The Federal Common Law of ERISA Plan Attorneys

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# THE FEDERAL COMMON LAW OF ERISA PLAN ATTORNEYS

Jay Conison†

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INTRODUCTION

Attorneys have a pervasive and influential role in the activities of employee benefit plans. To help with the establishment of a plan, the sponsor likely will engage an attorney to draft the plan documents and, where possible, obtain a letter determining qualification from the Internal Revenue Service. During the life of the plan, attorneys engaged by the plan and its fiduciaries may continually provide advice and assistance to help them comply with statutes, regulations, and the plan document. ¹ For example, in the course of the plan’s operation, attorneys may assist the administrator with preparing and filing annual reports and other required information; guide the plan and its fiduciaries through contested benefit claims; obtain from the Internal Revenue Service exemptions from prohibited transaction rules; advise and assist on plan amendments; closely work with the fiduciaries to

¹. Use of an attorney is sometimes required by law. For example, where the fiduciary is a national bank, it must “designate, employ or retain legal counsel who shall be readily available to pass upon fiduciary matters and to advise the bank and its trust department.” 12 C.F.R. § 9.7(c) (1989).
help them avoid breaches of their fiduciary obligations; and formally request guidance on difficult questions from the Department of Labor, the Internal Revenue Service or a federal court. When a plan is terminated, an attorney may be needed to help guide the parties through the regulatory requirements and deal with any controversies that arise. A plan without an attorney is as helpless as a would be corporation.

This article deals with one group of attorneys who perform legal work in connection with employee benefit plans: ERISA plan attorneys. By “ERISA plan attorneys” (or “plan attorneys”) we mean those attorneys who are engaged either by a plan governed by ERISA, or by a fiduciary of such a plan in his capacity as such. The


3. Thus, the term “ERISA plan attorney” does not refer to attorneys who represent plan sponsors (such as employers and unions) in their non-fiduciary capacities. The reason for excluding them from the discussion will emerge in Section IV(A)(2), infra notes 363-375 and accompanying text. Nor does it refer to attorneys for plans not governed by ERISA. ERISA § 4(b), 29 U.S.C. § 1003(b), exempts from the statute’s coverage: governmental plans (as defined in ERISA § 3(32), 29 U.S.C. § 1002(32)); certain church plans (as defined in ERISA § 3(33)), 29 U.S.C. § 1002(33)); plans “maintained solely for the purpose of complying with applicable workman’s compensation laws or unemployment compensation or disability insurance laws”; certain foreign plans; and unfunded excess benefit plans (as defined in ERISA § 3(36), 29 U.S.C. § 1002(36)). Some of the conclusions reached here might be applicable to attorneys for such plans. The extent to which they might be applicable would depend greatly on the character of the plan in question and the nature of state regulation of it. Thus, it is difficult to draw general conclusions and we do not try to do so here.

Finally, the term “ERISA plan attorney” does not refer to an attorney who provides legal services through a prepaid legal services plan (which is a kind of plan subject to ERISA). See ERISA §§ 3(1), 4(a), 29 U.S.C. §§ 1002(1), 1003(a). The reason for excluding those attorneys is discussed in Section II(B)(3)(b), infra notes 221-230 and accompanying text.
purpose of the article is to demonstrate that there should be, and that there can be, a federal common law comprehensively governing the plan-related conduct of these attorneys.

Although there are currently some federal common law rules that govern plan attorneys, they are few and isolated. They deal with narrow topics, such as attorney-client privilege and liability for participation in a fiduciary’s breach of duty, and they do so in an unsystematic way. There is simply no body of federal common law that coherently and comprehensively deals with the plan attorney’s fiduciary and professional conduct, and no recognized set of principles that might be used to develop such a body of law. The reason is that there is a little appreciation of the need for such a body of law and the possibility that such a body of law can be developed. This article aims to remedy that state of affairs.

The article is divided into three main parts. In the first part (Section I), we review some fundamental principles of ERISA and characteristics of plans. One purpose of the discussion is to explain key concepts to the uninitiated reader. Another purpose is to clarify a few important points — in particular, the nature of plans, the importance of ERISA’s disclosure policies, and the noncomprehensiveness of the statute — that are central to the subsequent argument.

In the second part (Sections II-III), we show that a federal common law of plan attorneys is necessary and that courts have both the authority and discretion to develop it. We begin this part of the discussion by seeking to identify sources of rules that might legitimately govern the conduct, responsibilities, and liabilities of plan attorneys. We shall see that ERISA itself contains very little express regulation of plan attorneys (Section II(A)). We will then see that, contrary to normal expectations, state law is not available because ERISA’s preemption provision is so expansive that it ousts all state regulation of attorneys who are acting in their capacity as legal counsel to an ERISA plan or plan fiduciary. (Section II(B)). This obviously leaves an unacceptable regulatory lacuna. As we shall see, the gap in the law is one that may properly be filled by courts exercising their authority, derived from ERISA and elsewhere, to develop federal common law (Sections II(C) & III).

In the final part (Sections IV-VI), we show how a federal common law of plan attorneys may be developed on a principled basis. We first address some fundamental issues concerning the relationship between the plan attorney and the plan entities with which he deals (Section IV). We discuss who, if anyone, may be deemed the client of
the plan attorney (Section IV(A)), and what should be the scope of the attorney-client privilege in the plan representation context (Section IV(B)). We next turn to the fiduciary obligations of the plan attorney, first dealing specifically with his responsibilities when he learns of a breach of duty by a plan fiduciary (Section V(A)), and then dealing more generally with the contours of his various fiduciary obligations to the several kinds of persons involved in the plan (Section V(B)). Finally, we turn to the subject of the civil liabilities of plan attorneys (Section VI). We show that courts have clear authority to impose liability on plan attorneys for their wrongdoings (Section VI(A)), and we deal with the question of who has standing to bring remedial actions (Section VI(B)).

In dealing with the questions raised in this last part, we not only try to develop basic rules, we also show how the policies of ERISA and the characteristics of plans must carefully be taken into account to ensure that the rules developed properly address the specific needs of plans, as well as the legitimate needs of their participants, beneficiaries and fiduciaries. In that regard, we shall find the following general conclusions to be most important for proper development of the common law of plan attorneys:

• Plan attorneys, although not ERISA fiduciaries, have characteristics that bring them within the ambit of some of ERISA's policies.
• Plans are sufficiently unlike corporations that one cannot uncritically apply to them rules — especially rules concerning legal representation — that have been developed for corporations.
• The traditional concept of “client” is not appropriate in the plan representation context.
• ERISA's policy of promoting disclosure of fiduciary conduct renders much of the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct inappropriate as guides to plan attorney conduct.
• Courts have extensive, but hitherto largely unused, power to develop common law rules for the remedy of wrongs by plan attorneys.

The rules and principles developed in the third part of the article do not exhaust the important topics in the area of plan attorney conduct. Thus, we conclude (Section VII) by suggesting other topics that are appropriate for further inquiry.

I. ERISA: An Overview

ERISA is a lengthy, and in many respects highly technical, statute. Books and other resources abound that explain the technical pro-
visions of ERISA and their administrative elaborations. The arguments in this article, though, are based on only a few central features of ERISA and of benefit plans, and, in general, do not turn on the more technical provisions of the statute. Thus, an overview of the central policies and a few of the key requirements of ERISA will be enough for the reader unfamiliar with ERISA or with benefit plans.

A. What Constitutes an “Employee Benefit Plan”?

Although the ultimate purpose of ERISA is to promote the availability and security of employee benefits, the statute cannot be characterized as the federal law of employee benefits. Rather, it is the law of employee benefit plans, and its stated policy is “to protect . . . the interests of participants in employee benefit plans.” If benefits are provided to employees without a plan, ERISA does not apply. Accordingly, to fully understand ERISA’s policies and its rules, one must first understand what an employee benefit plan is.

ERISA is surprisingly unhelpful. It presumes the existence of employee benefit plans and immediately divides them into two broad kinds: pension benefit plans, which are plans that provide for retire-
ment income, and welfare benefit plans,\textsuperscript{10} which provide for medical or other current needs of employees. Each of these kinds is respectively defined as a “plan, fund, or program . . . established or maintained . . . for the purpose of providing” delineated types of benefits to participants and beneficiaries. The term “employee benefit plan” (or, for short, “plan”) is then defined — purely as a shorthand term — as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.”\textsuperscript{11} As a result of this definitional scheme, the nature of ERISA’s central concern, the benefit plan, must be inferred from the statutory and judicial treatment of it.

The treatment has been sparse, but it is reasonably clear that employee benefit plans have two aspects, ones that are usually not found together. On the one hand, a plan is just an established program for paying benefits that are sufficiently regular to create in some people a reasonable expectation of receiving the benefits.\textsuperscript{12} The core concept is that of a program.\textsuperscript{13} A plan is not a contract,\textsuperscript{14} person, organization,
or item of property. Rather, it is an activity; a regularly conducted one, but one that may be more or less formal.

On the other hand, a plan is also treated by ERISA as a legal entity distinct from its sponsor.\(^\text{15}\) It may sue or be sued,\(^\text{16}\) have judgment entered against it,\(^\text{17}\) enter into contacts, own property, engage attorneys, and hire employees.\(^\text{18}\) In this respect, a plan is an artificial individual, akin to a corporation or a trust.

This hybrid concept of an employee benefit plan as an activity that is also a discrete legal entity is virtually without counterpart in any other area of law.\(^\text{19}\) It is entirely a creation of ERISA.\(^\text{20}\) As we shall later see, because of the unorthodox character of benefit plans, extreme care must be used in applying to them rules designed for artificial entities of a more familiar nature.\(^\text{21}\)

**B. ERISA as Systematic, but Not Comprehensive, Pension Reform**

**1. ERISA’s Systematic Character**

ERISA governs a wide variety of pension and welfare benefit plans: profit-sharing plans, employee stock ownership plans, long-term disability plans, severance plans, and prepaid legal plans, to give just a few examples. Despite the wide scope of its coverage, Congress’s main interest was much narrower: programs that “provide[d] retirement income for employees who have spent their careers in use-

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\(^\text{15}\) See Guidry v. Sheet Metal Workers Nat’l Pension Fund, 110 S. Ct. 680, 686 (1990) (plan and union sponsor were “distinct entities”; wrong by plan fiduciary to union sponsor was not wrong to plan remediable under ERISA).

\(^\text{16}\) ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1) (“An employee benefit plan may sue or be sued . . . as an entity”).

\(^\text{17}\) ERISA § 502(d)(2), 29 U.S.C. § 1132(d)(2) (“Any money judgment under [the enforcement provisions of ERISA] against an employee benefit plan shall be enforceable only against the plan as an entity. . . .”).

\(^\text{18}\) See generally ERISA § 406(a), 29 U.S.C. § 1106(a) (regulation of business activities of plans).


\(^\text{20}\) The Welfare and Pension Plan Disclosure Act, a statute superseded by ERISA, contained definitions of “employee welfare benefit plan” and “employee pension benefit plan” similar to those found in ERISA. Pub. L. No. 85-836, 3, 72 Stat. 997 (1958). However, that act did not recognize plans as legal entities in any significant way.

\(^\text{21}\) See infra notes 357-403 and accompanying text.
ful and socially productive work."\(^{22}\) The record of abuses in connection with retirement plans was a major impetus for pension reform,\(^ {23}\) and the legislative history is replete with horror stories about workers who had unfairly been deprived of pensions that they had thought that they would get.\(^ {24}\)

In the early 1970's, when Congress took up the cause of pension reform, benefits and benefit plans were governed by a patchwork of state and federal regulation. The Labor Management Relations Act provided limited fiduciary regulation for those plans which had been adopted through the process of collective bargaining.\(^ {25}\) The Internal Revenue Code imposed some fiduciary standards for retirement trusts, but only as a condition of their obtaining favorable tax treatment.\(^ {26}\) The Welfare and Pension Plan Disclosure Act, the first federal statute to deal exclusively with employee benefit plans, imposed limited reporting and disclosure obligations on plans and plan administrators.\(^ {27}\) And some state trust laws governed the fiduciary obligations of retirement fund trustees.\(^ {28}\)

Congress found this existing collection of laws to be inadequate as a framework for protecting the interests of plan participants in their benefits, and concluded that the problems it wished to remedy demanded systematic treatment.\(^ {29}\) Among the problems that Congress wished to remedy were overly-stringent vesting rules, un-

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\(^{24}\) See, e.g., I LEGISLATIVE HISTORY, supra note 22, at 90, 207-08, 210-15, 673; II LEGISLATIVE HISTORY, supra note 22, at 1599, 1622, 1634, 1635, 1666, 1667-68, 1758, 1762, 1772, 1866; III LEGISLATIVE HISTORY, supra note 22, at 3584, 3592, 4710, 4713, 4716-17, 4749-50, 4790, 4792, 4794, 4799.


\(^{29}\) See, e.g., S. REP. No. 127, 93d Cong., 1st Sess. 13 (1973), reprinted in I LEGISLATIVE HISTORY, supra note 22, at 599 and in 1974 U.S. CODE CONG. & ADMIN. NEWS 4849 ("the nature and extent of the problems determined to exist required one omnibus legislative proposal which would embody essential and indispensable reforms"); id. at 15, reprinted in I LEGISLATIVE HISTORY, supra note 22, at 601 and in 1974 U.S. CODE
derfunding of plans, inadequate disclosure requirements, insufficient fiduciary requirements, and inadequate enforcement mechanisms. To deal with them, Congress relied on the existing tax, reporting, and fiduciary approaches, but added provisions and systems of provisions that it believed would make federal regulation more effective. In particular, it added minimum vesting funding standards, more comprehensive reporting and disclosure requirements, an extensive regulatory and enforcement role for the Department of Labor, more stringent and sweeping fiduciary rules, and a broad civil enforcement scheme. The approach can fairly be characterized as systematic, in that a well defined group of problems was sought to be corrected through a single statute, taking an integrated approach based on articulated policy choices.

But, although ERISA is systematic, one must be careful not to suppose that it is comprehensive. It is true that the Supreme Court has described ERISA as a "comprehensive and reticulated statute" and a "comprehensive legislative scheme," and that lower courts have repeated those phrases endlessly. Yet the description is clearly an overstatement. ERISA may well have been an initial attempt at comprehensive regulation, but, like many initial attempts, it failed to

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31. See, e.g., H.R. REP. No. 779, 93d Cong., 2d Sess. 8 (1974), reprinted in II LEGISLATIVE HISTORY, supra note 22, at 2597 ("Your committee regards the present legislation as part of an evolutionary process which keeps [the] basic framework but which builds on it new provisions which experience indicates are necessary, for the proper functioning of these plans.").


