Fiduciary Exception to Attorney-Client Privilege for ERISA Plans

A Lexis Practice Advisor® Practice Note by
Russell L. Hirschhorn and Paul M. Hamburger, Proskauer Rose LLP

Russell L. Hirschhorn
Proskauer Rose LLP

Paul M. Hamburger
Proskauer Rose LLP

This practice note explains the doctrine commonly referred to as the fiduciary exception to the attorney-client privilege. It is important for plan sponsors, fiduciaries, and their legal advisors to understand the rules regarding when the fiduciary exception doctrine can result in communications between a plan fiduciary and an attorney not to be privileged and become susceptible to being produced in litigation. This practice note also explains how the fiduciary exception doctrine has been used to try to obtain communications ordinarily protected by the attorney work product doctrine. The principles outlined in this practice note can help employee benefits counsel and their clients better understand how best to protect the privacy of their communications and how to anticipate when these communications may be open to examination by plan participants.

This practice note is organized in the following sections:

General Principles Governing the Attorney-Client Privilege

The attorney-client privilege refers to a legal privilege that serves to keep secret those confidential communications between an attorney and the attorney's client. It protects the fact that the communication took place as well as the substance of those communications. The privilege often is asserted in the face of a legal demand for documents or communications, whether as a discovery request from an opposing party in litigation or as a government request in the context of an investigation, audit, or other inquiry. Although such requests often do not surface until well after communications have taken place, it is important to always be thinking about whether communication is intended to be kept confidential.

The attorney-client privilege serves several purposes, including the primary purpose of encouraging the free flow of information between attorney and client. The U.S. Supreme Court has long recognized the importance of the attorney-client privilege. In Upjohn Co. v. United States, the Court observed:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law . . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

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

For the attorney-client privilege to apply, there must be (1) a communication (2) made between privileged persons (3) in confidence and (4) for the purpose of obtaining or providing legal assistance for the client. Restat 3d of the Law Governing Lawyers, § 68. A communication is defined as "any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such an expression." Restat 3d of the Law Governing Lawyers, § 69.

Application in the Context of Employee Benefit Plans

Although ethical and privilege issues arise across all disciplines, they are particularly prevalent and tricky in their application to the employee benefits practice. When, for example, an ERISA plan fiduciary attends to a participant's claim for benefits under an employee benefit plan and wishes to consult an attorney for advice, those communications may not be protected from disclosure by the attorney-client privilege.

The challenge in the employee benefit plan context is to understand exactly when and how the attorney-client privilege will apply to the various scenarios encountered by the employee benefits advisor. The remainder of this practice note explores these questions and provides practical ideas to help benefit plan advisors and their clients best guard their communications.

Identifying the Client in the Employee Benefit Plan Context

The Employee Retirement Income Security Act (ERISA) is a federal law that protects the assets of millions of American workers who invest their funds in employer-sponsored retirement plans throughout their working lives to ensure that the funds will still be there when they retire. ERISA-covered plans operate as separate entities. At the same time, there are a number of parties related to these plans that provide the functional and logistical support that make these plans work and deliver the promised benefits. The attorney charged with representing the plan and its various related parties, therefore, must be clear on who in fact is the true client.

The starting point for analyzing attorney-client privilege issues is to understand that the privilege belongs to the client—and only the client—not the attorney. In the employee benefit plan context, this means two key things:

- First, it is important to understand who the client is. As discussed below, the client may be the employee benefit plan, the plan sponsor, or the plan fiduciary (among others). The failure to clearly identify the client could have significant ramifications in terms of whether communications that are intended to be privileged from third parties are in fact privileged.
- Second, a client can lose the privilege by allowing non-clients to participate in the communications that otherwise would be privileged (e.g., by permitting other non-clients "in the room" to hear that communication).

The Potential Clients

Three common potential clients in the context of employee benefit plans are (1) the plan itself, (2) the sponsor of the plan, and (3) fiduciaries of the plan.

Employee Benefit Plans

An employee benefit plan refers to an employee welfare benefit plan or an employee pension benefit plan, or a plan that is a combination of both. The plan is a separate and distinct legal entity that may sue or be sued as an entity. ERISA § 502(d) (29 U.S.C. § 1132(d)). That said, a plan as such does not transmit or receive communications other than through the parties who establish, manage, or administer the plan.

