The Privilege Challenge

The concept of *privilege* gets tricky, especially when it comes to boards of trustees for employee benefit plans. How would you answer these ten questions?

by | **Paul A. Green**

Privilege is a term that gets bandied about a lot, especially by lawyers. Many of us have only a vague impression of what it is and how it works. To make matters worse, the rules governing privilege are not always clear and vary from jurisdiction to jurisdiction. What is clear is that privilege exists only under specific circumstances, is limited in its effect and can be easily lost.

Test your knowledge by taking the Privilege Challenge. Read the following ten scenarios and answer the questions. See how you stack up against your friends, neighbors and co-workers!

Question 1: *A board of trustees of an employee benefit plan goes into executive session with only the trustees present to discuss confidential matters.* **Is this conversation privileged?**

Question 2: *The board of trustees goes into executive session with the plan's attorney. The trustees discuss various confidential matters among themselves while the attorney takes notes.* **Is this conversation privileged?**

Question 3: *Same scenario as Question 2.* **Are the attorney's notes privileged?**

Question 4: *The trustees discuss various confidential matters with the attorney relating to several plan investments, and the attorney provides various legal opinions.* **Is this conversation privileged?**

Question 5: *The same scenario as Question 4, except that the building engineer enters the room to adjust the thermostat.* **Is the conversation with counsel privileged?**

Question 6: *At the request of the trustees, the plan's attorney has prepared a memo to the trustees regarding a participant's appeal. Among other things, the memo discusses the possible litigation risks should the trustees deny the appeal. While in executive session with just the attorney, the trustees question the attorney about the memo. Ultimately, the trustees deny the appeal and the participant sues. The participant makes a discovery request for the administrative record.* **Must the plan disclose the relevant portion of the minutes of the executive session?**

Question 7: *Same scenario as Question 6.* **Must the plan provide the participant with a copy of the attorney's memo to the trustees?**

Question 8: *Following the initiation of litigation by the participant, the plan's attorney prepares a memorandum describing the factual scenario leading up to the litigation. The participant requests a copy of the memorandum.* **Must the plan provide the memorandum to the participant?**

Question 9: *The Department of Labor (DOL) begins an investigation of the plan and issues subpoenas for copies of the attorney's memos to the trustees on a variety of issues.* **Must the plan disclose these memos to DOL?**

Question 10: *DOL sues the trustees as well as the union and the employer association that appoint the trustees. The plan's attorneys meet with the trustees and representatives of the union and the employer association, along with their attorneys, on several occasions to discuss the case for the purpose of providing legal advice. During a deposition of one of the trustees, DOL asks about the joint meetings with counsel.* **Must the trustee testify about discussions that took place at the meetings?**

Answers and Explanation

Question 1: *A board of trustees of an employee benefit plan goes into executive session with only the trustees present to discuss confidential matters.* Is this conversation privileged?

Answer 1: No.

Privilege is a narrow exception to the general rule that, in the face of legal compulsion (in litigation or when faced with a subpoena, for example), information, documents, etc., must be disclosed. If a document or communication is privileged, that means that it may be protected from disclosure. There is no such thing, however, as a generalized "executive session" privi-

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lege. A discussion solely among trustees is not privileged, no matter how "off the record" it may be.

Question 2: *The board of trustees goes into executive session with the plan's attorney. The trustees discuss various confidential matters among themselves while the attorney takes notes.* Is this conversation privileged?

Answer 2: No.

The two types of privilege generally applicable to employee benefit plans are attorney-client privilege and attorney work product privilege. Although these two privileges are related, there are distinct differences between them in terms of how they attach, how they are exercised and when they may be breached.

Attorney-client privilege always involves communications between an attorney and a client. Furthermore, the communication must be for the purpose of obtaining or providing legal advice. A communication does not need to be in any particular form to be protected by privilege. It may be written, oral or in any other form. For example, depending on its contents, a letter to a board of trustees from the plan's attorney may be protected from disclosure by privilege. Similarly, a trustee may be able to avoid testifying about a privileged conversation with plan counsel.

In Question 2, although the plan's attorney was present during the conversation, that is not enough to make it privileged. None of the discussion was directed at the attorney, nor was it related to any legal advice.

Question 3: *Same scenario as Question 2.* Are the attorney's notes privileged?

Answer 3: No.

As distinct from attorney-client privilege, *attorney work product privilege* applies to an attorney's work product prepared in anticipation of, or during the course of, litigation.[1] This privilege applies only to documents or other tangible things. Although the attorney's notes may well be work product, they are not privileged because they were not prepared in anticipation of litigation.[2]

Question 4: *The trustees discuss various confidential matters with the attorney relating to several plan investments, and the attorney provides various legal opinions.* Is this conversation privileged?

