

AFL-CIO Lawyers Coordinating Committee  
2024 ERISA Advanced Seminar

# **ETHICS FOR UNION SIDE MULTIEMPLOYER PLAN ATTORNEYS**

September 26, 2024  
3:00 - 4:00 p.m.





## Jessica M. Alvarez

Ms. Alvarez is an associate attorney at Kraw Law Group and focuses on the representation of multiemployer benefit funds. She counsels pension and health and welfare plans on all aspects of law, including plan design, regulatory compliance, legal issues relating to plan investments, and litigation matters.

Prior to joining Kraw Law Group, she practiced traditional labor and employment law for both a non-profit organization and a California state agency, where she investigated and litigated allegations of unfair labor practices under the Agricultural Labor Relations Act and represented workers in wage claims and workplace violations claims.

Ms. Alvarez received her J.D. from University of the Pacific, McGeorge School of Law and received her Bachelor of Arts from the University of California, Davis. She is admitted to practice in California.



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## Sara Corello, Esq. (she/her)

Sara Corello advises Spivak Lipton's employee benefit fund clients, particularly those in the entertainment industry, on regulatory and compliance issues. She represents the funds' interests in arbitration, federal and state courts, and government agencies, as well as in collective bargaining negotiations.

Having worked with many of the firm's fund clients for 20+ years, Sara can effectively guide decision-making with her knowledge of the funds' history and regulatory requirements. She works with funds to anticipate and mitigate challenges, ensuring that benefit fund trustees are well-informed and able to meet their obligations. Sara is also known for her ability to translate the complex nature of benefit plans in a way that's easy for non-lawyers to understand.

Sara joined Spivak Lipton in 1993, became a partner in 2001, and serves as one of the firm's Managing Partners. She values the firm's collaborative nature and the opportunity to serve her clients.

Prior to joining the firm, Sara clerked for the Honorable Eugene H. Nickerson of the United States District Court for the Eastern District of New York. Ms. Corello has served as an adjunct professor at Columbia Law School and continues to speak at various conferences for attorneys, trustees, and union leaders. She serves on Columbia Law School's Public Interest/Public Service Council.



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# Topics to Be Covered

- Introduction what are the governing rules?
  - The Governing Rules
- Who is your Client?
  - The Different Parties
  - The Different Hats
  - Clarifying your role as the attorney
- Settlers vs. trustees: the role of counsel
- Attorney -client privilege issues
  - The duty to preserve confidences and secrets
  - Who can assert the privilege?
  - How is it waived?
  - The fiduciary exception to the privilege
- Three fact patterns dealing with ethical obligations where there are:
  - Conflicts of interest (2)
  - Breaches of fiduciary duties



# Introduction:

What ethics rules apply? While each state adopts its own rules of legal professional responsibility, all states except California have adopted the ABA Model Rules (with certain modifications). The ABA website includes a helpful chart for each rule noting the modifications adopted by different states :

[https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts/](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/)



# Who is Your Client – The Different Parties



Multi - employer Union - side benefit attorneys interact with multiple parties:



- The Board of Trustees
- The Trust
- Plan sponsor(s)
- Named Fiduciary
- Individual Plan Trustees
- Plan Administrator
- Plan participants and beneficiaries

- Contributing employers
- Participating unions
- Co-counsel, and counsel for other parties - for individual participants/beneficiaries and others.

# The same person or entity can wear different hats:

Employer may:



- Be settlor of trust
- Appoint trustees
- Be a signatory Employer that contributes to the Plan for its employees

Union may:



- Be settlor of trust
- Appoint trustees
- Contribute to the Plan for its employees

Plan Administrator (Third Party Administrator or Self - Administered Fund Office) may:



- Have Administrative duties only
- Serve as Fiduciary for claims administration or other duties (such as authority to settle delinquencies and/or waive accrued late fees)
- Have employees who participate in Plan

# But . . . Who is actually *Your Client*?

ABA Model Rule 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

What is the organization?

