Ethics Issues for Employee Benefits Counsel

ACC Mid-America Chapter & Spencer Fane LLP

June 9, 2021

Greg Ash and Julia Vander Weele

SpencerFane

1

Agenda

- Attorney-Client Privilege and Work Product Doctrine for External and In-House Benefits Counsel
- The Fiduciary Exception to Privilege
- Cybersecurity Issues
- Emerging Employee Benefits Issues

SpencerFane

2

Context

- Communications between outside benefits counsel and:
  - In-house counsel
  - Corporate executives and decision-makers (HR, CFO, etc.)
  - Plan fiduciaries/committees
- Communications between in-house counsel related to benefit plan issues
  - Benefit claim decisions
  - Collaboration with plan vendors
  - Employment-related claims by dismissed employees
- Potential loss of attorney-client privilege and mandatory disclosure of documents in litigation

Privilege and Work Product Basics

- Absent client's informed consent, ABA Model Rule of Prof. Conduct 1.6 prohibits attorneys from revealing information relating to representation of client
  - Comments indicate attorney must invoke privilege when it is applicable (Model Rule 1.6, cmts. [2] and [4])
- Attorney-client privilege is oldest of the privileges for confidential communication (*U.S. v. Zolin*, 491 U.S. 554 (1989))
- **Attorney-client privilege** applies to:
  - A communication
  - Made between privileged persons (attorney and client)
  - In confidence
  - For the purpose of obtaining or providing legal advice (Restatement (Third) of the Law Governing Lawyers (2002) § 68)
- Privilege belongs to, and may be waived by, client

Privilege and Work Product Basics

- Privilege issues in the ERISA context
  - Who is the "client"?
    - Plan sponsor, fiduciary committee, individual fiduciaries?
    - Is the advice "legal" or "business"?
    - *See, e.g., Byrnes v. Empire Blue Cross Blue Shield*, 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. 1999) (only memoranda exchanged by actuary, employer's attorney, and employer that were prepared to assist attorney in rendering legal advice were privileged; those meant to aid employer's business decisions were not)
    - *Lewis v. UNUM Corp.*, 203 F.R.D. 615 (D. Kan. 2001) (discussions among committee members while considering beneficiary's claims not privileged, despite attendance of counsel, to extent discussions not for purpose of obtaining/providing legal advice)
  - In-house counsel issues
    - Is the advice "legal" or "business"?
    - Who is the client?
      - Representation of employer (as plan sponsor) or fiduciary committee?
      - Representation of individual executives or corporation?

Privilege and Work Product Basics

- **Work product doctrine** protects oral or written materials from disclosure when:
  - They were prepared by or for an attorney
  - At a time of "adversarial tension" (i.e., in anticipation of litigation), and they contain
  - The mental impressions, conclusions, opinions, or legal theories of an attorney
- Subject to disclosure only in very limited circumstances ("substantial need" and otherwise unavailable "without undue hardship")
- Evidentiary doctrine established by U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and codified in Fed. R. Civ. P. 26(b)(3)
- May be claimed by either client or lawyer (see, e.g., *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981))
- May not be applied against a client or client's interest

The Fiduciary Exception

- Attorney-client privilege is not absolute, especially in the ERISA context
- The "fiduciary exception" may require disclosure to persons to whom fiduciaries duties are owed
- The exception originates in trust law
- Many, but not all, federal Circuits have adopted it in the ERISA context as a matter of federal common law
- Two justifications for the exception (see *U.S. v. Evans*, 796 F.2d 265 (9th Cir. 1986):
  - Promoting full disclosure between fiduciary and participants/beneficiaries
    - ERISA imposes duty to disclose and act for exclusive benefit of participants, which supersedes attorney-client privilege (*see Solis v. Food Employers*, 644 F.3d 221 (4th Cir. 2011))
  - Applying the privilege to the "real" client
    - As representative for participants and beneficiaries of plan, fiduciary/trustee is not the attorney's "real" client
    - Instead, privilege belongs to participants and beneficiaries (see *Stephan v. Unum*, 697 F.3d 917 (9th Cir. 2012))