Answer 4: **Yes.**

In Question 4, the conversation was for the purpose of seeking and providing legal advice. Therefore, the conversation is privileged. As you will see from later Q&As, however, just because a conversation is privileged does not mean that privilege cannot be breached.

Question 5: *The same scenario as Question 4, except that the building engineer enters the room to adjust the thermostat.* Is the conversation with counsel privileged?

Answer 5: **No.**

Although the facts of Q&As 4 and 5 are mostly the same, the difference is that there is a third party in the room during the conversation. The disclosure of a privileged conversation to a third party generally constitutes a waiver of privilege. Furthermore, the general rule is that once privilege has been waived, it is waived for all purposes.

This leads to the question of who can be permitted to listen to or participate in a privileged communication without waiving that privilege. In the case of an employee benefit plan, this can be a difficult question to answer. Typically the presence of key personnel and contractors, in addition to the trustees, will not waive privilege. For example, a third-party administrator's account executive for the plan and the plan's auditor may be considered key personnel whose presence will not result in a waiver of privilege. On the other hand, the presence of lower level personnel who are not necessary to the discussion is likely to result in a waiver of privilege.

Question 6: *At the request of the trustees, the plan's attorney has prepared a memo to the trustees regarding a participant's appeal. Among other things, the memo discusses the possible litigation risks should the trustees deny the appeal. While in executive session with just the attorney, the trustees question the attorney about the memo. Ultimately, the trustees deny the appeal and the participant sues. The participant makes a discovery request for the administrative record.* Must the plan disclose the relevant portion of the minutes of the executive session?

Answer 6: **Yes.**

Here, the question is not whether the trustees' conversation with the plan's attorney is privileged; it is whether that privilege protects the conversation from disclosure to a plan participant. Courts generally have applied the *fiduciary exception:* Because the trustees are acting as fiduciaries for the plan's participants and beneficiaries, the purpose of any privilege is to protect the interests of participants and beneficiaries. It therefore makes no sense for the trustees to be able to use privilege to defeat a request for information by a participant.[3]

Although Question 6 involves a request in discovery, the

takeaways

- A discussion solely among trustees is not privileged, no matter how off-the-record it may be.
- An attorney's notes taken in executive session are not privileged.
- A conversation between trustees and their attorney on confidential matters in which the attorney provides legal opinions is privileged—although privilege may be waived if the privileged conversation is disclosed to a third party.
- Because trustees are acting as fiduciaries for plan participants and beneficiaries, trustees cannot use privilege to defeat a participant's request for information.
- An attorney may invoke attorney work product privilege even if his or her client is willing to disclose the document.
- Common interest privilege—which can be invoked if parties that have common interests with regard to actual or anticipated litigation and agree to maintain privilege among themselves—should be approached with caution.

same result applies to a participant's request for the administrative record prior to the commencement of litigation. Under the applicable DOL regulations, the minutes of the executive session relating to the appeal would be subject to disclosure at the participant's request,[4] and it would not be protected by privilege.[5]

Question 7: *Same scenario as Question 6.* Must the plan provide the participant with a copy of the attorney's memo to the trustees?

Answer 7: **Yes.**

For reasons explained in Q&A 6, the attorney's memo may not be withheld from the participant on the basis of attorney-client privilege. Because the memo is a document that constitutes an attorney's work product, the question also arises whether it is separately protected from disclosure by attorney work product privilege.

One of the major distinctions between attorney-client privilege and attorney work product privilege is that the former is intended to protect only the client, while the latter also protects the attorney. This means that it may be invoked by an attorney even if the client is willing to disclose the document. Therefore, the fiduciary exception generally does not apply to attorney work product privilege.

Attorney work product privilege has other important distinctions and limitations, however. As noted above, it applies only to documents prepared during or in anticipation of litigation. In Questions 6 and 7, the attorney's memo was prepared prior to the conclusion of the appeal process. At least one court has opined that a document prepared in the context of resolving an appeal cannot have been prepared in anticipation of litigation, because litigation would not occur if the appeal were resolved in the participant's favor.[6]

Question 8: *Following the initiation of litigation by the participant, the plan's attorney prepares a memorandum describing the factual scenario leading up to the litigation. The participant requests a copy of the memorandum.* Must the plan provide the memorandum to the participant?

Answer 8: **No (probably).**

In this case, the document prepared by the attorney may be protected from disclosure by both attorney-client privilege and attorney work product privilege. An important caveat to the fiduciary exception to privilege is that it does not apply once the interests of the trustees and the participants sufficiently diverge, such as following the initiation of litigation by a participant against the trustees.[7]

Since the document was prepared by the attorney during the course of litigation, it would also be protected by attorney work product privilege. Attorney work product privilege is, however, subject to an important exception that is not unique to employee benefit plans. An otherwise privileged document must be disclosed if the participant can show "good cause" for disclosure, i.e., "substantial need" and "undue hardship" if the document is not disclosed.[8] For example, if the participant could demonstrate that there is no way to get an overview of the facts and the basis for the trustees' decision without excessive burden and expense other than by reviewing the attorney's memo, then the court likely would set aside the work product privilege and require that the document be disclosed.