■ The Multiemployer Trust Fund

Who is the “duly authorized constituent” for a Multiemployer Trust Fund?

■ Board of Trustees

■ Individual Trustees

■ Participants

Representing the Board of Trustees (or Trust Fund) does not necessarily mean the lawyer represents individual Trustees or participants. (But see discussion of fiduciary exception later).





# Who Is *Your* Client?

## Turn to the documents



- The Written Documents :  
What does engagement letter say?
- The Parties Involved:  
What do the parties you work with think?

# Who Is Your Client: Be Clear Who is and/or is Not Your Client

## Model Rule 1.13 Organization as Client

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

■ An example – a management trustee whose company is also a signatory employer.

■ Who do YOU represent and what would be a situation where you would have to clarify your role?

## Model Rule 4.3 requires:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interest of the client.

■ An example – when dealing with a QDRO you may have to communicate with the individual participants.

■ Who do YOU represent and what would be a situation where you have to clarify your role?

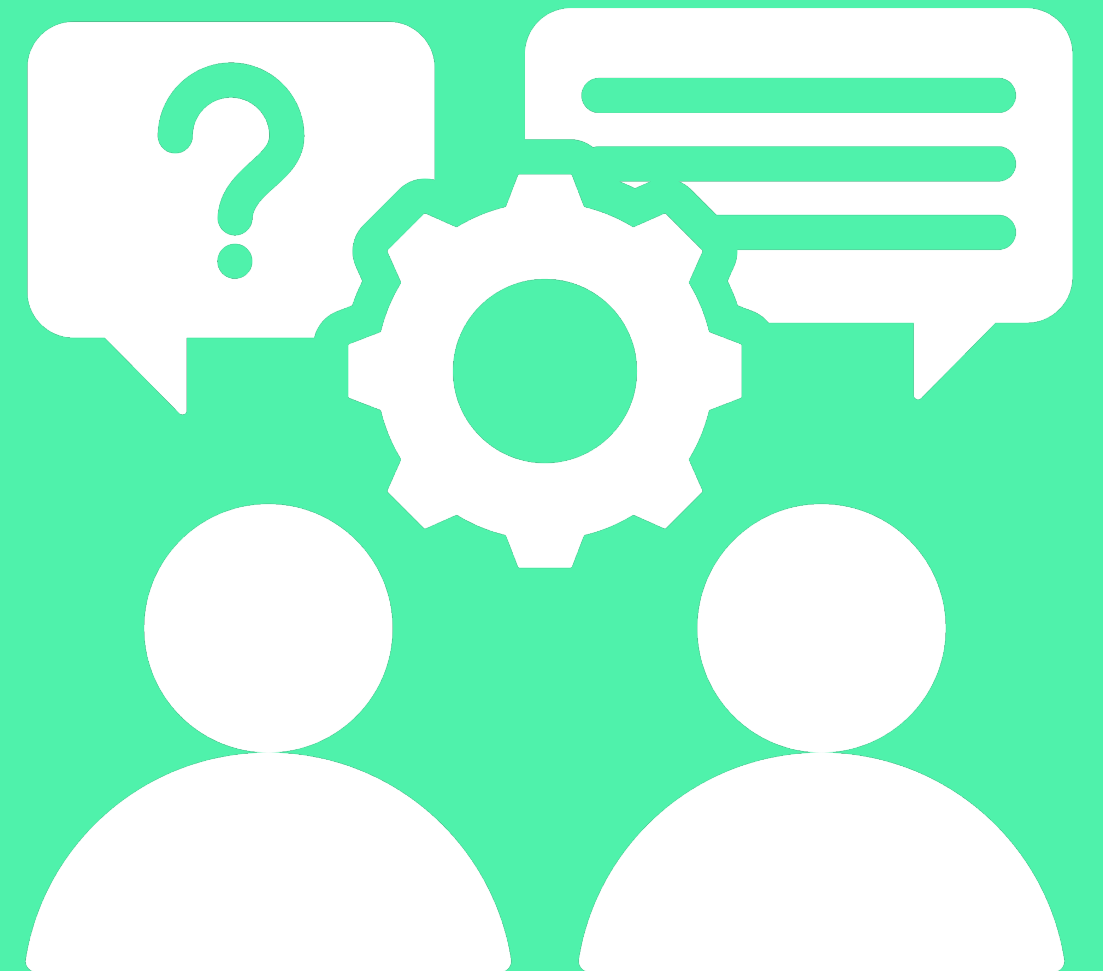


# Failing to Clarify Someone Is Not Your Client May Result In An Unintended Attorney - Client Relationship

Restatement of Law 3d of the Law Governing Lawyers, Chapter 2, The Client - Lawyer Relationship; §14,Cmt . f

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients ...In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.

Duty to withdraw: The lawyer may be obligated to withdraw from representation of both clients, or in litigation, face disqualification. *Home Care Indus., Inc. v. Murray* , 154 F. Supp. 2d 861 (D.N.J. 2001); *NY State Ethics Op.* 743 (2001) (failure to inform union member of nonrepresentation may create attorney-client relationship precluding disclosure of member's confidences). *Foley v. IBEW Local Union 98 Pension Fund* , 1998 U.S. Dist. LEXIS 16742, at \*4, 13 (E.D. Pa. Oct. 16, 1998) (a plan's attorney was not disqualified from representing the plan against a former trustee where attorney attested he "never represented any Trustee of the Pension Fund individually").



# Who Is the Client: Key Takeaways

- Be clear in your written engagement letter and other communications who is your client
  - Clarity in Emails to Fund Office, Trustees, participants and/or employers
- Always communicate and clarify, if need be, the relationship between you and the person you are speaking with, when asked for advice by Fund
  - related parties who are not your client.