Circuits Recognizing the Fiduciary Exception

- Second
  - *In re Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997)
- Fourth
  - *Solis v. Food Employers*, 644 F.3d 221 (4th Cir. 2011)
- Fifth
  - *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631 (5th Cir. 1992)
- Sixth
  - *Moss v. Unum Life Ins. Co.*, 2012 WL 3553497 (6th Cir. 2012)
- Seventh
  - *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779 (7th Cir. 2005)
- Eighth
  - *Carr v. Anheuser-Busch Cos.*, 495 F. App'x 757 (8th Cir. 2012)
- Ninth
  - *Stephan v. Unum Life Ins. Co.*, 697 F.3d 917 (9th Cir. 2002)

The Fiduciary Exception

- Exception may be invoked by:
  - Plan participants and beneficiaries (and perhaps assignees of claims, like service providers)
  - Dept. of Labor (acting on behalf of participants and beneficiaries)
- ABA Opinion Letter 94-380
  - Addresses "the circumstances of a lawyer who has undertaken to represent only the fiduciary, and not the beneficiaries of the estate or the trust for which the fiduciary has responsibility"
  - Explains that such an attorney should provide the fiduciary/client the same duty of confidentiality he/she owes other clients
    - Attorney owes beneficiaries only those obligations owed to other third parties
  - Courts have not reconciled application of Opinion Letter 94-380 with the "real client" rationale for the fiduciary exception

Fiduciary Exception in Application

- Exception applies when advice is given to a "fiduciary" acting in a fiduciary capacity
  - Who is the client? Plan sponsor/employer (settlor) v. investment committee (fiduciary)
  - Is the client a "fiduciary"?
    - Named fiduciary (plan document)
    - Functional fiduciary
  - Is advice being sought in connection with fiduciary functions?
  - In-house counsel's role
    - When serving on a fiduciary committee for the plan
    - When advising a fiduciary committee for the plan
    - When advising the company as plan sponsor
- Fiduciary exception does not apply to communications concerning:
  - Non-fiduciary conduct (*see, e.g., In re Long Island Lighting Co.*, 129 F.3d 268, 273 (2d Cir. 1997) (decisions regarding plan adoption, amendment, or termination are not fiduciary in nature); *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779, 787-88 (7th Cir. 2005) ("Decisions relating to a plan's amendment or termination are not fiduciary decisions."))
  - Fiduciary's own liability (*see, e.g., Solis v. Food Employers Lab. Rel. Ass'n*, 644 F.3d 221, 228 (4th Cir. 2011); *Black v. Pitney Bowes*, 2006 WL 3771097 (S.D.N.Y. Dec. 21, 2006))

Fiduciary Exception in Application

- Creation of investment committee for 401(k) plan was not a fiduciary act; therefore, communications regarding creation of committee were privileged
  - *Beesley v. Int'l Paper Co.*, 2008 WL 2323849 (S.D. Ill. 2008)
- Advice from counsel regarding documents drafted for purpose of communicating with participants about amendments to benefit plans related to fiduciary matters, and therefore was subject to the fiduciary exception and not protected
  - *Baker v. Kingsley*, 2007 U.S. Dist. LEXIS 8375 (N.D. Ill. 2007)
- Communication by severance plan administrator and in-house counsel regarding claim denial must be produced under fiduciary exception
  - *Stroot v. Hartford Life & Accident*, 363 F. Supp. 3d 1174 (D. Kan. 2019)

Fiduciary Exception In Application

- Advice by corporate counsel to ESOP-owned company's directors involving general corporate matters, rather than plan fiduciary functions, not subject to fiduciary exception.
  - *Scalia v. Reliance Trust Co.*, 2020 WL 2111368 (D. Minn. 2020)
- Does fiduciary exception apply to non-ERISA plans?
  - Top-hat plans (*see, e.g., Tolbert v. ARB Capital Markets Corp.*, 2012 U.S. Dist. LEXIS 42974 (S.D. Tex. 2012) (fiduciary exception did not apply); *Marsh v. Marsh Supermarkets*, 2007 WL 1598938 (S.D. Ind. 2007) (fiduciary exception did not apply))
  - What about other sources of fiduciary obligation?