33. Id. at 147 (quoting Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981)).

34. See, e.g., 120 CONG. REC. 4777 (1974), reprinted in III LEGISLATIVE HISTORY, supra note 22, at 3583 (the act is "long overdue but represents a strong first step toward reform") (remarks of Rep. Reid); id. at 4779, III LEGISLATIVE HISTORY, supra note 22, at 3589 ("This bill is a necessary first step") (remarks of Rep. Drinan); 120 CONG. REC. 29,193 (Aug. 20, 1974), reprinted in III LEGISLATIVE HISTORY, supra note 22, at 4658 ("the bill does not cover everything that we might desire but is a beginning that should have been made long ago") (remarks of Rep. Perkins); id. at 29,196, reprinted in III LEGISLATIVE HISTORY, supra note 22, at 4666 ("We know that there will be many trials
address issues and problems that were legitimate candidates for regulation through the same statute. Some of those problems and issues Congress just did not foresee. On others, Congress was unable to reach agreement. Others, Congress did not intend to regulate by statute, preferring to let courts or agencies work out appropriate rules. Others, it did not wish to regulate at all.

Congress, in fact, was well aware that ERISA was neither comprehensive nor the last word on the subject of benefit plan regulation. To that end, it provided in the statute itself for six different groups to study ERISA's effects and to report to Congress for purposes of further legislation. In particular, Congress established an Advisory Council on Employee Welfare and Pension Benefit Plans, consisting of representatives of a wide variety of interested groups and enterprises, who were "qualified to appraise the programs instituted under" ERISA. Its recommendations were to be submitted to Congress every year by the Secretary of Labor. Congress also "authorized and directed" the Secretary of Labor "to undertake research studies relating to pension plans," in particular on the effects of Title I, on the general role of private pensions, on the operation of private

35. A paper prepared for a Senate Committee in 1984 identified benefit portability, public employee plan regulation, mandatory employee pensions, and inflation protection as the major areas left unaddressed. See WOODRUFF, supra note 30, at 30-31.

36. "There are problems not contemplated in its provisions and we will be busy for many years attacking those problems." 120 CONG. REC. 29,196 (Aug. 20, 1974), reprinted in III LEGISLATIVE HISTORY, supra note 22, at 4668 (remarks of Rep. Dent).

37. See infra text accompanying notes 313-327.

38. See, e.g., ERISA § 503, 29 U.S.C. § 1133 (plan claim procedures shall be "[i]n accordance with regulations of the Secretary [of Labor]").

39. "It is a modest bill. It does not purport to solve every problem. Further study and deliberation by our own committee and by other committees of the Congress will be necessary." 120 CONG. REC. 4278 (Feb. 26, 1974), reprinted in II LEGISLATIVE HISTORY, supra note 22, 3369 (remarks of Rep. Perkins). See id. at 4279, reprinted in II LEGISLATIVE HISTORY, supra note 22, at 3373 ("although this not a perfect bill, it does provide a good beginning") (remarks of Rep. Brademas).

40. ERISA § 512(a), 29 U.S.C. § 1142(a). The fifteen member council was to draw representatives from employee organizations, employers, pension benefit recipients, the general public, insurance companies, corporate trust companies, actuarial consultants, investment counseling companies, investment managers, and accounting firms.


42. ERISA § 513(b), 29 U.S.C. § 1143(b).
pension plans, and on methods of encouraging pension plan growth. The findings and conclusions were to be submitted to Congress annually. Congress also established a Joint Pension, Profit Sharing, and Employee Stock Ownership Plan Task Force, which was to study questions concerning discrimination, portability, small employer plans, stock ownership, and preemption, and to report its findings to Congress within twenty-four months. Finally, three congressional committees were directed to study government pension plans and to report their findings.

Thus, while ERISA may fairly be called systematic, it is far from a comprehensive or complete law of employee benefit plans.

2. Plans as Voluntary Arrangements

To understand why ERISA is not a comprehensive statute, one must appreciate its key premise that pension benefit plans (and, a fortiori, welfare benefit plans) should be voluntary arrangements. Congress intended that the private retirement plan system should be one that is voluntarily established and self-administered to the greatest extent possible. The rationale was not only to avoid "excessive Federal interference," but as well the belief that employers should have the flexibility to adopt or not adopt plans as they deemed best, and should have substantial freedom to design plans that they believed

44. ERISA § 513(b), 29 U.S.C. § 1133(b).
would best serve their needs and the needs of their employees.\(^{50}\) As a result, nothing in ERISA, or any other law, makes retirement plans mandatory.

3. The Cost-Benefit Calculus

ERISA's noncomprehensive character results from its two competing purposes. One of ERISA's main goals is to encourage employers to establish retirement plans for their employees. The other is to safeguard participants' rights to benefits once a plan has been established. ERISA is largely a set of policy adjustments between those two goals.\(^{51}\)

To implement the policy of encouraging employers to adopt retirement plans, ERISA, through the Internal Revenue Code, provides favorable tax treatment to employers and employees.\(^{52}\) The employer receives an immediate deduction for contributions to the plan, while the employees are allowed to defer taxation of the employer's contributions and investment income realized on plan funds until they receive their benefits.\(^{53}\) This is the same method that had been used under prior law to encourage employers to establish retirement plans for employees.\(^{54}\)


\(^{52}\) "The basis of all private pensions is the tax law. We have private pensions because a payment or contribution to the pension fund is tax-free. Those pension funds grow so they can do the job because the earnings are tax-free." 120 CONG. REC. 30,044 (Sept. 18, 1973), reprinted in II LEGISLATIVE HISTORY, supra note 22, at 1642 (remarks of Sen. Curtis). See also S. REP. NO. 383, 93d Cong. 1st Sess. 2, 10 (1973), reprinted in I LEGISLATIVE HISTORY, supra note 22, at 1070, 1078 and in 1974 U.S. CODE CONG. & ADMIN. NEWS 4898-99.


\(^{54}\) See 120 CONG. REC. 7417 (Mar. 13, 1973), reprinted in I LEGISLATIVE HISTORY, supra note 22, at 211 (remarks of Sen. Bentsen).
Under prior law, the employer and the participants would receive favorable tax treatment — the plan was said to be “qualified” — if certain minimal protections for plan funds were in place. ERISA changed the terms of this bargain. As new and additional conditions for qualification, ERISA imposed standards that Congress believed would help prevent unfair benefit deprivations. Favorable tax treatment was the reward for establishing plans that contained safeguards of employees’ rights to benefits.55

In determining which new requirements to impose, Congress sought to avoid placing such a burden on employers as to make it undesirable for them to establish plans. As one Senate Report explained:

Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to participate or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans. At the same time, there are advantages in setting minimum standards in these areas both to serve as a guideline for employers in establishing or improving plans and also to prevent the promise of more in the form of pensions or related benefits than eventually is available.56

Thus, ERISA’s scope and substantive requirements reflect a compromise between two not entirely consistent goals.

55. In fact, ERISA has a third major goal (in addition to voluntariness and employee protection), that of ensuring that the plans established do not favor the more highly compensated employees or the corporate managers. This goal is reflected in the discrimination rules that are part of the Internal Revenue Code’s qualification standards. See generally Wolk, Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality, 70 VA. L. REV. 419 (1984). These provisions are of little importance to the subject of this article, however, so we do not discuss them further.

C. Two Aspects of Plan Content Regulation

For purposes of this article, it is necessary to consider two relatively nontechnical parts of ERISA’s regulation of the content of the plans.

1. The Requirement of a Claims Procedure

ERISA contains very little regulation of plan content. Indeed, the only content requirement applicable to every plan governed by ERISA is the requirement that the plan have a claims procedure—that is, a procedure for challenging denials of benefits—in accordance with regulations issued by the Secretary of Labor. This basic requirement is consistent with the conception of a plan as essentially a regularly conducted practice of providing benefits to employees.

2. The Writing Requirement and Written Plans

With insignificant exceptions, ERISA requires every plan to “be established and maintained pursuant to a written instrument.” The requirement that plans be established pursuant to a written instrument is a fiduciary provision, and it is a requirement designed to strengthen the substantive rules governing fiduciary conduct. Its chief purpose is to ensure that participants and fiduciaries will be able to know their respective rights and obligations, and to ensure that participants will easily be able to discover to whom they should turn...
for information or assistance in connection with the plan. It also "protects the plan’s actuarial viability by setting forth the terms under which benefits may be paid . . . [and] protects ERISA plans from the sort of corruption fostered by private verbal agreements." 62

All written plans must contain provisions dealing with the plans’ fiduciaries. Specifically, the plan documents must identify the named fiduciaries who “shall have authority to control and manage the operation and administration of the plan,” 63 and must identify the trustees (if the plan has any). 64 Unlike the law of trusts, 65 ERISA permits — but does not require — written plans to have provisions that govern the allocation and delegation of fiduciary responsibility among various plan fiduciaries. 66

ERISA also contains various prohibitions. One express prohibition, applicable to all written plans, is the prohibition of “any provision . . . which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty [under ERISA’s fiduciary provisions]." 67 Congress viewed the fact that state trust laws had allowed such exculpation as a major flaw in existing fiduciary regulation that had to be rectified in federal standards. 68

D. Reporting and Disclosure under ERISA

Prior to ERISA, the Welfare and Pension Plan Disclosure Act ("WPPDA") 69 was the sole federal statute devoted exclusively to the regulation of benefit plans. The WPPDA did not govern all plans within the scope of the commerce clause: it regulated only larger

64. ERISA § 403(a), 29 U.S.C. § 1103(a).
65. See Restatement (Second) of Trusts § 171 (1959).
66. ERISA §§ 402(b)(2) & (c)(2), 405(c)(1), 29 U.S.C. §§ 1102(b)(2) & (c)(2), 1105(c)(1). The plan document must also describe a procedure for establishing and implementing a funding policy, ERISA § 402(b)(1), 29 U.S.C. § 1102(b)(1); specify a procedure for amending the plan, ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3); and “specify the basis on which payments are made to and from the plan,” ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4).
68. See infra text accompanying notes 83-88.
plans, those with twenty-five or more participants. The WPPDA provided a limited framework for protecting the interests of plan participants. It did so principally by requiring disclosure of information relating to the plan. To that end, it required plan administrators to publish a plan description and annual financial reports for the plan, and to file them with the Secretary of Labor and make them available for inspection by participants.

It was widely believed that the WPPDA was ineffective. As Congress explained in one of the reports accompanying a bill that led to ERISA: "[WPPDA] is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found in its reliance upon the initiative of the individual employee to police the management of his plan." Notwithstanding the perceived inadequacies, ERISA clearly builds on the WPPDA; several of the bills that led to ERISA were designed as elaborate amendments to cure some of its inadequacies. In those bills, and in others introduced around the same time that contained rules to govern reporting and disclosure, a close connection could be seen between the reporting and disclosure requirements and the fiduciary responsibility rules. In particular, the requirement of detailed reporting and disclosure was considered a prophylactic device to make the fiduciary rules more effective. In that respect, the reporting and disclosure requirements were seen as functioning similarly to the writing requirement. Thus, as one of the congressional reports explained:

The underlying theory of the Welfare and Pension Plans Disclosure Act to date has been that reporting of generalized information concerning plan operations to plan participants and beneficiaries and to the public in general would, by subjecting the dealings of

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71. The WPPDA, as originally enacted, was exclusively a reporting and disclosure statute. In 1962, it was amended to impose criminal penalties for embezzlement, certain forms of fraud, and kickbacks in connection with benefit plans, and to impose bonding requirements for administrators, officers and employees of plans, and persons who handle plan funds and property. See Pub. L. No. 87-420, 76 Stat. 3 (1962).
persons controlling employee benefit plans to the light of public scrutiny, insure that the plan would be operated according to instructions and in the best interests of participants and beneficiaries. . . . But experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. At the same time, the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general. 74

To implement these policies, ERISA imposes reporting and disclosure obligations on every plan within its scope. 75 It requires that every plan administrator furnish the participants with a summary plan description 76 (a brief, nontechnical description of the plan) and file a plan description with the Secretary of Labor. 77 The administrator must also publish and file annual reports with the Secretary of Labor. 78 The report must disclose information on transactions with parties in interest, losses caused by wrongdoing, plan finances, actuarial projections, and changes in fiduciaries. 79 The administrator must

75. Pursuant to statutory authority, the Secretary of Labor has exempted from some of the reporting and disclosure requirements for certain small, unfunded welfare benefit plans, 29 C.F.R. § 2520.104-20; group insurance arrangements, id. § 2520.104-21; and apprenticeship or training plans, id. § 2520.104-22.
78. ERISA § 103, 29 U.S.C. § 1023. Certain reports must also be filed with the Secretary of the Treasury, I.R.C. §§ 6057-6059 (1989); and the Pension Benefit Guarantee Corporation, ERISA §§ 4041, 4043, 4065. In practice, a plan files a single annual report with the Secretary of the Treasury, which is distributed to the Secretary of Labor and the Pension Benefit Guarantee Corp.
79. 29 C.F.R. § 2520.103-1(b). See Internal Revenue Service Form 5500 ("Annual Return/Report of Employee Benefit Plan (with 100 or more participants)").
also furnish information regarding the plan and individual benefit entitlements to any participant who seeks such information. 80

ERISA also contains a specialized enforcement provision that allows imposition of substantial civil damages and heavy fines on administrators who refuse to comply with the reporting and disclosure rules. For example, an administrator must provide a participant, upon request, with information to which he is entitled within thirty days. Otherwise, the administrator may be subject to liability to the participant in an amount up to $100 per day. 81 The administrator may also be fined under these provisions up to $1000 per day for failure to file an annual report on time. 82 The incentives thus are very strong for administrators to comply with the rules.

E. Fiduciary Standards: Generally

1. Pre-ERISA Fiduciaries

ERISA’s fiduciary provisions are sweeping, stringent, and one of the most innovative features of the law.

Prior to ERISA, there were three sources of fiduciary protection for plans. One was the Internal Revenue Code, which required as a condition for qualification that the trust part of a plan be “for the exclusive benefit” of the participants and their beneficiaries. 83 Another was the various state laws of trusts. The third was the Labor Management Relations Act, which, for employee benefit plans established by unions, permitted only those trust funds “established . . . for the sole and exclusive benefit of the employees . . . and their families and dependents.” 84

Congress found substantial flaws with these existing forms of protection. One problem was scope of coverage. Not all plans are union-established, and not all plans are qualified. The labor laws and tax code governed only select employee benefit plans. A more subtle, but equally serious problem, was that not all employee benefit plans are established as trusts. There were only minimal restrictions imposed upon persons responsible for employee benefit plans whose as-

80. ERISA §§ 105, 502(c), 29 U.S.C. §§ 1025, 1132(c).
82. ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2).
sets were not held in trust.\textsuperscript{85}

Another problem was substantive. Traditional trust law was designed for the purpose of implementing the intent of settlors of \textit{inter vivos} and testamentary trusts. Congress found this body of law to offer inadequate protection to participants and beneficiaries of employee benefit plans because its rules allowed fiduciary conduct that Congress believed should be prohibited. As one of the early Committee reports explained:

> [E]ven where the funding mechanism of the plan is in the form of a trust, reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and \textit{inter vivos} trusts (usually designed to pass designated property to an individual or small group of persons) with an attendant emphasis on carrying out the instructions of the settlor. Thus, if the settlor includes in the trust document an exculpatory clause under which the trustee is relieved from liability for certain actions which would otherwise constitute a breach of duty, or if the settlor specifies that the trustee shall be allowed to make investments which might otherwise be considered imprudent, the trust law in many states will be interpreted to allow the deviation. In the absence of a fiduciary responsibility section in the present Act, courts applying trust law to employee benefit plans have allowed the same kinds of deviations, even though the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature.\textsuperscript{86}

To address these problems, Congress made two substantial changes in the law. First, it codified general fiduciary standards, derived from trust law, and made them applicable to virtually any employee benefit plan irrespective of whether it used a trust as a funding mechanism.\textsuperscript{87} Second, it eliminated rules that Congress deemed to be

\textsuperscript{85} 120 CONG. REC. 12,075 (April 12, 1973), \textit{reprinted in I LEGISLATIVE HISTORY, supra} note 22, at 275 (statement of Sen. Javits); S. REP. No. 127, 93d Cong., 1st Sess. 29 (1973), \textit{reprinted in I LEGISLATIVE HISTORY, supra} note 22, at 615 and in 1974 U.S. CODE CONG. & ADMIN. NEWS 4865. Thus, one of the bills that led to ERISA provided that “[e]very employee benefit plan shall be deemed to be a trust.” H.R. 2, 111(a)(1), 93d Cong., 1st Sess., \textit{reprinted in I LEGISLATIVE HISTORY, supra} note 22, at 41. This unnecessary legal fiction was subsequently discarded.

