine's protection. Work-product protection for some documents was considered in *Cotillion* as well as in *Everett v. U.S. Air Group*. In *Cotillion*, the court carefully reviewed the purpose for which each document was prepared and rejected work-product protection for communications related to plan administration, communications to plan auditors, and communications regarding the pension plan funding/actuarial valuations because these were not prepared in anticipation of litigation, but rather in the ordinary course of the plan's business. [60] In *Everett*, the court held that, when an attorney cannot demonstrate that the communications constitute work product and were prepared in anticipation of the plan beneficiary's litigation, the documents are likely discoverable because the party claiming the work-product exemption failed to prove that the protection applies. [61]

[60] *Cotillion v. United Ref. Co.*, 279 F.R.D. 290 (W.D. Pa. 2011).

[61] *Everett v. U.S. Air Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1985); *Cotillion v. United Ref. Co.*, 279 F.R.D. 290 (W.D. Pa. 2011).

Several exceptions exist to the application of the attorney work-product doctrine's protection.

Crime Fraud and Extraordinary eed Exceptions

The work-product doctrine does not apply when the crime/fraud exception applies, thus a party must disclose work-product materials to prevent a client from committing a crime or fraud. Moreover, the doctrine does not apply under the extraordinary need exception, namely when a party has a substantial need for the documents protected as work product and when the party would encounter substantial hardship in obtaining the material through alternative means. [62]

[62] Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947).

Prepared for se in Reports Filed With SEC

Financial statements and reports filed with SEC generally are not protected as work product, even if prepared by an attorney. In *United States v. Textron Inc.*, [63] a publicly-traded company tried to avoid production of its tax accrual work papers requested by IRS. Even though the accrual work papers were prepared by tax lawyers, they were not protected by the work-product exemption because they were prepared to support financial statements made to obtain auditor approval for securities law compliance, not in anticipation of litigation. IRS also had a legitimate and important function for accessing the work papers to detect and disallow abusive tax shelters.

[63] *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009).

oluntary Disclosure of Work Product

A party waives protection under the work-product doctrine when the party voluntarily discloses documents or communications otherwise protected as attorney work product. For example, in *U.S. Airline Pilots Ass'n v. PBGC*, [64] the Pension Benefit Guaranty Corporation effectively waived work-product protection based on its voluntary disclosure of a report to the pilots association. [65] The U.S. Airline Pilots Association had sued PBGC to remove it as trustee of the plan and replace the pilots association as trustee because it claimed PBGC had failed to investigate or remedy breaches of the prior plan trustee. PBGC's in-house attorney had investigated alleged breaches of fiduciary duty by the plan's former trustee, which was done in anticipation of litigation and would have been protected as

work-product if PBGC had not voluntarily disclosed the report to the pilots association. Because PBGC waived work-product protection on the investigation when it voluntarily disclosed the reports to the pilots association, PBGC attorneys involved in the investigation were stripped of the work-product doctrine's protections and could be deposed by the pilots association.

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[64] *U.S. Airline Pilots Ass'n v. Pension Ben. Guar. Corp.*, 274 F.R.D. 28 (D.D.C. 2011).

[65] *Id.*

Generally, involuntary disclosures, such as those pursuant to a search warrant or subpoena, will not waive attorney-client privilege or the protection of the work-product doctrine. [66] In some circuits, when no threat of contempt, subpoena, or document request exists, a responding party's testimony or production of documents is not involuntary; therefore, the responding party would lose the protection of the attorney-client privilege and work-product doctrine if the documents are produced. [67] Accordingly, if a party voluntarily shares the documents, such disclosure will destroy the privilege and work-product protection. [68] In general, a party may not waive the privilege or work-product doctrine selectively. Yet, some courts have concluded that a single inadvertent disclosure is not sufficient to waive the privilege. [69] Disclosure to attorneys representing another federal agency with conflicting interests involved in the litigation is not a disclosure that waives work-product protection because the attorneys are all part of the same party—the federal government. [70]

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[66] *See United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992).

[67] *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

[68] *In re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012).

[69] *Tolbert v. RBC Capital Market Corp.*, No. H-11-0107, (S.D. Tex. Mar. 28, 2012). The U.S. Court of Appeals for First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Federal, and D.C. circuits have all refused claims of selective waiver, *see* discussion in *In re Pacific Pictures,* 679 F.3d 1121 (9th Cir. 2012). All of these cases were decided before the 2008 change to Rule 502 of the Federal Rules of Evidence which addressed continued protection for inadvertent disclosures but did not address voluntary disclosures or selective waivers outside of inadvertent disclosures.

[70] *Menasha Corp. v. U.S. Dept. of Justice*, No. 12-1720 (7th Cir. Feb. 20, 2013).

Under Rule 502 of the Federal Rules of Evidence, the disclosure in a federal proceeding of a document or communication otherwise protected by the attorney-client privilege or work-product doctrine also waives the protection to undisclosed protected material "only if: (1) the waiver is intentional; (2) the disclosed and undisclosed information or communications concern the same subject matter; and (3) they ought in fairness to be considered together." [71] As a result of the increased use of electronic search technologies, the Federal Rules of Evidence includes a nonwaiver of the attorney-client privilege and electronically-stored information (ESI)/document rule when, under certain circumstances, the party claiming the privilege seeks the prompt return of privileged ESI/documents inadvertently disclosed. [72]

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[71] Fed. R. Evid. 502(a); *see also Trs. of Elec. Workers Local No. 2 Pension Trust Fund v. Trust Fund Advisors Inc.*, 266 F.R.D. 1, 48 EBC 2138 (D.D.C. 2010)(30 PBD, 2/17/10; 37 BPR 420, 2/23/10); *U.S. Airline Pilots Ass'n. v. Pension Ben. Guar. Corp.*, 274 F.R.D. 28 (D.D.C. 2011).