Fiduciary Exception in Application

- Courts are split on application of fiduciary exception to the work product doctrine
- Some courts reason that the exception applies equally to work product under the "real client" rationale
  - *See, e.g., Geissal v. Moore Med. Corp.*, 192 F.R.D. 620 (E.D. Mo. 2000) (work product regarding benefit claim)
- Others refuse to apply the exception to work product, citing material differences between the attorney-client privilege and work product doctrine
  - Attorney-client privilege belongs to client, whereas work product doctrine may be invoked by attorney (*Panter v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978))
  - By definition, work product doctrine arises when parties are in conflict, so no commonality of interest between fiduciary's attorney and plan participants/beneficiaries (*see In re Int'l Systems & Controls Corp. Securities Litig.*, 693 F.2d 1235 (5th Cir. 1982); *Lawrence E. Jaffe Pension Plan v. Household Int'l*, 244 F.R.D. 412 (N.D. Ill. 2006))

Fiduciary Exception in Application

- *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011)
  - In non-ERISA case involving trust relationship between United States and tribes, Supreme Court addressed factors courts examine when determining whether fiduciary exception applies
    - Purpose: Was the communication intended for any purpose other than to benefit the beneficiary?
    - Timing: Were adversarial proceedings between the fiduciaries and beneficiaries pending when the advice was sought?
    - Payment: Was the attorney paid out of trust assets?
  - Some courts have incorporated the *Jicarilla* analysis in ERISA cases

Polling Question

Representing Multiple Parties

- Representing multiple parties in ERISA litigation is not unusual
  - E.g., representation of employer (which may be a fiduciary or settlor) and directors, officers, or other employees (who also may be fiduciaries)
- Under Model Rule 1.7, a conflict exists not only when clients are directly adverse, but also when there is a significant risk that representation of one or more clients will be "materially limited" by the attorney's responsibilities to another client, former client, or third party

Representing Multiple Parties

- ABA Model Rule 1.7
  - No representation of a client if representation would involve a concurrent conflict of interest, which is defined as a direct adversity to another client with a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person by a personal interest of the lawyer
  - A lawyer may represent a client even with a concurrent conflict of interest if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against the other client represented by the lawyer in the same litigation or other proceeding before a tribunal, and (4) each affected client gives informed consent, confirmed in writing

Representing Multiple Parties

- Note 29 to Model Rule 1.7
  - In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation are not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

Representing Multiple Parties

- Generally, a law firm may represent both the corporate employer/plan sponsor and the plan
  - *See Edgin v. Cobb*, 2008 WL 2858741 (E.D. Mich. 2008)
- Benefits attorneys who provide ongoing consultation to fiduciaries face a risk under Model Rule 3.7
  - An attorney may not act as an advocate in litigation if he or she is likely to be a necessary witness, unless (1) the testimony relates to an uncontested issue, (2) the testimony relates to the nature and value of legal services rendered in the case, or (3) disqualification of the lawyer would work substantial hardship on the client
  - But disqualification of individual attorney should not prevent other attorneys in the same firm from providing representation. *See* Model Rule 3.7(b)

Representing Multiple Parties

- Joint representation of affiliated companies sued as co-defendants?
  - *See* Model Rule 1.7
  - *But* special circumstances if each affiliate has separate fiduciary liability insurance policy and carrier

