

# **ETHICAL CONSIDERATIONS FOR EMPLOYEE BENEFITS COUNSELORS**

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- I. **The Glory and Peril of Written Advice.** Most of us in attendance at this session are employee benefits counselors, not litigators. We give advice. Although we may draft or review plan documents or contracts, for many of us our bread and butter is advising clients about their obligations and the rules applicable to their plans under ERISA, the federal Tax Code, and various other laws. At our best, we help clients understand their legal responsibilities and help them chart a path toward meeting those obligations.

Much of what we explain is complex. The laws, as well as the practical considerations, are multi-layered and sometimes difficult to understand. When explaining the relevant legal requirements, we are effectively teachers. We must synthesize, and almost always simplify, the law when explaining it to clients. We must know what to include and what not. We must know when our advice might be confusing and anticipate the questions it may raise. We must understand how simplifying the law for the purpose of clarity may cause clients to extrapolate from what we say to reach wrong conclusions about circumstances that differ from those presented.

To do all of the above effectively requires us, at least on occasion, to provide our advice in writing. Sometimes that is not necessary, and perhaps not even desirable. It may not be desirable, in part, because for those of us for whom writing is difficult, written advice is more costly for clients than oral advice, may delay the delivery of our advice, and may raise attorney-client privilege concerns that I will discuss below.

In thinking about the value to clients of written advice, it helps to think about how important writings are to our own learning. For many of us, when presented with a non-routine question, even if we have visceral sense of what we think the answer may be, it is often wise for us to double check that conclusion by consulting the relevant legal guidance. And that is almost always a written law, regulation, agency guidance, or court case. We look at the words contained in those sources because words provide precision. They illuminate concepts carefully, or betray ambiguities by their failure to be precise. Studying words lets us conclude whether an issue is clear or instead murky. Just as importantly, words give us the details, nuances, and exceptions to the general rule. These are things we lose when we simplify a concept in order to remember it. Failing to consult written legal resources would make the practice of law a game of gossip. It would be foolish to put so heavy a burden on our memory.

In similar fashion, I would argue that clients sometimes need written advice. When a matter is particularly complex, or is likely to recur in the future, written advice serves several purposes. First, it can help the client understand the advice. That is true because the client can re-read the advice, and because there is a precision to words that can be lost

in oral communication. Second, there is a tendency for people to keep in their minds an oversimplified, generalized version of what they have learned. Written advice can counteract this tendency by helping a client understand the context and limited circumstances in which the advice applies. As a corollary, written advice can help a client understand that the answer to the question at hand may not be the same as the answer to a later question that is superficially similar, but different in a meaningful respect. Third, where an issue may recur, or where a question may later arise as to why a particular decision was made or process implemented, the ability to refer back to written advice informing those decisions can prove helpful. That writing can jog the memory of those originally involved as to what decision was made and why. And perhaps more importantly, as there is turnover in a client's employee benefits, human resources, or finance workforce, written advice can be an instructive resource for later hires who were not present when the question was originally raised.

**Privilege.** One fear about written advice is that if the client ends up defending a lawsuit, or finds itself under investigation by the Department of Labor, the IRS, or another government agency, that advice may be discoverable. This is a particularly acute fear for employee benefits counselors because much of that on which we advise is not subject to attorney-client privilege. That is because of the so-called "fiduciary exception" to attorney-client privilege. For background on the "fiduciary exception," see Appendix A to these materials.

If we were litigators assisting a client in defending a lawsuit or dealing with a government agency investigation, we might prefer that advice not have been provided in writing. After all, that advice, if discovered, might provide an adverse party with a "road map" for making a claim. In fact, we might have advised in writing that certain actions be taken, yet the client may have failed to do so, either purposefully or inadvertently. The need to disclose that written advice would be particularly unfortunate.

Because of these privilege concerns one of the considerations when deciding whether to provide written advice is how to balance (a) the need for a client to understand and remember advice, with (b) the possibility that advice may be subject to disclosure in later litigation or a government agency investigation. My view is that if no litigation is on the horizon, we serve our clients best by providing advice in writing when either (a) the client requests it, or (b) a writing is required for a client to accurately understand our advice or address the issue consistently in the future. Providing written advice in these circumstances would seem to give clients and their plans the best opportunity to comply with the law, and may for that reason minimize the risk of litigation or a bad result from an agency audit or investigation.

The conundrum about how much advice to provide in writing arises primarily where the advice we are giving relates to a fiduciary matter. If, instead, we are providing legal advice in connection with a "settlor" matter, the risk of others discovering that written advice is of lower concern because the fiduciary exception to attorney-client privilege would not apply. This assumes, of course, that the client will not, perhaps inadvertently, waive privilege by disclosing our advice to others.

**Circular 230 and Audit Risk.** When providing written advice, it is important to take into account the so-called “Circular 230” rules. Those rules are set forth in regulations governing practice before the IRS, and are generally found at 31 C.F.R. Part 10. They are commonly known as the “Circular 230” rules because these regulations are reprinted as Treasury Department Circular No. 230. An individual subject to Circular 230 must meet minimum standards of conduct with respect to written tax advice, and those who do not are subject to disciplinary action, including suspension or disbarment as to their ability to practice before the IRS.

Under Circular 230, a practitioner giving written advice concerning a federal tax matter must not, in evaluating the matter, take into account the possibility that a tax return will not be audited or that the matter will not be raised on audit. 31 C.F.R. § 10.37. Notably, the preamble to final Treasury Regulations modifying the standards governing written tax advice (the Circular 230 rules) at 79 Fed. Reg. 33685 (June 12, 2014), suggests, although somewhat obliquely, that even when giving oral advice, one may not take into account audit risks. In particular, the preamble says the following with respect to oral advice:

Treasury and the IRS agree that audit risks should not be considered by practitioners in the course of advising a client on a Federal tax matter, regardless of the form in which the advice is given. Because § 10.37 addresses only written advice, Treasury and the IRS do not believe that the rules barring considerations of the possibility that a return or issue will be audited when giving written advice suggests that it may be considered when giving oral advice.

It appears, however, that a practitioner may, when giving written advice evaluating a Federal tax matter, take into account the possibility that an issue will be resolved through settlement if raised. It appears this is because the Treasury and IRS believe that in giving comprehensive written advice it may be appropriate for a practitioner to inform a client of the “existence or nonexistence of legitimate hazards that may make settlement more or less likely,” and that in fact this may be a “material issue for which the practitioner has an obligation to inform the client.” (Emphasis added.)

**II. Minutes: How Much Detail to Include?** The same attorney-client privilege concerns relating to the provision of written advice apply to decisions about how to draft minutes of board or fiduciary committee meetings, and in particular how much detail to include in those minutes. Once again, there is risk that there will be no privilege with respect to fiduciary matters addressed in meeting minutes. And even where a matter is not fiduciary in nature, there is always the risk privilege will be waived by the presence at the meeting of parties other than the client and the client’s legal counsel (see the discussion of waiver in the background materials set out in Appendix A to this outline).

There are perhaps three basic approaches to drafting minutes. Under the first, only a minimum amount of information is included. The minutes are populated with a listing of who was present at the meeting and what actions were taken, with only barebones description of those actions. Although this approach may provide the best protection against disclosure of potentially damaging information, it may also be detrimental to

attempts to establish the “procedural prudence” that is so fundamentally important in defending a claim that fiduciaries breached their duty of prudence under ERISA Section 404(a)(1)(B). It may be easier to establish procedural prudence where there is some indication in minutes of how issues were resolved and why.

At the other extreme from the minimalist approach to drafting minutes is one where the minutes include a blow-by-blow description of the discussion and arguments made. Not only does this impose on the drafter an exhausting amount of work, it’s probably not wise. It’s probably not desirable both because including great detail about discussions increases the odds that some of those details will have been captured inaccurately (and not corrected by a careful reading by board or committee members prior to approving the minutes), and because it may provide plaintiffs or government agencies the ability to isolate particular comments or objections raised in the meeting, and to use those isolated comments to build a case in a way that would not only be detrimental to the client, but also unfair. It would give adverse parties the ability to use a perhaps not carefully considered comment, without the client’s ability to fully explain the atmosphere of the meeting in which the comment was made.

The “middle” approach to drafting minutes may be best. Minutes certainly need to memorialize what actions were taken and when. Including a relatively modest degree of detail that gives a sense of the rationale for the decisions made could prove helpful in establishing procedural prudence. Under this approach, minutes might simply indicate what materials were presented to the board or committee, and include a sentence or two summarizing why the board or committee made the decision it did.

For the purpose of showing that a fiduciary committee or board has been prudent in its deliberations, my view is that it is always helpful to attach to the meeting minutes all reports, analyses, and documents presented to the board or committee members at (or in advance) of the meeting. I say that these materials should be “attached” to the minutes, but investment reports, actuarial valuations, plan documents, and other items presented to the members of the board or committee will often be bulky, so when I say they should be “attached” to the minutes, I really mean they should be unambiguously associated with the minutes, perhaps in an expandable folder that is clearly tied to the meeting. The minutes might refer to the documents as Exhibit A, Exhibit B, and so forth, with the documents being marked accordingly. For examples of lawsuits in which courts addressed whether meeting minutes were privileged, see in Appendix A to this outline *Cottillion v. United Refining Co.* (p. 9 below); and *Hill v. State Street Corp.* (p. 46 below).

As to the approval of plan documents or amendments, one wants to have associated with minutes of the meeting at which those were approved the precise plan document or plan amendment, and not merely a summary. There seems to be a temptation, particularly for busy boards of directors, compensation committees, executive committees, and fiduciary committees, to present to the decisionmaking body only a summary description of changes to be made to plan documents, without including the actual plan language. Under the better process, one would also include the particular language to be adopted. Doing so may avoid a later question (perhaps in litigation) about whether, in fact, a particular nuance was effectively adopted. The danger in failing to take this more careful approach may be

illustrated by a case involving executive compensation, *Cole v. Champion Enterprises, Inc.*, 45 EBC 2371 (4<sup>th</sup> Cir. 2008). In *Cole* a powerpoint presentation concerning a new employment agreement did not cover with adequate specificity all the terms of the executive's employment and compensation, and as a result no contract was formed.

**III. Attorney's Retention of Consultant: Privilege for Client's Communications With Consultant.** [Note that this section is repeated as Part II to Appendix A.] Attorney-client privilege relates, of course, to a client's communications with its (or his or her) attorney. It generally does not extend to a client's communications with the client's accountants or plan vendors, such as benefit consultants, actuaries, recordkeepers, or third party administrators. That is so even though there may, in some jurisdictions or in certain circumstances, be some privilege other than attorney-client privilege, perhaps for communications between a client and its accountant or under federal tax rules for certain advice sought from a non-attorney tax professional.

There can be an exception to this lack of privilege for communications with non-attorneys where legal counsel has employed or retained the non-lawyer to help understand a legal matter about which the client has sought advice. This exception arises under a hoary Second Circuit decision, *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Under the so-called *Kovel* doctrine, a client's communications with a non-attorney can be privileged, even though they would not have been privileged had the communications been directly between the client and the non-attorney without the non-attorney first having been retained by counsel.

The contours of the *Kovel* doctrine are not at all clear. That is because rather than announce a clear formulation for determining when attorney-client privilege extends to a client's communications with a consultant, the court in *Kovel* described its holding in more contextual terms. In *Kovel*, an accountant employed by a law firm specializing in tax law was sentenced for criminal contempt for refusing to answer a question asked in the course of an inquiry by a grand jury. It appears the accountant was not simply retained by the law firm as a consultant, but was instead an actual employee of the firm.

The grand jury was investigating alleged federal income tax violations by a client of the law firm. The accountant was subpoenaed to appear and asked to testify about various discussions and communications with this firm client. The accountant refused to answer. He was held in contempt and sentenced to three years imprisonment. On appeal, the Second Circuit vacated the judgment and remanded the matter for further consideration. (The remand was a consequence of the circuit court not having adequate facts to resolve the matter on its merits.)

The Second Circuit framed the issue very nicely. It said the question was "under what circumstances, if any, the attorney-client privilege may include a communication to a non-lawyer by the lawyer's client." Relying heavily on Wigmore's treatise on evidence, the court concluded that although an attorney's retention of a non-lawyer does not automatically confer privilege on a client's communications with that non-lawyer, when the attorney needs the assistance of another to understand matters, the client's communications with the non-lawyer providing that assistance may enjoy attorney-client

privilege. In reaching this conclusion, the court relied heavily on an analogy to an attorney's use of a foreign language translator. The court thought it clear that if an attorney needed to retain a translator in representing a client who spoke a foreign language, the communications between the client and the interpreter should be privileged.

The court cautioned that simply retaining a non-lawyer does not result in communications with the non-lawyer being privileged. But where a party is necessary to aid the attorney in handling his or her legal work, a client's communications with that party should enjoy privilege. The court put it this way:

Nothing in the policy of the [attorney-client] privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam. On the other hand, in contrast to the Tudor times when the privilege was first recognized, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. "The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." (Footnotes and citations omitted.)

In introducing the foreign language translator analogy, the court said the following:

[T]he Government does not here dispute that the privilege covers communications to non-lawyer employees with "a menial or ministerial responsibility that involves relating communications to an attorney." We cannot regard the privilege as confined to "menial or ministerial" employees. Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice. All four cases meet every element of Wigmore's famous formulation, § 2292, "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance

permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived,” save (7); literally, none of them is within (7) since the disclosure is not sought to be compelled from the client or the lawyer. Yet § 2301 of Wigmore would clearly recognize the privilege in the first case and the Government goes along to that extent; § 2301 would also recognize the privilege in the second case and § 2311 in the third unless the circumstances negated confidentiality. We find no valid policy reason for a different result in the fourth case, and we do not read Wigmore as thinking there is. Laymen consulting lawyers should not be expected to anticipate niceties perceptible only to judges -- and not even to all of them.

Applying the translator analogy to the client’s communications with the accountant– and more generally, one assumes, to other experts necessary for an attorney to do his or her job (and in particular to those required for the attorney to understand technical materials that may be necessary to provide representation) – the court said the following:

This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; **the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.** By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer’s physical presence while the client dictates a statement to the lawyer’s secretary or in interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, as in *Olender v. United States*, 210 F.2d 795, 805-806 (9 Cir. 1954), see *Reisman v. Caplin*, 61-2 U.S.T.C. P9673 (1961), or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists. (Emphasis added; footnotes omitted.)

Importantly, the court noted that for a client’s communications with a non-lawyer to enjoy attorney-client privilege, legal counsel must first retain the non-attorney. So, the order in which matters occur is important. The court anticipated criticism of this conclusion that

there can be privilege only where the attorney is retained first (and the attorney then retains the non-attorney), saying:

We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter, *Gariepy v. United States*, 189 F.2d 459, 463 (6th Cir. 1951)), and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help. (Footnotes omitted)

For benefits lawyers, the salient points in the *Kovel* court's discussion are that (1) the attorney needs to have been hired in the matter prior to the client communicating with the non-attorney (and perhaps that the attorney, rather than the client, have hired the non-attorney), and (2) the non-attorney probably needs to be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Let's apply this second point to the benefits practice. Although one assumes a client's discussions with a pension or health plan actuary would not normally enjoy privilege, there may be circumstances where those communications will be privileged, particularly if the actuary is instead first retained by the client's legal counsel. Consider, for example, a client that retains an attorney to evaluate (a) whether ERISA's minimum funding requirements have been met for its defined benefit pension plan, and (b) the consequences for the client should those standards not have been met. The attorney may well need the services of an actuary to properly understand the various steps required to determine whether the minimum funding standards have been met. If, for that reason, the attorney retains an actuary, and thereafter the client has discussions with the actuary, one could argue those discussions would be privileged under *Kovel*. A harder question may be whether the actuary can be the regular plan actuary with whom the client has previously communicated on unrelated, similar, or the same issue, and whether privilege will extend to future communications on those same issues if they relate to the attorney's engagement.

The *Kovel* doctrine seems to arise most commonly where either a plan sponsor or plan fiduciary wishes to engage a party to do a compliance audit. The client could, of course, engage a law firm to handle the audit. But if the client were instead to turn to a benefits consulting firm or other non-lawyer vendor to evaluate the sponsor's (or fiduciary's) compliance with ERISA, the Tax Code, and other legal requirements, there may be value in having legal counsel for the client engage the party, rather than the plan sponsor or fiduciary doing so directly.

Whether the resulting communications between the client and the party handling the compliance review would then enjoy attorney-client privilege would seem a more difficult issue than in the example above where an attorney who was asked about minimum funding requirements retains an actuary. That is because some of the work handled by the

compliance audit vendor will very likely fall within the capabilities of the attorney. In the parlance of *Kovel*, there would be no need for a “translator” with respect to much of the information gathered. There would, though, be exceptions, where it would be necessary, or at least highly useful, for the attorney to have experts knowledgeable in actuarial science, finance, medicine, or intellectual technology, “translate” for the attorney.

But even if the attorney has the skill set to do the entire audit, recall that *Kovel*, in *dicta*, noted that attorneys cannot do their work effectively without the assistance of helpers having non-technical abilities, such as “secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts.” The court quoted Wigmore to the effect that “the assistance of these agents being indispensable to his work, . . . the privilege must include all the persons who act as the attorney’s agents.” One could argue, then, that if an attorney has been retained to pull together and analyze the results of a compliance audit vendor’s efforts, and uses those results in providing a report to the client involving legal (rather than business) analysis, having the compliance audit vendor report its results to the attorney (and perhaps even having the attorney retain that vendor) may well extend attorney-client privilege to the client’s communications with the non-attorney vendor.