\textsuperscript{86} S. REP. No. 127, 93d Cong., 1st Sess. 29 (1973), \textit{reprinted in I LEGISLATIVE HISTORY, supra} note 22, at 615 and in 1974 U.S. CODE CONG. & ADMIN. NEWS 4865.

\textsuperscript{87} H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. 294-97 (1974), \textit{reprinted in III
acceptable in the plan context. Thus, for example, ERISA prohibits exculpatory provisions and prohibits fiduciaries from deviating from the plan document. To implement ERISA's fiduciary policies, Congress also authorized courts to develop a fiduciary law specially adapted to benefit plans, that takes into account their special character.

2. **ERISA Fiduciaries: Who Are They?**

There are important differences between a plan fiduciary under ERISA and a fiduciary under the common law of trusts. Trust law has one fiduciary, the "trustee," in whom all significant fiduciary responsibility for a trust is reposed. ERISA fiduciary law is more complex, in that it contemplates the existence of several plan fiduciaries, each of whom has a different set of responsibilities.

There are two types of fiduciary that every plan now must have. One is the so-called "named fiduciary," who has "authority to control and manage the operation and administration of the plan." This fiduciary is wholly a creature of ERISA, with no obvious counterpart in the common law of trusts. The importance of this fiduciary role lies in the fact that its holder is named in the plan document or pursuant to it. Its existence ensures that there will be at least one fiduciary known as such to the participants and beneficiaries.

The other fiduciary that every plan must have is the so-called "administrator." The administrator's fiduciary function is not defined; there are simply obligations — mainly ones dealing with reporting and disclosure — imposed by ERISA on the person who has this role. Unlike the named fiduciary, the administrator need not be named in or pursuant to the plan document, for if the plan document

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**Legislative History, supra note 22, at 4561-64 and 1974 U.S. Code Cong. & Admin. News 5076.**


91. See, e.g., Restatement (Second) of Trusts §§ 169, 171, 184.


is silent, the plan sponsor becomes the administrator by default.\textsuperscript{94}

In addition to these two mandatory fiduciaries, every plan whose assets are held in trust must have a trustee, who is designated in or pursuant to the plan document.\textsuperscript{95} The trustee is the ERISA fiduciary most like the trust-law trustee; he has “exclusive authority and discretion to manage and control the assets of the plan.”\textsuperscript{96} In addition to the trustee, a plan may also have an “investment manager,” appointed by the named fiduciary, who has power “to manage (including the power to acquire and dispose of) any assets of a plan.”\textsuperscript{97}

The named fiduciary, administrator, trustee, and investment manager are the four main fiduciary roles with respect to ERISA plans. ERISA contemplates that these roles may be filled by officers, agents, or other representatives of the employer.\textsuperscript{98} More than one person may be assigned each role and one person may be assigned two or more of such roles.\textsuperscript{99} In addition, there is a network of rules governing allocation and delegation of these fiduciaries’ responsibilities.\textsuperscript{100}

But those four roles do not exhaust the fiduciary roles with respect to a plan. ERISA defines “fiduciary” very broadly, through a function-and-discretion test. Under ERISA, any person is automatically a fiduciary to the extent that he performs certain functions involving discretion:

[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 monies 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.\textsuperscript{101}

This is a novel approach to fiduciary status. Unlike the common

\textsuperscript{94} ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).
\textsuperscript{95} ERISA § 403(a), 29 U.S.C. § 1103(a).
\textsuperscript{96} ERISA § 403(a), 29 U.S.C. § 1103(a).
\textsuperscript{97} ERISA § 402(c)(3), 29 U.S.C. § 1102(a).
\textsuperscript{98} ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3).
\textsuperscript{99} ERISA § 402(c)(1), 29 U.S.C. § 1102(c)(1).
\textsuperscript{100} ERISA §§ 402(b)(2), 402(c)(2) & (3), 403(a), 405(b)(1)(B), 29 U.S.C. §§ 1102(b)(2), 1102(c)(2) & (3), 1103(a), 1105(b)(1)(B).
\textsuperscript{101} ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
law, in which fiduciary status most commonly arises because of title (e.g., trustee, partner, lawyer), ERISA diminishes the importance of title and imposes fiduciary status because of the discretionary role played in management or administration of the plan. This approach has three important corollaries for plan attorneys.

First, a person’s actual role in the plan may override the name of his office in determining fiduciary status. Thus, courts have found persons to be plan fiduciaries, notwithstanding their efforts to evade it through creative plan draftsmanship or avoidance of a title. Conversely, courts have found persons labelled “trustees” or “administrators” not to be fiduciaries, after examining their actual roles and responsibilities.

The second corollary arises from the “to the extent” language: in general, ERISA fiduciaries are limited fiduciaries, having fiduciary responsibility only for certain functions. This, too, is a novel feature of ERISA. It is an accommodation to the fact that benefit plans, unlike testamentary trusts, are complex, ongoing activities, often with tens of thousands of participants and often with hundreds of millions of dollars or more of assets held in trust. Division of managerial, financial and administrative responsibility is as essential in a large ERISA plan as it is in a large business enterprise. Because fiduciary responsibility

102. See generally J. SHEPARD, LAW OF FIDUCIARIES, ch. 2; Frankel, Fiduciary Law, 71 CALIF. L. REV. 795, 795-96 (1983). Thus, the Uniform Fiduciaries Act defines “fiduciary” as follows:

"Fiduciary’ includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

103. Munoz v. Prudential Ins. Co. of Amer., 633 F. Supp. 564, 568 (D. Colo. 1986) (“it is a person’s ability to make policy decisions outside of a pre-existing or separate framework of policies, practices and procedures which saddles that person with ERISA fiduciary liability”).


106. Chambers v. Kaleidoscope, Inc. Profit Sharing Plan & Trust, 650 F. Supp. 359 (N.D. Ga. 1986). See also, e.g., Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (corporation hired to administer plan was not a fiduciary); Munoz, 633 F. Supp. at 567-69 (company that performed non-discretionary processing of claims was not a fiduciary).
with respect to a plan follows upon managerial, financial and adminis-
trative responsibility, the natural division of labor in running the plan
means division of fiduciary responsibility as well.

Third, there is an inescapable element of arbitrariness in ERISA
fiduciary determinations. "Discretion," the key to fiduciary status, is
a flexible term. A secretary to a fiduciary may have discretion as to
some mundane matters of plan management, but secretaries are not
thereby made fiduciaries — not even limited ones. In principle, they
could be, but experience and common sense suggests that a minimum
level of discretion should be fixed, below which a person has no fiduci-
ary responsibility at all.

The arbitrariness of the line drawn can be seen in the case of an
attorney who regularly gives advice to a plan fiduciary. The attor-
ney's opinion might be extremely influential in, for example, cases of
contested benefit determinations, and interpretation of the plan docu-
ment might, as a matter of practice, always be accepted by the fiduci-
ary responsible for benefit claims. It is entirely plausible to consider
the attorney's responsibility for giving advice to be "discretionary au-
thority in the administration of [the] plan," or to consider the act of
giving advice, to the extent accepted, an exercise of discretionary au-
thority in plan administration. 107 But policy choices have been made
to the contrary, and so regulations place plan attorneys, to the extent
they act solely as attorneys, below the fiduciary-status line. 108

It should be kept in mind, though, that the line easily could have
been placed elsewhere, all the while remaining consistent with the text
and policies of ERISA. Secretaries, attorneys and other persons
could have been included as part of the class of fiduciaries by virtue of
their discretion — albeit limited — in plan affairs. Thus, the fact that
a person who is involved in a plan is not an ERISA fiduciary does not
mean that he entirely lacks the kind of discretionary authority that is
of concern under the policies of ERISA. As a result, ERISA's poli-
cies, though not its full complement of fiduciary rules, may still apply
to persons below the line.

union official was fiduciary with respect to local unions' dental plans because of influence
in fact over plans' choices of provider).
3. **ERISA Fiduciary Responsibility**

a. **General Standards**

ERISA’s basic rule governing the conduct of fiduciaries is set forth in section 404(a)(1):

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Three of the basic duties made part of the rule — loyalty, care, and prudence — are derived from the common law of trusts. The other two duties — risk minimization and adherence to plan documents — represent new fiduciary requirements adapted to the special needs of plans. All of the fiduciary requirements apply, with very minor exceptions, to every plan subject to ERISA.

Two of the fiduciary duties are of especial importance to plan attorneys: the duty of loyalty, and the duty to follow plan documents.

i. **The Duty of Loyalty**

The fiduciary duty with which we shall be most concerned is the duty of loyalty: that of discharging duties “solely in the interest” of participants and beneficiaries and “for the exclusive purpose” stated in the section. Loyalty is not only the basic duty of any fiduci-

109. 29 C.F.R. § 2509.75-5, at D-1.

ary,\textsuperscript{111} it is one of the defining characteristics of any fiduciary.\textsuperscript{112} The precise scope and character of the duty of loyalty varies from one fiduciary relationship to another.\textsuperscript{113} ERISA largely incorporates the loyalty obligations of the law of trusts, with adaptations to take into account the special characteristics of plans.

One adaptation is reflected in the characterization of the fiduciary’s duties as ones “with respect to a plan.”\textsuperscript{114} This is an unusual formulation, because duties, and especially fiduciary duties, are conventionally described as being “with respect to” matters or areas of responsibility, but as “owed to” persons or entities.\textsuperscript{115} Nothing in the legislative history of ERISA explains why the formulation, “with respect to a plan,” was chosen instead of a conventional formulation, such as that the fiduciary’s duties are owed “to the plan” or “to the participants and beneficiaries.” What, if anything, does it suggest about the differences between the ERISA fiduciary’s duty of loyalty and the duty of loyalty of the common law trustee?

It suggests a subtle, but significant, difference. Recall that a plan, although a legal entity, is also a regularly conducted activity established for the purpose of providing benefits.\textsuperscript{116} The duties of the ERISA fiduciary are thus duties “with respect to” this benefit-payment activity. But there is no one to whom those duties are said to be primarily owed. A fiduciary is not required, or even permitted, under section 404(a)(1) to carry out his duties in the separate interests (plural) of the participants and beneficiaries. To the contrary, he is required to carry out his duties in their “interest” (singular). That single, collective interest is just the obverse of the purpose of the plan: it is the interest in receiving benefits and having the plan properly administered. Thus, the ERISA fiduciary’s duty of loyalty is a duty to discharge his substantive obligations solely to further the activity

\begin{itemize}
  \item \textsuperscript{112} J. Shepard, supra note 102, at 35, 48 & ch. 6 (no fiduciary status without a duty of loyalty).
  \item \textsuperscript{113} Scott, The Fiduciary Principle, 37 Calif. L. Rev. 539, 541 (1949).
  \item \textsuperscript{114} This characterization applies to all of a fiduciary’s duties, and not just that of loyalty.
  \item \textsuperscript{115} See, e.g., Restatement Second of Agency § 13 (fiduciary duty “with respect to matters within the scope of the agency”); Investment Advisors Act 36(b), 15 U.S.C. § 80a-35(b) (fiduciary duty “with respect to the receipt of compensation for services, or of payments of a material nature”).
  \item \textsuperscript{116} See Section I(A), supra notes 6-20 and accompanying text.
\end{itemize}
that constitutes the plan. Missing from ERISA is a traditional duty of loyalty to the participants and beneficiaries, or to anyone else. In its stead is a duty of loyalty to an activity. This is a novel sort of duty, one that requires of a fiduciary a loyalty more akin to a player's loyalty to "the game," than akin to a trustee's loyalty to a beneficiary.

In a practical sense, of course, the fiduciary's obligations ultimately run to the participants and beneficiaries. Since the fiduciary must carry out his responsibilities to further the purpose of the plan in providing benefits, he will necessarily perform his obligations to their advantage. But this loyalty to the participants and beneficiaries is derivative of, and limited by, the fiduciary's statutory obligations to the ongoing program of providing benefits. Because the primary obligation of the fiduciary is generally to the program, rather than to the participants and beneficiaries, a fiduciary is prohibited from furthering an interest of the participants and beneficiaries, or any group of them, in anything other than receipt of benefits. A fiduciary cannot, for example, act primarily to further some or all of the participants' interests in job security, by loaning money to the employer or by assisting the employer to resist a hostile takeover effort. Similarly, because the fiduciary's duty of loyalty is not owed directly to the participants and beneficiaries, they have no claim for compensatory damages, under ERISA, against a fiduciary who causes injury to them through a breach.

117. This point was explained by Senator Williams:
There is an extremely important social purpose that is intended to be fostered by ERISA's fiduciary and other rules. It is the supplying of retirement and deferred income and health and welfare benefits to employees covered under the plans, and it is the duty of every plan sponsor and any fiduciary investing plan assets to adopt economically sound objectives and methods — policies, procedures, and particular investment decisions — designed to achieve that goal.

... Situations may arise where the interests of active employees may be at odds with the retirement income security interests of those same employees or present retirees. In such cases, a pension plan fiduciary must choose the course which is consistent with the primary duty of loyalty to the retirement income needs of plan participants.


120. Russell, 473 U.S. 134 (no individual right to damages under § 502(a)(2)); Amos v. Blue Cross-Blue Shield, 868 F.2d 430, 432 (11th Cir.), reh. denied (en banc), 875 F.2d
Recognizing that the fiduciary’s duty of loyalty is owed primarily to the plan activity, and that it does not run directly to the participants and beneficiaries, helps clear up some apparent perplexities in ERISA’s fiduciary rules. For example, the statutory provision which allows a plan sponsor to appoint an “officer, employee, agent, or other representative” as a fiduciary\(^{121}\) is sometimes thought to be an inexplicable departure from ERISA’s stringent duty of loyalty.\(^{122}\) The reason for such belief is that the employee-fiduciary is seen as necessarily having dual loyalties: to both the sponsor and the participants and beneficiaries. This is thought to create an otherwise impermissible conflict of interest. But there is no dual loyalty in the sense feared, and no necessary conflict of interest, for there is no duty of undivided loyalty to the participants and beneficiaries that would be undermined by the fiduciary’s obligations to the sponsor. The duty of loyalty to the program of providing benefits is consistent with a generalized loyalty of the fiduciary to the sponsor. The consistency of the two should be obvious from the fact that the sponsor established and maintains the program of paying benefits, and that the sponsor appointed the fiduciary to the position of responsibility for it, presumably with the hope and expectation that the fiduciary would carry out those responsibilities. Conflicts, of course, can arise in such a case, but conflicts of some kind can arise no matter who the fiduciary happens to be.\(^{123}\)

\section*{ii. The Duty to Follow Plan Documents}

Another fiduciary duty is the duty to act “in accordance with the documents and instruments governing the plan insofar as such docu-
ments and instruments are consistent” with ERISA. The duty promotes the policy behind the writing requirement (which itself is designed to help ensure proper fiduciary conduct), and is designed to prevent the kinds of deviations from written instruments that were permitted by the common law of trusts.