Question 9: *DOL begins an investigation of the plan and issues subpoenas for copies of the attorney's memos to the trustees on a variety of issues.* Must the plan disclose these memos to the department?

Answer 9. **Yes.**

DOL generally is considered to be acting in the interests of a plan's participants and beneficiaries and therefore is treated the same with regard to the fiduciary exception.[9] In other words, if a document is not protected from dis-

closure to a participant, then it is also not protected from disclosure to DOL.

This raises a number of practical difficulties, however. As discussed earlier, privilege can be easily waived. Not only is the government subject to the Freedom of Information Act, individual agencies have information-sharing agreements with other agencies, and the sharing of otherwise privileged documents by an agency is likely to constitute a waiver of privilege.[10] To protect against waiver, it may be beneficial to seek the order of a court declaring that disclosure to DOL does not waive privilege and requiring the department to notify the plan if disclosure is sought by third parties.[11]

Question 10. *DOL sues the trustees as well as the union and the employer association that appoint the trustees. The plan's attorneys meet with the trustees and representatives of the union and the employer association, along with their attorneys, on several occasions to discuss the case for the purpose of coordinating legal strategies. During a deposition of one of the trustees, DOL asks about the joint meetings with counsel.* Must the trustee testify about discussions that took place at the meetings?

Answer 10. **No (probably).**

These facts are tricky because multiple parties are involved, which would ordinarily result in a waiver of privilege. Here, however, because the interests of the parties to the meeting coincide, the meetings with counsel may be subject to *common interest* privilege. Common interest privilege requires that the parties have common interests with regard to actual or anticipated litigation and that they agree to maintain privilege among themselves.[12] Under these circumstances, common interest privilege protects communications between the different parties and their counsel. The problem with common interest privilege, however, is that it is not always very well-defined and may not be universal. It must, therefore, be approached with caution.

How Did You Do?

If you got eight or more right, you are doing far better than most of us. The instinct of lawyers is to seek to protect any conversation with a client by claiming privilege. As we have seen, however, the presence of counsel does not create a "cone of silence" that protects all such communications from disclosure in all circumstances. Rather, privilege is narrow, elusive and fleeting. Furthermore, because these rules are not uniformly applied and can vary depending on where you are, you should always consult with your attorney first before relying on any claim of privilege. The one universal principle, however, is that trustees are best served by not fooling themselves into believing that they can keep their communications, including their communications with counsel, secret.

Endnotes

1. See *Everett v. U.S. Air Group, Inc.*, 165 F.R.D. 1, 5 (D.D.C. 1995). (Work product privilege protects a document prepared by the plan's attorney in preparation for litigation, although such a document may still have to be disclosed to participants if it was prepared on their behalf.)
2. *Geissal v. Moore Medical Corp.*, 192 F.R.D. 620, 625 (E.D.Mo. 2000).
3. *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 85 (N.D.N.Y. 2003). (Fiduciary exception applies to fiduciary acts, but not to nonfiduciary acts); *Hudson v. General Dynamics Corp.*, 186 F.R.D. 271, 274 (D.Conn. 1999). (Same).
4. 29 C.F.R. §2560.503-1(j)(3), (m)(8).
5. *Allen v. Honeywell Retirement Earnings Plan*, 698 F.Supp. 2d 1197, 1203 (D.Az. 2010).
6. *Geissal*, ibid.
7. *U.S. v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999); cf., *Allen*, 698 F.Supp. 2d at 1201-02 (Interests of the trustees and the participant have not sufficiently diverged prior to conclusion of the appeal process, despite the "inevitability" of litigation); cf. *Moore v. Metropolitan Life Insurance Co.*, 799 F.Supp. 2d 1290, 1297 (M.D.Ala. 2011) (Memo from attorney relating to reconsideration of the denial of an appeal must be disclosed despite having been written after the commencement of litigation).
8. *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 588 (N.D.Ill. 1981).
9. *Solis v. FELRA*, 644 F.3d 221, 229-30 (4th Cir. 2011).
10. But see *In re Syncor ERISA Litigation*, 229 F.R.D. 639, 646 (C.D.Ca. 2005)(Disclosure of documents to the Securities and Exchange Commission constituted a complete waiver of privilege).
11. See *FELRA*, 644 F.3d at 225.
12. See Restatement (Third) of the Law Governing Lawyers §76 (2000).

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