It would seem that the role of the attorney must be meaningful, though. That is, *Kovel* imagines a circumstance where an attorney has been asked for legal advice. The attorney gathers assistance from others in providing that advice. The attorney is, of course, the party that provides the legal advice to the client. If, instead, an attorney were engaged simply to serve as a conduit for the compliance audit vendor’s report, receiving and passing it along to the client, and perhaps for the purpose of retaining the vendor, it would seem hard to argue that the client’s communications with the vendor would enjoy attorney-client privilege under *Kovel*. That is because if the attorney’s only role is to “touch” the vendor’s report as it passes to the client (and perhaps to retain the vendor), the attorney would not seem to have been retained to provide any meaningful legal analysis for which the attorney would have needed the assistance of the compliance audit vendor.

All of this begs the question whether the “fiduciary exception” to attorney-client privilege described in Section I.D below makes all this moot. Where the matters at issue are fiduciary, rather than settlor, in nature there would typically be no privilege in any event, unless the “personal liability” rule described in Section I.F below applies. There is no reason to think the *Kovel* doctrine somehow bootstraps one out of the fiduciary exception, creating privilege where none would otherwise have existed. In the examples above, involve funding and compliance audits, there may, depending on the facts and circumstances, be some argument that the personal liability rule applies or that some or all of the issues are settlor.

**Disclosure to Actuary.** In *Cottillion v. United Refining Co.*, 2011 U.S. Dist. Lexis 151519, 53 EBC 1275 (W.D. Pa. 2011), a federal district court considered a dispute concerning an actuarial reduction in early retirement benefits. As to the inapplicability of the fiduciary exception for advice concerning personal liability (see the *U.S. v. Mett* discussion in Section I.F of Appendix A below), the court held that the interest of the plan beneficiaries diverged from the plan trustee’s interest when the trustee took concrete steps to actuarially

reduce benefits to retirees already in pay status and to recoup overpayments, because at that point a serious and significant threat of litigation had materialized. An attorney's action in copying an actuary on an email did not waive attorney-client privilege because the actuary's involvement was at the direction of the attorney, to assist the attorney in the provision of legal advice. As to whether a disclosure to the actuary constitutes a waiver, the court said the critical inquiry is "whether the third party consultant is involved in the giving of legal advice" or "functions like an employee in providing information which facilitates the obtaining of legal advice." The key in the instant case was that the communications with the actuary were at the attorney's direction, for the express purpose of assisting him in providing legal advice.

An email from the actuary to a committee member regarding recouping payments was not, however, privileged, even if it was at the attorney's direction because it concerned only accounting issues related to the administration of the plan (and was prepared for non-litigation purposes, not in anticipation of litigation).

The court also concluded as follows:

1. A draft document subject to revision was not automatically privileged.
2. A proposed response to an inquiry from a beneficiary relating to a reduction in benefits enjoyed no privilege because it was related only to plan administration.
3. A draft form of a letter to participants regarding a benefit reduction in a VCP process was related to administration of the plan, and therefore not privileged.
4. Discussions of plan amendments concerned settlor issues, so the fiduciary exception was inapplicable.
5. Meeting minutes generally were not privileged, except small portions containing legal advice falling within the personal liability limitations of the fiduciary exception.

The court also concluded that letters to auditors relating to the annual plan audit were not privileged.

**IV. Preserving Client Confidentiality on Listservs and in Online Chat Rooms.** When considering a complex question, if the law seems ambiguous an employee benefits attorney may solicit the views of other attorneys by posting an inquiry on a listserv or online chat room or message board (examples of the latter are the message boards associated with [www.benefitslink.com](http://www.benefitslink.com)). Recent ABA and Texas Bar opinions remind us that a general duty of confidentiality, and, of course, the usual prohibition on violating attorney-client privilege, apply when posting inquiries on those fora. The fundamental point is that it is important when describing our questions to avoid effectively identifying our client through the details we provide. For example, if we were to indicate in a posting that we are representing in 2018 the former chief executive officer of a U.S. television network who

has been accused of sexual misconduct, that would likely be a problem. It would likely be a problem because it would identify our client for many readers, due to widespread news reporting about just such a circumstance. Similarly, if we were to indicate we represent a VEBA providing retiree welfare coverage to former employees of three large U.S. auto companies, those of us who remember the news about the United Autoworkers' 2007 collective bargaining agreements transferring retiree health care liabilities to a new independent VEBA might successfully guess at the client.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 480, entitled "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary," in March of 2018. (The Formal Opinion 480 is available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_480.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.pdf).) This opinion addresses, among other things, lawyers' confidentiality requirement when commenting on listservs and website postings. Here is an excerpt from the opinion:

### **Duty of Confidentiality Under Rule 1.6**

Model Rule 1.6(a) provides:

A lawyer shall not reveal information relating to the 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 by paragraph (b).

As Comment [2] emphasizes, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."

This confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.7 Rule 1.6(b) provides other exceptions to Rule 1.6(a). However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.

Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or

record, is *not* exempt from the lawyer’s duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.

A violation of Rule 1.6(a) is not avoided by describing public commentary as a “hypothetical” if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client’s informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is “generally known” or contained in a “public record.” Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).

(Footnotes omitted.)

The ABA opinion also warns in a footnote (footnote 4) about creating a “positional conflict,” citing favorably in this regard D.C. Bar Opinion 370 (2016). The D.C. Bar opinion says, with respect to attorneys’ use of social media, that “[c]aution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, inadvertently creating a conflict.” The ABA opinion footnote also cites, apparently favorably, a treatise author’s statement that “social media presence can pose a risk for attorneys, who must be careful not to contradict their firm’s official position on an issue in a pending case.” (Citing Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 50-51 (11<sup>th</sup> ed. 2018).)

The ABA’s Standing Committee on Ethics and Professional Responsibility has also recently reminded us that a lawyer’s duty of confidentiality extends to former clients. The Committee addressed the “generally known” information exception to this obligation in Formal Opinion 479, issued in December 2017 (available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_479.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_479.pdf)). Opinion 479 explains when a lawyer may use information relating to the representation of a former client to the former client’s disadvantage without informed consent, after that information has become “generally known.” The opinion concludes that information is generally known only if it has become (a) widely recognized by members of the public in the relevant geographic area, or (b) widely recognized in the former client’s industry, profession, or trade. Information is not generally known “simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories information.” Perhaps most notably for our purposes here, the opinion explains that this exception from an attorney’s obligation with respect to a former

client’s confidential information relates only to the use of confidential information that has become generally known. It does not allow an attorney to reveal a former client’s confidential information. So, “[l]awyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.”

The Professional Ethics Committee for the State Law of Texas, in Opinion No. 673 (dated August 2018 and available at <https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-673>) addresses whether a Texas lawyer may seek advice for the benefit of a client from other lawyers in an online discussion group. The Texas opinion provides, in part, as follows:

If possible, the inquiring lawyer should limit such consultation to general or abstract inquiries that do not disclose confidential information relating to the representation. If it is not reasonably possible to address the issues in question using a general or abstract inquiry, a lawyer may reveal a limited amount of unprivileged client information in a lawyer-to-lawyer consultation, without the client’s express consent, when and to the extent that the inquiring lawyer reasonably believes that the revelation will benefit the inquiring lawyer’s client in the subject of the representation. The inquiring lawyer should do so using a hypothetical that does not identify the client. If under the circumstances a responding lawyer might match the hypothetical facts to a specific person or entity, or if it is reasonably foreseeable that the disclosure of the information will harm, prejudice or embarrass the client, the discussion of hypothetical facts without the client’s consent may violate the Texas Disciplinary Rules of Professional Conduct.

An inquiring lawyer may not reveal confidential information protected by the lawyer-client privilege without the client’s express, informed consent. An inquiring lawyer may not reveal unprivileged confidential information for the benefit of the client if the client has expressly instructed the lawyer not to do so.

This opinion warns that an attorney responding to an inquiry has no obligation to maintain the confidentiality of the information disclosed by the inquiring attorney, absent an agreement to do so. Consistent with this, we should be alert to the possibility that our posts will be read by attorneys who represent parties currently adverse to our client, or who may be adverse in the future. As to the risks in posting a question, given that a responding attorney (or other reader of the post) generally does not have a confidentiality obligation, the Texas opinion says “in deciding whether and to what extent disclosure of unprivileged client information would be in the client’s best interest, the inquiring lawyer should take into account whether the responding lawyer has agreed to maintain the confidentiality of the consultation.” In my experience, it would be rare for an attorney responding to an inquiry on a listserv or message board to have agreed to maintain confidentiality.

As to the duties of the responding attorney him or herself, the Texas Bar opinion warns that the attorney must “take reasonable steps to avoid providing information that could

impair any obligations to the responding lawyer's clients." Expanding on this, the opinion explains that responding lawyers must be careful not to reveal confidential information of their own clients when responding, and should take reasonable steps to ensure that they do not adversely affect a present or former client in a subject of present or former representation.

**APPENDIX A**  
**to**  
**ETHICAL CONSIDERATIONS FOR EMPLOYEE BENEFITS COUNSELORS**

**I. Attorney-Client Privilege.**

The determination of who an attorney represents is, of course, fundamental in understanding the scope of any attorney-client privilege. Absent a client's informed consent, the Model Rules prohibit an attorney from revealing information relating to representation of a client. Model Rule 1.6. The comments to Model Rule 1.6 indicate that an attorney *must* invoke attorney-client privilege when it is applicable. Model Rule 1.6, cmts. [2] and [4].

According to the Restatement, attorney-client privilege may be invoked with respect to “(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.” Restatement § 68. There can be no privilege unless an attorney-client relationship exists. Importantly, to be privileged a communication must be made in confidence and for the purpose of obtaining legal advice. *See, e.g., Hudson v. General Dynamics*, 186 F.R.D. 271 (D. Conn. 1999) (questionnaire responses provided by early retirees in their capacity as witnesses were not made for the purpose of obtaining legal advice, and therefore were not privileged); *Byrnes v. Empire Blue Cross Blue Shield*, 1999 U.S. Dist. Lexis 17281 (S.D. N.Y. 1999) (only those memoranda exchanged by an actuarial firm, an employer's attorney, and the employer that were prepared to assist the attorney in rendering legal advice were privileged; those meant to aid the employer's business decisions were not privileged); *Neuder v. Battelle Pacific Northwest National Laboratory*, 194 F.R.D. 289 (D. D.C. 2000) (documents prepared in connection with a meeting of employer's personnel review committee were not privileged, even though in-house counsel participated in the meetings; where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected; court found that in-house counsel was serving as a member of the committee in a nonlegal capacity); *Aiena v. Olsen*, 194 F.R.D. 134 (S.D. N.Y. 2000) (letters to insurer's counsel sent by individuals charged with violating ERISA, for the purpose of convincing the insurer of its obligation to provide indemnification and bear the cost of the individual's defense, were not privileged because they were not for the purpose of obtaining legal advice or for use by potential future defense counsel; instead, insureds were seeking counsel of their own choice and agreed the carrier had a conflict of interest prohibiting it from defending them). Notably, in *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001), discussions among committee members while considering a beneficiary's claims were not privileged, despite the attendance of counsel, to the extent communications with counsel were not for the purpose of obtaining legal advice, nor did privilege attach to the members' opinions, impressions, or conclusions based upon events occurring during the meeting.

Where attorney-client communications are privileged, the privilege runs only to the communications themselves, not to the underlying information communicated. That is, a party is not precluded by the attorney-client privilege from discovering information

through an alternate path, which does not involve compelling disclosure of communication with an attorney. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 237-38, 40 EBC 1545 (3d Cir. 2007), citing *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

A. **Attorney's Retention of Consultant: Privilege for Client's Communications With Consultant.** Attorney-client privilege relates, of course, to a client's communications with its (or his or her) attorney. It generally does not extend to a client's communications with the client's accountants or plan vendors, such as benefit consultants, actuaries, recordkeepers, or third party administrators. That is so even though there may, in some jurisdictions or in certain circumstances, be some privilege other than attorney-client privilege, perhaps for communications between a client and its accountant or under federal tax rules for certain advice sought from a non-attorney tax professional.

There can be an exception to this lack of privilege for communications with non-attorneys where legal counsel has employed or retained the non-lawyer to help understand a legal matter about which the client has sought advice. This exception arises under a hoary Second Circuit decision, *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Under the so-called *Kovel* doctrine, a client's communications with a non-attorney can be privileged, even though they would not have been privileged had the communications been directly between the client and the non-attorney without the non-attorney first having been retained by counsel.

The contours of the *Kovel* doctrine are not at all clear. That is because rather than announce a clear formulation for determining when attorney-client privilege extends to a client's communications with a consultant, the court in *Kovel* described its holding in more contextual terms. In *Kovel*, an accountant employed by a law firm specializing in tax law was sentenced for criminal contempt for refusing to answer a question asked in the course of an inquiry by a grand jury. It appears the accountant was not simply retained by the law firm as a consultant, but was instead an actual employee of the firm.

The grand jury was investigating alleged federal income tax violations by a client of the law firm. The accountant was subpoenaed to appear and asked to testify about various discussions and communications with this firm client. The accountant refused to answer. He was held in contempt and sentenced to three years imprisonment. On appeal, the Second Circuit vacated the judgment and remanded the matter for further consideration. (The remand was a consequence of the circuit court not having adequate facts to resolve the matter on its merits.)

The Second Circuit framed the issue very nicely. It said the question was "under what circumstances, if any, the attorney-client privilege may include a communication to a non-lawyer by the lawyer's client." Relying heavily on Wigmore's treatise on evidence, the court concluded that although an attorney's retention of a non-lawyer does not automatically confer privilege on a client's communications with that non-lawyer, when the attorney needs the assistance of another to understand matters, the client's communications with the non-lawyer

providing that assistance may enjoy attorney-client privilege. In reaching this conclusion, the court relied heavily on an analogy to an attorney's use of a foreign language translator. The court thought it clear that if an attorney needed to retain a translator in representing a client who spoke a foreign language, the communications between the client and the interpreter should be privileged.

The court cautioned that simply retaining a non-lawyer does not result in communications with the non-lawyer being privileged. But where a party is necessary to aid the attorney in handling his or her legal work, a client's communications with that party should enjoy privilege. The court put it this way:

Nothing in the policy of the [attorney-client] privilege suggests that attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam. On the other hand, in contrast to the Tudor times when the privilege was first recognized, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. "The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." (Footnotes and citations omitted.)

In introducing the foreign language translator analogy, the court said the following:

[T]he Government does not here dispute that the privilege covers communications to non-lawyer employees with "a menial or ministerial responsibility that involves relating communications to an attorney." We cannot regard the privilege as confined to "menial or ministerial" employees. Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story; a second where the attorney, himself having some little knowledge of the foreign tongue, has a more knowledgeable non-lawyer employee in the room to help out; a third where someone to perform that same function has been brought along by the client; and a fourth where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice. All four cases meet every element of Wigmore's famous

formulation, § 2292, “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived,” save (7); literally, none of them is within (7) since the disclosure is not sought to be compelled from the client or the lawyer. Yet § 2301 of Wigmore would clearly recognize the privilege in the first case and the Government goes along to that extent; § 2301 would also recognize the privilege in the second case and § 2311 in the third unless the circumstances negated confidentiality. We find no valid policy reason for a different result in the fourth case, and we do not read Wigmore as thinking there is. Laymen consulting lawyers should not be expected to anticipate niceties perceptible only to judges -- and not even to all of them.

Applying the translator analogy to the client’s communications with the accountant– and more generally, one assumes, to other experts necessary for an attorney to do his or her job (and in particular to those required for the attorney to understand technical materials that may be necessary to provide representation) – the court said the following:

This analogy of the client speaking a foreign language is by no means irrelevant to the appeal at hand. Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; **the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.** By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer’s physical presence while the client dictates a statement to the lawyer’s secretary or in interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service, as in *Olender v. United States*, 210 F.2d 795, 805-806 (9

Cir. 1954), see *Reisman v. Caplin*, 61-2 U.S.T.C. P9673 (1961), or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. (Emphasis added; footnotes omitted.)

Importantly, the court noted that for a client's communications with a non-lawyer to enjoy attorney-client privilege, legal counsel must first retain the non-attorney. So, the order in which matters occur is important. The court anticipated criticism of this conclusion that there can be privilege only where the attorney is retained first (and the attorney then retains the non-attorney), saying:

We recognize this draws what may seem to some a rather arbitrary line between a case where the client communicates first to his own accountant (no privilege as to such communications, even though he later consults his lawyer on the same matter, *Garipey v. United States*, 189 F.2d 459, 463 (6th Cir. 1951)), and others, where the client in the first instance consults a lawyer who retains an accountant as a listening post, or consults the lawyer with his own accountant present. But that is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help. (Footnotes omitted)

For benefits lawyers, the salient points in the *Kovel* court's discussion are that (1) the attorney needs to have been hired in the matter prior to the client communicating with the non-attorney (and perhaps that the attorney, rather than the client, have hired the non-attorney), and (2) the non-attorney probably needs to be "necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Let's apply this second point to the benefits practice. Although one assumes a client's discussions with a pension or health plan actuary would not normally enjoy privilege, there may be circumstances where those communications will be privileged, particularly if the actuary is instead first retained by the client's legal counsel. Consider, for example, a client that retains an attorney to evaluate (a) whether ERISA's minimum funding requirements have been met for its defined benefit pension plan, and (b) the consequences for the client should those standards not have been met. The attorney may well need the services of an actuary to properly understand the various steps required to determine whether the minimum funding standards have been met. If, for that reason, the attorney retains an actuary, and thereafter the client has discussions with the actuary, one could argue those discussions would be privileged under *Kovel*. A harder question may be whether the actuary can be the regular plan actuary with whom the client has previously communicated on unrelated, similar, or the same issue, and whether privilege will extend to future communications on those same issues if they relate to the attorney's engagement.