One consequence of the duty is to give an important role to attorneys in plan management and administration. The construction and interpretation of legal documents is an activity within the special expertise of attorneys. The peril to a fiduciary in failing to act in accordance with plan documents can be great; it may lead to a suit for breach of fiduciary duty and concomitant exposure to huge liability. Thus, fiduciaries have great incentive to rely on the opinion of legal counsel as to the propriety of actions that might be questioned. In very difficult cases, the fiduciary may even deem it prudent to petition a court for instructions as to how to proceed — a course of conduct that also calls for the involvement of an attorney.

b. Prohibited Transactions

ERISA recognizes that plans will engage in business and investment activities in order to increase the funds available to pay benefits and as part of the day-to-day management and administration of the plan. ERISA contains a set of rules to govern the plan’s business activities.

First, ERISA identifies a class of persons called “parties in interest.” A party in interest is a person who potentially has power, directly or indirectly, to influence the plan. Parties in interest include the employer of the participants, any union that represents them, and anyone who provides services to the plan. It also includes controlling persons, partners, related business entities, relatives, officers, directors and employees of any of the foregoing. The plan’s business dealings with these persons are subject to special rules.

The rules are called “prohibited transaction” rules. They pro-

125. See supra notes 59-68 and accompanying text.
127. ERISA § 3(14), 29 U.S.C. § 1002(14).
128. The definition of “party in interest” also includes fiduciaries, but it is confusing and unnecessary to treat a fiduciary also as a party in interest. In this article, the term “party in interest” will mean a party in interest who is not a fiduciary.
hibit sales, leases, loans, services, transfers of assets, and stock transactions between a plan and a party in interest, unless the transaction meets statutory or administrative criteria of propriety. These rules do not invalidate or otherwise prohibit the transactions, however. Instead, they merely prohibit fiduciaries from causing or permitting the plan to engage in the various prohibited transactions.

F. Enforcement

Pre-ERISA enforcement mechanisms were scattered, just as were pre-ERISA fiduciary standards. State law and the Labor Management Relations Act provided some remedies, but, for the reasons discussed above, did not do so comprehensively or effectively. Enforcement of the fiduciary standards contained in the tax code was inherently troublesome, because the only remedy for a violation was disqualification of the plan — a remedy that harmed participants and beneficiaries as much as it punished wrongdoing employers and fiduciaries.

To strengthen the enforcement scheme, ERISA made two substantial changes: it created an arsenal of remedies for participants, beneficiaries, and fiduciaries to use in redressing wrongs to the plan; and it gave a substantial enforcement role to the Department of Labor. As an early House report explained:

The enforcement provisions have been designed specifically to provide the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due participants.

133. See supra note 85 and accompanying text.
ERISA contains certain specialized enforcement mechanisms, including criminal penalties, civil penalties, special taxes, and arbitration provisions. The central enforcement provisions, though, are the civil liability provisions of section 502(a). Those provisions are as follows:

A civil action may be brought:
(1) by a participant or beneficiary — (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
(4) by the Secretary [of Labor] or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);
(5) except as otherwise provided in subsection (b), by the Secretary [of Labor] (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or
(6) by the Secretary [of Labor] to collect any civil penalty under subsection (i).

An extensive body of case law has developed that applies and gives meaning to these provisions. For purposes of this article, only a few points are important.

First, an action by a participant or beneficiary to recover benefits under ERISA section 502(a)(1)(B) differs in important ways from an action for breach of fiduciary duty under section 502(a)(2), (3) or (5). An action for benefits is brought to correct a supposed wrong by the plan to a participant or beneficiary. An action for breach of fiduciary duty is brought to remedy a supposed wrong to the plan by a fiduciary.

137. ERISA § 502(i) & (l), 29 U.S.C. § 1132(i) & (l).
140. ERISA § 502(a), 29 U.S.C. § 1132(a).
Thus, a benefit claim is brought on the participant's behalf and a fiduciary claim is brought on the plan's behalf. Individual benefits are sought in the former action, while damages or equitable relief on behalf of the plan are sought in the latter.

Second, Congress intended the enforcement mechanisms under ERISA to be interpreted and applied expansively, and one must guard against too cramped an interpretation of section 502(a). In Massachusetts Mutual Life Insurance Co. v. Russell, the Supreme Court stated that the six carefully integrated civil enforcement provisions found in 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly, and professed to be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." As a result of this emphasis on the comprehensiveness of ERISA's "enforcement scheme," some courts have read section 502(a) very narrowly to prohibit any remedy that Congress did not expressly provide.

One must be careful not to misapply the Supreme Court's point. It is true that the civil enforcement provisions of section 502(a) are, in some respects, "comprehensive." It is also true that to "tamper" with the enforcement scheme in section 502(a) is to risk contravening congressional intent. But unless providing a certain remedy can be deemed "tampering" with the "scheme" of section 502(a), it is not prohibited under Russell's reasoning. Thus, it is important to understand the sense in which section 502(a) may be said to be "comprehensive."

What is the enforcement scheme of section 502(a) that may not be tampered with? It surely is not a scheme for all remedies relating to benefit plans. ERISA itself contains others, as does the Labor Management Relations Act and (as we shall see below) federal common law. Thus, section 502(a) is not comprehensive in any absolute sense. It is substantially comprehensive only in the areas of benefit claims and private civil remedies against plan fiduciaries. The

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142. 473 U.S. 134.
143. Id. at 146 (emphasis in original).
144. Id. at 147.
146. See 29 U.S.C. § 186(c)(5).
scheme of remedies, so understood, should not be tampered with because it can sensibly be understood to strike a balance between two competing policies: facilitating redress of wrongs while limiting or controlling potential costs to plan sponsors. But it is obvious that permitting other kinds of claims will not necessarily upset the balance and the implicit scheme of section 502(a), and so may not be disallowed by Russell's logic.

II. THE SOURCES OF LAW FOR ERISA PLAN ATTORNEYS

Our concern in this article is the ERISA plan attorney. As we explained above, the reason for attending to the subject is that a plan attorney may be extremely influential in helping fiduciaries properly to conduct the affairs of the plan. His activities may involve — indeed, to the extent he gives legal advice, should involve — the exercise of discretion.\textsuperscript{147} As explained above, while the blanket exclusion of plan attorneys, acting as such, from the class of ERISA fiduciaries is certainly consistent with the language of ERISA, it is not compelled by it.\textsuperscript{148} But correct or incorrect, the immediate result is that ERISA's fiduciary rules do not apply to plan attorneys. What, then, are the legitimate sources of rules that might govern the conduct of these important plan actors?

A. ERISA Fiduciary Rules

Although a plan attorney, \textit{qua} plan attorney, is not an ERISA fiduciary,\textsuperscript{149} he is a party in interest.\textsuperscript{150} Accordingly, his dealings with


\textsuperscript{148} See supra notes 107-109 and accompanying text.

\textsuperscript{149} 29 C.F.R. § 2509.75-5, at D-1. See Yeseta v. Baima, 837 F.2d 380 (9th Cir. 1988) (attorney who reviewed plan and its compliance with ERISA was not fiduciary); Useden v. Acker, 721 F. Supp. 1233 (S.D. Fla. 1989) (law firm providing legal counsel to plan was not fiduciary); Anoka Orthopedic Assocs. v. Mutschler, 709 F. Supp. 1475 (D. Minn. 1989), aff'd, 910 F. 2d 514 (8th Cir. 1990).

Of course an attorney may be a fiduciary with respect to a plan by virtue of other non-legal responsibilities; for example, he may regularly provide investment advice for a fee. But that situation presents issues different from those of concern here. See generally Note, Attorney's Liabilities Under ERISA, 82 W. Va. L. Rev. 129 (1979).

\textsuperscript{150} ERISA § 3(14)(A) & (B), 29 U.S.C. § 1002(14)(A) & (B).
the plan do fall within the scope of the prohibited transaction rules. In particular, they fall within the scope of the prohibition concerning a party in interest’s providing legal services to a plan unless the services are “necessary for the establishment or operation of the plan” and the compensation paid for it is “reasonable.” This is the totality of ERISA’s regulation of plan attorneys.

B. State Law: Preemption

Since ERISA provides virtually no rules to govern plan attorney conduct, one normally would look to state law for guidance. Under state law, an attorney has well-delineated fiduciary, professional and other obligations to clients, benefit plans and plan fiduciaries would seem perfectly capable of being clients. A central feature of ERISA, however, makes problematic the applicability of state attorney-client law to the conduct of ERISA plan attorneys.

1. The Expansiveness of ERISA Preemption

The problem arises because ERISA undoubtedly contains the most expansive preemption clause found in any federal statute. Section 514(a) provides that, with exceptions not relevant here, ERISA “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” “State law” is defined to include “all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.”

Because ERISA preemption arises from an express statutory pro-

156. An express preemption provision, nearly as expansive as ERISA’s is contained in the Federal Aviation Act, as amended, which provides that:
[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation.
158. ERISA § 514(c)(1), 29 U.S.C. § 1144(c).
vision, rather than by implication, its scope is determined by the clear statutory language, rather than by the accommodation of state and federal concerns in individual cases.\textsuperscript{159} Congress has already balanced state and federal interests on a wholesale basis. Thus, Supreme Court decisions interpreting the preemption clause have made clear that this language must be applied literally, and that the key term, “relate to,” must be given its “broad common sense meaning”\textsuperscript{160} of having “a connection with or reference to” a plan.\textsuperscript{161} Applying this literal standard, courts have found a wide variety of state laws to be preempted — to the extent they relate to employee benefit plans — that on their face appear to have nothing to do with such plans. Among the subjects found to be preempted have been probate law,\textsuperscript{162} contract law,\textsuperscript{163} trust and fiduciary law,\textsuperscript{164} tort law,\textsuperscript{165} wrongful discharge law,\textsuperscript{166} escheat law,\textsuperscript{167} bankruptcy exemption law,\textsuperscript{168} and workers compensation law.\textsuperscript{169} The result in an individual case may be counterintuitive. For example, in \textit{Mackey v. Lanier Collections Agency,}\textsuperscript{170} the Supreme Court was called on to determine whether ERISA preempted a provision of a state garnishment law that expressly exempted employee


\textsuperscript{161} \textit{Shaw}, 463 U.S. at 96-97.

\textsuperscript{162} \textit{MacLean v. Ford Motor Co.}, 831 F.2d 723 (7th Cir. 1987); \textit{Board of Trustees of W. Conf. of Teamsters Pension Fund v. H.F. Johnson, Inc.}, 830 F.2d 1009 (9th Cir. 1987).


\textsuperscript{165} \textit{Taylor}, 481 U.S. 58; \textit{Straub v. Western Union. Tel. Co.}, 851 F.2d 1262 (10th Cir. 1988); \textit{Farlow v. Union. Cent. Life Ins. Co.}, 874 F.2d 791 (11th Cir. 1989).


\textsuperscript{170} 486 U.S. 825 (1988).
benefit plans from garnishment orders. Clearly, the state was trying to prevent its garnishment law from relating to employee benefit plans. The Supreme Court nevertheless held the exemption to be preempted because, on its face, it referred to employee benefit plans, and as such "relate[d] to" them. 171

Without doubt, such rampant preemption was a result intended by Congress: it does not stem from judicial activism 172 or judicial mistake. The early versions of the bills that became ERISA would have limited the statute’s preemption to state laws, only “insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans”; 173 or to state laws only “insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act . . . ”; 174 or with analogous subject mat-

171. The Court’s conclusion here nicely demonstrates the fallacy of mechanically reasoning about preemption. The state could just as well have indirectly exempted benefit plans from garnishment by listing the proper subjects of garnishment orders, and failing to include benefit plans. There would be no improper reference to employee benefit plans and thus, it would appear, no ground for preemption. Yet, if the state can exempt plans from garnishment orders by omission, it surely should be able to exempt them by express statement as well. It is the consequences of a law that should matter; not its syntax.

The Court also held in Mackey that the state’s general garnishment law was not preempted to the extent that it related to welfare benefit plans because of evidence in the text of ERISA that Congress intended to permit garnishment in such cases. Four Justices dissented from this holding. See id. at 841 (Kennedy, Blackmun, O’Connor, and Scalia, J.J., dissenting).

172. To the contrary, judicial activism in this area generally finds expression in artificial limits on preemption, devised in order to avoid an unsympathetic or undesirable result. See generally Hutchinson & Ifshin, Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974, 96 U. CHI. L. REV. 23 (1978); Kilberg & Inman, Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514, 62 TEX. L. REV. 1313 (1984). To take just one example, in Greenblatt v. Budd Co., 666 F. Supp. 735 (E.D. Pa. 1987), an employee whose company was acquired allegedly was told by the new employer that his pension benefits would be increased to the level of benefits provided to comparable employees of the acquiring company. The promise was not fulfilled, and the employee sued, inter alia, for state law misrepresentation. Ignoring a plethora of contrary precedent, the court held the misrepresentation claim not to be preempted, mainly because the employee otherwise would be left without a remedy. Id. at 742. But absence of remedy is not a legitimate factor in the analysis, since it is clear, from other provisions of ERISA, that Congress intended there to be no monetary remedy in such cases. See, e.g., Cefalu, 871 F.2d at 1296.


174. S. 4, 93d Cong., 1st Sess. 602(a) (1973), reprinted in I LEGISLATIVE HISTORY, supra note 22, at 186. In addition to S. 4, the Senate also considered S. 1557, which
ter limitations. \textsuperscript{175} It was not until the Senate and House bills emerged from the Conference Committee that the section on preemption was amended to its current sweeping form. \textsuperscript{176} The purpose of the amendment was explained as follows by one of ERISA's sponsors:

Both House and Senate bills provided for preemption of State law, but — with one major exception appearing in the House bill — defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation — at either the State or Federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of State action in the field of private employee benefit programs. \textsuperscript{177}

Congress recognized that such a novel, sweeping provision could generate unexpected results, and that those results would have to be evaluated subsequently. Thus, the amended bill also provided for the establishment of a Joint Pension Task Force to study the consequences of the preemption provision, as well as other provisions which were also deemed to warrant further consideration. \textsuperscript{178} As was

\textsuperscript{175} E.g., H.R. 12906, 93d Cong., 2d Sess. 514, reprinted in II LEGISLATIVE HISTORY, supra note 22, at 2920-21.