Plan Sponsors

The plan sponsor is typically the employer or employee organization (i.e., a union) that establishes the plan. Sponsors engage in settlor (as opposed to fiduciary) functions and are ultimately responsible for the plan's design decisions. When communicating with plan sponsors that operate through corporate entities, it is important to make sure that the *Upjohn* test (or state variation thereof) is satisfied. As provided for by the U.S. Supreme Court in *Upjohn Co.*, the attorney-client privilege applies to communications between a company employee and the attorney if all of the following are true:

- The communication involves information necessary for the attorney to provide legal advice to the company.
- The communication and information relate to matters within the employee's scope of employment.

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- The communication involves information necessary for the attorney to provide legal advice to the company.
- The communication and information relate to matters within the employee's scope of employment.

- The employee making the communication was aware that the information was being shared with the attorney in order to provide the organization with legal advice.
- The communication was kept confidential and not disseminated beyond employees who, considering the corporate structure, need to know its contents.

449 U.S. at 383; see also, e.g., Fletcher v. ABM Bldg. Value, 775 F. App'x 8, 14 (2d Cir. 2019); In re Allen, 106 F.3d 582, 603 (4th Cir. 1997); United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996). Importantly, unless agreed otherwise, a lawyer representing an organization represents the entity, not the employees or managers within that organization with whom the attorney might otherwise communicate.

In multiemployer plans, which cover employees represented by a union and involve more than one employer, the union and the employers are generally viewed as co-sponsors of the plan. For this purpose, the key distinction between the plan sponsor and plan fiduciaries is that the plan sponsor acts in a nonfiduciary (settlor) capacity—it is acting for itself and its own (plan sponsor) interests.

Plan Fiduciaries

The plan fiduciaries are responsible for managing and administering the plans, and they are required to act in the best interests of participants and their beneficiaries.

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

ERISA § 3(21)(A) (29 U.S.C. § 1002(21)(A)).

This definition is intentionally designed to be broad and can include the plan's named fiduciaries, administrators (including potentially the employer participating in the plan), trustees, and investment advisors. Regardless of who the fiduciaries are, they must nonetheless discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of administering their benefits.

The Fiduciary Exception to Attorney-Client Privilege

Under the fiduciary exception, legal advice provided to plan fiduciaries acting in their fiduciary capacity is not protected by the doctrine of attorney-client privilege and may be discovered by plan participants and beneficiaries (and those who stand in their shoes) in litigation. In reality, and as explained more fully below, the fiduciary exception is not really an exception as much as it is an application of the general rule that the privilege applies to communications with the client. The real clients to whom the privilege belongs in this view are the participants, and that is why they may be entitled to have access to the communications. But, as also explained below, there are limits to the exception. If, for example, the communication is made to a nonfiduciary client, like a plan sponsor operating in a nonfiduciary capacity, then the plan sponsor is the client and can expect to keep the communications privileged.

The Origins of the Fiduciary Exception

The fiduciary exception can be traced back to 19th century English common law in the case of Talbot v. Marshfield, 12 L.T.R. 761, 762 (Ch. 1865), where the court distinguished between two items of legal advice: one dispensed to trustees prior to any threat of suit, advising them regarding the propriety of paying advances to the children of the testator, and one dispensed after the commencement of suit, aimed at advising them "how far they were in peril." The court required the trustees to produce the first item but not the second.

As American jurisprudence developed over time, so did the fiduciary exception. One of the earliest American cases applying the exception to attorney-client privilege was Riggs Nat'l Bank v. Zimmer, in which the court required the production of a memorandum drafted by the trustee's counsel which addressed future potential tax litigation issues because the trust beneficiaries were ultimately the parties intended to benefit, not the trustees individually. Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 710 (Del. Chan. 1976). The court there referenced English common law when holding that whether or not disclosure of the memorandum would be allowed should be determined in light of the purpose for which it was prepared, the party(ies) for whose benefit it was procured, and whether it related to litigation which was pending or threatened.