The *Kovel* doctrine seems to arise most commonly where either a plan sponsor or plan fiduciary wishes to engage a party to do a compliance audit. The client could,

of course, engage a law firm to handle the audit. But if the client were instead to turn to a benefits consulting firm or other non-lawyer vendor to evaluate the sponsor's (or fiduciary's) compliance with ERISA, the Tax Code, and other legal requirements, there may be value in having legal counsel for the client engage the party, rather than the plan sponsor or fiduciary doing so directly.

Whether the resulting communications between the client and the party handling the compliance review would then enjoy attorney-client privilege would seem a more difficult issue than in the example above where an attorney who was asked about minimum funding requirements retains an actuary. That is because some of the work handled by the compliance audit vendor will very likely fall within the capabilities of the attorney. In the parlance of *Kovel*, there would be no need for a "translator" with respect to much of the information gathered. There would, though, be exceptions, where it would be necessary, or at least highly useful, for the attorney to have experts knowledgeable in actuarial science, finance, medicine, or intellectual technology, "translate" for the attorney.

But even if the attorney has the skill set to do the entire audit, recall that *Kovel*, in *dicta*, noted that attorneys cannot do their work effectively without the assistance of helpers having non-technical abilities, such as "secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." The court quoted Wigmore to the effect that "the assistance of these agents being indispensable to his work, . . . the privilege must include all the persons who act as the attorney's agents." One could argue, then, that if an attorney has been retained to pull together and analyze the results of a compliance audit vendor's efforts, and uses those results in providing a report to the client involving legal (rather than business) analysis, having the compliance audit vendor report its results to the attorney (and perhaps even having the attorney retain that vendor) may well extend attorney-client privilege to the client's communications with the non-attorney vendor.

It would seem that the role of the attorney must be meaningful, though. That is, *Kovel* imagines a circumstance where an attorney has been asked for legal advice. The attorney gathers assistance from others in providing that advice. The attorney is, of course, the party that provides the legal advice to the client. If, instead, an attorney were engaged simply to serve as a conduit for the compliance audit vendor's report, receiving and passing it along to the client, and perhaps for the purpose of retaining the vendor, it would seem hard to argue that the client's communications with the vendor would enjoy attorney-client privilege under *Kovel*. That is because if the attorney's only role is to "touch" the vendor's report as it passes to the client (and perhaps to retain the vendor), the attorney would not seem to have been retained to provide any meaningful legal analysis for which the attorney would have needed the assistance of the compliance audit vendor.

All of this begs the question whether the "fiduciary exception" to attorney-client privilege described in Section I.D below makes all this moot. Where the matters at issue are fiduciary, rather than settlor, in nature there would typically be no

privilege in any event, unless the “personal liability” rule described in Section I.F below applies. There is no reason to think the *Kovel* doctrine somehow bootstraps one out of the fiduciary exception, creating privilege where none would otherwise have existed. In the examples above, involve funding and compliance audits, there may, depending on the facts and circumstances, be some argument that the personal liability rule applies or that some or all of the issues are settlor.

**Disclosure to Actuary.** In *Cottillion v. United Refining Co.*, 2011 WL 6989832, 2011 U.S. Dist. Lexis 151519, 53 EBC 1275 (W.D. Pa. 2011), a federal district court considered a dispute concerning an actuarial reduction in early retirement benefits. As to the inapplicability of the fiduciary exception for advice concerning personal liability (see the *U.S. v. Mett* discussion in Section I.F below), the court held that the interest of the plan beneficiaries diverged from the plan trustee’s interest when the trustee took concrete steps to actuarially reduce benefits to retirees already in pay status and to recoup overpayments, because at that point a serious and significant threat of litigation had materialized. An attorney’s action in copying an actuary on an email did not waive attorney-client privilege because the actuary’s involvement was at the direction of the attorney, to assist the attorney in the provision of legal advice. As to whether a disclosure to the actuary constitutes a waiver, the court said the critical inquiry is “whether the third party consultant is involved in the giving of legal advice” or “functions like an employee in providing information which facilitates the obtaining of legal advice.” The key in the instant case was that the communications with the actuary were at the attorney’s direction, for the express purpose of assisting him in providing legal advice.

An email from the actuary to a committee member regarding recouping payments was not, however, privileged, even if it was at the attorney’s direction because it concerned only accounting issues related to the administration of the plan (and was prepared for non-litigation purposes, not in anticipation of litigation).

The court also concluded as follows:

1. A draft document subject to revision was not automatically privileged.
2. A proposed response to an inquiry from a beneficiary relating to a reduction in benefits enjoyed no privilege because it was related only to plan administration.
3. A draft form of a letter to participants regarding a benefit reduction in a VCP process was related to administration of the plan, and therefore not privileged.
4. Discussions of plan amendments concerned settlor issues, so the fiduciary exception was inapplicable.
5. Meeting minutes generally were not privileged, except small portions containing legal advice falling within the personal liability limitations of the fiduciary exception.

The court also concluded that letters to auditors relating to the annual plan audit were not privileged.

- B. Entity Representation.** Generally, an entity client will enjoy attorney-client privilege with respect to communications between its attorney and its constituents, so long as those communications relate to the subject matter of the representation. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); Restatement § 73 & cmt. d. To enjoy privilege, the communication must, however, be with an “agent” of the entity, which can include even lower level employees communicating with counsel concerning the subject matter of the representation.

**Corporation’s Privilege for Communications With Outside Consultant Who Was Functional Equivalent of Employee.** The Ninth Circuit concluded that a corporation can enjoy privilege with respect to communications its attorneys have with consultants who are the “functional equivalent” of employees. *U.S. v. Graf*, 610 F.3d 1148 (9th Cir. 2010). The issue arose in the criminal trial of the founder of a corporation who was technically not an employee. The founder sought to exclude testimony of the corporation’s counsel. At least ostensibly, the founder was a consultant to the company, having been prohibited from acting as an employee or agent by the terms of California cease-and-desist orders relating to earlier misconduct.

The court concluded that the defendant (the founder of the company) had no attorney-client relationship with the company’s attorneys, and therefore had no privilege he could assert. Since this conclusion did not seem to depend on whether the company had privilege, one might argue that the court did not need to reach that issue. Nonetheless, the court plainly addressed the question. Specifically, the court held that the company had privilege for its counsel’s communications with the founder because the founder, as a consultant, was a “functional employee” of the company. The company waived its privilege so its attorneys could testify in the founder’s criminal trial, against the founder’s wishes.

In concluding that the company had privilege with respect to its counsel’s communications with the founder, the Ninth Circuit adopted the Eighth Circuit’s analysis in *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994). In *Bieter*, the Eighth Circuit relied on the Supreme Court’s decision in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981), to apply privilege to communications between corporate counsel and outside consultants. The Ninth Circuit described *Bieter* as follows:

The *Bieter* court reasoned that “too narrow a definition of ‘representative of the client’ will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.” *Id.* The consultant at issue in *Bieter* was “involved on a daily basis with the principals of Bieter and on Bieter’s behalf in the unsuccessful development that serve[d] as the basis for th[e] litigation,” therefore, he was “precisely

the sort of person with whom a lawyer would wish to confer confidentially in order to understand Bieter's reasons for seeking representation." *Id.* at 938 (citing *Upjohn*, 449 U.S. at 389). The court concluded that "he was in all relevant respects the functional equivalent of an employee." *Id.* (citing *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990)).

*Graf* not only addressed a corporation's privilege for communications between its counsel and non-employees who are the "functional equivalent" of employees, it also announced a standard for determining whether a corporate employee holds a joint privilege over communications with corporate counsel. This question of joint privilege seems tantamount to the question whether corporate counsel, intentionally or not, has come to represent an employee (or functional employee) in addition to representing the corporation.

*Graf* is illustrative of a tension inherent in representing an entity – the need to communicate through the entity's constituents, without coming to represent the constituents themselves. Given the fundamental nature of this conflict, it is worth describing the facts of the case and the court's analysis in further detail.

The defendant, Mr. Graf, was the founder of, and ostensible consultant to, a company that purported to provide health care benefits coverage to more than 20,000 plan members. In fact, the company was, as the court put it, "part of an elaborate scheme to defraud" individuals and small businesses who purchased health plan coverage through the company.

Graf was indicted for his involvement in the fraudulent operation of the company. The district court allowed several attorneys who had represented the company to testify against Graf at his criminal trial, despite Graf's motion to exclude their testimony. The district court found that the attorneys represented only the company and that Graf had no individual attorney-client relationship to establish any privilege that would be violated by the proffered testimony.

A jury found Graf guilty of conspiracy, mail fraud, misappropriation, conducting unlawful monetary transactions, and obstruction of justice. Graf was sentenced to 300 months' imprisonment, and ordered to provide restitution in an amount exceeding \$20 million.

The Ninth Circuit was asked to consider whether the district court's refusal to exclude the attorneys' testimony was erroneous. The question was made complicated by the fact that Graf had not been listed as an employee, officer, or director of the company, nor of 16 related trade associations. This was so even though Graf had organized the company and the trade associations with his then-girlfriend and one other individual. As the court noted, the failure to list Graf as an employee, officer, or director was "likely because Graf had previously been banned from insurance work in the state of California for misconduct in violation of state insurance laws."

The plans were multiple employer welfare arrangements (“MEWAs”) marketed to insurance agents, who in turn sold them to employers and individuals. Graf misrepresented to the insurance agents and the public that the plans were insured through various insurance companies. In making these misrepresentations, Graf ignored advice of the company’s attorneys that the marketing of the plans violated state and federal law.

Graf also incorporated another company, created to appear as a preferred provider organization. This allowed Graf and his then-girlfriend to “funnel money” from the main company into the ersatz PPO in exchange for services the phony PPO allegedly rendered to the main company. This second organization was actually a shell company designed to hide the diversion of about \$750,000 in premiums Graf and his then-girlfriend used to purchase jewelry, a sports car, and a house.

When the Department of Labor began investigating the main company, Graf obstructed that investigation in a variety of ways. For example, Graf instructed attorneys representing the company to inform the Department that the marketing of the plans had ceased, even though Graf knew this was false. He also told the company’s employees to hide documents and information from DOL investigators conducting an onsite visit. When the DOL issued subpoenas to the second company (the one intended to appear as a PPO), Graf produced documents that purported to show that the company was in fact a PPO (run by his girlfriend), and that it provided services to the main company, although Graf knew this was false.

The DOL filed a civil suit to remove Graf and his girlfriend from the company, install an independent fiduciary to operate the company, and freeze the company’s assets, as well as the personal assets of Graf and his girlfriend. The district court did, in fact, install an independent fiduciary and froze the assets of the two companies, the trade associations, and those of Graf and his girlfriend.

Sadly, the company collected about \$14 million in payments for medical coverage, but paid less than \$1.8 million in claims. Unpaid claims exceeded \$20 million.

The independent fiduciary waived the company’s attorney-client privilege with regard to all communications between the company and its legal counsel – both its general counsel and outside counsel. As noted earlier, Graf argued that he was a joint holder of the attorney-client privilege and had not waived it, so the testimony of these attorneys should be excluded.

The court noted that a party asserting attorney-client privilege has the burden of establishing both the existence of an attorney-client relationship and the privileged nature of the communication, citing *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (quoting *U.S. v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997)). Because the privilege “impedes full and free discovery of the truth,” the privilege, the court explained, is strictly construed.

The Ninth Circuit indicated that it applies the following eight-part analysis in determining whether information is covered by the attorney-client privilege: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his or her instance permanently protected (7) from disclosure by him or herself or by the legal advisor, (8) unless the protection is waived. (Citing *U.S. v. Ruehle, supra*, which in turn quoted *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n. 2 (9th Cir. 1992))

Graf argued that even if, as the government asserted, the company enjoyed privilege with respect to its attorneys' communications with the company's officers, directors, and employees, Graf was not an officer, director, or employee, but was instead an outside consultant.

The court said there appeared to be two potential consequences of Graf's status as an independent consultant. First, Graf argued that because he was not an employee his conversations with the company's attorneys should not have fallen within the company's corporate privilege under the Supreme Court's decision in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). Second, Graf contended that because he was an independent but interested or related third party, he was a joint client of the attorneys.

The court's obligation to address the first of these arguments – that because Graf was not an employee his conversations with the attorneys should not have fallen within the company's corporate privilege – may explain why the court bothered to consider whether the company had privilege. After all, the company waived any privilege it may have had, so one might think the only relevant question was whether Graf himself had privilege. For Graf to have privilege he would have needed to have been a client of the attorneys, but this would not seem to require that the company also have privilege.

In any event, the court did take the opportunity to consider both (1) whether a company's corporate attorney-client privilege extends to communications between its counsel and outside consultants, and (2) when corporate employees themselves have attorney-client privilege for communications with a corporation's counsel.

As to the first of these questions – whether a company's corporate attorney-client privilege extends to communications between the company's counsel and the company's outside consultants – the court first reminded the reader of the Supreme Court's holding in *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that a corporation's privilege extends to communications between corporate employees and corporate counsel as long as the communications are “made at the direction of corporate superiors in order to secure legal advice.” The Ninth Circuit then adopted the Eighth Circuit's conclusion in *Bieter, supra*, that communications between an outside consultant and an entity's attorneys will be covered under the entity's attorney-client privilege where the outside consultant is the “functional equivalent of an employee.”

The Ninth Circuit held that Graf was a “functional employee” of the company. He was a functional employee by reason of his communications with insurance brokers and agents on behalf of the company, his management of company employees, and more importantly, his role as the company’s primary agent in its communications with corporate counsel. The sole reason Graf was not explicitly a director, officer, or employee was, again, apparently because outstanding California cease-and-desist orders prevented him from lawfully being employed by an insurance company in the state. Because Graf was a functional employee, and not an independent outside consultant to the company, the court rejected Graf’s claim of entitlement to a jointly-held attorney-client privilege with the company’s attorneys.

Having concluded that Graf did not have a jointly-held attorney-client privilege with the company, the court turned to the question of whether Graf, as a functional employee of the company, held a personal attorney-client privilege over any of his communications with the attorneys. The court announced in this regard that it was adopting the Third Circuit’s test in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986) for determining whether individual employees enjoy a personal attorney-client privilege for their communications with a company’s corporate counsel.

Under the *Bevill* test, which has also been adopted by the First, Second, and Tenth Circuits, individual corporate officers or employees seeking to assert a personal claim of attorney-client privilege must affirmatively show the following five factors:

*First*, they must show they approached counsel for the purpose of seeking legal advice. *Second*, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. *Third*, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. *Fourth*, they must prove that their conversations with counsel were confidential. And *fifth*, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

*Bevill* at 123, 125 (quoting *In re Grand Jury Investigation*, 575 F. Supp 777, 780 (N.D. Ga. 1983) (brackets omitted and emphases added).

In describing its reason for adopting the *Bevill* test, the court said the following:

There are strong policy reasons to adopt the *Bevill* test. As noted above, any time a corporation retains counsel, counsel will have to talk to individual employees to represent the company effectively. The *Bevill* test responds to this reality by ensuring that a corporation is free to obtain information from its officers, employees, and

consultants about company matters and then control the attorney-client privilege, waiving it when necessary to serve corporate interests. The test also preserves the individual's ability to claim a personal attorney-client privilege when the individual makes clear he or she is seeking personal legal advice and the communications relate to personal legal affairs, not to the company's business. Moreover, there are reasons to look to other circuits when contemplating the proper standard to this arena. As the Supreme Court cautioned in *Upjohn*, "[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." 449 U.S. at 393. For these reasons, we adopt the *Bevill* test in the Ninth Circuit.

The court explained how the *Bevill* test would apply to Graf. For Graf to enjoy a personal attorney-client privilege, Graf must establish the following:

- (2) he approached the attorneys for the purpose of seeking legal advice; (2) when he did so, he made it clear to the attorneys that he was seeking legal advice in his individual rather than in his representative capacity; (3) the attorneys saw fit to represent him personally, knowing a conflict could arise; (4) his conversations with the attorneys were in confidence; and (5) "the substance of [his] conversations with [the attorneys] did not concern matters within [the company] or the general affairs of [the company]."

The court concluded that Graf failed to meet factors 2, 3, and 5 as to all of the attorneys at issue. In reaching this conclusion, the court placed weight on the fact that the attorneys' retainer agreements and engagement letters were signed by one of the company's founders other than Graf, and that the company paid the attorneys' bills.

The court concluded that Graf had not sought any personal legal advice from the attorneys. Instead, his conversations with counsel had related to his official duties at the company and the general affairs of the company. One attorney had previously represented Graf in an unrelated matter covering a completely different subject matter. Specifically, the attorney had represented another Graf company in connection with a potential acquisition of an insurance company. The company related to the instant litigation had, in contrast, hired the attorney's firm to review insurance policies the company planned to use in connection with its welfare program, and to determine whether those policies met federal and state law requirements. Although there was some disagreement about whether the attorney had represented Graf personally during the earlier representation of Graf's prior company, the court assumed for purposes of its opinion that he done so. The attorney ultimately did not testify at trial, but the court indicated that there had been no personal representation of Graf because the two representations were different and were separated by several years.

As to conversations between Graf and the company's general counsel, Graf was not personally represented by that attorney while he served as general counsel (a position he held for only six months or so). The attorney did, though, represent Graf personally both before and after he was general counsel. The court said Graf presented no evidence that he ever asked the attorney to represent him personally while he was serving as general counsel, or that the attorney agreed to dual-representation after considering the potential conflicts. The attorney had previously represented Graf in an individual capacity on a variety of matters, including family law, bankruptcy, and business matters related to the California Department of Insurance's investigation of Graf's prior company. None of these personal matters was, however, legally or factually related to the matters the attorney handled at the company while serving as its general counsel. After the company was shut down by the Department of Labor, the attorney again advised Graf, this time regarding complaints he was drafting *pro se* against representatives of the Department. In indicating that he did not represent Graf personally while engaged as general counsel, the attorney not only said he did not discuss with Graf any personal liability during that time, he also testified with refreshing candor that he did "exceptionally little" as general counsel.