\textsuperscript{178} H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., at 205-06, 360-61, 383 (1974) reprinted in III LEGISLATIVE HISTORY, supra note 22, at 4476-77, 4627-28, 4650. ERISA § 3022 provides that, within 24 months of the enactment of ERISA, the Task Force shall "make a full study and review of . . . the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar
explained to the Senate:

The conferees — recognizing the dimensions of such a policy — also agreed to assign the congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it determines that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, then appropriate modifications can be made.179

2. Limits to ERISA Preemption

But, even if the language and legislative history of ERISA require extremely broad preemption, beyond the statute’s express subjects,180 preemption still cannot be limitless. It would be impractical, if not absurd, to apply the “relate to” language as far as semantic considerations alone might allow. To do so would place all persons connected with a plan, merely because they are connected with the plan, in “a fully insulated legal world”181 where ERISA alone is the law and where all state regulation of them is ousted. This surely is not a result that a rational Congress would have intended.182 But plans,” and report the results to the committees. No report of the Task Force was ever submitted. For a review of Congressional consideration of the preemption provision after the enactment of ERISA, see Irish & Cohen, ERISA Preemption: Judicial Flexibility and Statutory Rigidity, 19 MICH. J. OF L. & REFORM 109, 114-16, 148-56 (1985).


180. Some courts — particularly state courts — still fail to understand or to accept the fact that preemption extends beyond the subjects explicitly addressed by ERISA. See, e.g., Martori Bros. Distrbs. v. James-Massengale, 781 F.2d 1349, 1359 (9th Cir.), cert. denied, 479 U.S. 949 (1986); Smith v. Crowder Jr., 280 Pa. Super. 626, 421 A.2d 1107, 1113 (1980).


182. Actually, there is an approach to preemption analysis, on the basis of which such limitless preemption would make sense. As we shall see below, because in much of the area where ERISA preempts state law — whatever that area might be — ERISA provides no rule of conduct, courts must supply rules through the common law process. In framing a federal common law rule, a court always has the option of incorporating the ousted state law rule, and making it the federal standard. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Mishkin, The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797 (1957). Thus, the “relate to” language can be construed literally, provided that the question of where preemption reasonably should end is replaced by the question of where federal courts should begin to incorporate state law wholesale as rules of decision. The difference between the two approaches is that, under the current one, the applicable
where does one draw the line?

In drawing the line, one must be careful not overly to limit the scope of preemption. For although Congress did not intend to create a fully insulated legal world around a benefit plan, it surely did intend to insulate plans from state law within a very substantial domain, one broader than the subjects of ERISA alone. The task, then, is to define a boundary for the exclusion of state regulation, which lies beyond the express scope of ERISA, but only at a reasonable distance beyond it.\(^{183}\)

\(\text{a. The Unavailability of a State-Interest Test}\)

The difficulty is that the boundary cannot be fixed — as it is tempting to do — at a supposed line where state interests become so compelling that federal regulation should not intrude. The language and legislative history of the statute simply will not permit the courts to balance state and federal interests in individual cases, because Congress has already done the balancing for them. Most courts have resisted the temptation to set the bounds of preemption this way.

Some courts, though, have unwittingly used a disguised state interest test, and have upheld state laws relating to plans that should have been found preempted. The disguised state-interest approach has been used mainly in cases in which the person whose conduct is of concern simultaneously has both a substantial role in a benefit plan and a significant role outside it. The approach purports to examine the "capacity" in which that person acts, or else his "relationship" to other parties in a given case. The purpose of the examination is to determine whether the capacity or relationship, in that case, is, in its essential respects, a state or an ERISA one.

A leading example of this approach is *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*\(^{184}\) In Corrigan, a plan was a minority stockholder of the employer. The plan alleged that the employer and one of its directors had violated ERISA and had breached state corporate law fiduciary duties by inducing the plan to sell its stock back to the employer at an unfair price. The

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183. For an effort to define the boundary systematically, see Kilberg & Inman, supra note 172.
employer and director were ERISA fiduciaries. The trial court had ruled that the state law fiduciary claims were preempted by ERISA.

The Court of Appeals reversed, reasoning that the state corporate fiduciary law in question "centers on the relation between corporate director and shareholder" and that "the law imposes the duty upon [the director] in that capacity only." Since the state law duty was not imposed on the defendants in their capacities as ERISA fiduciaries, the court reasoned that the law did not relate to the plan so as to be preempted. Similar reasoning can be found in other cases.

The analysis has a superficial plausibility, but it plainly begs the question. The Court of Appeals was correct in noting that state corporation law imposed obligations on the defendants only by virtue of their corporate status. But making the point adds nothing to the analysis, for ERISA preemption extends to many state laws that impose duties on a person in some state law capacity. An easy example is state negligence law. It imposes liability on a person solely in his capacity as a person under a state law duty of care. But the mere fact that the duty of care "centers" on a purely state relationship does not save from preemption a state law negligence suit against a plan administrator for malfeasance in processing a benefit claim. Indeed, because the negligence suit does relate to a plan, ERISA not only preempts the suit, it preempts the state-created status (person with duty of care) to the same extent as well. Thus, the Corrigan court begged the question — indeed erred — by failing to realize that ERISA might preempt the state corporate fiduciary status on which the state fiduciary duty "centered."

b. The Remoteness Test and Practical Rules

The Supreme Court has suggested an approach to defining the

185. However, it was unclear whether they were fiduciaries with respect to the sale of the stock. The case was remanded for a determination of that issue, because of improper jury instructions on the functional limitations of ERISA fiduciary responsibility. Corrigan, 793 F.2d at 1470.
186. 793 F.2d at 1468.
188. If a state imposed duties on a person or plan because of his or its ERISA status, the law would, of course, be preempted; indeed, that would be an easy case. But ERISA preemption is not limited to state laws that so explicitly affect ERISA plans.
189. Taylor, 481 U.S. 58. See also Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1095 (9th Cir. 1985) (since state suit "originates from the handling and disposition" of a claim for benefits, it is preempted, even though it is brought against defendants "in their capacity as employer . . . and seemingly concerns the employment relationship").
limits of preemption. It has stated, albeit in dictum, that some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a fashion to warrant a finding that the law 'relates to' the plan."\(^{190}\) Unfortunately, the Court has not had occasion to apply those concepts to save a state law from preemption on grounds that, even though it related to an employee benefit plan, it did so too remotely. Few lower courts have had the opportunity to apply the "remoteness test" either.\(^{191}\) Necessarily, the test must be construed as one that seeks to interpret congressional intent;\(^{192}\) in difficult cases, the focus must be on whether Congress would reasonably have intended preemption to extend so far.\(^{193}\)

Most cases, though, do not require application of a remoteness standard. Whether a state law is preempted usually can be easily determined, by reference to the articulated concerns of Congress or by application of one of the narrower tests used in cases of implied preemption. It is obvious, for example, that any state law which imposes standards or requirements inconsistent with ERISA is preempted. For instance, in Alessi v. Raybestos Manhattan, Inc.,\(^{194}\) the Supreme Court held that an ERISA method of calculating pension benefits preempted a New Jersey law that proscribed the same manner of calculation.

Inconsistency with ERISA, of course, is not the touchstone for preemption. A broader rule used by courts, but one which still does not exhaust the scope of preemption, is that ERISA preempts any state law which purports to regulate the subjects of ERISA,\(^{195}\) such as

\(^{190}\) Shaw, 463 U.S. at 100 n.21.
\(^{191}\) See, e.g., Aetna Life Ins. Co., 869 F.2d 142 (state escheat statute); Quigley v. Unum Life Ins. Co., 688 F. Supp. 80 (D. Mass. 1988), aff'd mem., 887 F.2d 258 (1st Cir. 1989); Cornell Mfg. Co. v. Mushlin, 70 A.D.2d 123, 420 N.Y.S.2d 231 (1979) (claim against corporate officers for waste of assets by making improper contributions to pension plan; "the involvement of the pension plan . . . was at most incidental"); Lynn v. Allied Corp., 41 Ohio App. 3d 392, 395, 536 N.E.2d 25, 30 (1987) (state law claims for emotional distress resulting from telephone call to hospitalized plan participant about early retirement benefit: "[t]his incident . . . affects ERISA too remotely or tenuously to be considered related to ERISA").
\(^{192}\) "[T]he question whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" Dedeaux, 481 U.S. at 45. See also FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990).
\(^{193}\) Cefalu, 371 F.2d at 1294.
funding,\textsuperscript{196} administration,\textsuperscript{197} vesting,\textsuperscript{198} reporting, or fiduciary duties.\textsuperscript{199} Laws of this character are preempted, even if application of them would effectuate ERISA’s policies in the subject area.\textsuperscript{200}

Another rule of preemption often used by courts is that any claim over which there is subject matter jurisdiction under ERISA section 502(a) is \textit{ipso facto} an ERISA claim, and purported state law causes of action for that claim are preempted.\textsuperscript{201} As the Supreme Court emphasized in \textit{Pilot Life Insurance Co. v. Dedeaux}:\textsuperscript{202}

\begin{quote}
[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. “The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”\textsuperscript{203}
\end{quote}

As a result, any state law claim alleging a wrong in the payment or nonpayment of benefits by a plan, or wrongful conduct by a fiduciary in the course of administration of the plan, is preempted.\textsuperscript{204} This is so even if ERISA provides no remedy for the alleged wrong.\textsuperscript{205} For example, state law tort or contract actions by beneficiaries, which seek

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\textsuperscript{197} Gibson v. Prudential Ins. Co., 915 F.2d 414 (9th Cir. 1990); Powell v. Chesapeake & Potomac Tel. Co. Va., 780 F.2d 419, 421 (4th Cir. 1985).


\textsuperscript{200} Hotel & Restaurant Employees Int’l Union Local 54 v. Danziger, 709 F.2d 815 (3d Cir. 1983), \textit{vacated on other grounds}, 468 U.S. 491 (1984).

\textsuperscript{201} Thus, a putative state law claim seeking benefits from a plan is an ERISA claim, and may be removed from state to federal court. \textit{See}, e.g., \textit{Taylor}, 481 U.S. 58; \textit{Lister}, 890 F.2d 941; \textit{Amos}, 868 F.2d 430.

However, ERISA does not preempt a state law claim merely because it is pendent to an ERISA claim. \textit{See} Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1243 (11th Cir. 1989).

\textsuperscript{202} 481 U.S. 41 (1987).

\textsuperscript{203} \textit{Dedeaux}, 481 U.S. at 54 (citation omitted).

\textsuperscript{204} \textit{See id.} at 56; \textit{Taylor}, 481 U.S. at 62-63.

\textsuperscript{205} \textit{See Phillips}, 799 F.2d at 1470.
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benefits based on an oral promise or representation, are preempted, even though ERISA has generally been held to bar any action to enforce a purported oral term or oral modification of a plan.\textsuperscript{206}

Together, these rules just described cover most cases, but not all. It is only in cases where a state law arguably relates to a plan, where there is no corresponding regulation under ERISA, where there is no obvious conflict with any ERISA policy, and where there is a strong state interest in the subject, that preemption questions become difficult and a standard of remoteness will come into play.\textsuperscript{207}

3. \textit{Preemption of State Laws Governing ERISA Plan Attorneys}

No reported federal court decision has yet addressed the issue of whether ERISA preempts any state laws governing plan attorneys.\textsuperscript{208} The case for sweeping preemption, though, is sufficiently clear that the remoteness test is not even required to evaluate the result.

\textsuperscript{206} E.g., \textit{Lister}, 890 F.2d 941; \textit{Cefalu}, 871 F.2d 1290; \textit{Straub}, 851 F.2d 1262; Nachwalter \textit{v. Christie}, 805 F.2d 956 (11th Cir. 1986). \textit{But see Black \textit{v. TIC Inv. Corp.}, 900 F.2d 112 (7th Cir. 1990)} (estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans).

\textsuperscript{207} It is in these difficult cases, which the rules of analysis just discussed do not reach, that it may be proper to consider the intensity of the state interest in regulating the subject matter, as a factor bearing on "remoteness." \textit{See Aetna Life Ins. Co.}, 869 F.2d 142; \textit{J.A. Jones Constr. Co.}, 846 F.2d 1213.

\textsuperscript{208} The Florida Supreme Court was recently presented with an argument that ERISA would preempt a suggested bar regulation governing the unauthorized practice of pension plan law. While the court was receptive to the preemption argument, it chose to reject the proposed regulation on other grounds. In \textit{Florida State Bar \textit{re Advisory Opinion Nonlawyer Preparation of Pension Plans}, 571 So. 2d 430 (1990)}, a committee of the Florida State Bar had presented an advisory opinion to the Court for approval. The opinion sought to define the unauthorized practice of law with respect to pension plans, and would have prohibited non-lawyer professionals (such as certified public accountants, actuaries, pension consultants, and insurance underwriters) from selecting and drafting plans for clients, qualifying the plan before the Internal Revenue Service, and terminating a plan. Non-lawyer professional organizations argued that, because ERISA itself regulated some aspects of non-lawyer practice, the proposed regulation was preempted. The court reviewed the extensive federal regulation of pension plan practice by accountants and actuaries, but declined to rest its determination on preemption grounds. Instead, it concluded that:

\textit{[W]e find that our authority is restricted because much of the practice in this field of law is before administrative agencies, and we are not convinced by this record that there exists a public need for the protection sought in this proposed opinion. Consequently, at this time, we find that we should disapprove the proposed opinion.} 571 So. 2d at 433. On the other hand, courts in New Jersey and New York have simply brushed aside the possibility of ERISA preemption of state regulations of attorneys, after superficial consideration of the issue. \textit{See In re 1115 Legal Serv. Care}, 110 N.J. 344, 349
**a. The Reasons for Preemption**

State laws that govern attorneys, in their representation of plans or plan fiduciaries, "relate to" employee benefit plans within the meaning of ERISA section 514(a). The relationship that is the focus of such laws has a plan or plan fiduciary as one of the two parties. The conduct sought to be regulated is conduct by the attorney that directly or indirectly affects the plan, its fiduciaries, its participants and others closely connected with the plan. Four major bodies of state law purport to regulate that plan-related conduct: fiduciary law, tort law, agency law, and professional responsibility law. The first three are well-established and uncontroversial areas for expansive ERISA preemption; the fourth area contains rules that are largely derived from the first three. Application of the preemption provision to plan attorneys thus appears to present a straightforward case.

Yet the case for preemption is made stronger still by several additional considerations. One is that a plan attorney is a party in interest and so his conduct is already expressly governed by ERISA under the prohibited transaction rules. One prohibited transaction rule that applies to every plan attorney is the prohibition of the "furnishing of [legal] services"209 unless the services are "necessary for the establishment or operation of the plan"210 and unless "no more than reasonable compensation is paid therefor."211 Since ERISA does regulate the furnishing of legal services to a plan, it follows from a basic rule of preemption that any state law which purports to regulate that same subject must be held to be preempted.212 It makes no difference that ERISA’s regulation of attorney services is more limited than the body of state law it preempts. That is a common occurrence, since ERISA preemption in general is far broader than the statute’s regulatory scope.

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The only article to date that has been concerned with the law governing plan attorneys largely ignores the issue of preemption. See Note, Attorney’s Liabilities Under ERISA, 82 W. VA. L. REV. 129 (1979).