The fiduciary exception as applied in the context of employee benefit plans is rooted in two distinct rationales:

- **The real client.** Some courts have endorsed the theory that, as a representative for the participants

and beneficiaries of the plan which the fiduciary is administering, the fiduciary is not the real client. In this view, the fiduciary exception is not an exception to the attorney-client privilege; rather, it reflects the fact that, at least as to advice regarding plan administration, a fiduciary is not the real client and thus never enjoyed the privilege in the first place.

- **Duty to disclose.** Other courts have held that the fiduciary exception derives from an ERISA fiduciary's duty to disclose to plan beneficiaries all information regarding plan administration, particularly when it is the administration of the plan that is being challenged in the litigation. In such cases, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way to a competing legal principle.

See, e.g., Wachtel v. Health Net, Inc., 482 F.3d 225, 234 (3d Cir. 2007); U.S. v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999).

Limitations on the Fiduciary Exception

Just as the attorney-client privilege itself has limitations, so too the fiduciary exception to the attorney-client privilege rule has its limits, including those discussed below.

Settlor Functions

To begin with, it is well established that the fiduciary exception has no applicability to settlor functions, such as plan design, amendments, and termination, because in such cases the true client is the plan sponsor, not the plan participants or beneficiaries. E.g., Bland v. Fiatallis N. Am., Inc., 401 F.3d 779, 787–88 (7th Cir. 2005) (holding that the fiduciary exception did not apply to communications regarding the termination or amendment of a plan); Wachtel, 482 F.3d at 225 (reasoning that the "fiduciary exception does not apply to settlor acts because such acts are more akin to those of a non-fiduciary trust settlor than they are to those of a trustee"); Feinberg v. T. Rowe Price Grp., Inc., 2019 U.S. Dist. LEXIS 217544, at *10 (D. Md. 2019) (holding that the fiduciary exception did not apply to minutes from a plan trustee meeting containing legal advice from in-house counsel regarding 401(k) plan design and amendments).

When the employer/plan sponsor is also the fiduciary, it is important to understand the capacity in which the employer is acting during the attorney/employer communication. As one court explained, "[t]he employer's ability to invoke the attorney-client privilege . . . turns on whether or not the communication concerned a matter as to which the employer owed a fiduciary obligation to the beneficiaries." Becher v. Long Island Lighting Co., 129 F.3d 268, 271 (2d Cir. 1997). In other words, if the employer acts in a nonfiduciary context as plan sponsor, communications between the employer and an attorney ought to retain the general attorney-client privilege. If the employer is acting in a fiduciary capacity during the communication, the fiduciary exception may very well apply.

This is why it can be important to clarify the context at the outset of a communication. For example, a memorandum or letter might have a legend that explains that the purpose of the communication between the employer and attorney is one between the employer acting as plan sponsor and not as plan fiduciary. The legend will not necessarily determine the final outcome if the facts are not consistent with the legend; nevertheless, it can help support a claim of privilege (and nonapplication of the fiduciary exception) if the legend is consistent with the nature of the underlying communication.

A best practice is to create an expectation of privilege and act accordingly. For example, where applicable, make clear on all written communications that they are protected by the attorney-client privilege and do not disclose them to other parties.

Good Cause Showing Requirement

Some courts have required a party seeking disclosure of what would otherwise be deemed privileged information to first establish good cause for requiring the production. E.g., In re Occidental Petroleum Corp., 217 F.3d 293, 298 (5th Cir. 2000) (requiring that documents be produced because plaintiffs had alleged breach of fiduciary duty claims sufficient to meet the good cause requirement); Chill ex rel. Calamos Growth Fund v. Calamos Advisors LLC, 2017 U.S. Dist. LEXIS 62565, at *3 (N.D. Ill. 2017) (finding that plaintiffs did not meet their burden to show good cause because they neglected to demonstrate necessity for the information and its unavailability from other sources).

Other courts, however, have rejected the good cause requirement. E.g., Hudson v. General Dynamics Corp., 186 F.R.D. 271, 274 (D. Conn. 1999) (concluding plan beneficiaries are not required to show good cause in order to invoke the fiduciary exception); Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 326 (S.D.N.Y. 1991) ("the common-law principles governing required disclosure of trustee communications do not impose a 'good cause' limitation on this type of information").