In adopting the *Bevill* factors, the court appears to have rejected application of an alternate test for determining whether Graf had a personal attorney-client privilege. Under that alternate theory, Graf argued that he had a "reasonable subjective belief that the company's attorneys represented him in his individual capacity." Although not entirely clear, the court seems to have adopted the five-part *Bevill* test for claiming a personal attorney-client privilege to the exclusion of this alternate theory.

**Privilege Over Pre-Merger Communications with Target Company May Pass to Surviving Corporation in Merger.** In a case of first impression involving the interpretation of a Delaware statutory provision concerning corporate mergers, the Delaware Court of Chancery concluded that, absent a contractual language to the contrary in the merger agreement, privilege over pre-merger communications with a target company belonged to the survivor as a matter of law under Section 259 of the General Corporation Law of the State of Delaware. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013).

For a similar ruling applying federal privilege law to a dispute involving corporations based outside Delaware, but organized under Delaware law, see *NewSpring Mezzanine Capital II, L.P. v. Hayes*, 2014 WL 6908058 (W.D. Pa. 2014). In that case, the court concluded that a successor corporation held the attorney-client privilege relating to pre-merger communications. But see *Tekni-Plex v. Meyner and Landis*, 89 N.Y.2d 123, 674 N.E.2d 663 (N.Y. 1996) (where, as described in *NewSpring Mezzanine*, "a New York state court applying New York law found that the former sole shareholder and CEO of a corporation retained control over the attorney-client privilege after a merger and transfer of control, but only with respect to communications that related to the negotiation of the merger. The court reasoned that the shareholder and CEO was in an adversarial posture

towards the company that was absorbing his own, and was entitled to confidential communications with his long-time lawyer about the negotiations.”) See also *Novack v. Raytheon Co.*, 382 Mass. L. Rptr. 32, 2014 WL 7506205 (Super. Ct. Mass. 2014) (“an acquiring company owns and controls the attorney-client privilege applicable to pre-merger communications between the acquired company and its counsel regarding the merger”).

For a case in which even though the court agreed that “[i]t is well established that when one company acquires or takes control of another, attorney-client privilege passes to the purchaser,” an acquired company nevertheless remained the holder of attorney-client privilege over pre-closing communications, see *Sentinel Offender Services, LLC, v. G4S Secure Solutions, Inc.*, 2015 WL 13546228 (C.D. Cal. 2015). The acquired company retained the privilege because the court concluded that purchase agreement provisions relating to “confidential information” (to be retained by the parties) included as confidential information attorney-client privileged material. This was so even though the purchase agreement provision failed to expressly state that this was the case.

- C. **Multiple Representation.** Although attorney-client privilege may be waived by disclosure to third parties, confidential communications between joint clients and their attorney are privileged as to third parties, and those communications may be disclosed to the other client without waiving confidentiality. Restatement § 75(1). Where co-clients’ communications with their attorney relate to “matters of common interest,” the attorney may disclose those communications to other co-clients unless the clients have agreed to the contrary. Restatement § 75(2).
- D. **Fiduciary Exception.** In general, to the extent an attorney advises (1) a fiduciary (2) about a matter dealing with the administration of an employee benefit plan, the attorney’s client for privilege purposes is not the fiduciary personally but, rather, the trust’s beneficiaries. *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906, 3 EBC 1741 (D. D.C. 1992). Some courts have concluded that this “fiduciary exception” to the attorney-client privilege applies only where there is “good cause” for requiring disclosure to participants (or to the Department of Labor, representing the participants’ interests). Courts requiring “good cause” have been influenced by the Fifth Circuit’s decision in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5<sup>th</sup> Cir. 1970), where the court required a corporation to disclose information to its shareholders in connection with a shareholder action for fraud where there was good cause to deny privilege. See, for example, *Thompson v. Avondale Industries, Inc.*, 2001 U.S. Dist. Lexis 15674 (E.D. La. 2001), where the court indicated that the parties “acknowledge[d] the applicability of *Garner*.” The court in *Thompson* refused to apply an exception to the attorney-client privilege because the plaintiff ESOP participants seeking discovery held only a small portion of the company’s outstanding stock, the plaintiffs did not establish that the information sought could not be obtained by other means, and the discovery sought was overbroad. Though not entirely clear, the court in *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 2 EBC 1393 (N.D. Ill. 1981),

seemed to assume that participants must show good cause to discover communications between an attorney and a fiduciary.

Other courts have not applied the *Garner* analysis in the ERISA fiduciary context. Instead, they have reached the conclusion that a fiduciary has no privilege *vis a vis* participants, without requiring that participants show good cause for the disclosure. For example, no good cause showing was required in *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906, 3 EBC 1741 (D. D.C. 1992); and *Martin v. Valley National Bank*, 140 F.R.D. 291 (S.D. N.Y. 1991), *summary judgment granted sub nom Reich v. Valley National Bank*, 837 F. Supp. 1259 (S.D. N.Y. 1993). Some courts have failed to impose a good cause requirement without squarely addressing the applicability of *Garner*. E.g., *Jackson v. Capital Bank & Trust Co.*, 1991 WL 148751 (E.D. La. 1991); *Hammond v. Trans World Airlines*, 1991 WL 93498 (N.D. Ill. 1991); and *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494 (D. Conn. 1985). In other cases, courts have determined that good cause existed, without determining whether good cause was required. E.g., *Helt v. Metropolitan District Commission*, 113 F.R.D. 7, 7 EBC 2617 (D. Conn. 1986). In *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 16 EBC 1235 (5<sup>th</sup> Cir.), *reh'g denied*, 979 F.2d 1013, 16 EBC 1251 (5<sup>th</sup> Cir. 1992), the Fifth Circuit found that attorney-client privilege protected communications between a fiduciary and litigation counsel because litigation counsel had advised the fiduciary for the purpose of defending the instant lawsuit “and did not deal with plan administration.”

**DOL Audit: Fiduciary Exception.** The Fourth Circuit held that the fiduciary exception applies not only where the Department of Labor acts on behalf of beneficiaries in an enforcement action, but also to a Department of Labor compliance investigation under ERISA Section 504. *Solis v. Food Employers Labor Relations Assn.*, 644 F.3d 221, 50 EBC 2697 (4<sup>th</sup> Cir. 2011). See also *Solis v. Principal Financial Group, Inc.*, 2011 WL 13290335 (S.D. Ia. 2011), where a magistrate judge’s report (adopted at 2011 WL 13290334 (S.D. Ia. 2011)) also applied the fiduciary exception in the context of a DOL investigation.

**E. Nonfiduciary Matters.** The fiduciary exception does not apply to overcome claims of privilege where the client was not acting in a fiduciary capacity<sup>1</sup> with respect to the communications at issue. See, e.g., *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 1994 WL 6883 (E.D. Pa. 1994) (employer’s communication with counsel would be privileged to the extent it related to decision to amend or terminate employee benefit plan). Similarly, in *In re Long Island*

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<sup>1</sup> In the privilege context, some courts seem to treat the term “plan administration” (as used in *Washington Star* and its progeny) as describing precisely those actions that are “fiduciary” – as opposed to “settlor” – in nature (a fiduciary/non-fiduciary distinction was applied in *In re Long Island Lighting Co.* and a number of subsequent decisions). *But see Fischel v. Equitable Life Assurance*, 191 F.R.D. 606 (N.D. Cal. 200), where the court was careful to note that *Mett* (and its predecessor *Washington Star*) used the term “plan administration,” whereas the court in *In re Long Island Lighting* applied a fiduciary/non-fiduciary activity distinction. The court in *Fischel* rejected the fiduciary/non-fiduciary distinction, in part, because it found it difficult to apply.

*Lighting Co.*, 129 F.3d 268, 21 EBC 2025 (2d Cir. 1997), a fiduciary enjoyed privilege with respect to communications concerning nonfiduciary matters (such as “settlor functions” like amending or terminating a plan), even though other communications with the same attorney relating to plan administration may not have been privileged.

Where an employer was unable to demonstrate that documents related “*solely* to its nonfiduciary activities or to the formation, amendment, or termination of [its] pension plan” and could not establish that the documents were “wholly unrelated to plan administration and have not been used in connection with defendants’ role as plan administrator,” the plan sponsor did not enjoy privilege *vis a vis* plan participants. *Everett v. USAir Group, Inc.*, 165 F.R.D. 1 (D. D.C. 1995) (emphasis added). The court in *Everett* did, however, recognize that when a plan sponsor can demonstrate that it has consulted an attorney on issues other than plan administration, the sponsor, and not any beneficiary, will be the client and will be entitled to attorney-client privilege.

Advice from counsel concerning documents drafted for the purpose of communicating with participants about amendments to benefit plans related to fiduciary matters, and therefore did not enjoy privilege *vis-à-vis* plan participants, in *Baker v. Kingsley*, 2007 U.S. Dist. Lexis 8375 (N.D. Ill. 2007). The case is notable because it appears that the “benefits update” and “retiree medical highlights brochure” that were the subject of the discovery dispute were prepared before the formal adoption of the plan amendments they described. They were, however, prepared after the business decision to change the plans had been approved by the employer’s board of directors. The employer argued that the fiduciary exception to privilege did not apply because the documents were drafted prior to the formal amendments having been adopted, and while the employer was still in the process of seeking advice from counsel on how to draft the formal plan documents. As a result, the employer argued, communications relating to the documents concerned non-fiduciary settlor functions, such as adoption or amendment of a plan. The court rejected this argument, stating that “defendants cite no authority in support of their argument that a plan needs to be in a final form in order for fiduciary obligations to arise regarding preparation of employee and retiree communications material explaining approved plan changes.”

A federal district court concluded that the creation of a plan committee having responsibility for investment issues relating to 401(k) plans was not a fiduciary decision, so communications regarding the creation of the committee were privileged. *Beesley v. Int’l Paper Co.*, 2008 WL 2323849, 44 EBC 1038 (S.D. Ill. 2008). The case involved allegations by participants in 401(k) plans that the defendants were fiduciaries and had breached their fiduciary duties in various ways, including by failing to contain plan costs, paying unreasonable fees to service providers, failing to minimize costs associated with investments in employer securities, and holding a portion of plan assets in cash. The plans were, apparently, at an earlier time supervised by a group called the “fiduciary review committee,” but a decision was later made to create a 401(k) committee to assume that function.

The company's Director of Trust Investments testified in a deposition that it was her understanding that the reason for removing the supervisory function from the earlier group was that "it was viewed as a conflict of interest to have directors of [the company] be responsible for decisions made with regard to the company stock so there was a decision a legal decision made to separate those two responsibilities." After the Director of Trust Investments testified that her knowledge of the alleged conflict of interest came from counsel, her attorney objected on the basis of attorney-client privilege and instructed her not to answer questions relating to the issue. Similarly, an individual who had previously served as plan administrator testified in a deposition that he was removed from his position as such after new corporate counsel reviewed the "board governance activities" and decided to make some changes. Plaintiffs' counsel attempted to ask questions about the "scope" of counsel's review, at which point defendants' counsel invoked the attorney-client privilege and instructed the witness not to answer.

The court considered whether, by reason of the fiduciary exception, the plaintiffs were entitled to ask questions of these witnesses about the reasons for the creation of the 401(k) committee, as well as the reasons the individual who had served as plan administrator was replaced in that capacity. In that regard, the defendants pointed out that the 401(k) committee was created by amendments to the relevant plans. The court said this was not dispositive of the question whether the creation of the committee was a fiduciary act (that is, a "plan administration function") because a plan administration function could not be converted into a plan amendment, and thereby become sheltered by privilege, simply by memorializing the act in a plan amendment. Instead, the court indicated that it must look to the nature of the act to determine whether the fiduciary exception applied. In this case, the nature of the act was to change the identity of the body charged with supervision and oversight of the plans at issue. The court noted that under Seventh Circuit precedent, the design of a plan is not a fiduciary function. Similarly, the decision to set up a new plan as part of a sale of the employer's assets has been held not to be a fiduciary function. More generally, fiduciary standards do not apply when an employer "decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms." Decisions about the investment of plan money and the exercise of control over the management or disposition of plan assets do, however, constitute administration of a plan, so the fiduciary exception would apply with respect to those decisions.

After reviewing the relevant Seventh Circuit precedent, the court concluded that the decision to create the 401(k) committee constituted a plan amendment rather than plan management. As a result, communications with corporate counsel regarding the creation of the committee were privileged.

- F. Personal Liability.** In *United States v. Mett*, 178 F.3d 1058, 23 EBC 1081 (9<sup>th</sup> Cir. 1999), the Ninth Circuit considered the privileged status of communications with an attorney who represented plan fiduciaries (as well as the plan itself and the employer). The court held that any advice relating to the fiduciaries' personal

liability was privileged as personal advice rather than advice concerning ongoing plan administration. Other courts, post-*Mett*, have also drawn a distinction between communications relating to plan administration and those relating to a fiduciary's personal liability. Generally, privilege attaches to communications relating to a fiduciary's personal liability, but not to communications relating to plan administration.

In the context of benefit claims, a number of courts have applied the *Mett* analysis to hold that advice provided prior to fiduciaries denying a claim is not entitled to privilege, although advice provided after a claim is denied may be privileged. *See, e.g., Geissal v. Moore Medical Corp.*, 192 F.R.D. 620, 24 EBC 2805, 27 EBC 1188 (E.D. Mo. 2000); *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001); *Coffman v. Metropolitan Life Insurance Co.*, 204 F.R.D. 296, 27 EBC 1188 (S.D. W.Va. 2001); *Anderson v. Sotheby's Inc. Severance Plan*, \_\_\_\_\_ (S.D.N.Y. May 13, 2005) (Case No. 04 CIV 8180 (SAS)(DFE)); *Asuncion v. Metro. Life Ins. Co.*, 493 F. Supp. 2d 716, 720-22 (S.D.N.Y. 2007); *Black v. Pitney Bowes*, 2006 U.S. Dist. Lexis 92263 (S.D. N.Y. 2006); *Bell v. Pfizer Inc.*, 2006 U.S. Dist. Lexis 62611 (S.D. N.Y. 2006).

One federal district court has, however, indicated that a “pre-decisional/post-decisional” approach for determining whether communications are subject to the fiduciary exception is inappropriately rigid. *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 43 EBC 2304 (M.D.N.C. 2008). The *Tatum* court instead concluded that the time period in which communications occur may be informative, but not dispositive, as to whether privilege applies. The key issue is whether the communication related to plan administration or generalized concern for liability, as opposed to concern for the fiduciaries' liability as a result of a specific threat of litigation. In *Tatum*, one of the plaintiffs, in complaining about the elimination of a 401(k) investment option for investing in stock of a former parent company, indicated that he had retained a lawyer and was considering a class action lawsuit. In a subsequent letter to the company's employee benefits committee, in which the participant submitted a claim for benefits, the participant alleged that the plan fiduciaries had violated their ERISA obligations and that if his claim were denied he wanted the names of the members of the committee, meeting minutes where the stock divestiture issue was discussed, and opinions of counsel relating to that divestiture.

The court found that under these circumstances, there was a concern for the fiduciaries' liability as a result of a specific threat of litigation, and that this arose even before the fiduciary committee had decided the participant's claim. That is, taking the participant's communications as a whole, it was reasonable that the defendants would have perceived the participant to be making a specific threat of litigation even before beginning the participant's administrative claim and review process. The circumstances did not reflect the generalized prospect of post-decisional litigation that may occur any time a claim is denied. Rather, the participant made specific statements indicating his intention to file suit. The

participant's administrative claim for benefits, submitted "at the Plan fiduciaries' instigation," merely delayed the filing of the participant's lawsuit.

The court concluded that communications reflecting legal advice concerning how to respond to the participant's legal claim and impending litigation were privileged, even though they apparently occurred before the participant's administrative claim was decided. The court found the existence of privilege to be a closer question with respect to legal opinions and advice of outside counsel regarding the response to the participant's administrative claim and appeal. Although generally legal advice related to the ordinary administration of a plan, such as preparing a response to a beneficiary's claim, is not privileged as against the beneficiary, in the instant case the legal advice was rendered by outside litigation counsel in anticipation of the participant's impending litigation. The court was not required to make a decision with respect to this advice under the attorney-client privilege doctrine, because the defendants successfully asserted work product protection for these documents. As a result, the documents were not required to be disclosed.

In a post-*Tatum* decision, a different federal district court, citing to both *Tatum* and *Wachtel* (discussed below in the section captioned "Insurance Companies"), held that an insurance company that decided claims and paid long-term disability benefits from its own assets enjoyed privilege with respect to communications occurring after the insurance company denied a plan participant's claim and after the participant threatened the insurance company with litigation. The court found that all of the communications in dispute related to the threatened litigation. *Fortier v. Principal Life Ins. Co.*, 2008 U.S. Dist. Lexis 43108 (E.D. N.C. 2008). The court observed, incidentally, that the Fourth Circuit has not directly addressed whether there is a fiduciary exception to attorney-client privilege in the ERISA context.

The *Tatum* analysis generally does not seem to have turned the tide from the pre-decisional/post-decisional approach (for determining whether communications are subject to the fiduciary exception). For example, a federal district court in 2009 noted approvingly the pre-decisional/post-decisional distinction, and this distinction seemed to guide the court's conclusion that certain pre-decisional communications were not privileged by reason of the fiduciary exception. *Redd v. Bhd. of Maintenance of Way Employees Div. of the Int'l Bhd. of Teamsters*, 2009 U.S. Dist. Lexis 46288, 47 EBC 1865 (E.D. Mich. 2009). The *Redd* court cited the rationale of *Geissal*, above, in rejecting a plan administrator's argument that documents were privileged where they were created in the "pre-decisional" phase of the administrator's decision to recalculate and reduce plaintiff-participants' pension benefits. The documents apparently concerned the administrator's decision that the pension benefits had been incorrectly calculated, as well calculation of the purportedly correct amounts.