211. Id.
A second consideration is that state rules and requirements for attorneys, so far as they apply to plan attorneys, frequently conflict with ERISA’s policies. For example, as we shall see below, ERISA’s policies require that plan attorneys take affirmative steps to help rectify fiduciary breaches which they learn about, and that such steps may include, if necessary, disclosure of the wrong. This requirement is flatly inconsistent with standards of professional responsibility imposed by many states. To permit those state rules to set standards for plan attorneys would undermine ERISA’s substantive policies. It would also subject attorneys for interstate plans to varying, and possibly conflicting, requirements. These are precisely the results that ERISA’s sweeping preemption rule was adopted to prevent.

A third, and related, consideration is that the relationship between an attorney and his client is traditionally considered to be a fiduciary relationship. But a central purpose of ERISA was to federalize the law of fiduciary relationships with respect to a plan. In particular, ERISA’s fiduciary policies, although derived from state trust law, are to be developed and applied by federal courts with sensitivity to the character of employee benefit plans. We have seen that plan attorneys, as persons who might well have been deemed ERISA fiduciaries, may be within the ambit of ERISA’s fiduciary policies. For the states to try to regulate the fiduciary relationship between plan attorneys and plans clearly threaten the full implementation of ERISA’s fiduciary policies and purposes.

Finally, the legislative history of ERISA makes it clear that Congress did intend to preempt some state regulation of plans in the form of state-enforced rules of professional responsibility. ERISA expressly includes prepaid legal services plans within the scope of its coverage, and Congress was concerned that state bar associations

213. Section V(A), infra notes 404-441 and accompanying text.
215. Consistent with this result, suits alleging breach of state law fiduciary duty by persons connected with ERISA plans have generally been held to be preempted. E.g., Light v. Blue Cross & Blue Shield of Ala., 790 F.2d 1247 (5th Cir. 1986) (claim against plan administrator); Powell, 780 F.2d 419; Authier, 757 F.2d 796; Metzner, 663 F. Supp. 716. Some courts have held such suits to be preempted even when brought against persons who are not ERISA fiduciaries. See Potomac Nationwide Inc., 872 F.2d 157; Muscar, 647 F. Supp. 1164 (suit against employer). See also Gibson v. Prudential Ins. Co. of Am., 915 F. 2d 414 (9th Cir. 1990)(suit against non-fiduciary claims handler for breach of duty of good faith).
216. See Part IV, infra notes 357-403 and accompanying text.
would try (as they had been doing) to hinder the development of such plans through state-enforced disciplinary rules.\footnote{218} Indeed, the perceived need to preempt state professional rules that threatened to interfere with the development of prepaid legal services plans appears to have been one of the main reasons that the Conference Committee expanded the scope of the preemption clause from the subjects of \textit{ERISA} alone, to all state laws which relate to plans.\footnote{219} This aspect of \textit{ERISA} preemption emerges clearly from an explanation of the new, broadened preemption provision, on the Senate floor:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. Consistent with this principle, State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized — for example, prepaid legal services programs — whether closed or open panel — authorized by [\textit{ERISA}].\footnote{220}

Thus, state regulation of the practice of law was intended to be within the scope of \textit{ERISA}'s preemption provision.

\footnote{218. For a review of this legislative history, see Pfennigstorf & Kimball, \textit{Employee Legal Service Plans: Conflicts Between Federal and State Regulation}, 1976 \textit{Am. B. Found. Res. J.} 787, 801-03, 828-30.}

\footnote{219. As Pfennigstorf & Kimball, \textit{supra} note 218, explain: [W]hen in the course of the negotiations of the conference committee some participants wanted to be sure the preemption would override the restrictive rules in state codes of professional responsibility that might prevent the establishment of closed panel legal service plans and doubts were expressed whether the phrase “relate to any employee benefit plan” in the preemption clause would cover ethical rules that were directed at lawyers and only indirectly affected employee benefit plans, the definitions of “state law” and “state” were added to the preemption section to eliminate doubt. \textit{Id.} at 829.}

\footnote{220. 120 \textit{Cong. Rec.} 29,933 (Aug. 22, 1974), \textit{reprinted in III Legislative History, supra} note 22, at 4745-46 (remarks of Sen. Williams).}
b. Arguments Against Preemption

Several reasons might be urged against preemption. None, though, is persuasive.

First, it might be urged that state interest in attorney regulation is so intense as to preclude federal regulation. But as we have seen, this very form of argument is unavailable, since Congress has already made the policy choice to oust state laws that relate to benefit plans, irrespective of the intensity of state interest in the area. In any event, an unstated premise of the argument is false, since state interest in regulating attorneys is not obviously more intense than the federal interest in doing so. Federal courts, no less than state courts, have the power to regulate the conduct of attorneys admitted to practice before them.\(^\text{221}\) "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of ... lawyers."\(^\text{222}\) Congress itself has evinced substantial interest in regulating the practice of law in matters such as fees, provision of legal services to the poor, and other areas.\(^\text{223}\) So, too, has the executive branch, for example, through enforcement of the Sherman Act by the Justice Department,\(^\text{224}\) and through Federal Trade Commission enforcement activities.\(^\text{225}\) Attorney regulation is very far from being the exclusive province of the states.

Another argument that might be urged is that state laws govern attorneys only in their state-created status, as attorneys licensed to practice in the forum.\(^\text{226}\) This argument, too, is unavailing. As we


\(^\text{222}\) Theard v. United States, 354 U.S. 278, 281 (1957) (state disbarment does not require federal disbarment).


\(^\text{225}\) E.g., FTC v. Superior Court Trial Lawyers' Ass'n, 110 S. Ct. 768 (1990) (concerted refusal to deal in order to raise hourly rates for services); FTC v. American Legal Distribrs., Inc., 890 F.2d 363 (11th Cir. 1989) (fraudulent legal services program); FTC v. Shaffner, 626 F.2d 32 (7th Cir. 1980) (violation of Fair Debt Collection Practices Act).

saw when analyzing the analogous reasoning of the *Corrigan* case, the argument shows only that if the state laws regulating attorneys do relate to the plan under the language of the preemption provision, the state laws creating the status may *pro tanto* be ousted as well. And as we shall see from the later discussion, ERISA may indeed be construed to oust the state-law status of attorney (so far as the attorney represents the plan) and create a new status of plan attorney that is wholly federal in character.

Another argument that might be raised is based on legislative history. When the final preemption provision emerged from the Conference Committee, and it was made clear that the changes were adopted, in part, to prevent state interference with prepaid legal plans through standards of professional conduct, some concern was expressed on the Senate floor that ERISA might preempt general state rules of professional conduct for those attorneys who provide legal services through the prepaid plan.227 The Senate sponsors made it clear that there would not be preemption in such cases. That conclu-

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227. The colloquy on the senate floor was as follows:

**MR. TAFT. . . .**

While there is preemption under section 514 of the substance of the pension legislation including the matter of provisions relating to attorneys services under employee benefit plans does this section 514 of the act seek to preempt State bar associations from adopting ethical rules or guidelines generally and/or from disciplining its members?

Some question arises in regard to that because of the remarks made indicating that the preemption doctrine extended to rules of professional organizations.

**MR. JAVITS. . . .**

My answer to that is no. Section 514 of the act does not preempt State bar associations from adopting and enforcing ethical rules or guidelines generally and/or from disciplining its members or acting to discipline members of the bar, which bar associations often do.

Section 514 does preempt State law with respect to any employee benefit plan described in section 4(a) and not exempted in section 4(b).

Since the plans subject to Federal supervision would include plans providing prepaid legal services, it is intended that State regulation — but not bar association ethical rules, guidelines or disciplinary actions — in regard to such plans be preempted. But the State, directly or indirectly through the bar, is preempted from regulating the form and content of a legal service plan, for example, open versus closed panels, in the guise of disciplinary or ethical rules or proceedings.

sion seems right, and from it, one might argue that state regulation of plan attorneys should also be saved from preemption.

Such an argument would be incorrect. Merely because state rules governing attorneys are not generally preempted insofar as they govern attorneys who provide their services through a plan, it does not follow that those rules are not preempted insofar as they purport to regulate attorneys who provide services to ERISA plans. Plan attorneys have a very different relationship to a plan than do attorneys who perform ordinary legal services to ordinary clients, but through a prepaid legal services plan. The latter are either employees of a plan or persons with a contractual relationship to it. Rules of professional responsibility, as well as other state laws governing attorneys, are mainly concerned with attorneys’ dealings with their clients, not with the attorneys’ dealings with their employers. Accordingly, in the case of an attorney associated with a prepaid legal plan, the state rules may fairly be said to relate to the plan only tenuously. By contrast, the plan attorney is intimately involved in the plan; indeed, he treats the plan or a plan fiduciary as his client. Thus, state rules and regulations which govern his conduct as an attorney do govern his relationship with the plan in a very direct way and, as we have seen, present a strong case for preemption.

A final argument against preemption points to its consequences. An argument sometimes advanced against ERISA preemption is that it would leave a gap in the law: an unregulated area or a wrong without a remedy. That argument might be thought to apply here, for if ERISA preempts all state laws governing benefit plan attorneys, there would appear to remain a regulatory gap, ERISA itself establishing few relevant rules. The argument, however, ignores the proper role of federal common law.

C. Federal Common Law as a Source of Law for ERISA Plan Attorneys

Federal common law is law of the United States to the same ex-

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229. Of course, as the legislative history shows, where the state regulation does not relate to the plan only tenuously — for example, where it would have the effect of preventing an attorney from providing services through a closed panel plan — it is preempted.

230. See, e.g., Lister, 890 F.2d 941; Phillips, 799 F.2d at 1470.
tent as is statutory law. By virtue of the supremacy clause of the Constitution, it is the "supreme law of the Land," applicable in all courts and governing all persons to the same extent as federal statutory law. It preempts all inconsistent state laws, just as does federal statutory law. So much is uncontroversial. Yet federal common law is misleadingly named and difficult to define. It is also an object of suspicion by some judges and academians.

To understand how federal common law may properly supply rules concerning plan attorneys, we must briefly examine what it is and what authority courts have to develop it.

1. Federal Common Law: An Overview

a. The Heterogeneity of Federal Common Law

Federal common law is not easy to describe or to explain, primarily because it forms such a motley assemblage. Some portions of federal common law closely resemble traditional common law, and warrant the "common law" appellation, for they constitute dynamic bodies of rules that emerge from judicial development of a few basic principles and policies. There are, for example, expansive, continually developing bodies of federal common law that deal respectively with admiralty, Indian affairs, and collectively bargained labor con-

231. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").


234. The Supreme Court once proposed that it might more accurately be called "law of independent federal judicial decision." United States v. Standard Oil Co., 332 U.S. 301, 308 (1947).


tracts;240 and each has been developed substantially through the traditional common law process.241 But there are limits to this genre of federal common law. Courts have not developed bodies of federal common law whose rules systematically deal with fundamental and widely applicable topics such as contracts, torts, or agency.242 Although there is federal common law covering, for example, certain collective bargaining agreements, government contracts, and oral settlement agreements, there is no general federal common law of contracts as exists in the states. The result, as the Supreme Court stated in Erie Railroad v. Tompkins, is that “[t]here is no federal general common law.”243 There are only areas where discrete topics of federal interest have been more or less broadly developed.

Although these bodies of law governing specific topics of federal interest are the parts of federal common law best known and most discussed in the academic literature,244 the great bulk of federal common law actually consists of isolated rules, or groups of rules, devel-

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240. See Lincoln Mills, 353 U.S. 448.
244. Even more specifically, the bulk of academic discussion of federal common law centers on the few areas where the topic of broad lawmaking is not clearly suggested by a statute or constitutional provision. See, e.g., M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 79-107 (2d ed. 1989).

It is true that the existence of these few areas raises interesting questions about the power and competence of federal courts to make “common law.” But it is also true that these areas of common lawmaking are only a very small part of the assemblage of federal common law. To let the analysis of them drive the analysis of the general authority and competence of courts to make federal common law is to invite distortion into the analysis.

Even if it were agreed that federal common lawmaking in the areas as to which there is controversy were improper, there would be little, if any, impact on the issue of the propriety of courts to develop federal common law of the far more common type discussed in this article.
oped by courts to supplement or clarify a statute or statutory scheme. No statute can comprehend all the rules needed to regulate a given subject area. Gaps, oversights, and ambiguities are inevitable. Indeed, there are certain questions — usually of a procedural character — that Congress persistently neglects to attend to. Courts must deal with these statutorily neglected questions. This “interstitial” common lawmaking is extremely common and is essential to the successful implementation of many statutory programs. Yet the fact that courts engage in this form of common lawmaking is so uncontroversial that little attention is ever paid to it.

For present purposes, it is sufficient to be aware that federal common law is a collection of rules, groups of rules, and bodies of rules, each part of which deals with a discrete area of federal interest. Although denominated “common law,” it substantially lacks the collections of rules of universal applicability that are the core concerns of traditional common law. It also differs from traditional common law by so largely consisting of fragmentary sets of rules. It is heterogeneous in the subjects addressed and is heterogeneous in the degrees to which its parts resemble traditional common law.

b. The Written Bases for Federal Common Law

The practical reason that federal common law has this heterogeneous character, and substantially omits systematic treatment of basic legal topics, is quite easy to diagnose. It lies in the jurisdictional dependence of federal common law on federal written law. In principle, federal common law may be created by either a federal or state court. In practice, though, the overwhelming portion of it is developed by the federal courts. Even more specifically, the

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246. Thus, for example, federal courts are often called on to determine the legal effect of a statutory prohibition, e.g., Deitrick v. Greaney, 309 U.S. 190 (1940); In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22 (D. Mass. 1987), to supply limitations periods for a statutory cause of action, or even to supply claims, defenses, and procedural rules that are missing from a statutory framework, e.g., Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).


248. This is not a necessary state of affairs. If state court lawyers and judges had
overwhelming portion of federal common law is developed on occasions where a federal court decides a case or controversy under its federal question jurisdiction. Most cases “arising under the Constitution, laws, or treaties of the United States,” and thus falling within the courts’ federal question jurisdiction, arise under written federal law. As a result, federal common lawmaking is usually contingent on there being a statute or other written provision that opens the door to federal court jurisdiction and federal court decision-making. Thus, the subjects federal common law may address are largely confined to the subjects Congress chooses to enact legislation on. If not for ERISA, for example, a federal common law of benefit plans probably would be impossible.

The upshot of the present state of affairs is that written federal law is antecedent to federal common law: it is the precondition to most of federal common law and is the preexisting background against which it is developed. By contrast, in state legal systems, it is

been trained to be more sensitive to the federal concerns involved in cases brought in state courts, they might by now have produced an expansive, state-court created, federal common law. For example, they might have created a federal common law of interstate transactions, of the kind the Supreme Court once hoped would be developed in diversity actions. See Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). But matters are otherwise. In the absence of a controlling federal statute, state courts invariably apply state law without giving much thought to the potential federal interest in the subject or the possibility of developing and applying federal common law.

