Discovery and Privilege Issues Arising for Benefits Attorneys

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Overview

- Attorney/Client Privilege
  - An Overview of the Rule
  - As Applied to ERISA-Governed plans
  - The Fiduciary Exception: Its Origins and Current State
  - The Divergence of Interest Rule
  - Waiver
  - DOJ Guidelines on Corporate Waivers
  - Reversing Direction?
  - Special Note for In-House Benefits Counsel
- Work Product Doctrine
  - An Overview of the Rule
  - Work Product Doctrine as Applied to ERISA-governed Plans
  - The Fiduciary Exception
  - Waiver

Overview

- Additional Considerations (Time Permitting)
  - Circular 230
  - Responding to Audit Inquiry Letters
  - "FIN 48:" Accounting for Uncertainty in Income Taxes
- Practical Advice (Time Permitting)
  - A Usable Analytical Framework for Day-to-Day Management of Privileges for ERISA-Governed Plans
- Conclusions

The Attorney/Client Privilege

- An Overview of the Rule
  - The attorney/client privilege originally developed as part of English common law.
  - The attorney/client privilege is a matter of common law and is not set forth in the Federal Rules of Evidence ("FRE").
- Under FRE § 501 …
  - **The Common Law** – as interpreted by United States courts in the light of reason and experience– governs a claim of privilege unless any of the following provides otherwise:
    - the United States Constitution
    - a federal statute; or
    - rules prescribed by the Supreme Court
  - As recognized by the Supreme Court of the United States (the "SCOTUS"), in *Upjohn Co. v. U.S.*, …

The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

The Attorney/Client Privilege

- An Overview of the Rule (Continued)
  - FRE § 502, prior to its amendment adopted on September 19, 2008, ("Old FRE § 502") included a largely correct statement of the common law privilege. It read, in relevant part …

    (b) **General Rule of Privilege**. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and representative of the client, or (5) between lawyers representing the client.

The Attorney/Client Privilege

- An Overview of the Rule (Continued)
  - Old FRE § 502(c) squarely addressed who could claim the privilege.
  - It read as follows …

> (c) **Who May Claim the Privilege**. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege, but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

– Old FRE § 502(d) dealt with exceptions, but not specifically instances of waiver.

The Attorney/Client Privilege

- An Overview of the Rule (Continued)
  - Old FRE § 503(a) provided definitions of several terms, the most important of which included the following …

    (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

    (2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

    (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The Attorney/Client Privilege

- As Applied to ERISA-Governed Plans
  - The "two hats" theory (*i.e.*, settlor versus fiduciary acts) plays out for plan sponsors and its benefits counsel.
  - This system was inherent in the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which relied, in part, on the common law of trusts.
  - Benefits counsel, which ordinarily represents the plan sponsor, necessarily serve different and often competing interests.
  - In addition to satisfying the elements of the common law privilege and avoiding waiver, the privilege gives way unless an exception applies.

The Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State
  - The Fiduciary Exception to the Attorney/Client Privilege may be summarized as follows …

    When a trustee acts in a fiduciary capacity, the attorney/client privilege does not serve to protect communications that would otherwise be privileged unless there is an exception to the exception.

  - Section 173 of the Restatement (Second) of Trusts simply describes the rationale for the rule as follows …

    The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts … and other documents relating to the trust.

The Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State (Continued)

  – The basis for the application of the fiduciary exception to ERISA-governed plans is twofold:

    (1) ERISA fiduciaries have a duty to make all information regarding the administration of a plan available to the plan's participants, a rationale that is similar to the trust obligation on trustees to be forthright.

    (2) Fiduciaries are not served personally by counsel; rather, as a representative of the beneficiaries, legal counsel inures to the benefit of the beneficiaries, who are the real clients. *Becher v. LILCO,* 129 F.3d. 268, 271-72 (2d Cir. 1997).

The Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State (Continued)
  - Since the fiduciary exception was first recognized as applying to ERISA-governed plans, in 1981, it has undergone transformation.
    - In early cases, the fiduciary exception seemed to swallow the attorney/client privilege. *See, e.g., Donovan v. Fitzsimmons,* 90 F.D.R. 583 (N.D. Ill.1981); *Washington-Baltimore Newspaper Guild v. Washington Start Co.*, 543 F.Supp. 906 (D.D.C. 1982).
  - This trend began to be reversed in the mid-1990s when courts began exploring the distinction between acts that were fiduciary versus those that were settlor in nature.

The Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State (Continued)
  - In *Varity v. Howe*, 516 U.S. 489 (1996), SCOTUS provided guidance on how to distinguish whether advice was sought for acts that were fiduciary versus settlor in nature.
    - *Varity* involved alleged misrepresentations that basically conveyed to the employees that transferring from Massey-Ferguson to Massey Combines ("Massey") would not significantly undermine the security of their benefits.
    - Varity management provided assurances to employees thinking of continuing employment with Massey that their benefits would remain unchanged and that, with the help of everyone, Massey's future looked bright.
    - As was widely recognized, Varity placed several unprofitable subsidiaries and debt in Massey, which made Massey unlikely to succeed. Within two years, Massey was in receivership.

The Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State (Continued)

  - The *Varity* court focused in part on whether Variety was acting in a fiduciary capacity. In doing so, it relied on "management" and "administration in Section 3(21) of ERISA.

    - Looking to trust law, the *Varity* court noted that the "administration" of a trust refers to the performance of duties conferred in the trust agreement. The trust , the Variety court noted, necessarily affords the powers one thinks are necessary to carrying out its purpose.

    - The *Varity* court then concluded that communicating with plan participants about future benefits is a natural purpose carried out in an ERISA-governed plan.

Attorney/Client Privilege

- The Fiduciary Exception: Its Origins and Current State (Continued)
  - In response, *Varity* made three arguments.
    - First, that it was not required to communicate at all.
    - Second, that the statements were made while acting in a settlor capacity.
    - Third, that the decision to amend or terminate the plan was a non-fiduciary act.
  - The first of Varity's three arguments is most interesting.
    - The *Varity* court held that there is more to plan administration than simply complying with the specific duties imposed. "Administration" necessarily includes the "ordinary and natural means" of achieving the "objectives of the plan."
    - While the *Varity* decision does not offer a bright line test, the holding suggests that amending or terminating a plan are settlor acts while implementing the decision is fiduciary in nature.

The Divergence of Interest Rule

- Exceptions of the Fiduciary Exception
  - The first line of defense is to protect the attorney/client privilege. If the fiduciary exception applies, exceptions to the exception may keep the privilege intact.
  - There are two main instances where there may be a divergence of interest.
    - First, advice relating to "plan administration" excludes advice whose goal is to advise the fiduciary about the legal implications of action and decisions undertaken while performing fiduciary obligations.
      - Did the individual seek the advice to protect himself or herself from potential liability, whether civil or criminal?
    - Second, when the interests of a participant and the plan diverge, the exception gives way.
      - For example, pre-decisional acts involved with the claims procedure are not protected, but where the claims procedures are exhausted post-decisional communications will not be subject to the exception.
      - This has been expanded to a specific threat of litigation.

Waiver

- General Rule

> Waiver may be found … not merely from words or conduct expressing an intention to relinquish a known right, but also from conduct such as partial disclosure which would make it unfair for the client to invoke the privilege thereafter. Finding waiver in situations in which forfeiture of the privilege was not subjectively intended by the holder is consistent with the view, expressed by some cases and authorities, that the essential function of the privilege is to protect a confidence which, once revealed by any means, leaves the privilege with no legitimate function to perform. Logic notwithstanding, it would appear poor policy to allow the privilege to be overthrown by theft or fraud, and in fact most authority requires that to effect a waiver of disclosure must at least be voluntary. 10 McCormick on Evidence 5th § 87.1 (Strong rev. 1999)(citations omitted).

Waiver

- General Rule (Continued)
  - Waiver occurs where …

    (1) Where a party pleads or otherwise asserts a claim or defense based upon the advice of counsel.

    (2) Where the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so.

    (3) Where the holder of the privilege takes the stand and testifies as to the content of a privileged communication, which will also serve to waive the remainder of privileged communications as to the same subject.

    (4) Where the holder of the privilege discloses or otherwise waives a privilege at an earlier proceeding in the same case, meaning that he or she cannot later assert that the same material is protected by the attorney-client privilege.

    (5) Where the holder of the privilege publishes otherwise privileged information, even if it is published or authorized for publication in a private setting. There are other instances where waiver may occur.