The plan administrator argued that the fiduciary exception did not apply, and the communications should therefore be privileged, in part because the participants were former employees who had already begun to receive pension benefits, so they and the plan administrator would "invariably be in an 'adversarial' posture as soon

as the plan administrator commenced the inquiry whether these benefits payments were erroneous and should be recalculated.” The court quoted from the *Geissal* opinion in rejecting the plan administrator’s argument, noting that if the possibility that a benefit denial would lead to litigation were sufficient reason to overcome the fiduciary exception, all of the antecedent, pre-decisional legal advice of counsel in connection with any denial of a beneficiary’s claim for benefits under a plan would be subject to attorney-client privilege. The court said this would “contradict[ ] the principle that the plan’s administrator or trustee administers the plan in the beneficiaries’ best interests.”

The court continued to quote from *Geissal*, as follows:

The prospect of post-decisional litigation against the plan by a disappointed beneficiary can exist whenever the plan denies a claim. Because the denial of claims is as much a part of the administration of a plan as the decision-making which results in no unhappy beneficiary, the prospect of post-decisional litigation against the plan is an insufficient basis for gainsaying the fiduciary exception to the attorney-client privilege.

The *Redd* court summed up its conclusion as follows:

[E]ven 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.

*Redd* raises a couple of other interesting issues. First, the plaintiffs argued that the “personal liability” exception to the fiduciary exception should not apply because they were making no effort to impose personal liability on the plan administrator such that the advice of counsel could be viewed “as offered on behalf of the plan administrator rather than the plan and its beneficiaries.” The court did not directly address the implications of the plaintiffs’ assertion, but it raises an interesting question: whether post-decisional communications may be privileged, or instead are subject to the fiduciary exception, where no claim is made against any party for personal liability. That, conceivably, might occur where a participant brings a claim only for benefits, and not, for example, for fiduciary breach, and where the claim is brought only against the plan administrator. One might argue that in this circumstance the relief sought is simply the payment of benefits from the plan’s assets, and no party to the litigation has been threatened with personal liability. This is an interesting question, but one which the court did not address (and to which the author does not know the answer).

Second, the plan administrator in *Redd* argued that it retained privilege with respect to pre-decisional decisions (and the fiduciary exception did not apply) because at least some of the plaintiffs were not merely plan participants but, while still employed, “played roles in the administration and operation of the plan.” The court concluded that this would not be sufficient to defeat application of the fiduciary exception, even though a magistrate judge had earlier apparently viewed this as a strong indication that the plan administrator’s action would lead to “an adversarial situation” and later litigation. The court, in contrast, seemed to conclude that rarely, if ever, would pre-decisional communications avoid the fiduciary exception and thereby retain their status as privileged.

Another point about *Redd* bears mention. The court noted in a footnote that it had permitted discovery so plaintiffs could explore the plan administrator’s possible conflicts of interest, since the court would need to take any such conflicts into account in its standard of review analysis under the Supreme Court’s guidance in *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008). Commentators had earlier observed that one of the consequences of *Glenn* might be a new judicial tolerance for discovery in benefits litigation. If so, this will make all the more important the question of when attorney-client privilege applies. Although the court concluded that pre-decisional communications were not privileged, it did express some skepticism about their relevance. In this regard, the court stated the following:

Yet, Plaintiffs have not endeavored to explain how the requested materials might tend to shed light on the existence or nature of any such conflict of interest. Similarly, while Plaintiffs posit that Defendants might pursue an “advice of counsel” defense, this Court is not aware of any case law support for the proposition that a plan administrator’s decision to deny benefits is better able to withstand judicial scrutiny if it rests upon an attorney’s reading of the pertinent plan provisions.

A different federal district court concluded that the fiduciary exception to privilege did not apply where the requested discovery related to communications from counsel after plaintiffs had commenced litigation, even though the advice was provided during the course of, and relating to, the plaintiffs’ administrative appeals. *Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 v. Boeing Co.*, 2009 U.S. Dist. Lexis 102345 (D. Kan. 2009). The plaintiffs, who were participants seeking pension benefits, initiated their administrative claims for benefits under the terms of the pension plan only after filing a lawsuit in which the plaintiffs asserted that the company’s Employee Benefit Plans Committee had breached its fiduciary duties to the plaintiffs.

Because of the pending litigation, the company’s pension service center engaged in-house counsel to provide legal advice concerning the administrative claims. Those administrative claims were denied and the plaintiffs appealed the denials to the company’s Employee Benefit Plans Committee. In doing so, the plaintiffs’

appeal referred to and incorporated allegations in their complaint pending in federal district court. The Committee retained outside legal counsel to “help it navigate the unfamiliar waters where the individuals claiming benefits had already filed suit in federal court seeking the very same benefits that were the subject of their administrative claims and were asserting that the Committee had to respond to the allegations in the lawsuit in deciding the administrative appeal.”

The court rejected the plaintiffs’ argument that the fiduciary exception applied. The plaintiffs had asserted that the fiduciary exception applied because the plaintiffs were seeking discovery only concerning counsel’s advice about plan interpretation, and not counsel’s advice relating to the fiduciaries’ personal liability. (Some of the requested documents related to legal advice provided in connection to the Committee’s response to the plaintiffs’ administrative appeal; other of the requested advice related also to the pending litigation.) The court, in concluding that the fiduciary exception did not apply, and that the requested information was protected under attorney-client privilege, said the following:

In this case the plan fiduciary retained counsel for legal advice because plaintiffs had already commenced litigation and alleged that the Committee had breached its fiduciary duties to the beneficiaries. Because the beneficiaries initiated a suit asserting claims directly against the Committee, “the legal fiction of the ‘trustee as a representative of the beneficiaries’ is dispelled.” See *United States v. Mett*, 178 F.3d 1058, 1065 (9<sup>th</sup> Cir. 1999). The legal advice was sought because of the pending litigation and claims of personal liability; thus, the attorney-client privilege remains intact. *Lewis [v. UNUM Corp. Severance Plan]*, 203 F.R.D. 616 (D. Kan. 2001)] at 619.

Plaintiffs argue that they seek to discover **only** advice on plan interpretation, not advice relating to a fiduciary’s personal liability. This argument is not persuasive. The Committee secured the services of legal counsel **because** the litigation filed against it included a claim that the Committee breached its fiduciary duty to plaintiffs. As noted above, the legal fiction that the trustee is a representative of the plaintiff beneficiaries disappears after claims are asserted directly against the Committee. Equally important, the implied suggestion that counsel could provide meaningful legal advice to the Committee concerning personal liability without evaluating the language of the plan is simply not persuasive.<sup>10</sup> Accordingly, the communications with (1) in-house counsel in June and August 2007 and (2) outside counsel in November and December 2007 are protected by the attorney client privilege. Counsels’ drafts and legal research during this period are also protected by the attorney work product doctrine. (Reference to amended complaint omitted)

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<sup>10</sup> Plaintiffs rely heavily on Lewis to support their claim for production. However, the legal communication ordered produced in Lewis was both “pre-decision” and “pre-litigation.” Most significantly, the claim in Lewis was limited to a request for benefits under the plan. The circumstances in this case are materially different from those presented in Lewis because these consolidated lawsuits include a count against the Committee personally for breach of fiduciary duty.

In *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606 (N.D. Cal. 2000), the court wrestled with whether to apply the *Mett* privilege analysis, or instead to apply what it seemed to consider to be different analysis under *In re Long Island Lighting*. The court preferred *Mett*, which it characterized as articulating the following formulation of the fiduciary exception: “that while generally, the fiduciary exception applies to matters of plan administration, the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains to protect itself from liability.” The court went on to say: “Another way of putting it is that *Mett* limits the scope of advice that relates to ‘plan administration’ by excluding from it any advice whose goal is to advise the trustee about the legal implications of actions and decisions undertaken while performing its fiduciary obligations.” This latter formulation of the *Mett* analysis would seem to provide broader privilege protection than that offered under the first quote above, since advising a trustee about the legal implications of an action or decision would, at least arguably, not always be solely for the purpose of protecting the fiduciary from liability. The court criticized the analysis in *In re Long Island Lighting Co.*, where the Second Circuit focused on whether communications concerned settlor functions or instead fiduciary functions. The *Fischel* court criticized this approach, in part, because of the difficulty in determining what constitutes a fiduciary function.

Applying *Mett*, the *Fischel* court concluded that privilege applied to (a) advice regarding the legal implications and potential liability for the employer and its board in amending and designing the employer’s plan, and (b) documents reflecting in-house counsel’s review and comments on drafts of letters responding to employees’ inquiries, complaints, and claims concerning the plan. In contrast, the court held there was no privilege with respect to (a) documents reviewed by in-house counsel that were intended to describe or communicate to beneficiaries changes in plan benefits, and (b) documents in which in-house counsel had reviewed and commented on the structure and design of the employer’s plan, including its compliance with the employer’s statutory obligations under the federal tax code.

As to counsel’s advice concerning the employer’s potential liability in amending and designing the plan, that advice was privileged because the court gleaned from the subject materials that “litigation [was] anticipated, and the advice relate[d] to the potential exposure to the trustees in their personal capacity.” Similarly, the review of draft letters responding to employees’ inquiries and complaints was privileged because those letters were written to parties who had challenged a

decision to restrict or alter benefits and the advice was rendered in anticipation of litigation. One might argue that privilege would also have applied to counsel's comments on the structure and design of the plan if the court had concluded, as did the court in *In re Long Island Lighting*, that privilege attaches to advice relating to settlor matters. The author would argue that the learning from *Mett* and *In re Long Island Lighting* should be that privilege attaches both (a) to advice that does not relate to plan administration (and does not relate to a fiduciary act or decision), and (b) to advice the goal of which is to advise a fiduciary about his or her potential personal liability.

In *Moss v. UNUM Life Ins. Co. of America*, 2011 U.S. Dist. Lexis 8635, 50 EBC 1984 (W.D. Ky. 2011), *aff'd*, 495 Fed. Appx. 583 (6<sup>th</sup> Cir. 2012), a federal district court, without deciding whether insurers have greater privilege than other fiduciaries (a la *Wachtel*, noted in Section I.H below), held that an insurer had privilege where documents were created before a final benefits determination, but after the initiation of a lawsuit, where the communications concerned the pending lawsuit.

- G. Plans Not Subject to ERISA Fiduciary Rules.** A federal district court has held that the fiduciary exception does not apply to communications concerning a “top hat” plan, because such an arrangement is not subject to ERISA’s fiduciary requirements (by reason of ERISA § 401(a)(1)). *Marsh v. Marsh Supermarkets, Inc.*, 2007 WL 1597938 (S.D. Ind. 2007). The court concluded that the fiduciary exception did not apply to negate the attorney-client privilege (or the work product doctrine) because that exception is premised on the existence of a fiduciary’s duty to its beneficiaries, and no ERISA fiduciary duty is owed with respect to a top hat plan. The court did not address the possibility that a fiduciary duty could nevertheless be owed plan participants under non-ERISA law, and therefore did not address whether a non-ERISA fiduciary obligation would cause the fiduciary exception to apply.

A second federal district court has held that the fiduciary exception does not apply to communications concerning a “top-hat” plan, because such an arrangement is not subject to ERISA’s fiduciary requirements. *Tolbert v. ARB Capital Markets Corp.*, 2012 U.S. Dist. Lexis 42974, 53 EBC 2549 (S.D. Tex. 2012). The court also concluded, however, that disclosure to an actuary waived privilege with respect to that disclosure, though not as to other documents.

- H. Insurance Companies.** In a thoughtful exercise of independent thinking, the Third Circuit concluded that the fiduciary exception did not apply to communications between an insurance company and its attorneys, even though those communications related to the insurance company’s actions as a fiduciary of a health plan subject to ERISA. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 40 EBC 1545 (3d Cir. 2007). Although the insurance company conceded that it was a fiduciary because of its discretion concerning claims decisions, it was not a plan administrator or trustee, and its fiduciary status arose only out of its discretionary authority over the payment of benefits owed to plan beneficiaries.

The *Wachtel* court reviewed the history and development of the fiduciary exception, and its application to ERISA fiduciaries by other courts. In tracing the introduction of the fiduciary exception into American law, the court focused on a Delaware Court of Chancery case, *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976). In *Riggs*, a non-ERISA case, the court held that the beneficiaries of a trust were entitled to discover a legal memorandum which had been prepared for their trustees in connection with matters of trust administration, and for which the trustees had paid using trust assets. The court in *Wachtel* characterized the analysis in *Riggs* as follows:

[T]he court found the memorandum to be discoverable for two reasons. First, the court placed a great deal of weight on the duty of a trustee to furnish information to the trust beneficiaries. Second, the court found the memorandum discoverable for the equally compelling reason that it determined that counsel’s “real” clients – in whom, under longstanding principle – the attorney-client privilege vested – were the beneficiaries, not the trustees (whom the court described as mere representatives). Identification of the “real” client was informed by several factors: (1) the content of the advice was for the benefit of the trust, not the trustees; (2) the advice was paid for with assets of the trust, not the trustees; and (3) no adversarial proceedings against the trustees was pending, meaning that the trustees had no need to seek personal legal advice. Indeed, the court noted that a trustee who properly executes his duties acts *only* on behalf of the beneficiaries. In this case, the fiduciary exception is something of a misnomer because it is the beneficiary, rather than the trustee, who is the “client” component of the “attorney-client” privilege.

(Citations omitted). 482 F.3d at 231.

In discussing the personal liability exception and settlor exception (under the *Mett* and *In re Long Island Lighting* line of cases), the court in *Wachtel* stated:

These two exceptions to the fiduciary exceptions (sic) share a common justification – both allow the attorney-client privilege to remain intact for an ERISA fiduciary when its interest diverge sufficiently from those of the beneficiaries that the justifications for the fiduciary exception no longer outweigh the policy underlying the attorney-client privilege. The beneficiaries are no longer the real clients, and disclosure of attorney-client communications is no longer an obligation.

482 F.3d at 234.

Drawing on the *Riggs* court’s rationale for borrowing the 19th century English common law fiduciary exception, the court in *Wachtel* concluded that application of the exception required careful consideration of the particular circumstances, and

that the fiduciary exception should not apply equally to all types of ERISA fiduciaries. The court concluded that the fiduciary exception did not apply to the subject communications between the insurance company and its attorneys because, in fact, the health plan participants were not the “real” clients obtaining legal representation. It reached this conclusion on the basis of (a) its consideration of four factors for determining who the “real” client is, and (b) an examination of any disclosure obligation the insurance company might have as to advice it receives.

As to the identity of the “real” client, the court stated that when a contractual service provider such as the insurance company being sued obtains legal advice regarding the execution of its fiduciary obligations, the beneficiaries of the benefit plans are not the “real” clients. 482 F.3d at 234. As noted earlier, the court looked to four factors in reaching this conclusion. The first was the ownership of the assets that would be used to pay claims. In the present case, which involved a claim for benefits, there was no trust (none was required under ERISA because the arrangement was insured), and the insurance company owned legal title to the assets that would be used to pay benefits.

Second, the insurance company had a structural (that is, inherent) conflict of interest because it was paying benefits from its own assets, which suggested that the participants would not have been the real clients to which the advice was directed. The court said as a fiduciary’s level of conflict with plan participants increases, the participants’ ability to claim they are the real clients diminishes.

The third factor examined in determining whether the insurance company, or instead the participants, were the real client, was the conflict that resulted from the insurance company administering claims for multiple ERISA benefit plans, as well as non-ERISA customers. That conflict was the insurance company’s need to satisfy its duties not only to participants in the plan at issue, but also to beneficiaries of other plans (as well as non-plan customers), all of whom were to be paid from the same pool of assets.

The fourth factor concerned the source of payment for legal advice. The court stated that “[c]ourts have noted that when a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries’ status as the true clients.” 482 F.3d at 235-36. The court continued “[c]onversely, when a fiduciary obtains legal advice using its own funds, the payment scheme is an indicator (albeit only an indicator) that the fiduciary is the client, not a represent.” 482 F.3d at 236.

As to the “real” client, the court summed up as follows:

Together, these four factors – unity of ownership and management, conflicting interests regarding profits, conflicting fiduciary obligations, and payment of counsel with the fiduciary’s own funds – indicate that an insurer which sells insurance contracts to ERISA-regulated benefit plans is itself the sole and direct client of counsel

retained by the insurer, not the mere representative of client-beneficiaries, and not a joint client with its beneficiaries. Were the insurer's counsel to also represent the beneficiaries who seek to maximize their benefit payments, that counsel would face a direct conflict of interest under any standard of legal ethics. It would be odd indeed if ERISA were to force lawyers into precisely this conflicted role.

482 F.3d at 236.

The court looked not only at the identity of the “real” client for whom the advice was intended, but also the second possible rationale for applying the fiduciary exception – the fiduciary's duty of disclosure. The court, in concluding that there was no duty of the insurance company to disclose to plan participants the advice it received from counsel, explained as follows:

The obligation of a trustee to disclose to beneficiaries the advice of counsel retained by the trust has been recognized in each of three Restatements of Trusts. Some courts have used language broad enough to suggest that *every* ERISA fiduciary has an obligation to disclose counsel's statements to its beneficiaries.