# Settlors v. Trustees

*Why is it important to know if the Trustee is performing settlor functions v. trustee actions?  
No fiduciary obligation when it is a settlor function*

01

## Functional test:

Distinction between settlor and fiduciary role is based on a person's function in making a decision or taking an action. *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993).

- Trustees are **not** liable for breaches of fiduciary duties when functioning as settlors. *Hughes Aircraft, Inc. v. Jacobson*, 525 U.S. 432 (1999). Instead, the more *relaxed* business judgment standard applies.

02

## Typical settlor functions:

Establishing, amending (at least sometimes, see below for exception), merging, and terminating Plans

## Some implications:

- Plan assets **may not** pay settlor expenses (including attorney's fees). DOL Field Assistance Bulletin (FAB 2002-2).

03

## Typical fiduciary functions:

administering and governing a plan

- Fiduciary exception to attorney-client privilege does not apply to attorney communications with settlors regarding settlor functions. *In re Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997).

# Settlor v. Trustees

Plan Design Functions : Trustees performing settlor functions : Most courts have concluded that multiemployer plan trustees act as settlors when they perform plan design functions, even when functions are delegated to the trustees in the plan's governing documents . *Beck v. PACE International Union*, 551 U.S. 96 (2007); *Janese v. Fay*, 692 F.3d 221(2d Cir. 2012).

Amending the Plan: Amending plan may be considered fiduciary act where plan documents confer authority to amend plan as a fiduciary function. DOL Field Assistance Bulletin (FAB 2002-2)

What happens when the Plan Document is silent as to the nature of the function?

- “Where -- the relevant plan documents are silent, then the activities of the board of trustees which are settlor in nature generally will be viewed as carried out by the board of trustees in a settlor capacity” DOL Field Assistance Bulletin (FAB 2002-2)

- The function needs to be “settlor in nature” – e.g. plan design



# Attorney - Client Privilege: What is Attorney

# - Client Privilege?



Evidentiary rule, not an ethical rule. The evidentiary rules on privilege are generally determined under common law (See Federal Rule of Evidence, Section 501 – Privilege in General).



Consistent with Model Rule 1.6, Duty to maintain client confidentiality.



An organization's attorney - client privilege belongs to the organization, not its constituents. See ABA Annotated Model Rules of Professional Conduct, p. 238 (8th ed. 2015)



Scope of rule includes work product.