Cybersecurity Issues

- US Department of Labor announced new cybersecurity guidance for retirement plans on April 14, 2021
- Applies to plan sponsors, plan fiduciaries, recordkeepers, and plan participants
- EBSA estimates that there are 34 million defined benefit plan participants in private pension plans and 106 million defined contribution plan participants covering estimated assets of $9.3 trillion
- ERISA requires plan fiduciaries to take appropriate precautions to mitigate cybersecurity risks

Cybersecurity Issues

- Three Pieces of Guidance:
  - Cybersecurity Program Best Practices: Assists plan fiduciaries and record-keepers in their responsibilities to manage cybersecurity risks
  - Tips for Hiring a Service Provider: Helps plan sponsors and fiduciaries prudently select a service provider with strong cybersecurity practices and monitor their activities, as ERISA requires
  - Online Security Tips: Offers plan participants and beneficiaries who check their retirement accounts online basic rules to reduce the risk of fraud and loss

Cybersecurity Program Best Practices

- Have a formal, well documented cybersecurity program
- Conduct prudent annual risk assessments
- Have a reliable annual third party audit of security controls
- Clearly define and assign information security roles and responsibilities
- Have strong access control procedures
- Ensure that any assets or data stored in a cloud or managed by a third party service provider are subject to appropriate security reviews and independent security assessments

Cybersecurity Program Best Practices

- Conduct periodic cybersecurity awareness training
- Implement and manage a secure system development life cycle (SDLC) program
- Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response
- Encrypt sensitive data, stored and in transit
- Implement strong technical controls in accordance with best security practices
- Appropriately respond to any past cybersecurity incidents

Polling Question

Tips for Hiring a Service Provider

- Ask about the service provider's information security standards, practices and policies, and audit results, and compare them to the industry standards adopted by other financial institutions
- Ask the service provider how it validates its practices, and what levels of security standards it has met and implemented. Look for contract provisions that give you the right to review audit results demonstrating compliance with the standard

Tips for Hiring a Service Provider

- Evaluate the service provider's track record in the industry, including public information regarding information security incidents, other litigation, and legal proceedings related to vendor's services
- Ask whether the service provider has experienced past security breaches, what happened, and how the service provider responded
- Find out if the service provider has any insurance policies that would cover losses caused by cybersecurity and identity theft breaches (including breaches caused by internal threats, such as misconduct by the service provider's own employees or contractors, and breaches caused by external threats, such as a third party hijacking a plan participants' account)

27

Tips for Hiring a Service Provider

- Make sure that the contract requires ongoing compliance with cybersecurity and information security standards – and beware of contract provisions that limit the service provider's responsibility for IT security breaches
- Try to include terms in the contract that would enhance cybersecurity protection for the Plan and its participants, such as:
  - Information Security Reporting
  - Use and Sharing of Information and Confidentiality
  - Notification of Cybersecurity Breaches
  - Compliance with Record Retention, Destruction, Privacy, and Information Security Laws
  - Insurance

28

Online Security Tips for Plan Participants

- Register, Set Up and Routinely Monitor Your Online Account
- Use Strong and Unique Passwords
- Use Multi-Factor Authentication
- Keep Personal Contact Information Current
- Close or Delete Unused Accounts
- Be Wary of Free Wi-Fi
- Beware of Phishing Attacks
- Use Antivirus Software and Keep Apps and Software Current
- Know How to Report Identity Theft and Cybersecurity Incidents

Emerging Employee Benefits Issues

- COBRA Subsidies
- Outbreak Period Extended Deadlines
- Consolidated Appropriations Act
  - Price Transparency
  - No Surprises Act
  - Fee disclosures for brokers and consultants
  - Mental health parity assessments

Thank You

Greg Ash
Partner | Overland Park, KS
913.327.5115 | gash@spencerfane.com

Julia Vander Weele
Partner | Overland Park, KS
816.292.8182 | jvanderweele@spencerfane.com