Fiduciary Personal Liability

Under ERISA, fiduciaries are subject to personal liability in cases of fiduciary breach. In that context, courts recognize that fiduciaries ought to be able to retain and maintain privileged communications with counsel. E.g., Mett, 178

F.3d at 1066 (holding that the fiduciary exception did not apply to legal memoranda advising defendants, as plan trustees, about their personal, civil, and criminal exposure); Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488, 498–99 (M.D.N.C. 2008) (concluding that the fiduciary exception was inapplicable to communications relating to an imminent lawsuit and the fiduciaries' concern for their own liability); Fischel v. Equitable Life Assur., 191 F.R.D. 606, 609–10 (N.D. Cal. 2000) (ruling that the fiduciary exception did not apply to legal advice provided to management concerning the potential liability for the employer-fiduciary). See Restat 3d of the Law Governing Lawyers, § 84 and cmt. b ("In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication: (a) is relevant to the claimed breach; and (b) was between the trustee and a lawyer who was retained to advise the trustee concerning the administration of the trust.").

Some courts have further explained that, in the absence of a "mutuality of interests" between the fiduciary and the plan beneficiaries regarding the purpose of the communications, the fiduciary exception to the attorney-client privilege does not apply and the fiduciary can have privileged communications with counsel. E.g., Wildbur v. Arco Chem. Co., 974 F.2d 631, 645 (5th Cir. 1992) (upholding a magistrate's finding that the fiduciary exception was inapplicable to communications from counsel to plan administrator concerning the defense of a pending lawsuit because there was no mutuality of interest creating a fiduciary relationship).

To determine whether a plan administrator was seeking legal advice in connection with plan administration and thus in a fiduciary capacity, courts generally look to "whether the interests of the fiduciary and the beneficiary had diverged at the time the communication occurred." Kushner v. Nationwide Mut. Ins. Co., 2018 U.S. Dist. LEXIS 119571, at *8–9 (S.D. Ohio 2018) (determining that the fiduciary exception did not apply because plan fiduciary "reasonably anticipated litigation" by engaging counsel from the beginning of the claims process). The underlying reasoning is applied uniformly across the courts in that the fiduciaries, acting in their personal capacity, are seeking legal advice on their own behalf and not on behalf of the participants.

The lesson for fiduciaries is to make the purpose of their communications with counsel clear. If the nature of the legal advice relates to personal liability of the fiduciary, to the extent possible make that clear before the communication is made.

Application of the Fiduciary Exception in Common Employee Benefit Situations

To further see how the attorney-client privilege rules and fiduciary exception apply in the employee benefit context, consider a few common scenarios.

General Advice/Advice at Meetings

By first answering the question of who the lawyer represents, lawyers and their clients—plan fiduciaries or employer-plan sponsors—can avoid getting tripped up on whether communications were or are privileged. On the one hand, when a lawyer represents a fiduciary, subject to the limitations on the application of the fiduciary exception, it can be expected that the communications with the fiduciary may be subject to disclosure to plan participants. On the other hand, when a lawyer represents an employer-plan sponsor, situations can get confusing rather quickly.

For example, a lawyer might be assisting the administrative personnel in human resources about plan-related issues, such as a plan-related compliance review, plan design-related questions, or legal compliance related matters. Care should be taken to separate clearly who the lawyer represents and for what purpose. By keeping clear lines of separation between fiduciary matters and plan sponsor matters, protected communications that are intended to be privileged can remain privileged and, moreover, attorneys and clients can avoid inadvertently tainting future communications.

Regardless of whether the lawyer represents the plan fiduciary, special care should be taken to avoid inadvertent waivers of the privilege. This can be particularly challenging in the context of meetings where the attorney and client will be accompanied by other parties. The problem arises because meetings often include attendees who are not clients, like actuaries, consultants, recordkeepers, and investment advisors or managers.

From a privilege perspective, the question is whether these third parties are necessary parties to the attorney in order for the attorney to render legal advice. For example, an attorney might have to answer a complex benefit question involving actuarial calculations. If the attorney needs actuarial help in order to formulate legal advice, the presence of the actuary might be necessary to the advice and not interfere with the application of the privilege. However, if the third parties at the meeting are not necessary for the lawyer's advice, any privilege that

may have existed concerning a conversation between the plan fiduciaries and counsel may be waived by the mere presence of these non-client parties. E.g., Hill v. State Street Corp., 2013 U.S. Dist. LEXIS 181168, at *17–19 (D. Mass. 2013).