**Model Rule 1.6(a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [one of the exceptions in] paragraph (b)."**



# Attorney - Client Privilege: What is Privileged Communication?



- a communication
- made between privileged persons (review who is the client above!)
- in confidence
- for the purpose of obtaining or providing legal assistance for the client.

(Restatement (3d) of Law Governing Lawyers, Section  
68)

# What is Attorney - Client Privilege: How Is it Waived?



Privilege is waived if

- 1 it is disclosed [to someone other than the client] in a nonprivileged communication
- 2 the lawyer or client (or other client representative) agrees to waive
- 3 If privileged information is introduced in a tribunal and the lawyer or client fails to object

(See Restatement (3d) of Law Governing Lawyers, Section 68, Sections 78 - 80.)

# Attorney - Client Privilege: Disclosure that may not waive privilege

A disclosure to a third party **may not** waive privilege if

- Third party has expertise necessary to provide legal advice
  - *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (no waiver of privilege where the third party provides specialized knowledge or expertise to counsel for the purpose of rendering legal advice)
  - *Cottillion v. United Ref. Co.*, 279 F.R.D 290 (W.D. Pa 2011) (attorney client privilege protected where communication between lawyers and consultants were for the purpose of obtaining legal advice).
  - Example: *Communications with an independent auditor*
- In these instances, the third party is functionally equivalent of plan employee.
  - *Trustees of Elec. Workers Loc. No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 8 (D.D.C. 2010)