We conclude that such broad language does not represent an intentional expansion of the fiduciary exception. Because fiduciary duties under ERISA “draw much of their content from the common law of trusts,” it is appropriate to apply a trustee's disclosure obligations to ERISA plan administrators who operate as trustees. When Congress extended obligations under the common law of trusts to reach entities which had not been deemed to be trustees under the common law, however, Congress did not intend to expand the full panoply of trustees' obligations to every entity which might designate a fiduciary under ERISA. Specifically, Congress provided that the assets of an insurance company need not be held in trust. For that reason, we do not believe that Congress intended to impose upon insurance companies doing business with ERISA-regulated plans the same disclosure obligations that have been imposed upon trustees at common law. [29 U.S.C.] Section 1103(b)(1)-(2) exempts insurers from trustee-like obligations; we see no reason to impose trustee-like disclosure obligations upon an entity excepted from ERISA's analogy to trust. Thus, simply because an insurer has certain limited fiduciary obligations under ERISA, those obligations are not coextensive with the common law obligations of a trustee.

(citations omitted) 482 F.3d at 236.

The Ninth Circuit has rejected the *Wachtel* holding, concluding that there is “no principled basis for excluding insurers from the fiduciary exception.” *Stephan v. UNUM Life Ins. Co. of Am.*, 697 F.3d 917 (9<sup>th</sup> Cir. 2012). In rejecting the insurer’s argument that documents were nevertheless privileged under the personal liability exception (to the fiduciary exception, noted in Section I.F above), the court said the documents at issue were notes of conversations between the insurer’s claim analysts and the insurer’s in-house counsel about how an insurance policy ought to be interpreted and whether, under a disability policy, an employee’s bonus ought to be considered monthly earnings within the meaning of the plan. Unlike the memoranda at issue in *Mett*, the disputed documents offered advice only with respect to how the plan ought to be interpreted, and did not address any potential civil or criminal liability the insurer might face, nor was there any indication that the documents were prepared with that type of liability in mind.

A federal district court outside the Third Circuit has rejected the *Wachtel* holding, finding the rationale in *Wachtel* unpersuasive given the status of the law in the First Circuit (in which the court sits). *Smith v. Jefferson Pilot Financial Ins. Co.*, 245 F.R.D. 45 (D. Mass. 2007). The court held that the fiduciary exception applied to communications between an insurance company’s claims personnel and in-house legal counsel, where the advice related to the insurance company’s role as fiduciary in adjudicating claims.

A federal district court in the Fourth Circuit cited *Wachtel*, as well as *Tatum* (discussed above in the section captioned “Personal Liability”), in holding that an insurance company deciding claims and paying long-term disability benefits from its own assets enjoyed privilege with respect to communications occurring after a plan participant’s claim was denied and after the participant threatened the insurance company with litigation. *Fortier v. Principal Life Ins. Co.*, 2008 U.S. Dist. Lexis 43108 (E.D. N.C. 2008).

A federal district court in the Eighth Circuit has expressly rejected *Wachtel*. *Buzzanga v. Life Ins. Co. of N. Am.*, 2010 U.S. Dist. Lexis 33089, 49 EBC 1032 (E.D. Mo. 2010). The case involved a claim for accidental death benefits under a group accident policy issued by an insurance company to an employer. Four documents were the subject of a privilege dispute. These consisted of a request to in-house counsel for a legal opinion and three research memoranda regarding applicable law governing DUI claims in an accidental death insurance context. Three of the disputed communications occurred before the insurer denied the plaintiff’s initial claim. The fourth occurred after that initial denial, and a few days before the insurer denied the plaintiff’s appeal of the initial denial.

Noting the standard pre-decisional/post-decisional line of demarcation for determining which documents enjoy attorney-client privilege, and expressly rejecting the holding in *Wachtel*, the court ruled that there was no attorney-client privilege nor work product privilege with respect to the three documents generated before the initial claim was denied. As to the work product privilege, the court said “the divergence of the beneficiary’s interests from those of the plan administrator

had not yet occurred.” In so holding, the court quoted from *Geissal v. Moore Med. Corp.*, *supra* in Part IV.F, as follows:

While litigation can result from any fiduciary act, the administrator’s acts of securing legal advice for the plan . . . prior to the plan’s decision regarding benefits cannot be said to be in anticipation of litigation.

As to the fourth document, which was generated after the plaintiff appealed the initial denial, but six days before the denial was upheld by the insurer on appeal, the court found that the insurer enjoyed work product privilege. By that time, “the prospect of litigation was sufficient to erect the attorney work product doctrine as a bar to the subject information.” (Quoting from *Geissal*.)

- I. A Chink in the Fiduciary Exception?** The Supreme Court, in *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (U.S. 2011), held, in a non-ERISA case, that the United States, as trustee of tribal property, was not subject to the fiduciary exception under trust law. The court made note of the ERISA distinction in discussing the fiduciary exception, but offered little comment expressly of approving or disapproving those decisions. Possibly of note, the court gave considerable weight to the source of the funds used to pay legal counsel, noting that the government’s attorneys were paid from Congressional appropriates with no cost to the tribe, and observing that the significant factor in determining who is the “real client” who should have access to advice. The court put it this way:

Here, the Government attorneys are paid out of congressional appropriations at no cost to the Tribe. Courts looked to the source of funds as a “strong indicator of precisely who the real clients were” and a “significant factor” in determining who ought to have access to the legal advice. We similarly find it significant that the attorneys were paid by the Government for advice regarding the Government’s statutory obligations.

The payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe.

In a post-*Jicarilla* case, a federal district court found that an insurer had no privilege even after it denied a benefit appeal, because it voluntarily reconsidered its decision. Although the decision came after *Jicarilla*, it did nothing more than mention the Supreme Court’s decision. *Moore v. Metropolitan Life Ins. Co.*, 799 F.Supp.2d 1290 (M.D. Ala. 2011).

In another post-*Jicarilla* decision, another federal district court concluded that *Jicarilla* “arguably supports the application of the fiduciary exception in the ERISA context, . . . and certainly does not alter or overrule the line of cases that have applied the fiduciary exception to ERISA fiduciaries . . . .” As with *Moore*, above, there was no privilege for documents created for administrative purposes during the

administrator review process as extended by the insurer. Also, there was no work product protection because the court applied a fiduciary exception even to that privilege, and because the documents were prepared as part of claims administration – that is, for business purposes – as opposed to in response to, or in anticipation of, litigation. The court seemed to think this followed from the fact that the insurer had not finally determined the claimant’s claim.

In yet a further post-*Jicarilla* decision, a federal district court concluded that *Jicarilla* “arguably supports application of a fiduciary exception in ERISA contexts, . . . and certainly does not alter or overrule the line of cases that have applied the fiduciary exception to ERISA fiduciaries . . . .” *Harvey v. Standard Ins. Co.*, 2011 U.S. Dist. Lexis 107834, 53 EBC 2185 (N.D. Ala. 2011). As with *Moore*, there was no privilege for documents created for administrative purposes during an administrative review process, as extended by the insurer. Also, there was no work product protection because the court applied a fiduciary exception even to that privilege, and because the documents at issue were prepared as part of the claims administration process – that is, for business purposes – as opposed to in response to, or in anticipation of, litigation. The court seemed to think this followed from the fact that the insurer had not finally determined the claimant’s claim.

In *McFarland v First Unum Life Ins. Co.*, 231 F.Supp.3d 10 (S.D. N.Y. 2017), a federal district court considered, and appears to have rejected, an insurer’s argument that under *Jicarilla* the fiduciary exception should not apply to spoil attorney-client privilege where the insurer itself is the source of the funding for the legal advice.

The court in *McFarland* also considered the Third Circuit’s decision in *Wachtel*, *supra*. The communications sought in *McFarland* were between an “appeals specialist” and the insurer’s in-house attorneys. The appeals specialist had responsibility for determining benefit appeals. She had considered a long term disability benefit appeal by the plaintiff. The district court disagreed with the Third Circuit’s decision in *Wachtel*, and in particular found no reasonable basis for applying the fiduciary exception to some, but not all, ERISA fiduciaries who are making decisions on benefit claims and appeals. The court concluded, in straightforward fashion, that “the fiduciary exception applies to insurers in ERISA cases.” As a consequence, the court ordered the insurer to provide it with unredacted copies of communications for an in-camera review, so the court could determine whether the communications were subject to the fiduciary exception and not protected by the work product doctrine.

- J. Waiver.** Clients and their attorneys must guard against waiver of privilege by the disclosure of otherwise confidential communications. In *Lewis v. Unum Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001), an employer waived privilege with respect to communications between in-house counsel and a human resources representative by sending otherwise privileged documents to the plan administrator, a nonprivileged third party fiduciary.

1. **Disclosure to Consultants.** In a dispute concerning the disclosure of minutes of fiduciary committee meetings, a federal district court concluded that the presence of the employee benefits consultant firm Wyatt Watson at meetings would destroy any attorney client privilege that might otherwise exist, because the firm’s presence was not necessary to assist the attorney in the provision of legal advice (that is, the loss of privilege due to waiver was not prevented under the *Kovel* doctrine, described in Section I.A above), and because there was no explanation of why Wyatt Watson would “need to know” the information disclosed, so there was no ability to avoid the waiver where an outside consultant functions like an employee, as described in *Graf* (discussed in Section I.B above). *Hill v. State Street Corp.*, 2013 U.S. Dist. Lexis 181168, 57 EBC 2036 (D. Mass. 2013).

In an interesting decision, a federal district court concluded that the presence of two consultants at a multiemployer pension plan board of trustees meeting would not prevent attorney-client privilege (nor work product privilege) from attaching to legal advice provided by counsel to the fund. *Trustees of the Electrical Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 2010 U.S. Dist. Lexis 12578, 48 EBC 2138 (D. D.C. 2010). In determining whether privilege attached, the court concluded that it was irrelevant whether the non-trustees present at the meeting were employees of the fund (or plan) or instead consultants. The proper question, the court said, was whether the presence of the two consultants while the trustees and fund counsel were having ostensibly privileged communications, and the consultants’ subsequent review of minutes that memorialized those discussions, was “consistent with the purpose and traditional interpretation of the common law attorney-client privilege.”

One of the consultants was an unpaid, nonvoting advisor who appeared to serve a substantial and integral role in the operation of the plan. The consultant, who was the Executive Director of the National Electrical Contractors Association, had been authorized by the trustees to attend trustees’ meetings and to provide advice. The consultant had responsibility for collections (he was a member of a two-person collection committee), and was expected to advise the trustees on the performance of their fiduciary responsibilities, to communicate with counsel concerning counsel’s legal advice, and to monitor the conduct of the fund administrator, trustees, professional consultants, contributing employers, and participants, to make sure that conduct was consistent with the relevant collective bargaining agreement, the plan documents, and the appropriate regulatory laws. Plan representatives asserted that the consultant’s role was one that would have been performed by a paid employee if the plan had any paid employees.

The second individual was an investment consultant who helped the trustees with their decisions to hire and fire investment managers. (The underlying lawsuit was against an investment manager that had been terminated.)

Counsel to the plan communicated with the investment consultant regularly, both at and outside board meetings, concerning legal issues relating to the plan's investments and investment managers. The attorney considered the investment consultant to be a fiduciary (under ERISA Section 3(21)).

The court held that the presence of the consultants at the board meetings, and their review of subsequent minutes memorializing discussions at those meetings, did not prevent privilege from attaching to the advice provided by counsel. The court concluded that both consultants seemed to have had "significant managerial responsibilities that would have been done by high-level corporate managers, had the Plan been incorporated." Further, there was no reason to think the trustees would have thought the consultants' "presence at meetings where matters that fell within their expertise and experience were being discussed would defeat the privilege that would otherwise attend the Board's discussions with counsel." Moreover, the court said the trustees relied on the consultants for "important work that often required legal guidance," and that extending privilege in this context would advance the purpose of attorney-client privilege (encouraging a frank discussion) without creating "any potential for its misuse."

2. **Disclosure to Actuary.** In *Cottillion v. United Refining Co.*, 2011 U.S. Dist. Lexis 151519, 53 EBC 1275 (W.D. Pa. 2011), a federal district court considered a dispute concerning an actuarial reduction in early retirement benefits. As to the inapplicability of the fiduciary exception for advice concerning personal liability (see the *U.S. v. Mett* discussion in Section I.F), the court held that the interest of the plan beneficiaries diverged from the plan trustee's interest when the trustee took concrete steps to actuarially reduce benefits to retirees already in pay status and to recoup overpayments, because at that point a serious and significant threat of litigation had materialized. An attorney's action in copying an actuary on an email did not waive attorney-client privilege because the actuary's involvement was at the direction of the attorney, to assist the attorney in the provision of legal advice. As to whether a disclosure to the actuary constitutes a waiver, the court said the critical inquiry is "whether the third party consultant is involved in the giving of legal advice" or "functions like an employee in providing information which facilitates the obtaining of legal advice." The key in the instant case was that the communications with the actuary were at the attorney's direction, for the express purpose of assisting him in providing legal advice.

An email from the actuary to a committee member regarding recouping payments was not, however, privileged, even if it was at the attorney's direction because it concerned only accounting issues related to the administration of the plan (and was prepared for non-litigation purposes, not in anticipation of litigation).

The court also concluded as follows:

1. An attorney's draft document subject to revision was not automatically privileged.
2. A proposed response to an inquiry from a beneficiary relating to a reduction in benefits enjoyed no privilege because it was related only to plan administration.
3. A draft form of a letter to participants regarding a benefit reduction in a VCP process was related to administration of the plan, and therefore not privileged.
4. Discussions of plan amendments concerned settlor issues, so the fiduciary exception was inapplicable.
5. Meeting minutes generally were not privileged, except small portions containing legal advice falling within the personal liability limitations of the fiduciary exception.

The court also concluded that letters to auditors relating to the annual plan audit were not privileged.

For another case in which a federal district court concluded that disclosure to an actuary waived privilege with respect to that disclosure (but not as to other documents), see *Tolbert v. ARB Capital Markets Corp.*, 2012 U.S. Dist. Lexis 42974, 53 EBC 2549 (S.D. Tex. 2012). The court also concluded that because top-hat plans are exempt from ERISA's fiduciary duties, the fiduciary exception to the attorney-client privilege does not apply.

3. **Disclosure in Response to Request of Government Agency or Inadvertent Disclosure in Civil Discovery.** Note that a state appellate court concluded that the disclosure of information to certain federal agencies did not waive attorney-client and attorney work product privileges as to the disclosed documents in *Regents of University of California v. Superior Court*, 2008 WL 2908123 (Cal. App. 2008). In summarizing the relevant California authority on waiver, the court indicated that when privileged documents have been disclosed either in response to the request of a government agency or inadvertently in the course of civil discovery, no waiver of privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure. The law, the court said, does not require that the holder of the privilege take "strenuous or Herculean efforts" to resist disclosure. In the instant case, which did not involve an employee benefit plan or ERISA, the court found that privilege was not lost since the defendants produced privileged documents to the federal Department of Justice in an antitrust case only because they believed there would be severe regulatory or criminal

consequences if they were labeled by the government as uncooperative, and not by reason of any voluntary, noncoerced disclosure.

4. **Representing Executives: Risk in Using Employer-Owned Computer.**

There is a developing body of law, perhaps not entirely consistent or coherent, concerning the waiver of attorney-client privilege, and potentially work product privilege, where an executive or other employee makes use of an employer-owned computer to correspond with an attorney by e-mail. For a general discussion, see *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege* by Adam C. Losey, 60 Fla. L. Rev. 1179 (2008). It appears that using an employer-owned computer to access an executive's (or other employee's) personal e-mail account may waive privilege as to the contents of those e-mails. That may be true even where the executive's e-mail account is password-protected. Although the law is evolving, it appears that where an employer provides explicit warning to employees that they should have no expectation of privacy while using an employer-owned computer, there may be no attorney-client privilege as to e-mails sent or accessed from such a computer, even where those e-mails are sent or accessed through use of a personal password-protected e-mail account. See, generally, *Long v. Marubeni America Corp.*, 2006 WL 2998671, 2006 U.S. Dist. Lexis 76594 (S.D. N.Y. 2006); *Nat'l Economic Research Assocs., Inc. v. Evans*, 2006 Mass. Super. Lexis 371, 21 Mass. L. Rep. 337 (Mass. Super. Ct. 2006); *In re Royce Homes, LP*, 449 B.R. 709 (Bankr. S.D. Tex. 2011). But see *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387, 2006 U.S. Dist. Lexis 29387 (E.D. N.Y. 2006).

5. **Bank of America Settlement with SEC Over Merrill Lynch Transaction.**

A federal district court raised a question about the waiver of attorney-client privilege where parties raise an "advice of counsel" defense in an SEC enforcement action. *SEC v. Bank of America Corp.*, 1:09-CV-06829 (S.D. N.Y. Aug. 25, 2009). The court has at least initially refused to approve a settlement of SEC disclosure violation allegations, under which the company, Bank of America, would pay a \$33 million fine, in part because the court wanted more information from the parties on whether Bank of America had waived attorney-client privilege. If it had not waived privilege, the court wanted a fuller explanation of how the SEC, in deciding not to bring charges against individual responsible officers of Bank of America, could credit those individual officers' statements that they relied on counsel concerning preparation of the allegedly misleading disclosure. The point that seemed to trouble the court most was that the burden of the proposed \$33 million penalty would fall to shareholders, and "arguably indirectly on U.S. taxpayers," instead of on individual officers associated with the misleading proxy statement.

The SEC had characterized its complaint as involving a straightforward disclosure violation, which it described as follows:

In the joint proxy statement, Bank of America represented that Merrill [Lynch] had agreed not to pay year-end performance bonuses or other discretionary incentive compensation to its executives prior to the closing of the merger without Bank of America's consent. In fact, Bank of America already had agreed that Merrill *could* pay a material amount of discretionary year-end and other bonuses to Merrill executives for 2008. Although the merger agreement was included as an exhibit and discussed in detail in the joint proxy statement, Bank of America's agreement allowing Merrill to pay discretionary bonuses was memorialized in a separate "disclosure" schedule that was omitted from the proxy statement and the contents of which were not disclosed prior to the shareholder vote on December 5, 2008.