[72] Fed. R. Evid. 502(d).

Fiduciary Exception Applied to Work-Product

As with the attorney-client privilege, there is a fiduciary exception to the work-product doctrine. For example, in *Solis v. Food Employers Labor Relations Association*, the Fourth Circuit ordered two multiemployer plans to produce documents, including communications with their attorneys, because the documents were not protected by the attorney-client privilege or work-product doctrine and because they related to plan fiduciary decisions regarding the investment of plan assets. [73] Likewise, in *Harvey v. Standard Insurance Co.*, an in-house attorney's documents, prepared as part of a post-denial administrative review, were not protected by the work-product doctrine because they fell within

the fiduciary exception to the attorney-client privilege. [74]

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[73] *Solis v. Food Emp'r Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011).

[74] *Harvey v. Standard Ins. Co.*, 275 F.R.D. 629, 52 EBC 2185 (N.D. Ala. 2011).

Additional Practical Considerations

In addition to being conscious of attorney-client privilege and work-product protection requirements, attorneys involved in litigation must be mindful of the ethical limitations regarding deposing or contacting opposing parties, how to handle persons formerly employed by the opposing party, and identifying to which parties these restrictions apply when the opposing party is an entity with a changing work force.

Deposing or Contacting Opposing Parties

Another area in which there are common disputes is the question—Who may be deposed? Certain ethical rules limit who opposing counsel may depose and who opposing counsel may contact. Model Rule 4.2 generally prohibits a lawyer from communicating with a person if the lawyer knows the person is represented by counsel with respect to the subject matter of the communications. An exception to this rule permits a lawyer to communicate with a represented person if the other lawyer consents or if the communications are authorized by law or court order. The consent of the represented person does not suffice to waive this prohibition.

When an entity is a party, the Model Rule 4.2 prohibition on ex parte contact extends to employees:

- who supervise, direct, or regularly consult with the corporation's lawyer regarding the matter;
- who are authorized to obligate the corporation with respect to the matter, and
- whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

[75] For example, in *EEOC v. University of Chicago Med. Ctr.*, the court found that the bar on ex parte contact under Model Rule 4.2 did not apply to a subpoena issued by the Equal Employment Opportunity Commission requesting contact information for a hospital's former human resources managers pursuant to an EEOC investigation of violations under the Americans with Disabilities Act because the requested information related to former hospital employees who were no longer agents of the hospital that could bind it. Nevertheless, the former employees were barred from discussing privileged information. [76]

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[75] Model Rules of Prof'l Conduct R. 4.2, cmt. 7.

[76] *EEOC v. Univ. of Chi. Med. Ctr.*, No. 11-C-6379, (N.D. Ill. Apr. 16, 2012).

Further, in most circumstances, outside counsel cannot be deposed in an ERISA litigation regarding their advice to the client in defending the litigation. [77] In *Wildbur v. Arco Chem. Co.*, for example, the court concluded that outside counsel could not be deposed because no mutuality of interests existed between counsel and the plan beneficiary and because the communications involved defense of the litigation, not plan administration. Accordingly, the fiduciary exception did not apply. [78]

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[77] *Wildbur v. Arco Chem. Co.*, 974 F.2d 631, 16 EBC 1235 (5th Cir. 1992).

[78] *Id.*

Likewise, in *Beesley v. International Paper Co.*, a tax code Section 401(k) plan participant's attorney was not permitted to depose the plan's former director of investments and plan administrator regarding the plan's decision to form a new administrative committee and select a new administrator. The court determined that the depositions were precluded because the plan's decisions were related to a plan amendment, a settlor function, and as a result, the fiduciary exception did not apply. [79]

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[79] *Beesley v. Int'l Paper Co.*, Civ. No. 06-703-DRH, 44 EBC 1038 (S.D. Ill. June 3, 2008)

(108 PBD, 6/5/08; 35 BPR 1300, 6/10/08).

Accordingly, attorneys must address the role of the parties to be deposed in an ERISA litigation case concerning any benefit plan and, in turn, the nature of that role as settlor versus fiduciary.

Multi urisdictional Practice

An ethical issue commonly encountered by labor, employment, and ERISA attorneys involves advice requested concerning the legal principles in states in which the individual attorney is not licensed. The ABA Model Rules provide in Model Rule 5.5 that, "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." [80] Consequently, attorneys need to be aware that, when they are asked questions regarding the labor, employment, and benefits laws in other states, the out-of-state attorney should ensure that he is in compliance with the ethical rules of the other state and inform the client in writing (if necessary) that it may want to seek local counsel's advice.

[80] Model Rules of Prof'l Conduct R. 5.5(a).

Electronic Issues

Electronic documents and communications may contain embedded information—known as metadata—that is not readily apparent on the face of the document or communication. This metadata may include information regarding when the document was saved, by whom it was last reviewed or edited, for whom it was previously created, redlined changes, and notes and comments. ABA Formal Ethics Opinion 06-442 permits lawyers to review and use embedded metadata in documents received from opposing counsel, an adverse party, or the agent of an adverse party. To avoid inadvertent disclosures of what may otherwise be privileged or protected information, attorneys should consider copying the document into a new document to avoid retaining metadata from a prior draft or consider sending hard copies or portable document format files.

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