And if it is at least possible that state courts could have taken the initiative in creating federal common law, it is also possible that federal courts could have done so, as state court surrogates, in the course of deciding controversies under the grant of diversity jurisdiction. But again, matters are otherwise. Federal common law is rarely created in diversity cases. For cases where it has been, see, e.g., Boyle, 487 U.S. 500; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

249. The federal common law of interstate relations is developed in cases as to which there is jurisdiction under the Constitution’s grant of power to federal courts to hear “Controversies between two or more States,” U.S. Const. art. III, § 2; and in these cases the Supreme Court has original jurisdiction. Federal admiralty law — which is almost exclusively common law — is created in cases brought pursuant to the Constitution’s grant of power to federal courts to hear “all Cases of admiralty and maritime Jurisdiction.” U.S. Const. art. III, § 2. And the common law of the rights and obligations of the United States is developed in cases brought pursuant to the Constitution’s grant of power to federal courts to hear “Controversies to which the United States shall be a Party.” U.S. Const. art. III, § 2.


251. It is because of this critical dependence on codified law that there is no clear demarcation between federal common law and statutory construction. HART & WECHSLER, supra note 235, at 771; Field, supra note 235, at 893-94; Merrill, supra note 245, at 3-7.
state common law that is the preexisting background against which the state legislature legislates.\textsuperscript{252} Thus, state and federal common law differ in this basic respect, that state and federal legal systems have foreground and background reversed.

2. Preconditions to Development of Bodies of Federal Common Law

This jurisdictional explanation of federal common law ultimately serves only to point to a deeper question: Why does federal common lawmaking in an area usually depend on prior congressional lawmaking in the area? Why shouldn't federal common lawmaking more often proceed independently, or even in advance, of legislation, as is the case with state common lawmaking? After all, the Constitution does not expressly limit federal court common lawmaking, and it is doubtful that the Rules of Decision Act\textsuperscript{253} can be read as posing a significant limitation, either.\textsuperscript{254}

The answer is far from clear. The most plausible explanation, though, is that the effective limitation of federal common lawmaking to areas of congressional lawmaking is an institutional, rather than a Constitutional limitation. That is to say, while federal courts, in principle, have extensive common lawmaking power — arguably as extensive as Congress’s legislative power — they have nonetheless evolved a pragmatic reluctance to develop federal common law, which has become an integral aspect of the federal judicial approach to deciding cases and controversies. This reluctance, in its application, yields the prevailing limitation.

There are two aspects to this institutional reluctance. One involves considerations of federalism. Federal courts conduct their Article III activities within the constraints of a political model in which state law (both statutory and common law)\textsuperscript{255} is taken as the preexisting background against which all federal law — both statutory and judicial — is made.\textsuperscript{256} Federal lawmaking, whether legislative or judi-

\textsuperscript{252} See Field, \textit{supra} note 235, at 885 n.11.

\textsuperscript{253} 28 U.S.C. § 1652 (1988). The Act states, in pertinent part: "[T]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." \textit{Id.}


\textsuperscript{255} See \textit{Erie R.R.}, 304 U.S. 64.

\textsuperscript{256} See, \textit{e.g.}, Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).
cial, often constitutes an invasion of this background legal corpus. Because of the supremacy clause, any such invasion necessarily ousts portions of state law. Now, it is taken as a principle of federalism that state interests, as reflected in state law, are not lightly to be invaded and ousted by federal lawmaking. In the case of legislation, there are safeguards to protect against ill-considered invasions. In particular, the representation of state interests in Congress serves as an internal restraint on excessive or objectionable federalization of an area. But there are no such internal restraints that govern federal courts. How, then, can federal courts respect the principle of federalism? 257

They can do so through self-restraint. One aspect of such restraint is institutional reluctance to develop federal common law. Formally, the reluctance manifests itself as a presumption against developing common law rules, particularly where such rules would trench on the state law background. Sometimes, this presumption is said to be more than institutionally compelled, and to be a necessary result of the tenth amendment 258 or the Rules of Decision Act. 259 But it is more accurate to say that those constitutional and statutory provisions simply reflect the very same principle of federalism, in furtherance of which federal courts have devised their presumption. The provisions reflect the concerns underlying the presumption, but do not themselves demand it.

Yet as the pervasiveness of federal common law makes plain, the presumption is not absolute. To overcome it, so as to be able to deem itself authorized to announce a rule of federal common law, a federal court need only find a proper justification for exercising its already existing lawmaking power in that instance. A meta-common law of federal common lawmaking has developed to deal with the question of what constitutes an acceptable justification. The basic rule is no more than distilled common sense: to overcome the presumption against creating federal common law in an area, a necessary (but not sufficient) condition is a showing of preexisting federal interest in that area; 260 and proof of such preexisting interest may most straightfor-
wardly be found in Congress’s decision to legislate in the area. 261 This is very much a pragmatic rule. If Congress has already legislated with respect to a subject, the states have already had the opportunity to protect their interests against invasion and displacement, and have failed to do so. Thus, the effect of the rule is that the internal restraint on congressional lawmaking is borrowed as an external restraint on the courts. A corollary is that the stronger the federal interest expressed through the statute, the more thoroughly the presumption is overcome and the more extensive is the authority of the courts to develop federal common law in the statute’s wake. 262

Considerations of federalism are not the only ones underlying the federal courts’ self-imposed limitation on their common lawmaking activity. A second consideration derives from the notion of separation of federal powers. 263 The Constitution vests all legislative power in the Congress. 264 Now, it is true that common lawmaking is not the exercise of legislative power, and so the provision does not of its own force limit common lawmaking by federal courts. Nonetheless, the Constitution’s express allocation of legislative power to Congress is widely regarded as a reflection of the broader, unexpressed principle that Congress has the primary responsibility and authority to deter-


Preexisting federal interest may also be shown from non-statutory sources, but these cases are less unequivocal. Compare Boyle, 487 U.S. at 500 (majority opinion), with Boyle, 487 U.S. at 517-18 (Brennan, J., dissenting) (“federal common law cannot supersede state law in vacuo out of no more than an idiosyncratic determination by five Justices that a particular area is ‘uniquely federal.”’). The few areas in which there have been non-statutory federal common law are those where other considerations show federal interest to be so intense, and federal regulation so necessary that displacement of state law by federal common law is compelled. They are substantially limited to the areas of the rights and duties of the United States, West Virginia v. United States, 479 U.S. 305 (1987); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-93 (1973); Clearfield Trust Co., 318 U.S. 363; the rights and duties of government contractors, Boyle, 487 U.S. 500; interstate rights and obligations, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); foreign relations, Sabbatino, 376 U.S. 398; admiralty and maritime law, Moragne, 398 U.S. 375; and Indian affairs, Oneida Indian Nation, 470 U.S. 226.

262. See Lincoln Mills, 353 U.S. 448; City of Milwaukee, 451 U.S. at 336 (Blackmun, J., dissenting).

263. See, e.g., City of Milwaukee, 451 U.S. 304; Northwest Airlines, Inc., 451 U.S. at 95.

mine national policy.265

Common lawmaking is impossible without reference to selected policies. Indeed, common lawmaking, like legislative lawmaking, is simply a method of implementing preselected policies. Because of the institutional principle that Congress should be the primary source of national policy, courts deem themselves generally not free to make policy choices on their own and generally obligated to adhere to Congress’s policy choices instead. This reluctance of courts to choose important policy becomes most important when courts are presented with Congress’s failure to legislate as to an issue — i.e., precisely when the occasion arises to develop a rule of federal common law. For, in those cases, the court must determine whether congressional silence reflects a policy choice that there should be no federal regulation at all.266 Thus, while congressional silence is, on the one hand, a predicate for making federal common law, on closer examination it might actually demand abstinence from the court’s actually doing so.

These considerations of federalism and separation of power have led federal courts to the general principle that they ordinarily should not make common law in an area unless they have been “authorized” by Congress to do so.267 Courts, therefore, proceed cautiously in developing federal common law.

It should be obvious that the term “authorized” is misleading, because authorization to engage in common lawmaking has nothing to do with judicial competence or power. Nor does “authorized” necessarily mean expressly permitted, or even implicitly permitted. Permission is not the issue. “Authorized,” here, means only that the exercise of common lawmaking power would not trench upon the state or congressional prerogatives that are thought to be threatened by federal common lawmaking.268

Isolated rulemaking to supplement or clarify a statute is usually uncontroversial. The very process of legislating demands as a concomitant this so-called interstitial lawmaking, and it generally is easy

266. See, e.g., Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 531-33 (1959) (legislative silence too equivocal to be taken as bar to common law rule).
268. Cf. Friendly, supra note 232, at 407 (“state courts must conform to federal decisions in an area where Congress, acting within the powers granted to it, has manifested, be it ever so slightly, an intention to that end.”).
for the courts to recognize the difference between filling in an oversig"h and contravening congressional intent. Disagreements over "au-

thorization" in these cases are less common than in situations

involving the development of expansive bodies of federal common

law. It is in these latter cases that uncertainty about "authorization"
is likely to arise and it is here that common lawmaking usually de-
m"ands strong and articulate justification.

One accepted circumstance where courts may properly develop a

comprehensive body of federal common law is where Congress, in the

statute, expressly or impliedly delegates such common lawmaking

power to the courts.\textsuperscript{269} Common lawmaking in such circumstances

obviously creates no problem, either of federalism or separation of

powers, since Congress has already made the determination that com-

mon lawmaking is proper.

Probably the most straightforward example of such delegation is

Rule 501 of the Federal Rules of Evidence, which provides that:

\begin{quote}
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .\textsuperscript{270}
\end{quote}

This rule substantially provides that rules of privilege shall be

whatever the federal courts determine they should be. Rarely, though, is the delegation so express. More often it has to be inferred

from the language of the statute or its legislative history.

Use of open-ended language — language that must be invested

with clarity and meaning — in a standard or prohibition is good evi-
dence of congressional intent to delegate lawmaking power. It is par-
ticularly good evidence where the language repeats, or draws upon, a

common law standard that has already been developed by the courts.\textsuperscript{271} A well-known case of such implicit delegation is Section 1

\begin{footnotes}
269. Texas Indus., 451 U.S. at 642. Merrill, supra note 245, at 40, has called this form of common lawmaking "delegated lawmaking," and we use the term here.

270. FED. R. EVID. 501.

271. See, e.g., Texas Indus., 451 U.S. at 643-45. See generally Merrill, supra note 245, at 43-45.
\end{footnotes}
of the Sherman Act, 272 which specifies that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 273 The legislative history does support the conclusion that the courts should develop a common law of restraints of trade to implement the general prohibition expressed in the statute. 274 Yet one need not appeal to the legislative history for this conclusion, since the statute's use of a very general standard, derived from the common law, itself justifies the courts in developing this common law. 275

Another circumstance where broad common lawmaking may be justified by a statute is where the federal interests identified in the statute are so intense, and the need for displacing state law so great, that preemption of state law extends beyond the express provisions of the statute. 276 In cases of this kind, courts themselves may have to supply a panoply of federal rules of conduct and federal rules of decision. Otherwise, there would be a regulatory void. 277

Common lawmaking of this latter sort is eminently proper under the guidelines discussed above. Since state law has already been displaced by Congress, creation of federal common law in the area of displacement does not invade state interests, and so does not transgress principles of federalism. Nor does it infringe on congressional policy-making prerogative, at least to the extent courts fill in regulatory gaps in a manner consistent with the intent of the legislation. Rather, development of federal common law in those circumstances


274. E.g., 21 Cong. Rec. 4089 (May 1, 1890) ("Now, I take it, with all due deference to what the Supreme Court may ultimately decide, that that is a contract in restraint of trade within the meaning of the bill.") (remarks of Rep. Culberson).


276. Merrill, supra note 245, at 36, calls this form of lawmaking "preemptive lawmaking." We shall use that term here.

277. Or else there would be regulation by default, where failure of courts to make a rule de facto makes one.
simply carries out congressional aims.278

Preemptive and delegating are not the only sources of authority for large-scale federal common lawmaking. But they are the most common ones. Nor are they always sharply distinguished. For example, where preemption is accompanied by congressional expectation of common lawmaking in the preemptive domain, the resultant common lawmaking may partake of both preemptive and delegated characteristics. Nonetheless, the differences are sometimes obvious and, as we shall see, the categories have value as a tool for analysis.


a. Authority for Common Lawmaking

ERISA authorizes federal courts — indeed, charges them — “to develop a federal common law of rights and obligations under ERISA-regulated plans.”279 Supreme Court pronouncements have placed the matter beyond dispute.280 However, neither the Supreme Court nor any other federal court has carefully examined the source and scope of federal common lawmaking authority concerning benefit plans, presumably because most of the exercises of that power have been uncontroversial.281

278. See Lincoln Mills, 353 U.S. at 456.

In these latter circumstances, the aim of common lawmaking is to devise rules that best carry out the purpose of the statute. As the Supreme Court described the process under the Taft-Hartley Act:

We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Lincoln Mills, 353 U.S. at 456-57 (citations omitted).

279. Firestone Tire & Rubber Co., 489 U.S. at 110.


281. For example, courts have exercised their common lawmaking power to develop: standards for judicial review of benefit determinations by plans, Firestone Tire &
There are, in fact, several sources of authority for courts to de­
velop a body of common law for benefit plans, and it is essential to see
what they are and to understand their scope.

i. The Two Primary Sources of Authority for a Benefits Plan
Common Law

The two major sources of authority for courts to develop federal
common law for benefit plans are the two important ones identified
above: preemption and delegation.

ERISA’s expansive preemption provision is one basis of common
lawmaking authority. It is obvious, in light of the prior discussion,
that courts are authorized to develop rules to carry out the congres­
sional purposes underlying ERISA in areas not addressed by the stat­
ute, but which, because of preemption, cannot be filled in by state
law. This area is extensive. Broad ERISA preemption calls for
broad common lawmaking in its wake.

Preemption, as a basis for common lawmaking, was, in fact, fore­
seen in the legislative history. Congress expected courts to develop
federal common law under ERISA, on the model of the federal com­
mon law developed under the Labor Management Relations Act,

Rubber Co., 489 U.S. 101; rules for exhaustion of intra-plan remedies before challenges to
benefit determinations are brought in court, e.g., Dale v. Chicago Tribune Co., 797 F.2d
458, 466 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987); rules concerning the validity
and enforceability of plan provisions in light of the policies underlying ERISA, Northeast
Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare
Fund, 764 F.2d 147 (3d Cir. 1985); Victor v. Home Sav. of Amer., 645 F. Supp. 1486,
1977), aff'd mem., 582 F.2d 1273 (3d Cir. 1978); rules to govern disputes over contracts
party beneficiary standards); Ryan-Walsh Stevedoring Co. v. Cormier, 675 F. Supp. 337
(E.D. La. 1987); rules of liability for non-fiduciaries who participate in a fiduciary’s
breach, see section VI(A)(1), infra notes 360-362 and accompanying text; rules for alter­
egoo liability, Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986); rules permitting restitution to
employers who mistakenly over-contribute to plans, Airco Indus. Gases v. Teamsters
Health & Welfare Pension Fund, 618 F. Supp. 943, 949-50 (D. Del. 1985); and rules for
preemption of state laws that “relate to” employee benefit plans, see section II(B)(1),
supra notes 156-179 and accompanying text.