The amount of the discretionary year-end bonuses was \$5.8 billion. The SEC argued that the \$5.8 billion in bonuses that Bank of America authorized Merrill to pay constituted nearly 12 percent of the \$50 billion purchase price, and was nearly 30 percent of Merrill's total shareholder stockholder equity.

Bank of America officers told the SEC they relied entirely on legal counsel in deciding what was to be disclosed in the proxy statement. The court explained its concern with the SEC's process in deciding not to charge individual officers as follows:

If the responsible officers of the Bank of America, in sworn testimony to the SEC, all stated that "they relied entirely on counsel," this would seem to be either a flat waiver of privilege or, if privilege is maintained, then entitled to no weight whatever, since the statement cannot be tested.

\* \* \* \* \*

If the SEC is right in [asserting that no waiver occurred], it would seem that all a corporate officer who has produced a false proxy statement need offer by way of defense is that he or she relied on counsel, and, if the company does not waive the privilege, the assertion will never be tested, and the culpability of both the corporate officer and the company counsel will remain beyond scrutiny.

The court ordered the parties to further brief the privilege issue. In those further briefs, the SEC explained its analysis as follows:

[C]orporate penalties are indirectly borne by shareholders. Accordingly, where shareholders have been harmed by

violations the Commission will “seek penalties from culpable individual offenders acting for a corporation.” [Statement of the Securities and Exchange Commission Concerning Financial Penalties, SEC Rel. No. 2006-4 (Jan. 4, 2006).] In the view of the Commission, however, the investigative record here does not provide an appropriate factual basis to charge individuals. The uncontroverted evidence in the investigative record is that lawyers for Bank of America and Merrill drafted the documents at issue and made the relevant decisions concerning disclosure of the bonuses. During the course of the investigation, key executives all stated that they delegated these decisions to counsel, who were aware of the relevant business terms of the transaction. There is no evidence that company executives separately discussed concealing compensation information and the executives questioned stated that there were no such discussions. Although the Commission assigns no weight to assertions of reliance on counsel in assessing the state of mind of the executives, under these uncontroverted facts and circumstances – that it was the lawyers rather than the executives themselves who made the actual disclosure decisions – there is a lack of evidentiary support to establish the factual predicate that is necessary to allege scienter-based fraud charges against company executives. Similarly, there is an insufficient evidentiary basis to establish a *prima facie* case of the requisite scienter with respect to the lawyers for purposes of alleging secondary liability under the securities laws.

As to privilege, the SEC stated that the Bank of America repeatedly asserted attorney-client privilege with respect to the production of documents in regard to testimony or interviews of witnesses, and had consistently declined to waive the privilege. The Commission indicated that its staff, as a matter of policy, will not credit an advice of counsel defense if a party in an investigation refuses to waive the privilege.

The SEC indicated that under Second Circuit precedent, the assertion by a party in an investigative setting that they have relied on counsel, or that they may have a defense based on such reliance, generally does not constitute a waiver of the attorney-client privilege (citing *John Doe Co. v. U.S.*, 350 F.3d 299 (2d Cir. 2003)). The result may be different, and there may be an implied waiver, where an advice of counsel defense is raised in a judicial setting. See *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000); *Sanofi-Synthelabo v. Apotex Inc.*, 363 F. Supp. 2d 592, 595 (S.D. N.Y. 2005); *In re Keeper of Records*, 348 F.3d 16, 23 (1<sup>st</sup> Cir. 2003); *U.S. v. White*, 887 F.2d 267, 270-71 (D.C. Cir. 1989).

There was, incidentally, expert testimony offered on behalf of Bank of America that it is typical to restrict “competitively sensitive” information, such as bonus information, to a separate disclosure schedule that is not included with the proxy statement. Bank of America also argued that the “total mix” of information available to shareholders, including media reports about the likelihood Merrill would pay billions of dollars in bonuses that preceded the shareholder vote in the merger, and SEC filings indicating that Merrill planned 2008 employee compensation roughly equal to what it had paid in 2007, effectively disclosed the incentive compensation.

The court ultimately approved a revised settlement, in an order dated February 22, 2010, though it did so with considerable reluctance. The settlement included some corporate governance measures designed to prevent nondisclosures in the future and a fine of \$150 million. As with the previously rejected settlement, the \$150 million fine – which the court characterized as “very modest” and appearing to be “paltry” – would be assessed against the company, and not against any individuals at the company. As to the court’s previously expressed concern about there being no penalty against individuals, the court seemed to abide this result by accepting as a reasonable conclusion (though not necessarily the one the court would have reached of its own accord) the SEC’s view that the Bank and its officers acted only negligently, rather than intentionally, in causing nondisclosures concerning Merrill bonuses and Merrill’s deteriorating financial performance.

The approved settlement would distribute the \$150 million only to former Bank of America shareholders, who were the shareholders harmed by the Bank’s nondisclosures, and not to former Merrill shareholders who now own Bank of America stock, nor to Bank officers or directors who had access to the undisclosed information. The court observed that the effect of targeting the allocation of the settlement proceeds in this way (rather than allocating the proceeds to all shareholders) would be modest, “amounting perhaps to no more than a few pennies per share,” and noted that although the legacy Merrill shareholders may have received a bit of a windfall as a result of the nondisclosures, they had in fact not been responsible for those nondisclosures yet would not be sharing in the settlement proceeds.

In one of the most interesting developments leading up to the settlement, Bank of America, which had been under considerable pressure to waive attorney-client privilege, did so to a limited extent under the terms of a protective order issued by the court on October 14, 2009. The court characterized the order as allowing Bank of America to waive attorney-client privilege and work-product protection regarding certain categories of information material to the case (and which would seemingly be relevant as well to certain ongoing state and federal inquiries, including a host of pending civil lawsuits) without waiving that privilege and protection regarding other information that might be of interest in related private

lawsuits. The court stated that this protective order comported with new Rule 502 of the Federal Rules of Evidence, as amended in 2008, which the court indicated permits such “cabined” waivers. The court’s protective order listed 58 pending civil actions and stated that although Bank of America intended to waive attorney-client privilege and work-product protection with respect to certain enumerated matters, it was not waiving privilege with respect to information relating solely to the legal defense of those private lawsuits.

At least one commentator has questioned whether the protective order will have the effect desired by Bank of America. See “Did Bank of America Mess Up Its Privilege Waiver?,” by Zach Lowe, Law.com, October 20, 2009. One of the commentator’s criticisms of the order concerns its use of the term “waiver.” The commentator argued that Rule 502 does not deal with “waivers,” but instead with the ability to disclose privileged documents in a limited way under the terms of a court order, and not a waiver. Whether or not this is an overly technical reading of Rule 502, the commentator also questioned whether, under the terms of the order, documents disclosed to the SEC are protected from discovery by other parties in other litigation. This latter issue may be tested in the relatively near future given that in what is apparently the largest of the civil lawsuits, involving the consolidation of 30 cases relating to the Bank of America/Merrill Lynch merger, the court lifted the automatic stay under the Private Securities Litigation Reform Act (the “PSLRA”) to permit discovery, prior to the court ruling on any motion to dismiss, of documents produced by Bank of America to government agencies (including the SEC, Congress, the New York Attorney General, and the North Carolina Attorney General), as well as transcripts of testimony given in connection with those investigations. *In re Bank of America Corp. Securities, Derivative, and ERISA Litigation*, 2009 U.S. Dist. Lexis 108322 (S.D.N.Y. 2009). And another derivative case against the Bank of America and pending in the Delaware Chancery Court has reportedly survived a motion to dismiss, so discovery can begin even without a waiver of the automatic stay under the PSLRA.

6. **Federal Rule of Evidence 502: Subject Matter Waiver and Inadvertent Disclosures in Federal Proceedings or to a Federal Agency.** In late 2008, President Bush signed into law a bill adding new Federal Rule of Evidence 502. Pub. L. 110-322.

Federal Rule of Evidence 502 reads, in its entirety, as follows:

**(a) DISCLOSURE MADE IN A FEDERAL PROCEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE OF A WAIVER.**—When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

**(b) INADVERTENT DISCLOSURE.** – When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

**(c) DISCLOSURE MADE IN A STATE PROCEEDING.**— When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
- (2) is not a waiver under the law of the State where the disclosure occurred.

**(d) CONTROLLING EFFECT OF A COURT ORDER.**—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding.

**(e) CONTROLLING EFFECT OF A PARTY AGREEMENT.** – An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

**(f) CONTROLLING EFFECT OF THIS RULE.** – Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out

in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

**(g) DEFINITIONS.** – In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The Federal Rules of Evidence apply in the federal district courts, and also in the Tax Court pursuant to Tax Code Section 7453 and Tax Court Rule 143(a). The new rule addresses the waiver of attorney-client privilege and work-product protection when disclosures are made “in a Federal proceeding” or to a “Federal office or agency.” The rule addresses both (a) whether a disclosure in those contexts constitutes a waiver of the attorney-client privilege or work-product protection with respect to undisclosed communications or information concerning the same subject matter (a “subject matter waiver”), and (b) whether an inadvertent disclosure operates as a waiver at all.

The stated objective for adoption of the rule was to alleviate the costs associated with electronic discovery in document production in litigation, by reducing the risks associated with inadvertent production of protected material. Under the rule, where an attorney inadvertently discloses information, the disclosure will not constitute a waiver so long as (a) the holder of the privilege or protection took reasonable steps to prevent disclosure, and (b) the holder promptly took reasonable steps to rectify the error, which might include utilizing the procedure in Federal Rule of Civil Procedure 26(b)(5)(B) for attempting to “clawback” the inadvertently disclosed information. FRE § 502(b).

As to an intentional disclosure made during a Federal proceeding or to a Federal office or agency, Rule 502(a) addresses the issue of subject matter waiver. Generally, a waiver resulting from such a voluntary disclosure will only extend to an undisclosed communication or information in a Federal or State proceeding if (1) the waiver was intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) the disclosed and undisclosed communications or information “ought in fairness” be considered together.

The first of these requirements – that the disclosure have been intentional – is a repudiation of the position previously taken by some courts that inadvertent disclosure of protected material can constitute a general subject matter waiver as to other documents or information. The third requirement – that the disclosed and

undisclosed communications “ought in fairness” be considered together – is presumably intended to prevent parties from engaging in the intentional and misleading use of protected or privileged information. As the IRS’ Office of Chief Counsel put it in Chief Counsel Notice 2009-023, “[i]f a party intentionally places protected information into the litigation in a selective, misleading and unfair manner, then there will be a waiver as to the undisclosed information concerning the same subject matter.” That, presumably, is because the intentionally disclosed information and the undisclosed information ought in fairness be considered together, to prevent the disclosing party from misleading others.

The referenced Chief Counsel Notice, which is attached to this outline as **Appendix A**, summarizes nicely both the background and effect of Rule 502. Rule 502(e) expressly authorizes parties to enter into an agreement on the effect of disclosure in a Federal proceeding, though that agreement will be binding only on the parties to it unless it is incorporated into a court order. The Chief Counsel Notice, though, cautions those at the Service to avoid claw-back agreements (agreements regarding the disposition of inadvertently produced documents) and quick-peek agreements (agreements allowing the requesting party to take a quick peek at documents without the producing party undertaking the time and expense in advance to review the entire population of documents). The Service’s concern with these types of agreements is, in part, that entering into them without first establishing that the documents are privileged or protected may give taxpayers the impression that they are entitled to these agreements, and that the government must negotiate an appropriate agreement before a taxpayer must turn over responsive documents.

As to quick-peek agreements, the Chief Counsel Notice termed them “inconsistent with the producing party’s duty to take reasonable steps to prevent disclosure of privileged or protected information.” The Office of the Chief Counsel also expressed concern about the effect of such agreements on other parties. The Chief Counsel Notice put it this way:

Entering into a non-waiver agreement with a view to adoption by the court might be viewed as the Service taking a partisan position in pending or prospective litigation between private litigants for expediency’s sake. For example, it may be argued that the entry of a Rule 502(d) order raises a question of whether that order violates the Due Process rights of persons and entities who are not parties to the Tax Court litigation because the rule purports to make an order of the court binding on all persons and entities in all federal or state proceedings, whether or not they were the parties to the litigation and regardless of whether the nonparties are subject to the jurisdiction of the Tax Court.

## **II. Work Product Doctrine.**

Even when no attorney-client privilege applies, certain attorney-client communications may be protected from discovery under the work product doctrine. That doctrine was

established by the U. S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure as follows :

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Attorney-client privilege belongs to the client and the client alone. In contrast, the work product rule may be claimed by either a client or an attorney. *E.g.*, *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587, 2 EBC 1393 (N.D. Ill. 1981); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995). Disclosure to third parties does not normally work a waiver of work product protection, unless that disclosure involves a significant likelihood that a litigation adversary will obtain the materials. *Castle v. Sangamo Westin, Inc.*, 744 F.2d 1464 (11<sup>th</sup> Cir. 1984); Restatement § 91(4).

The work product doctrine may not be applied against a client (or against a client's interest). In *Everett v. USAir Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995), the court concluded that although "the [work product] privilege belongs, at least in part, to the attorney," attorneys generally "may not invoke it to shield their attorney-work product from their own ultimate clients, the plan beneficiaries." As a consequence, even where documents were prepared expressly in anticipation of litigation, they were not protected "in so far as they were prepared in anticipation of litigation on behalf of the plan beneficiaries." 165 F.R.D. at 5.

**A. In "Anticipation of Litigation."** Importantly, the work product privilege applies only where material is prepared in "anticipation of litigation." Restatement § 87, cmt. i. If material is not prepared in anticipation of litigation, a party seeking discovery need not show a "substantial need" or "undue hardship" to overcome a claim of work product privilege. For employee benefits cases addressing application of the work product privilege *see Helt v. Metropolitan District Commission*, 113 F.R.D. 7, 7 EBC 2617 (D. Conn. 1986) (correspondence between trustees and pension plan attorneys did not enjoy work product privilege where the correspondence was made prior to the date the trustees received "demand or warning of charges or information from an outside source that a claim, demand, or charge was in prospect") (quoting *United States v. American Telephone & Telegraph*, 86 F.R.D. 603, 627 (D.D.C. 1979)); *Wsol v. Fiduciary Management Associates, Inc.*, 1999 WL 1129100, 23 EBC 2583 (N. D. Ill. 1999) (letter and report prepared by attorney enjoyed work product privilege where attorney was

retained following the publication of articles in the press, receipt of correspondence, and issuance of federal subpoenas from a grand jury, all suggesting irregular and improper practices connected with the fund's investments, since litigation arising from these practices could be anticipated); *Hudson v. General Dynamics Corp.*, 186 F.R.D. 271 (D. Conn. 1999) (quoting the Second Circuit's decision in *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), *order vacated by*, 134 F.3d 1194 (2d Cir. 1998) for the proposition that "there is no rule that bars the application of work product rule to documents created prior to the event giving rise to litigation"); *Beal v. Treasure Chest Casino*, 1999 WL 461970 (E.D. La. 1999) (no work product protection for (a) a third-party administrator's "report to file" memorializing steps taken during investigation of a participant's claim, (b) a letter from the third-party administrator requesting a legal opinion on the claim, or (c) a written report to an underwriter 12 days after the plaintiff notified the employer he had retained an attorney, because each of these was considered to have been prepared in the ordinary course of insurance business); *Martin v. Valley National Bank*, 140 F.R.D. 291 (S.D. N.Y. 1991), *summary judgment granted sub nom Reich v. Valley National Bank*, 837 F. Supp. 1259, 17 EBC 1257 (S.D. N.Y. 1993) (Department of Labor enjoyed no work product protection for certain forms and internal memoranda since, although litigation was sufficiently foreseeable with respect to some of the documents, DOL failed to prove the documents were prepared principally to assist in litigation; work product protection did not apply to a document prepared before a formal investigation was opened, since there could be no work product protection until the Department of Labor demonstrated the discovery of information that made litigation likely); *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), *order vacated by*, 134 F.3d 1194 (2d Cir. 1998) (in tax litigation, documents can be prepared in anticipation of litigation even before the subject transaction had been investigated and, in fact, even before the transaction occurs; whether work product rule applies depends on how firm the expectancy of litigation is); *Schmidt, Long & Associates, Inc. v. Aetna U.S. Healthcare, Inc.*, 2001 U.S. Dist. Lexis 7145, 26 EBC 1828 (E.D. Pa.), *summary judgment granted in part, denied in part*, 2001 U.S. Dist. Lexis 10709 (E.D. Pa. 2001) (no work product protection applied to documents prepared by an independent auditor hired to review claims administration, because the likelihood of litigation depended on the results of that audit).; *Anderson v. Sotheby's Inc. Severance Plan*, \_\_\_\_\_ (S.D.N.Y. May 13, 2005) (Case No. 04 CIV 8180 (SAS)(DFE)) (documents created in the ordinary course of assessing a participant's claim for severance benefits are not protected under the work product doctrine).