# Fiduciary Exception to Attorney

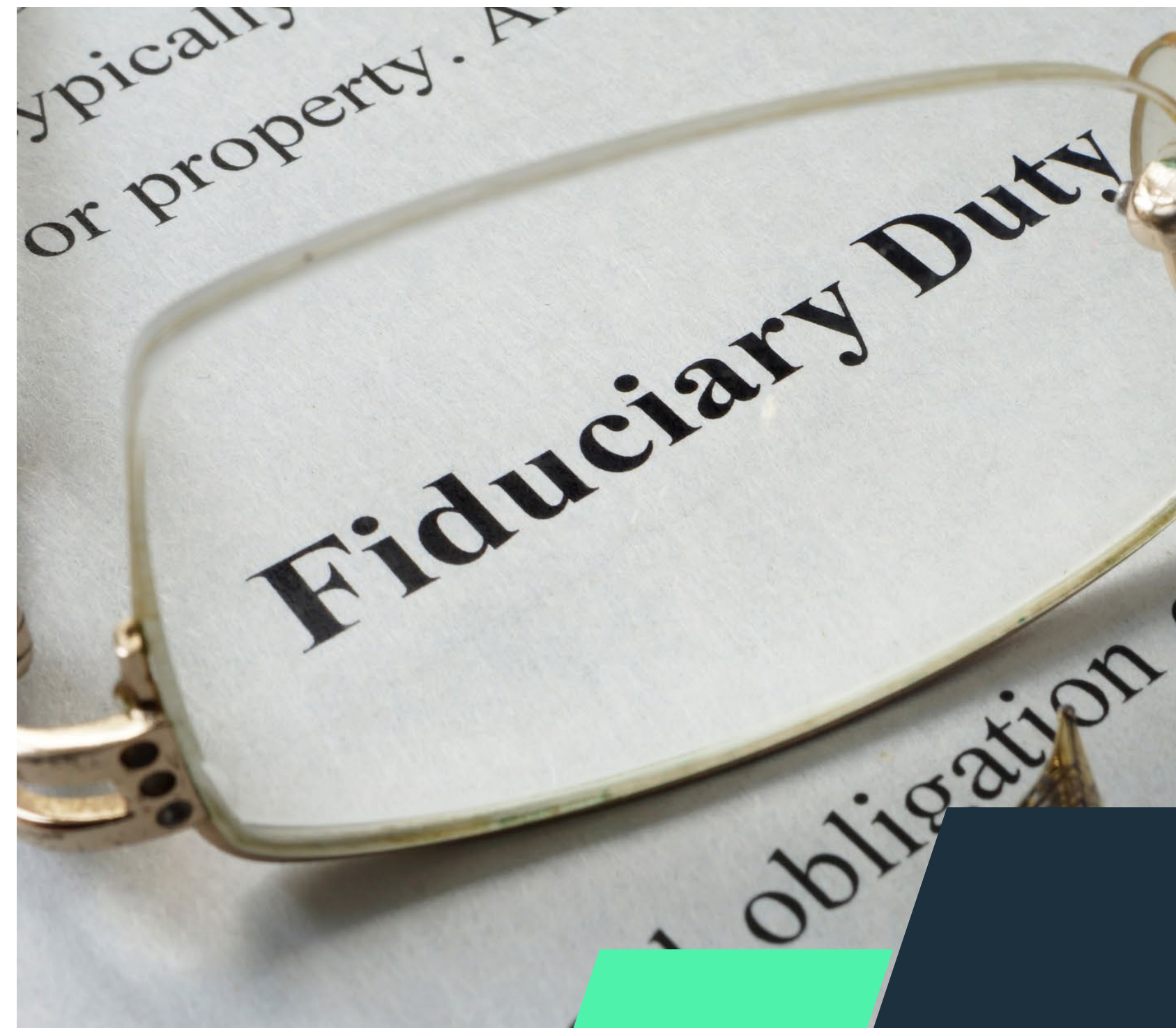
# - Client Privilege

What is it?

- Participants [and Department of Labor] are entitled to disclosure of otherwise privileged communications between plan counsel and a trustee. *Stephan v. Unum Life Ins. Co.*, 607 F.3d 917 (9th Cir. 2012); *Washington - Baltimore Newspaper Guild v. Washington Star, Inc.*, 543 F. Supp. 906 (D.D.C. 1982)

Rationale:

- Participants are true client under law of Trusts
- ERISA duty to disclose full and accurate information to plan participants and beneficiaries, particularly in claims and appeals.



# Fiduciary Exception: When does the fiduciary exception

**not** apply?



When interests of plan and participant become adverse (generally when appeal is finally adjudicated)

Advice relating to issues not subject to fiduciary duty, such as settlor functions (amending or terminating plan)

Advice relating to a trustees' personal liability

## Fact Pattern 1: Conflicts of Interest

*Lawyer serves as union co - counsel to the board of trustees and as counsel for the union. DOL notifies union that it is investigating possible employer payments to a shop steward to entice her to remain silent about the employer's failure to contribute to the trust funds on behalf of certain employees.*

*DOL also serves a subpoena on plan seeking contribution records from the contributing employer.*

Issues:

1. Does the lawyer face a conflict of interest?
2. If so, must the lawyer withdraw from representing the trust fund and/or the union in connection with the DOL investigation?



# Fact Pattern 1: Is there a conflict of interest?

First – what are the applicable rules/guidelines?

## Model Rule 1.7(a):

A concurrent conflict of interest exists if:

- 1** the representation of one client will be directly adverse to another client; or
- 2** there is a significant risk that the 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 or by a personal interest of the lawyer.



# Fact Pattern 1: Can the conflict be waived?

Many conflicts are waivable. See Model Rule 1.7(b)(4), which forbids simultaneous representation where a potential or current conflict of interest exists among clients unless “each client gives informed consent, confirmed in writing.”

**Actual, direct conflicts are never waivable.** Model Rule 1.7 (a)(1).

**Withdrawal is mandatory** if the consent of all clients is not obtained or if the conflict is not waivable.

**Voluntary Withdrawal/Model Rules exception:** Subject to the lawyer’s duties to a former client (Model Rule 1.9), the lawyer “may have the option to withdraw from one of the representations to avoid the conflict.” See Model Rule 1.7, Comment 5.



# Fact Pattern 1: Answers

Does the lawyer face a conflict of interest?

