

Attorneys: Ethical Considerations

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International Foundation
OF EMPLOYEE BENEFIT PLANS 

Outline for Discussion

- ERISA and the attorney-client relationship
- Ethical rules for remote work
 - Virtual law firms
- Artificial intelligence and the practice of law
- Cybersecurity issues



ERISA and the Attorney-Client Relationship

ERISA and the Attorney-Client Relationship

- Settlor/fiduciary issues
- Evidentiary issues, *i.e.*, attorney-client privilege/work-product doctrines
- Ethical issues, *i.e.*, conflicts of interest

Settlor/Fiduciary Issues

- Plan sponsors serve in more than one capacity
- Courts have focused on where to draw the line between fiduciary and settlor activities.
 - Settlor functions typically involve decisions establishing, terminating, amending, or merging plans
 - Fiduciary functions involve the management and administration of a plan (such as the management of the plan's assets or the method of implementing a settlor decision)
- To determine whether an action is a fiduciary function under ERISA, the courts have implemented a functional test.

Fiduciary Exception

- Legal advice obtained by the trustee regarding trust administration is for the benefit of the beneficiaries, and therefore the trustee cannot raise privilege when faced with a request from the beneficiary.
- Two rationales for extending the fiduciary exception to ERISA fiduciaries
 - Exclusive purpose rule supersedes the claim of privilege
 - Participants are the real clients

Fiduciary Exception

- Fiduciary exception does not apply to:
 - Settlor functions
 - When the interests of the ERISA plan fiduciary and the plan beneficiaries have diverged
- Generally, the fiduciary exception rules apply to work-product doctrine.

Fiduciary Exception

- Department of Labor asserts that it stands in the shoes of participants and therefore the attorney-client and work-product privileges do not apply when DOL investigates a plan.

Fiduciary Exception—Litigation Exception

- However, when a participant or the DOL has taken an adversarial position against the trust fund or trustees, communications may be protected by the attorney-client privilege.
 - Attorney work product applies to materials prepared in the anticipation of litigation.
- Important to call out the moment the participant takes an adversarial position.

Fiduciary Exception—Litigation Exception

- Key factor in driving the Court's analysis of the application of the liability exception to the fiduciary exception, after taking into account the context and content of the communication, is whether and "when the interests of the ERISA fiduciary and the plan beneficiaries have diverged sufficiently such that the fiduciary . . . [is acting] in its own interests to defend itself against plan beneficiaries . . . "
- *Krueger v. Ameriprise Fin., Inc.*, No. Civ 11-2781 (SRN/JSM), 2014 WL 12597432 (D.Minn. May 2, 2014)

Recent Developments in the Representation of ERISA Plan Stakeholders

- Law remains generally consistent throughout most of the country
 - Fiduciary exception to the rule means communications between the trust fund's attorney and the fund (including administrators) are not privileged. *Hughes v. Hartford Life & Accident Ins. Co.*, 507 F.Supp. 3d 384 (D. Conn. 2020).
 - In this case, Hartford argued there was an exception to the exception, arguing that the fiduciary exception does not apply to an insurer acting in the role of an administrator. The Court rejected that argument.

Recent Developments in the Representation of ERISA Plan Stakeholders

- Work-product doctrine and attorney-client privilege apply if the materials are prepared in anticipation of litigation and the advice is provided to protect the fiduciary from civil litigation. *Romanchuk v. Board of Trustees of Southern CA United Food & Commercial Workers*, 2:15-cv-08180-AB 2022 WL 3012178 (C.D. Calif. June 8, 2022)

Recent Developments in the Representation of ERISA Plan Stakeholders

- However, in the *Romanchuk* decision, the plaintiff, the party seeking the evidence, argued that the trustees did not have personal liability in the context of a benefits litigation claim. Benefit claims are payable from the plan assets.
- The Court agreed with the plaintiff, finding the documents were not protected by the attorney-client privilege. The Court did not cite to any other opinions to support this assertion.

Recent Developments in the Representation of ERISA Plan Stakeholders

- Plaintiff sought materials the defendant asserted were protected by the attorney-client privilege. Plaintiff argued the fiduciary exception applied. The defendant countered that a subset of the materials were protected by the litigation exception to the fiduciary exception. *In re GE ERISA Litigation*, 1:17-cv-12123-IT, 2022 WL 247719 (D. Mass. Jan. 6, 2022)
- The Opinion contains a good discussion about the legal standards, but ultimately determined the privilege log was too vague for the Court to rule on the issues.