To avoid tainting application of the attorney-client privilege, take proper precautions at meetings where legal advice may be provided. If the intention is to have a privileged conversation, first remove unnecessary parties from the discussion.

Claims Process – Pre-decisional Communications

As explained above, one key issue in determining whether a fiduciary can have privileged communications with an attorney is whether the fiduciary's interests have sufficiently diverged from the participants' interests. This can be challenging when a participant has submitted a claim for review to the plan fiduciary and the fiduciary seeks legal advice related to the claim. In this context, courts must ascertain the point in time when the fiduciary's interests deviate from the interests of the participants. Unfortunately, it is not always clear when these previously mutual interests (i.e., the participants want benefits and the fiduciaries have to make sure benefits are provided in accordance with the plan) diverge into adversarial interests (i.e., the fiduciary has finally determined that the participant is not entitled to benefits).

Courts have held that interests only diverge sufficiently when there is a final denial of benefits. As such, pre-decisional communications between counsel and plan fiduciaries are more likely to be discoverable than post-decisional communications, when interests have clearly diverged. E.g., Stephan, 697 F.3d at 933 (requiring disclosure of advice regarding plan administration made before the final determination of the participant's claim); Wildbur, 974 F.2d at 631 (upholding a magistrate's decision requiring in-house counsel and plan administrators to testify in depositions regarding events and advice surrounding the decision to deny benefits to a beneficiary).

Courts tend to compel production of legal advice that the fiduciaries relied upon in crafting the adverse benefit determination due to the Department of Labor's regulations governing claims procedures. Those regulations require that a claimant be granted access to all documents and information relevant to the claim. 29 C.F.R. § 2560.503-1(h)(2)(iii). A document is relevant if it was "relied upon in making the benefit determination" or if it was "submitted, considered, or generated in the course of making a benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination." 29 C.F.R. § 2560.503-1(m)(8). As such, many of the communications between plan counsel and fiduciaries will become part of the administrative record, open to the claimant.

Many courts continue to draw a line at the fiduciary's final decision for purposes of determining whether interests have diverged. Nevertheless, there are still instances where a sufficiently adversarial relationship could arise even before the final decision denying benefits. E.g., Kushner, 2018 LEXIS 119571, at *10 (holding that the parties' interests had sufficiently diverged when the plaintiff was informed his claim would be denied before even submitting his claim); see also Christoff v. Unum Life Ins. Co. of Am., 2018 U.S. Dist. LEXIS 43535, at *23–24 (N.D. Minn. 2018) (holding the fiduciary exception applied to communications prior to the final benefits determination because "there was no request for advice connected to any pending legal action or a specific threat of litigation," despite plaintiff retaining an attorney during the claims process and disputing the plan's denial of information). In these cases, courts have taken a fact-intensive approach, considering factors other than timing, such as (1) the threat of litigation being more than a remote possibility, (2) the interests of the beneficiary and ERISA fiduciary diverging significantly, and (3) the necessity of the communications to the administrative claim process.

Claims Process – Post-decisional Communications

When a plan fiduciary seeks legal advice after it has denied a claim, these communications are generally protected by the attorney-client privilege, falling outside of the fiduciary exception. E.g., Moss v. Unum Life Ins. Co., 495 F. App'x 583, 595 (6th Cir. 2012) (ruling that the exception does not apply "to communications after a final decision" has been made or to communications "generated after the initiation of [a] lawsuit"); D.T. v. NECA/IBEW Family Med. Care Plan, 2018 LEXIS 155616, at *12 (W.D. Wash. 2018) (denying plaintiff's motion to compel communications that occurred after the final denial of the claim); Allen v. Honeywell Ret. Earnings Plan, 698 F. Supp. 2d 1197, 1201 (D. Ariz. 2010) ("The interests of the plan participants and plan administrators undoubtedly diverge sufficiently upon the final denial of an administrative claim . . . ."); Garemani v. First Unum Life Ins. Co., 2010 U.S. Dist. LEXIS 161151, at *9 (C.D. Cal. 2010) (holding that the fiduciary exception did not apply to documents generated after the final administrative decision). See also Carr v. Anheuser-Busch Cos., 791 F. Supp. 2d 672, 677 (E.D. Mo. 2011) (finding that communications that occurred before a final benefits determination was communicated were still privileged, in

part, because at the time the communications occurred "the final decision to deny benefits had effectively been made"), aff'd, 495 F. App'x 757 (8th Cir. 2012).