- ✓ Yes. A potential conflict exists because the attorney may favor the union's interest over the plan's interest, or vice versa

If so, must the lawyer withdraw from representing the trust fund and/or the union in connection with the DOL investigation?

- ✗ Not necessarily

The conflict is waivable: If both parties give informed consent, the attorney can continue to represent both

*Partial withdrawal:* If one party refuses to give consent, the attorney may be able to withdraw as to one of the parties and continue to represent the other





## Fact Pattern 2: Conflicts of Interest

Lawyer serves as counsel to the board of trustees of a pension plan and as counsel for the sponsoring union. The union's lease of a space in a building owned by the pension plan is expiring and the lawyer has been asked to draft a new one

### Issues:


- 1 Does the lawyer face a conflict of interest?
- 2 Does the lawyer need to obtain conflicts waivers from the pension plan and the union?
- 3 Does it make a difference if the lease complies with Prohibited Transaction Exemption (PTE) 76 and PTE 77-1?


# Fact Pattern 2: Answers

Yes, there is a **waivable** conflict, since the parties to a lease are always in conflict, technically speaking

Yes, you should get a conflict waiver from each

This is a prohibited transaction, so it has to comply with a PT waiver, but that does not in itself address the attorney's conflict of interest. So will STILL need a written conflict waiver.

 **Prohibited Transaction Class Exemption 76** - 1 permits parties in interest, under specified conditions, to (A) make delinquent employer contributions; (B) receive loans; (C) and, obtain office space, administrative services and goods from plans. In the absence of this exemption, certain aspects of these transactions might be prohibited by section 406(a) and 407(a) of the ERISA.

 **Prohibited Transaction Class Exemption 77** - 10, authorizes a multiple employer plan to provide the goods and services described in Part C if certain conditions are met and provides relief from the provisions of section 406(b)(2)

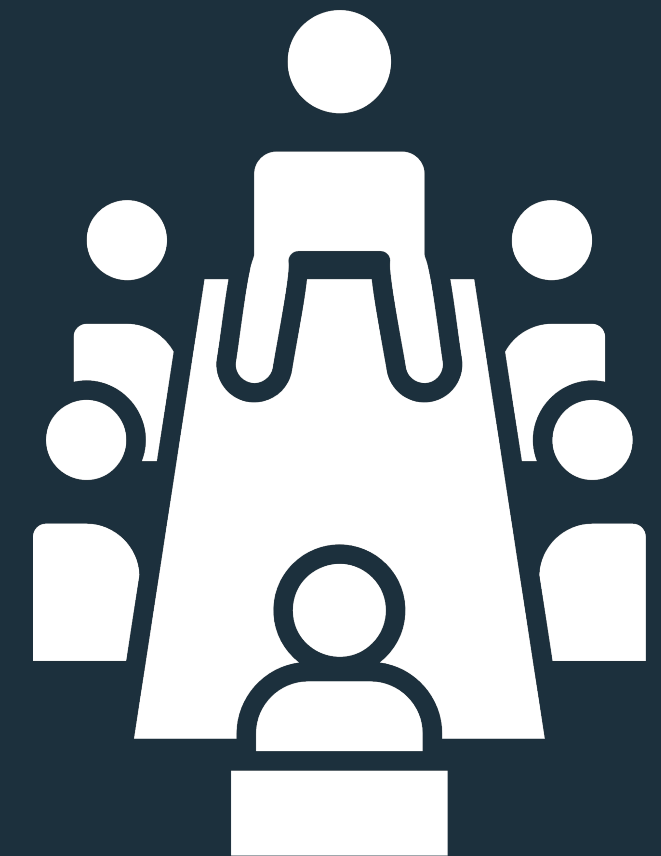


## Fact Pattern 3: Fiduciary Breaches

*Lawyer serves as co-counsel to the board of trustees of a pension plan and sole collection counsel for the plan. The union trustees block the board from authorizing the lawyer to sue a major contributing employer because union members may lose their jobs if the company is forced to pay a large judgment.*

Issues:

1. What are the lawyer's duties in these circumstances?
2. How does the attorney-client privilege affect the lawyer's actions?
3. Can the lawyer represent the board of trustees if they are sued by participant or the DOL for a fiduciary breach?