Conflicts of Interest

- Be aware of the development of potential conflicts of interest within a board.
- Representation of either the union or a contributing employer/employer association may create at least the appearance of a conflict.
- Generally, conflicts arise more frequently in the single-employer context.

Ethical Rules for Remote Work

Remote Work—Ethical Guidance

- ABA Formal Opinion 495 issued on December 16, 2020.
- ABA Professional Conduct Rules apply to lawyers working in states where they are not licensed.
- Also subject to bar rules in both licensed state and jurisdiction where they work.
- ABA issued an updated opinion on March 10, 2021, Formal Opinion 498.

Remote Work—Ethical Guidance

- ABA Model Rule Professional Conduct 5.5
 - A lawyer shall not practice law in a jurisdiction in violation of the legal profession in that jurisdiction
 - Working presence vs. systematic/continuous presence
 - Letterhead and business cards should not suggest a presence in the state where the attorney is not licensed to practice

Remote Work—Ethical Guidance

- ABA Rule 1.1—Duty of Competence
- “. . . a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology.*”
- ABA Rule 1.6—Confidentiality of Information
- “. . . *make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*”

Remote Work—Ethical Guidance

- ABA Formal Opinion 498
- Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (*e.g.*, administrative assistants, paralegals, investigators) and vendors.
- The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties.

Remote Work—Ethical Guidance

- When appropriate, lawyers should consider the use of a confidentiality agreement and should ensure that all client-related information is secure, indexed and readily retrievable.

Remote Work—Ethical Guidance

- Smart speakers, virtual assistants and other listening-enabled devices
 - Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.
 - Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

Remote Work—Ethical Guidance

- ABA Formal Op. 477R
 - A “lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti- Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software.”

Remote Work—Ethical Guidance

- Furthermore, “[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

Remote Work—Ethical Guidance

- Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.
- To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption.

Remote Work—Ethical Guidance

- When connecting over wi-fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs).
- Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

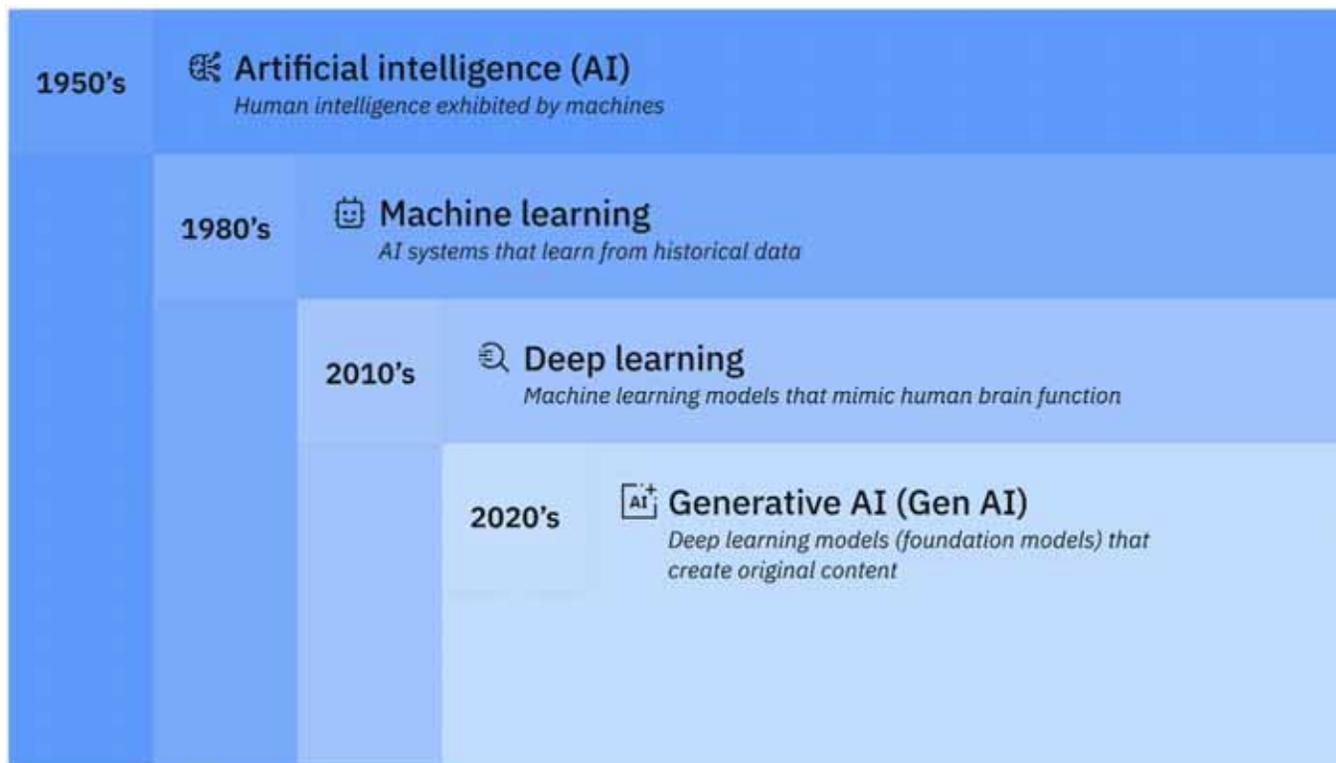
Evolution of “Virtual Law Firms”