- B. Fiduciary Exception?** Several courts have concluded that there is no fiduciary exception to the work product doctrine (analogous to the fiduciary exception to attorney-client privilege). These courts have refused to create a fiduciary exception to the work product doctrine, in part, because plan beneficiaries do "not stand in the same position with respect to the attorney, for whom the work product rule was designed to benefit," as they do to plan fiduciaries. *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 2 EBC 1393 (N. D. Ill. 1981) (emphasis added). *Accord, Helt v. Metropolitan District Commission*, 113 F.R.D. 7, 7 EBC 2617 (D. Conn. 1986); *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 16 EBC 1235 (5<sup>th</sup> Cir. 1992). But

see, *Redd v. Bhd. Of Maintenance of Way Employees Div. of the Int'l Bhd. Of Teamsters*, 2009 U.S. Dist. Lexis 46288 (E.D. Mich. 2009) (concluding that courts have found that the fiduciary exception may overcome the work product privilege “at least as to materials prepared in the ‘pre-decisional’ phase of a benefit determination”; the court cited *Lewis*, 203 F.R.D. at 623, and *Geissal*, 192 F.R.D. at 625, for support, characterizing the holdings in *Lewis* and *Geissal* as involving a fiduciary exception to the work product privilege; in fact, though, the courts in those decisions concluded that there was no work product privilege because the communications were not “in anticipation of” litigation); *Fortier v. Principal Life Ins. Co.*, 2008 U.S. Dist. Lexis 43108 (E.D. N.C. 2008) (stating, *in dicta*, that a fiduciary exception applies to the work product doctrine in some circuits, citing to two opinions collected in *Tatum*, 247 F.R.D. at 493); *Harvey v. Standard Ins. Co.*, 2011 U.S. Dist. Lexis 107834, 53 EBC 2185 (N.D. Ala. 2011) (applied the fiduciary exception to work product doctrine).

- C. **“Substantial Need” Exception.** Although most courts have concluded there is no “good cause” exception to the work product doctrine, Federal Rule of Civil Procedure 26(b)(3) permits the discovery of documents otherwise subject to work product immunity where the party seeking discovery has “substantial need” of the materials in preparation of the party’s case and the party is unable “without undue hardship” to obtain the substantial equivalent by other means. For example, where fiduciaries allege they acted appropriately and did not breach their fiduciary duties because they acted upon “advice of counsel,” participants or the Department of Labor may have an opportunity to discover documents relating to that advice. See, e.g., *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981).
- D. **“Dual Purpose” Documents: Tax Advice - IRS’ Discovery Relating to Tax Accrual Work Papers.** In a 3-2 decision, an *en banc* panel of the First Circuit concluded that the work product doctrine did not shield from an IRS summons “tax accrual work papers” prepared by attorneys and others in a company’s tax department. These were papers prepared to support the company’s calculation of tax reserves for its audited corporate financial statements. *U.S. v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009).

The decision is notable in a several ways. First, the district court had concluded that any attorney-client privilege that may have existed was waived when the company disclosed the work papers’ contents to its independent accountants. The appeals court apparently was not asked to review this holding.

The bulk of the appellate court decision dealt with the work product doctrine. The First Circuit concluded that the work papers were independently required by statutory and audit requirements, and largely for that reason the work product privilege did not apply. The court summed up its ruling as follows:

[T]he work product privilege is aimed at protecting work done for litigation, not in preparing in financial statements. Textron’s work papers were prepared to support financial filings and gain auditor

approval; the compulsion of the securities laws and auditing requirements assure that they will be carefully prepared, in their present form, even though not protected . . . .

**“Prepared for Litigation” Standard (as opposed to “Because of Litigation” Standard.**

A vigorous dissenting opinion accused the majority of changing the work product standard in the First Circuit as it relates to dual purpose documents – that is, documents having a business purpose, but also prepared in anticipation of litigation. The dissent claimed that the court had abandoned its previous precedent in *Maine v. U.S. Dept. of Interior*, 298 F.3d 60 (1st Cir. 2002), in which the court had been influenced by the Second Circuit’s decision in *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). In *Maine*, which the dissent characterized as establishing a “because of” test, the proper inquiry was whether “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” 298 F.3d at 68 (emphasis in original) (quoting *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)). The dissent argued that the majority had replaced this test with a “prepared for” test, under which one must ask whether the documents were “prepared for use in possible litigation.” The dissent criticized this as being an even narrower privilege than a Fifth Circuit standard the court had previously rejected as being overly narrow, under which the work product doctrine protects documents only if they are “primarily motivated to assist in future litigation.” (emphasis added) (quoting from *U.S. v. El Paso*, 682 F.2d 530, 542-43 (5th Cir. 1982), which itself cited *U.S. v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

The dissent noted that the tax accrual work papers at issue included estimates by Textron’s counsel expressing, in percentage terms, their judgments regarding Textron’s chances of prevailing in any litigation over tax positions that might be challenged by the IRS. The dissent said there would have been no need to create a tax reserve if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding.

The dissent warned that the majority’s decision will result in attorneys who identify “good faith questions and uncertainties in their clients’ tax returns” being more likely to avoid putting those concerns in writing, thereby diminishing the quality of their representation. This will be the result, the dissent predicted, because providing such information in writing will result in discovery by the IRS. The dissent noted, in this regard, that although the law required that Textron prepare audited financial statements reporting total reserves based on contingent tax liabilities, and the accounting standards require some evidential support before those statements can be certified, the accounting standards do not explicitly require the form and detail of documents prepared by Textron’s attorneys with respect to each potentially challenged tax item. Instead, all that must be actually reported is the company’s final tax reserve liability amount.

The dissent said these concerns are all the more worrying because the majority’s decision will remove protection not only for the company’s work papers, but also

for “back up materials.” In *Textron* these materials included “notes and memoranda written by Textron’s in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of litigation percentage that should apply to each item.” The dissent said these documents involved not simply numbers used to compute a total reserve, but in fact explained the legal rationale underpinning the company’s views of its litigation chances. In essence, requiring disclosure of these papers would permit one party to litigation, the IRS, to discover an opposing party’s analysis of the business risks of that litigation, including the amount of money set aside in a litigation reserve fund.

Most strikingly, the dissent argued that the general application of the new rule announced by the majority is that there will be no protection for documents analyzing anticipated litigation, if those documents are prepared to assist in a business decision rather than to assist in the conduct of the litigation. The court continued, as follows:

Nearly every major business decision by a public company has a legal dimension that will require such analysis [of anticipated litigation]. Corporate attorneys preparing such analyses should now be aware that their work product is not protected in this circuit.

**Majority’s Recitation of Facts.** To give the reader full context of the dispute, here is the majority’s rather nice statement of the facts:

The question for the *en banc* court is whether the attorney work product doctrine shields from an IRS summons “tax accrual work papers” prepared by lawyers and others in Textron’s Tax Department to support Textron’s calculation of tax reserves for its audited corporate financial statements. Textron is a major aerospace and defense conglomerate, with well over a hundred subsidiaries, whose consolidated tax return is audited by the IRS on a regular basis. To understand the dispute, some background is required concerning financial statements, contingent tax reserves and tax audit work papers.

As a publicly traded corporation, Textron is required by federal securities law to have public financial statements certified by an independent auditor. See 15 U.S.C. §§ 781, 78m (2006); 17 C.F.R. § 210 *et seq.* (2009). To prepare such financial statements, Textron must calculate reserves to be entered on the company books to account for contingent tax liabilities. Such liabilities, which affect the portrayal of assets and earnings, include estimates of potential liability if the IRS decides to challenge debatable positions taken by the taxpayer in its return.

The calculation of such reserves entails preparing work papers describing Textron’s potential liabilities for further taxes; these

underpin the tax reserve entries in its financial statement and explain the figures chosen to the independent auditor who certifies that statement as correct. By examining the work papers the accountant discharges its own duty to determine “the adequacy and reasonableness of the corporation’s reserve account for contingent tax liabilities.” *United States v. Arthur Young & Co.*, 465 U.S. 805, 812, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1983) (rejecting claim of accountant work product privilege protecting such work papers).<sup>1</sup> The work papers are thus one step in a process whose outcome is a certified financial statement for the company.

<sup>1</sup> The procedural requirement that auditors examine tax accrual work papers is based on a combination of Statement on Auditing Standards No. 96, Audit Documentation (2002), *superseded by* Auditing Standards No. 3, Audit Documentation (2004); Statement on Auditing Standards No. 326, Evidential Matter (1980); and Auditing Interpretation No. 9326, Evidential Matter: Auditing Interpretations of Section 326 (2003).

In Textron’s case, its Tax Department lists items in the tax return that, if identified and challenged by the IRS, could result in additional taxes being assessed. The final spreadsheets list each debatable item, including in each instance the dollar amount subject to possible dispute and a percentage estimate of the IRS’ chances of success. Multiplying the amount by the percentage fixes the reserve entered on the books for that item. The spreadsheets reflecting these calculations may be supported by backup emails or notes.

A company’s published financial statements do not normally identify the specific tax items on the return that may be debatable but incorporate or reflect only the total reserve figure. As the Supreme Court explained in *Arthur Young*, tax accrual work papers provide a resource for the IRS, if the IRS can get access to them, by “pinpoint[ing] the ‘soft spots’ on a corporation’s tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes” and providing “an item-by-item analysis of the corporation’s potential exposure to additional liability.” 465 U.S. at 813.

The IRS does not automatically request tax accrual work papers from taxpayers; rather, in the wake of Enron and other corporate scandals, the IRS began to seek companies’ tax accrual work papers only where it concluded that the taxpayer had engaged in certain listed transactions “that [are] the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be

a tax avoidance transaction.” 26 C.F.R. § 1.6011-4(b)(2) (2009). Only a limited number of transactions are so designated.<sup>2</sup>

2 A current list of such transaction types, amounting to less than three dozen, appears at Internal Revenue Service, Recognized Abusive and Listed Transactions - LMSB Tier I Issues, <http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html> (visited July 7, 2009).

The present case began with a 2003 IRS audit of Textron’s corporate income tax liability for the years 1998-2001. In reviewing Textron’s 2001 return, the IRS determined that a Textron subsidiary - Textron Financial Corp. (“Textron Financial”) - had engaged in nine listed transactions. In each of the nine instances, Textron Financial had purchased equipment from a foreign utility or transit operator and leased it back to the seller on the same day. Although such transactions can be legitimate, the IRS determined that they were sale-in, lease-out (“SILO”) transactions, which are listed as a potential tax shelter subject to abuse by taxpayers.

SILOs allow tax-exempt or tax-indifferent organizations - for example, a tax-exempt charity or a city-owned transit authority - to transfer depreciation and interest deductions, from which they cannot benefit, to other taxpayers who use them to shelter income from tax. Where the only motive of a sale and lease back is tax avoidance, it can be disregarded by the IRS and taxes assessed on the wrongly sheltered income.<sup>3</sup>

3 See *AWG Leasing Trust v. United States*, 592 F. Supp. 2d 953, 958 (N.D. Ohio 2008) (upholding denial of depreciation and interest deductions for SILO transaction); I.R.S. Notice 2005-13, 2005-9 I.R.B. 630 (Feb. 11, 2005); Shvedov, *Tax Implications of SILOs, QTEs, and Other Leasing Transactions with Tax-Exempt Entities* 10-12, CRS Report for Congress (Nov. 30, 2004).

Textron had shown the spreadsheets to its outside accountant, Ernst & Young, but refused to show them to the IRS. The IRS issued an administrative summons pursuant to 26 U.S.C. § 7602 (2006), which allows the IRS, in determining the accuracy of any return, to “examine any books, papers, records, or other data which may be relevant or material to such inquiry.” *Id.* § 7602(a)(1). According to IRS policy, where the taxpayer claims benefits from only a single listed transaction, the IRS seeks only the workpapers for that transaction; but where (as in Textron’s case) the taxpayer claims benefits from multiple listed transactions, the IRS seeks all of the workpapers for the tax year in question. I.R.S. Announcement 2002-

63, 2002-27 I.R.B. 72 (July 8, 2002). The summons also sought related work papers created by Ernst & Young in determining the adequacy of Textron's reserves that Textron might possess or could obtain. Textron again refused.

The IRS brought an enforcement action in federal district court in Rhode Island. See 26 U.S.C. § 7604(a) (2006). Textron challenged the summons as lacking legitimate purpose and also asserted, as bars to the demand, the attorney-client and tax practitioner privileges and the qualified privilege available for litigation materials under the work product doctrine. The IRS contested all of the privilege claims. Both the IRS and Textron filed affidavits and, in addition, the district court heard witnesses from both sides.<sup>4</sup>

<sup>4</sup> Textron's evidence came from Norman Richter, chief tax counsel and manager of Textron's Tax Department; Roxanne Cassidy, director of tax reporting; Edward Andrews, director of tax audits; Debra Raymond, vice president, taxes, of Textron Financial; and Mark Weston, a partner in Ernst & Young. IRS evidence was provided by Internal Revenue Agent Edward Vasconcellos; Professor Douglas Carmichael, former chief auditor of the regulatory body for auditors of public companies (the Public Company Accounting Oversight Board); and Gary Kane, an IRS expert on tax accrual work papers.

Textron agreed that it usually settled disputes with the IRS through negotiation or concession or at worst through the formal IRS administrative process; but it testified that sometimes it had litigated disputed tax issues in federal court. Its evidence also showed that the estimates for tax reserves and the supporting work papers were generated within its Tax Department but that tax lawyers in that department were centrally involved in their preparation and that Textron Financial also used an outside counsel to advise it on tax reserve requirements.

Textron described generically the contents of the work papers in question: these included (1) summary spreadsheets showing for each disputable item the amount in controversy, estimated probability of a successful challenge by the IRS, and resulting reserve amounts; and (2) back up e-mail and notes. In some instances the spreadsheet entries estimated the probability of IRS success at 100 percent. Textron said that the spreadsheets had been shown to and discussed with its independent auditor but physically retained by Textron.

Neither side disputed that the immediate purpose of the work papers was to establish and support the tax reserve figures for the audited

financial statements. Textron's evidence was to the effect that litigation over specific items was always a possibility; the IRS did not deny that in certain cases litigation could result although it said that this was often unlikely. Whether Textron's evidence is materially different than that of the IRS remains to be considered.

The D.C. Circuit also has considered the application of the work product doctrine to materials produced by a company's independent auditor. In *U.S. v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010), the court considered whether a company's independent auditor must produce three documents in connection with ongoing tax litigation between the company and the IRS. The IRS argued that one of the documents was not work product because it was prepared by the auditor, Deloitte, during the audit process. In addition, although the IRS conceded that the other two documents were work product, it argued that the company, Dow Chemical, waived work-product protection when it disclosed those documents to Deloitte.

The three disputed documents were (a) a draft memorandum prepared by Deloitte that summarized a meeting between Dow employees, Dow's outside counsel, and Deloitte employees about the possibility of litigation over a tax matter and the necessity of accounting for that possibility in an ongoing audit, (b) a memorandum and flow chart prepared by two Dow employees – an accountant and an in-house attorney, and (c) a tax opinion prepared by Dow's outside counsel. The second and third of these documents were disclosed to Deloitte so it could “review the adequacy of Dow's contingency reserves” for the transactions at issue. According to Dow's Director of Taxes, Deloitte “compelled Dow's production of these documents by informing the company that access to these documents was required in order to provide Dow with an unqualified audit opinion for its public financial statements.”

The government argued that the first of the documents, the draft memorandum prepared by Deloitte, could not be work product for two reasons. First, it argued that it could not be work product because it was created by Deloitte, not Dow or its representative. Second, it argued that the memorandum could not be work product because it was generated as part of the routine audit process, not in anticipation of litigation. The D.C. Circuit rejected both of these arguments, but concluded that the district court lacked sufficient information to determine that the entire memorandum was work product.

As to the ability of the document created by Deloitte to constitute work product, the court said “the question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product – the thoughts and opinions of counsel developed in anticipation of litigation.” The court concluded that the memorandum generated during the annual audit was being prepared “in anticipation of litigation” under the “because of” standard, under which work product applies where a document was “prepared or obtained because of the prospect of litigation.”

The court then considered whether the two documents prepared by Dow, but disclosed to Deloitte, lost their work-product protection by reason of that disclosure. The IRS conceded that these latter two Dow documents were work product, but contended that Dow waived work-product protection by disclosing them to Deloitte. The D.C. Circuit said to the best of its knowledge, no Circuit had addressed whether disclosing work product to an independent auditor constituted a waiver. It observed, however, that most district courts addressing the issue have found no waiver in that circumstance. The court stated that “while voluntary disclosure waives the attorney-client privilege, it does not necessarily waive work-product protection.” The disclosure of work product to a third party can waive protection if “such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party’s adversary.” The court concluded that while there may be “tension between an auditor and a corporation that arises from an auditor’s need to scrutinize and investigate a corporation’s records and book-keeping practices” (quoting *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D. N.Y.)), the possibility of a future dispute between Deloitte and Dow did not render Deloitte a potential adversary for the purpose of determining whether the work-product protection had been waived. The court concluded that there was no waiver of work product privilege because the auditor was not an adversary in the sense necessary to work a waiver.

**Three Standards for Whether Materials are Prepared in “Anticipation of Litigation.”** As noted above, the dissent in *Textron* characterized the First Circuit’s new test for determining whether materials are prepared in “anticipation of litigation” – so they can enjoy work product privilege – as being a “prepared for” litigation standard. This is different from the “because of” test applied by the Second, Fourth, Seventh, Eighth, and D.C. Circuits. Under the “because of” test, work product applies where the document was “prepared or obtained because of the prospect of litigation.” *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). See also *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4<sup>th</sup> Cir. 1992); *Bink Mfg. Co. v. Nat’l Presto Indus. Inc.*, 709 F.2d 1109, 1118-19 (7<sup>th</sup> Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8<sup>th</sup> Cir. 1987); *Senate of Puerto Rico v. U.S. Dep’t. of Just.*, 823 F.2d 574, 586 (D.C. Cir. 1987). Under this “because of” standard, a document may serve an additional purpose other than preparation for litigation, and yet be work product. The Fifth Circuit has adopted a “primary purpose” test, under which the work product doctrine protects documents only if they are “primarily motivated to assist in future litigation.” (Emphasis added.) *U.S. v. El Paso*, 682 F.2d 530, 542-43 (5<sup>th</sup> Cir. 1982), citing *U.S. v. Davis*, 636 F.2d 1028, 1040 (5<sup>th</sup> Cir. 1981).