Other Parties Involved in Benefit Disputes

Notably, courts also have held that the U.S. Department of Labor steps into the shoes of a participant for purposes of applying fiduciary exception principles. E.g., Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981) (concluding that a sufficient identity of interests existed to allow the Secretary of Labor to invoke the fiduciary exception).

Application of the fiduciary exception, however, is less certain when it comes to communications with insurers. Compare Stephan v. Unum Life Ins. Co. of Am., 697 F.3d 917, 932 (9th Cir. 2012) (finding no reason "why the disclosure of information is any less important where an insurer, rather than a trustee or other ERISA fiduciary, is the decisionmaker") with Wachtel, 482 F.3d at 238 (concluding that the real client was the insurer not the plan beneficiary).

Application of the Fiduciary Exception to the Attorney Work Product Doctrine

Separate from issues of attorney-client privilege, there is a doctrine known as the attorney work product doctrine. This rule operates similar to the attorney-client privilege in that it is intended to protect information, such as written or oral materials prepared by or for an attorney, in the course of legal representation, particularly in preparation for litigation. Fed. R. Civ. P. 26(b)(3). The work product doctrine actually provides broader protection in some respects than the attorney-client privilege. An adverse party, however, may discover or compel disclosure of work product upon a showing of substantial need to prepare its case if it cannot obtain the substantial equivalent by other means without undue hardship. Id.; see Hickman v. Taylor, 329 U.S. 495 (1947).

The general policy against invading the privacy of an attorney's course of preparation is so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. Unlike the attorney-client privilege, the right to assert work product protection belongs principally, if not exclusively, to the attorney.

Several courts have addressed claims that discovery should not be permitted because the documents or information sought was protected by the attorney work product doctrine. Unsurprisingly, these courts have concluded that where the discovery sought is attorney work product, it will be protected from disclosure. E.g., Wildbur, 974 F.2d at 646 ("Because the attorney work-product doctrine fosters interests different from the attorney-client privilege, it may be successfully invoked against a pension plan beneficiary even though the attorney-client privilege is unavailable."); Aull v. Cavalcade Pension Plan, 185 F.R.D. 618, 629 (D. Colo. 1998) (concluding that documents exchanged between the plan, its outside counsel, and accountant concerning plaintiff›s claims for breach of fiduciary duty, improper calculation and denial of benefits and other violations were protected by the attorney work product doctrine because they were prepared to assist counsel in anticipation of litigation); Everett v. USAir Group, Inc., 165 F.R.D. 1, 5 (D.D.C. 1995) (holding the plan sponsor could assert the work product privilege to the extent the participants' discovery requests called for documents that were prepared expressly in anticipation of litigation except insofar as they were prepared in anticipation of litigation on behalf of the beneficiaries).

Some courts leave the impression that they have created a fiduciary exception to the work product doctrine. Upon closer examination of those cases, though, it is more accurate to say that those courts simply took the position that the work product doctrine did not apply. E.g., Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482 (S.D.N.Y. 2019) (holding that documents circulated among executives and reviewed by the general counsel were not attorney work product because there was no evidence to suggest the documents were prepared in anticipation of litigation); Geissal v. Moore Med. Corp., 192 F.R.D. 620 (E.D. Mo. 2000) (concluding that counsel's pre-decisional communications with plan fiduciary concerning a participant's claim for benefits were not protected by the work product doctrine because the communications occurred before the adverse decision was final and the divergence of interest occurred).