- Called “distributed” firms—Organizations without any physical office
- First firm started officially in 2022
 - FisherBroyles—Up to 293 attorneys with \$139,984,000 in gross revenue in 2023
 - Partners keep up to 80% of their collected bills
 - “Firm” keeps 20% to pay for websites, insurance, and related costs



Artificial Intelligence and the Practice of Law

Artificial Intelligence and the Practice of Law



<https://www.ibm.com/topics/artificial-intelligence>

Artificial Intelligence and the Practice of Law

- What is artificial intelligence?
 - Artificial intelligence (AI) is technology that enables computers and machines to simulate human learning, comprehension, problem-solving, decision-making, creativity and autonomy.
- What is ChatGPT?
 - ChatGPT was first developed by OpenAI and released in late 2022.
 - GPT—Abbreviation for generative pre-trained transformers

Artificial Intelligence and the Practice of Law

- At the most basic level, ChatGPT answers questions and creates text/content
- User provides information, and ChatGPT creates written responses
- Difference between ChatGPT and Google
 - ChatGPT will generate text and answer questions using natural language
 - Google searches the internet and provides results in the form of links to various sites

Artificial Intelligence and the Practice of Law

- ChatGPT is primarily limited to gathering information in existence before September 2021, the cutoff date for its training.
- However, recently, through a partnership with Microsoft's Bing search engine, ChatGPT is now connected to the internet.

Artificial Intelligence and the Practice of Law

 Pam Nissen

What is the attorney client privilege for ERISA practitioners

 ChatGPT



The attorney-client privilege is a legal framework that protects communications between a client and their attorney from being disclosed without the client's consent. This privilege is particularly important for ERISA (Employee Retirement Income Security Act) practitioners because they often deal with sensitive information related to employee benefit plans, compliance issues, and other legal matters concerning retirement and health plans.

Here are some key points regarding attorney-client privilege as it relates to ERISA practitioners:

1. **Confidential Communication:** The privilege applies to communications made in confidence between a client and an attorney for the purpose of seeking legal advice. For ERISA practitioners, this can include discussions about compliance with ERISA regulations, plan design, and fiduciary responsibilities.

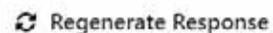
2. **Scope of Coverage:** The privilege typically covers both verbal and written communications. However, it does not protect communications related to medical

 Regenerate Response

Artificial Intelligence and the Practice of Law

2. **Scope of Coverage:** The privilege typically covers both verbal and written communications. However, it does not protect communications related to illegal activities or actions that fall outside the attorney-client relationship.
3. **Corporate Clients:** In the context of corporate clients, such as employers sponsoring ERISA plans, the privilege can extend to communications with employees who are authorized to speak on behalf of the organization regarding legal matters.
4. **Waiver of Privilege:** The privilege can be waived if the client shares the privileged communications with third parties or if the information is disclosed in a manner that is inconsistent with confidentiality.
5. **Advisory Role:** ERISA practitioners often serve in an advisory capacity, which can enhance the privilege if they provide legal advice rather than merely business advice.
6. **Litigation Context:** In cases where ERISA plans are litigated, the privilege may be critical in protecting sensitive communications that could impact the outcome of the case.

While the attorney-client privilege is a powerful tool for protecting sensitive communications, practitioners should be cautious in maintaining confidentiality and understanding the specific nuances of the privilege in their practices. Consulting with experienced attorneys in the ERISA field can provide additional clarity on the application of the privilege.

 Regenerate Response

Artificial Intelligence and the Practice of Law



What is the attorney client privilege for ERISA "practitioners"



Feedback



McGuireWoods

<https://media.mcguirewoods.com/publications/ppf>

Practitioners-Summary-Guide-Attorney-Client-Privilege. ...