Waiver

- Waiver Issues Specific to ERISA-Governed Plans
  - Courts have diverged on whether disclosure of privileged and protected documents to third party administrators.
  - "Joint representation" waivers generally do not apply because the plan sponsor may act in dual capacities, which is a rule clearly consistent with ERISA's statutory framework.
    - Some matters may be of such a sensitive nature that separate counsel may be sought for settlor functions to ensure the attorney/client privilege is not waived under the "joint representation" waiver.
  - Where a benefit claim is judged using the arbitrary and capricious standard of review, any attorney/client privilege is waived by placing the reasonableness of the denial in question, but this is only insofar as the evidence was presented to or consulted by the fiduciaries rendering the decision.

DOJ Guidelines on Corporate Waivers

- Holder / Thompson / Filip / Yates - Memoranda
  - Department of Justice ("DOJ") guidance providing a system of rewards for disclosing privileged materials during DOJ investigations.
    - Companies have been provided with "cooperation credit" for voluntary waivers.
  - Arlen Specter - Attorney-Client Privilege Protection Act of 2007/2009.
    - Subsequent DOJ memoranda more circumspect on waiver credit.
    - Yates – facts are not subject to privilege.

Reversing Direction?

- *United States v. Jicarilla Apache Nations*, 131 S.Ct. 2313 (2011).
  - In *Jicarilla*, the Supreme Court acknowledged that the U.S. has a fiduciary relationship with Indian tribes, the fiduciary exception to the attorney/client privilege is inapplicable.
    - The two-prong test used to justify the holding related to the fact that the government was the source of payment and the U.S. did not occupy a traditional "trustee-type" relationship as a fiduciary.
    - While the *Jicarilla* court relied on several ERISA cases, it is not widely accepted as applicable to litigations involving ERISA-governed plans.
    - In *Wachtel v. HealthNet*, 482 F.3d 225 (3d Cir. 2007), a broad reading of the holding seemed to hold that the fiduciary exception would not apply. However, in *HealthNet* the insurer was dealing with its own assets, as opposed to separate assets of an employee benefit plan.

Special Note for In-House Benefits Counsel

- Post-*Upjohn* Lessons
  - In *Upjohn v. United States,* 449 U.S. 383 (1981), the Supreme Court of the United States held that a corporation may enjoy the attorney/client privilege; however, commentators have closely followed the application of the attorney/client privilege to corporations.
    - In-house counsel can expect courts to be less sympathetic to privilege claims, which some commentators argue is based upon in-house counsel making "business decisions."
    - In-house counsel in a separate legal department seem to fair better, but there seems to be heightened scrutiny.
    - *Wildbur v. ARCO Chemical Corp.*, 974 F.2d 1013 (5thCir. 1992) is illustrative because post-claim denial / pre-litigation advice from in-house benefits counsel still had the requisite mutuality of interest for the fiduciary exception to apply. However, the work product doctrine protected from disclosure (mainly as a procedural matter).
    - *Asuncion v. Metropolitan Life Ins. Co.*, 493 F.Supp. 2d 716 (S.D.N.Y. 2007) is cited as another example. In *Asuncion*, the court held a request to review a claim denial letter and conduct an investigation was not legal in nature (i.e., the actions did not reflect a request for legal advice and mere prospect of litigation is not enough to result in privileged communications).

Work Product Doctrine

- An Overview of the Rule
  - The work product doctrine is a qualified immunity rather than a legal privilege and is held by the attorney (as opposed to the client).
  - The purpose is to protect the attorney's documents and tangible things prepared in anticipation of litigation.
  - The rationale is to protect others from "piggybacking" on the efforts of other attorneys, subject to an exception for undue hardship.
  - The work product doctrine is embodied in Federal Rule of Civil Procedure 26(b)(3).

Work Product Doctrine

- ## Work Product Doctrine as Applied to ERISA-Governed Plans

The work product doctrine has survived its application to ERISA plans largely intact. That is to say that mental impressions, conclusions, opinions, or legal theories of the attorney (or his or her representative) prepared in anticipation of litigation or for trial are not discoverable unless the other party is unable to obtain substantially equivalent material without undue hardship. Fortunately for the benefits defense bar, it appears that most courts have rejected the application of the fiduciary exception in cases involving ERISA plans.

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