Best Practices for ERISA Plan Sponsors, Fiduciaries, and Benefits Advisors for Navigating the Fiduciary Exception to the Attorney-Client Privilege

Navigating issues of privilege can be a tricky endeavor and that is particularly true in the employee benefits arena. As explained in this practice note, the starting point

is always to identify who is the client with whom the lawyer is communicating. Relatedly, consider the subject of the communications and the purpose for which the communications are being made. Such seemingly simple questions may sometimes be difficult to answer and may not always be so clear in hindsight. Benefits counsel and their clients will be well served to consider the following when communicating about issues pertaining to employee benefits:

- **Anticipate privilege issues.** Although requests for communications often do not surface until well after they have taken place, it is important to always be thinking about whether communication is intended to be kept confidential.
- **Who is the client?** The starting point for analyzing attorney-client privilege issues is to understand that the privilege belongs to the client—and only the client—not the attorney. It is therefore critical to identify at the outset who is the real client.
- **Create an expectation of privilege.** Where applicable, make clear on all written communications that they are protected by the attorney-client privilege and treat them as such.
- **Make the purpose of the communication clear.** If the nature of the legal advice relates to personal liability of the fiduciary, to the extent possible make that clear before the communication is made and keep such communications separate from those that arguably invoke a mutuality of interest.
- **Take proper precautions when legal advice is being communicated.** If the intention is to have a privileged conversation, first remove unnecessary parties from the discussion.
- **Timing issue for benefit claim advice.** Pre-decisional communications between counsel and plan fiduciaries are more likely to be discoverable than post-decisional communications, where interests have clearly diverged.
- **Remember the attorney work product doctrine.** The attorney work product doctrine is generally effective at protecting communications between a plan fiduciary and attorney.

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Russell L. Hirschhorn, Partner, Proskauer Rose LLP

Russell L. Hirschhorn, co-head of the ERISA Litigation Group, represents plan fiduciaries, trustees, sponsors and service providers on the full range of ERISA and state law benefit and fiduciary issues. From single plaintiff to litigation and arbitration to complex class action litigation, he provides practical guidance, develops unique litigation defense strategies and, when appropriate, mediates successful resolutions.

Russell represents clients across a wide array of publicly-held, multi-national companies and privately owned companies across a multitude of industries including, banking, finance and investments, pharmaceuticals, retail products and construction, to name just a few. In addition, he also counsels benefit plan clients on a host of compliance and federal and state government agency enforcement matters, including complex and lengthy investigations and audits by the U.S. Departments of Justice and Labor.

Russell is management co-chair of the American Bar Association Employee Benefits Committee. He also writes on cutting-edge ERISA litigation issues, serving as the co-editor of the Firm's Employee Benefits & Executive Compensation Blog and as a contributing author and a past chapter editor to *Employee Benefits Law* (BNA Third Edition).

Deeply dedicated to pro bono work, Russell was a principal drafter of several amicus briefs for the Innocence Project, a legal non-profit committed to exonerating wrongly convicted people. Russell has been recognized on several occasions for his commitment to pro bono work including by President George W. Bush in receiving the U.S. President's Volunteer Service Award.

Paul M. Hamburger, Partner, Proskauer Rose LLP

Paul M. Hamburger is co-chair of the Employee Benefits & Executive Compensation Group and head of the Washington, DC office. Paul is also a leader of the Practice Center's health and welfare subgroup and a member of Proskauer's Health Care Reform Task Force.

Paul provides technical knowledge and advice to employers on all aspects of their employee benefit programs, and advises employee benefit plan trustees and service providers on ERISA and employee benefit plan-related matters. He has extensive experience in negotiating service provider and outsourcing agreements. Paul frequently represents clients before government regulatory agencies, including the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation.

Recognized by a number of publications for his exceptional work, Paul is described by *The Legal 500 United States* as "one of the best in his field; he inspires a high level of confidence and is a pleasure to work with." *Chambers USA* notes that Paul's clients refer to him as "a creative, business-oriented and brilliant lawyer who educates and enlightens."

As a noted thought leader in his field, Paul frequently speaks on employee benefit matters. In addition, he served for several years as an adjunct professor at Georgetown University Law Center teaching the LL.M. tax course on ERISA Health and Welfare Benefit Plans.

An author of numerous articles on employee benefits matters, Paul has produced a number of nationally-circulated loose leaf publications, published by Thompson Information Services: *Mandated Health Benefits – The COBRA Guide, The Guide to Assigning & Loaning Benefit Plan Money, and The Pension Plan Fix-It Handbook*. Most recently, he was the managing author of the 6th edition of *The New Health Care Reform Law – What Employers Need to Know (A Q&A Guide)*, published by Thompson HR.