In the ERISA context, which has spawned the vast majority of fiduciary exception cases, ... Unlike the attorney-client privilege, both clients and their lawyers ...

306 pages



Practical Law/Westlaw

<https://content.next.westlaw.com/document/Attorney-Client-Privilege-for-ERISA-Plans-Presentation-Materials>

Attorney-Client Privilege for ERISA Plans: Presentation Materials ...

The presentation can be used to educate fiduciaries, retirement plan practitioners, and human resources professionals. This presentation may be customized for a ...



American Bar Association

<https://www.americanbar.org/resources/litigation-news>

Understanding the Fiduciary Exception to the Attorney- ...

Oct 19, 2022 — Jump to: The Fiduciary Exception to the Attorney-Client Privilege. How Courts Analyze the Issue. Tips for Practitioners. Resources.



Law Journal Newsletters

<https://www.lawjournalnewsletters.com/2011/09/28/a->

Asserting the Attorney-Client Privilege in ERISA Cases

Sep 28, 2011 — Asserting the Attorney-Client Privilege in ERISA Cases. A spate of recent case

Artificial Intelligence and the Practice of Law

- In June 2023, two attorneys from New York were sanctioned by a federal judge for submitting a legal brief that contained six fictitious case citations.
 - “Acts of conscious avoidance and false and misleading statements to the court”
 - \$5,000 sanction

Artificial Intelligence and the Practice of Law

- In December 2023, a Colorado attorney was suspended from the practice of law for using ChatGPT to assist with drafting a memorandum in support of a summary judgment motion.
- 2-year suspension, but only 90 days served if attorney completed probation.
- Realized the cases were fictitious and first blamed an intern.

Artificial Intelligence and the Practice of Law

- How is it used in the practice of law?
 - Electronic discovery
 - Contract analytics
 - Prediction of how a judge might rule on a motion
- Ethical considerations
 - Competency
 - Disclosure of confidential information
 - Reasonable fee if ChatGPT is used

Artificial Intelligence and the Practice of Law

- ABA issued an Ethics Opinion on July 29, 2024 regarding Generative Artificial Intelligence Tools
 - Competence standards under Model Rule 1.1
 - Requires attorneys to exercise the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”
 - Attorneys using generative artificial intelligence tools need to have an understanding of the capabilities and limitations of the tool

Artificial Intelligence and the Practice of Law

- Confidentiality standards under Model Rule 1.6
 - Keep confidential all information relating to the representation of a client
 - Generative artificial intelligence tools require input of the client's data and information
- Communication under Model Rule 1.4
 - Duty to disclose to a client "about the means by which the client's objectives are to be accomplished"
- Candor to the tribunal under Model Rule 3.1, 3.3, and 8.4(c)

Artificial Intelligence and the Practice of Law

- Fees under Model Rule 1.5
 - Fees must be reasonable and the basis upon which the fees are charged must be disclosed
 - Attorneys may only bill for time spent. If using AI to assist, cannot value bill for the end result

Artificial Intelligence and the Practice of Law

- According to an article from Bloomberg Law, big law firms are requiring summer associates to learn generative AI.
- Law schools are providing students free access to legal generative AI tools.
 - Primary use is research and writing

Artificial Intelligence and the Practice of Law

- United States Judge Kevin Newsom of the U.S. Court of Appeals for the 11th Circuit has authored two concurring opinions exploring the use of AI
 - *Snell v. United Specialty Insurance Co.*, 102 F.4th 1209 (11th Cir. 2024) (Newsom, J., concurring)
 - *United States v. Deleon*, No. 23-10478, 2024 WL 4048332 (11th Cir. Sept. 5, 2024) (Newsom, J., concurring)

Cybersecurity Issues

Cybersecurity Issues

- Law firms and law practices data provide a treasure trove of valuable information, making them valuable targets.
 - Trade secrets
 - Intellectual property
 - Merger and acquisition details
 - Financial records
- Consequences of a data breach range from minor embarrassment to serious legal issues.

Cybersecurity Issues

- First “wave” of ransomware involves a hacker accessing your data and encrypting the data.
- The hacker then offers an encryption key for a ransom, to allow you to gain access to your data.
- Second “wave” of ransomware involves theft of the data before encryption and includes searching out and destroying back-up data.

Cybersecurity Issues

- American Bar Association's annual surveys on Cybersecurity include responses from attorneys in private practice ranging from solo practitioners to firms of 500+ attorneys.
- Report is published on an annual basis.