# Fact Pattern 3: Fiduciary Breaches

*Issue 1: What are the lawyer's duties in these circumstances?*

01

Identify the Problem

Here, union trustees have violated their duty of undivided loyalty to the interests of participants. ERISA § 404(a)(1)(A)

02

Determine the Client and Obligations to That Client

Here, you are counsel for the Plan, not the union. You can counsel/advise the Union Trustees as Trustees of the Plan

03

Identify Your Obligations

Continued →

# Identify Your Obligations

1. Obligation has arisen to explain to the union trustees that the client is the plan or board, not the union or the union members.

"A lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." **Model Rule 1.13(f)**

2. Obligation to persuade the union trustees to follow the law.

"If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, **then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.**" Model Rule 1.13 (b)

3. Obligation to explain who you, as the lawyer, represent.

That he/she represents the plan or the board of trustees as an entity.

That the union trustees should seek independent legal advice regarding their fiduciary duties.

## *Consequences of failure to explain:*

The union trustees could argue in later litigation that they had formed a reasonable belief that the lawyer represented them as individuals. See *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120 (4th Cir. 1994); *United States v. Evans*, 796 F.2d 264 (9th Cir. 1986)



# Fact Pattern 3: Fiduciary Breaches

*Issue 2: How does the attorney - client privilege affect the lawyer's actions?*

*Should the lawyer explain that blocking the collection action violates the exclusive purpose rule?*

**Danger** : The attorney - client privilege may not be asserted in fiduciary duty litigation brought by the participants, the plan or the DOL *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221 (4th Cir. 2011) (suit by DOL); *Wilbur v. ARCO Chem . Co.*, 974 F.2d 631, 645 (5th Cir. 1992) ("An ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration.")

**Recommendations** :

The lawyer should explain that any opinion he/she gives, written or oral, may be discoverable (i.e. not covered by attorney-client privilege because this regards a breach of fiduciary duty).

If the lawyer **declines** to give advice regarding the fiduciary duty issue, **he/she** should **counsel the trustees to seek independent legal advice** .

# Fact Pattern 3: Fiduciary Breaches

*Issue 3: Can the lawyer represent the board of trustees if they are sued by participants or the DOL for a fiduciary breach?*

*First, what are the applicable rules?*

- Model Rule 1.7(a)(1): "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest . A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client"
- Model Rule 1.7(b): **Permits** concurrent representation of clients with interests directly adverse to one another with **informed consent, confirmed in writing** .
- Model Rule 1.7(b)(3): **Prohibits concurrent representation** , even if confirmed in writing, if "the representation . . . involve [s] the assertion of a claim by one **client against another client represented by the lawyer** in the same litigation or other proceeding before a tribunal."

Here, the lawyer is continuing to represent the plan (ultimately, the participants) while defending the trustees in an action alleging a violation of the trustees' duty to the participants. So, an actual, direct conflict.



## Fact Pattern 3: Answers

*Can the lawyer represent the board of trustees if they are sued for a fiduciary breach?*

⊗ No. Rule 1.7(b)(3) prohibits representation of opposing parties in the same litigation regardless of the clients' consent .

Unlike first fact pattern, now we are dealing with an actual lawsuit, not just an investigation .

# Fact Pattern 3: Possible Approaches

*What are the lawyer's duties in these circumstances? How does the attorney - client privilege affect the lawyer's actions?*

- 1 Advise the trustees that he/she represents the plan or the board of trustees as an entity
- 2 Attempt to persuade the union trustees to comply with their fiduciary duty
- 3 Advise the trustees to seek independent legal advice regarding their fiduciary duties
- 4 Advise that any opinion he/she gives, written or oral, may be discoverable
- 5 If the trustees still want the lawyer's opinion, he/she should explain that blocking the collection action violated the exclusive purpose rule. Or he/she might simply decline to give her opinion



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# Thank You

For Your Attention