Cybersecurity Issues

- From the 2023 ABA Survey
(unclear how many responses were received)
 - 80% of respondents have one or more policies governing technologies
 - 50% have a remote access policy
 - 34% have an incident response plan
 - 48% have encrypted email
 - 54% have multifactor authentication

Cybersecurity Issues

- In 2020, one of the highest-profile data breaches at a law firm involved more than a dozen entertainers
 - Lady Gaga, Bruce Springsteen, Mariah Carey
 - Claimed to have emails and data involving former President Donald Trump
- Breach was orchestrated by REvil ransomware group (Russian-based entity), who demanded \$42 million
- Unable to confirm if ransom was ever paid, but some data was released (contracts, emails, etc.)

Cybersecurity Issues

- Part of the ABA annual surveys seeks information about Incident Response Plans (IRP).
- Most smaller law firms and solo practitioners report that they do not have an IRP.
- Likely most lawyers do not know if the firm has one or what is in it.
- Coveware, a cybersecurity firm specializing in ransomware, reported at the end of 2021 that the average ransomware payment was \$140,000.

Cybersecurity Issues

- Growing trend among hackers is to target small and midsize law firms
 - Less security
 - Avoidance of large targets with national political or law enforcement response
 - Costs are difficult to measure
 - Ransom amount
 - Downtime for attorneys and staff
 - Public embarrassment
 - Malpractice claims

Cybersecurity Issues

- Statistically it is likely that your firm will be subject to a ransomware/security breach incident
- 2021 ABA survey found 25% of the attorneys responding disclosed their firm had experienced a data breach
 - Only 36% had an incident response plan

Cybersecurity Issues

- 2023 ABA survey responses on the question of whether your firm has experienced a security breach
 - 29% reported that their firm had a breach
 - 19% reported not knowing if their firm ever experienced a security breach
- 2023 survey on cybersecurity insurance reported a decline from 46% having insurance in 2022 to only 40% in 2023

Cybersecurity Issues

- During 2023, three of the top 50 law firms experienced a data breach by the ransomware group "Clap".
- 154% increase in federal data breach class action lawsuits.
- Checkpoint research reported in 2023, that 1 out of every 40 cyber attacks is on a law firm.

Cyber Ransom Threats to Your Practice

- Industry experts advise the following steps to limit your exposure to ransomware
 - Enable two-factor authentication
 - Endpoint detection and response protection for all devices (detects and monitors for behavior indicating malware or the existence of an attack)
 - Have multiple backups, test often, keep one copy isolated
 - Apply updates and patches promptly

Cyber Ransom Threats to Your Practice

- Industry experts advise *(continued)*
 - Restrict privileged access
 - Cybersecurity awareness training for all employees—
Use phishing simulations to test employees' awareness
 - Adopt an Incident Response Plan (IRP)
 - Consider a cyber insurance policy

Cyber Ransom Threats to Your Practice

- Steps to contain the damage when a breach occurs (should be in your IRP)
 - Connect with a data breach expert
 - Do this now before the breach occurs
 - Report the incident to law enforcement
 - Familiarize yourself with state and federal laws that would impact your obligations
 - HIPAA, CCPA (California Consumer Privacy Act), etc.
 - Promptly notify anyone affected
 - Report to your cyber insurance carrier

Zoom Litigation

- In re: Zoom Video Communications, Inc. Privacy Litigation, N.D. Cal. Master Case No. 3:20-cv-02155-LB.
- The lawsuit alleged that Zoom (i) shared certain information with third parties (Facebook, Google and LinkedIn), (ii) should have done more to prevent unwanted meeting disruptions by third parties, and (iii) advertised its Zoom Meetings App as being encrypted “end-to-end” when Plaintiffs contend it was not at that time.
- Parties reached a settlement where Zoom agreed to pay the class participants \$85 million.
- On April 21, 2022, the Court granted Final Approval of the Settlement. Distributions commenced in July 2022.

Key Takeaways

- ERISA practitioners need to be aware of the limits of the attorney-client privilege and the limits of the protections of the work-product doctrine.
- As remote work rules continue to evolve, practitioners need to be aware of technology and how it impacts the practice of law.

Key Takeaways

- Don't dabble in the use of artificial intelligence, but don't avoid it.
 - No need to be an expert, but consult an expert before using
 - May be the most efficient way to deliver services
- Cybersecurity remains vital to all practices, whether you are in a small or large firm.

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Session Evaluation