282. See, e.g., In re White Farm Equip. Co., 788 F.2d at 1191-94; Landro v. Glen­
denning Motorways, Inc., 625 F.2d 1344, 1351-56 (8th Cir. 1980); Victor, 645 F. Supp.
at 1495-96.

283. See, e.g., Sherman, Spendthrift Trusts and Employee Pensions: The Problem of
Creditors’ Rights, 55 IND. L.J. 247 (1980) (developing federal common law of creditors’
rights, made necessary by preemption).
which itself implicitly preempts a large area of state law.\textsuperscript{284} This expectation emerges clearly, for example, in Senator Javits' explanation of the effect of preemption: "It is . . . intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."\textsuperscript{285}

The other major source of authority is delegation by Congress. Congressional intent that courts should have broad common lawmaking authority in certain areas relating to plans is reflected in the general and often discretionary language of basic ERISA provisions: in particular, the provisions governing fiduciary duties and the provisions governing remedies for violations.\textsuperscript{286} It also emerges from the legislative history, which reflects congressional intent that specific areas — again, rules governing fiduciary conduct and liability in particular — should largely be left to the courts for development.\textsuperscript{287}

The existence of these two sources is quite clear, and generally recognized by courts. But confusion sometimes arises because courts do not always appreciate the significance of the fact that there are two distinct sources of authority to develop federal common law. Yet the character of the common lawmaking power differs in the two grants of authority, and so it is important for courts to understand the basis on which they might proceed in a given case.

Preemptive common lawmaking under ERISA has an extensive subject matter scope: in principle, it extends to any subject not ex-
pressly regulated by ERISA, but within the scope of the preemption provision. However, preemptive common lawmaking is supplementary lawmaking, a program of carrying out the purposes of Congress in areas Congress could have addressed, but did not. Ordinarily, courts will have limited discretion to make policy choices in developing this law.

Delegated lawmaking, on the other hand, is narrower, in that it is limited to the specific subjects for which there has been delegation. But delegated lawmaking is more discretionary than preemptive lawmaking, since courts are authorized to make policy choices in place of Congress, so long as the result is consistent with the mandate of the delegation. All ERISA-related common lawmaking may be treated as preemptive common lawmaking, as a program to fill in the gaps and supplement the program of federal regulation, consistent with Congress’s intent. But some of it is also authorized as delegated common lawmaking, and, where it is, courts have substantial discretion to make policy choices in developing the law. It thus may be important to identify the areas in which Congress delegated such authority to create common law.

**ii. A Note About Inherent Judicial Power**

In seeking to understand the scope and character of ERISA-related common lawmaking, it helps to examine the impact of one of the inherent powers of courts.

Courts have many so-called “inherent powers.” These powers “consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists.” 288 They are also “inherent” in the sense that they exist even without specific constitutional or statutory authorization. They include, among many others, the familiar powers of courts to punish contempt, 289 to regulate their proceedings, 290 to regulate their own fi-

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nancial affairs,\textsuperscript{291} and to regulate the practice of law.\textsuperscript{292} The inherent powers are sometimes deemed to be a source of common lawmaking authority.\textsuperscript{293} However, exercise of inherent power is not necessarily the exercise of common lawmaking power, since an inherent power need not be exercised through the usual dispute resolution process. Inherent power may, for example, be exercised through promulgation of rules or issuance of orders on the court’s own initiative.

One inherent judicial power, albeit a power not well recognized, is the power of courts over the administration of trusts. Like other inherent powers, this one is often exercised in proceedings that are not necessarily adversarial in character. For example, the inherent power over trusts includes the power to give instructions, on request, to trustees regarding trust administration;\textsuperscript{294} to accept the resignation of a trustee;\textsuperscript{295} to appoint a trustee;\textsuperscript{296} and to authorize leases and sales not permitted by the trust instrument.\textsuperscript{297}

Courts have substantial discretion in the exercise of this power, just as they do with any other inherent power. The power, moreover, may be exercised \textit{sua sponte}. Thus, a court with jurisdiction over a trust may, on its own initiative, compel a trustee to carry out his responsibilities under the trust.\textsuperscript{298} As \textit{Scott on Trusts} explains:

As a general rule, of course, a court does not act on its own initiative in protecting rights or enforcing duties. It is the function of the court to determine controversies brought before it by the parties. . . . There is, however, a modern tendency . . . for a court that has supervision over the administration of trust estates to enforce the duties of trustees even though not called upon by the beneficiaries to do so. The notion seems to be, although it is never very explicitly stated, that it is the function of the court to see that the directions of the settlor are carried out, even though no one com-

\textsuperscript{291} J. Cratsley, supra note 288, at 27, 29-37.
\textsuperscript{292} C. Wolfram, supra note 147, § 2.2.2; J. Cratsley, supra note 288, at 39-40.
\textsuperscript{293} See, e.g., Merrill, supra note 245, at 18, 46-47.
\textsuperscript{295} See RESTATEMENT (SECOND) OF TRUSTS §§ 108; In re Parker’s Trust Estate, 228 Mo. App. 400, 67 S.W.2d 114, 119 (1934) (“authority inheres in the court”).
\textsuperscript{296} See RESTATEMENT (SECOND) OF TRUSTS §§ 189 comment d, 190 comment f.
\textsuperscript{297} See RESTATEMENT (SECOND) OF TRUSTS § 200 comment h.
plains to the court of the failure of the trustee to carry them out; that the court has administrative powers as distinguished from strictly judicial powers; that once the court acquires jurisdiction over the administration of the trust, it is the function of the court to see that the trust is administered in accordance with the directions of the settlor ... 299

This inherent power derives from the courts’ role as creator of the system of trusts. Unlike other institutions — such as partnerships, corporations, or bailments — with trusts, courts did not simply take a pre-existing arrangement or an arrangement created by another branch of government and develop rules for deciding disputes about it. To the contrary, courts themselves developed the institution of trusts, and did so in the face of substantial opposition by the British King and, to a lesser extent, Parliament. 300 Trusts exist only because courts exist, and because courts consistently exercised their powers as a politically independent part of government to protect and enforce them. 301 The inherent power that courts now have over trusts recapitulates their power to create the institution.

This inherent power is one that properly may be exercised with respect to benefit plans. 302 Many ERISA plans use a trust as the vehicle for holding assets. 303 The traditional judicial power just described should apply unproblematically to these trusts and plans, since the use made of the trust device is irrelevant to the exercise of judicial power. The power should also apply with respect to those plans whose assets are not held in trust. All plans are trust-like in their

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299. III A. SCOTT & W. FRATCHER, supra note 111, § 200.4.

300. On the development of the system of trusts, see F. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 23-42 (1929); I A. SCOTT & W. FRATCHER, supra note 111, § 1; Ames, The Origin of Uses and Trusts, 21 HARV. L. REV. 261 (1908); Holmes, Early English Equity, 1 LAW Q. REV. 162 (1885).

301. Trusts are largely unknown outside the legal systems based on British law, except to the extent consciously borrowed from those systems. See G. BOGERT, supra note 111, § 9.

302. Cf. Van Boxel v. Journal Co. Employees’ Pension Trust, 836 F.2d 1048, 1051 (7th Cir. 1987) (courts’ traditional, broad supervisory power over trustees explains current standard for review of benefit claim denials). For a case expressly applying such inherent power in connection with a pre-ERISA pension plan, see Ball v. Victor Adding Machine Co., 236 F.2d 170 (5th Cir. 1956). See also the pre-ERISA cases cited supra note 294.

303. ERISA § 403(a), 29 U.S.C. § 1103(a), provides that “[e]xcept as provided in subsection (b), all assets of an employee benefit plan shall be held in trust. . . .” However, ERISA itself contains no statutory mechanism for the formation of the trust, and, in practice, state law generally is followed.
material aspects, having settlors (i.e., the sponsor), fiduciaries and beneficiaries. They lack only the trust res. But the power in question relates to administration, not to the trust res, and it mainly involves regulation of the conduct of fiduciaries. It loses none of its rationale through absence of trust funds, and can be adapted to non-trusteered plans with little, if any, modification.

The legislative history of ERISA suggests that Congress intended this traditional power to apply to plans.\textsuperscript{304} In fact, Congress intended that a great deal of trust law should apply to benefit plans, including the part of trust law that results from, and involves discretionary exercise of, judicial power over trusts. For example, under ERISA courts have been expressly granted the power to remove plan fiduciaries — one of their traditional inherent powers over trusts.\textsuperscript{305} More generally, courts have been given great discretion to issue “remedial” orders and to “enforce” the terms of the plan, whenever jurisdiction over a plan has attached.\textsuperscript{306} This delegation would appear to invoke the traditional power of courts over trust administration. Additional evidence of congressional intent that courts should have discretionary power over plan administration is found in the express statement in the legislative history that fiduciaries may petition a court for instructions when in doubt over how to proceed on a matter of substantial concern.\textsuperscript{307}

Yet, in the context of plans, this inherent power does not really

\textsuperscript{304}When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of statutory purposes. As this Court long ago recognized, “there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.” Mitchell v. Robert De Mario Jewelry, 361 U.S. 288, 291-92 (1960) (citation omitted). See also Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (“Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction. . . . [T]he comprehensiveness of this equitable jurisdiction is not to be denied in the absence of a clear and valid legislative command”); Cumings v. Briggs & Stratton Retirement Plan, 797 F.2d 383, 390 (7th Cir.), cert. denied, 479 U.S. 1008 (1986) (stating that principle was inapplicable in actions relating to benefit plans).

\textsuperscript{305}See ERISA § 409(a), 29 U.S.C. § 1109(a). On the other hand, they are denied the traditional power to authorize deviations from the plan document. See supra text accompanying notes 83-90 and 126.

\textsuperscript{306}See ERISA §§ 409(a), 502(a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(3).

constitute an additional source of common lawmaking authority. After all, as we have just seen, ERISA may be understood to have delegated much of the very same authority to the courts. Instead, the power is better understood as a source of added judicial discretion in the creation and enforcement of federal common law rules relating to plans. In delegating this lawmaking power to courts, ERISA recognizes the courts' traditional responsibility for trusts, as well as their institutional competence in trust-related common lawmaking and in oversight of trust administration. The upshot is to undermine arguments for limiting courts' power and discretion in developing a common law for plans.

b. Two Fallacies to be Avoided

Recognition that preemption is an independent source of federal common lawmaking power helps expose a fallacy to which federal courts have sometimes fallen prey. At times, courts have been reluctant to develop federal common law as to a matter concerning benefit plans, because they find no delegated authority to do so. This reluctance is unfounded, since it ignores preemption as a source of authority not dependent on express and implied delegations.

Another fallacy to be avoided would also place unjustified limits on preemptive common lawmaking. Obviously, a proper limitation on preemptive lawmaking is negative legislative intent: the failure of ERISA to regulate an area may evince congressional intent to leave the matter unregulated. For example, there is currently wide agreement that the doctrine of estoppel has a limited place, if any, in the common law of benefit plans because of ERISA's central requirement that plans be in writing. A common law of oral plan modifications arguably would contravene this policy.

But it by no means follows that the failure of Congress to regulate an aspect of benefit plans necessarily means that Congress wanted the matter left unregulated, and that common lawmaking is im-

308. See, e.g., Nieto v. Ecker, 845 F.2d 868, 871-72 (9th Cir. 1988) (refusing to recognize federal common law claim "[a]bsent an explicit directive from Congress").
309. See ERISA § 402(a), 29 U.S.C. § 1102(a).
proper. 311 That conclusion would follow only if ERISA were thoroughly comprehensive, which, as we have seen, it is not. Thus, to take a simple example, although Congress has exempted welfare benefit plans from the mandatory vesting standards imposed on pension plans, it does not necessarily follow that courts may not develop federal common law rules to govern vesting by agreement of the parties to a plan. 312

c. Examples of Delegated and Preemptive Common Lawmaking

One important aspect of benefit plans with respect to which courts have unquestionably been delegated common lawmaking power is that of fiduciary responsibility. Here, Congress adopted broad, general standards derived from the common law, and left it to the courts to fill in the details. 313 As the legislative history explains: "The fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts." 314 Significantly, it is the "principles," rather than specific rules, that have been codified in ERISA, and this is reflected in the extreme generality of the basic fiduciary standards.

Another important area of delegated common lawmaking power is that of remedies. ERISA expressly gives courts broad power to grant "such . . . equitable or remedial relief as the court may deem appropriate" 315 for breaches of fiduciary duty, and to grant "appropriate equitable relief" 316 to redress violations of ERISA or the terms of a plan. This language, like that of the fiduciary provisions, on its

313. See Central States, 472 U.S. at 570.
315. ERISA § 409(a), 29 U.S.C. § 1109(a).
face delegates to the courts authority to develop a body of remedial common law.317

Congress’s delegation of common lawmaking power as to both the substance of fiduciary obligations and remedies for their breach makes for an unusually broad delegation of lawmaking power.318 It is significantly broader than the delegation of common lawmaking power under the Sherman Act, for while the Sherman Act does delegate authority for courts to create a federal common law of violations, the Supreme Court has held that there is no accompanying delegation of authority to develop a common law of remedies.319

There are other subjects as to which courts have been delegated authority under ERISA to make common law.320 However, for most


318. This was pointed out by one of ERISA’s sponsors: ERISA’s substantive standards and its remedial relief provisions were thought to be, at the time of their enactment, exceedingly comprehensive and broad, permitting courts to fashion virtually any type of civil relief necessary to redress violations of the statute.


320. The preemption provision appears to command development of a body of common law that gives substance to the “relate to” language. Many of the definitions do, as well. Of particular note are the definitions of “employer” and “employee” (ERISA § 3(5), 3(6)), see, e.g., Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986); “plan” (ERISA § 3(3)), see, e.g., Dillingham, 688 F.2d 1367; Brundage-Peterson, 877 F.2d 509; James v. National Business Sys., 721 F. Supp. 169, 175 (N.D. Ind. 1989);
areas relating to employee benefit plans, common lawmaking must be considered preemptive only. For example, because of the preemption of all state laws concerning plan content and the dearth of ERISA regulation, courts have had to develop a "contract law" of plan documents, an important part of which deals with the validity of plan provisions in light of ERISA's basic policies. Another such area is the field of benefit claims. The statutory requirements are minimal, and development has been left to the Secretary of Labor. Even the regulations, though, impose only minimal requirements concerning a few aspects of benefit claims. Thus, courts have supplemented ERISA and the Department of Labor regulations with a common law of benefit claims, which includes rules for review of claims, rules for exhausting plan remedies prior to bringing suit, and rules concerning the effect of a fiduciary's failure to follow a proper claims procedure.

III. THE GENERAL CHARACTER OF PLAN ATTORNEY COMMON LAW

We have seen that ERISA broadly preempts state laws that purport to regulate plan attorneys to the extent needed to fill the regulatory gap. Such preemption authorizes federal courts to develop rules which carry out the purposes of ERISA. There is really no difference between this preemption-based authority to develop a common

and "fiduciary" (ERISA § 3(21)(A)), see, e.g., Munoz, 633 F. Supp. at 567-69 (D. Colo. 1986).


324. See 29 C.F.R. § 2560.503-1.


326. See, e.g., Dale v. Chicago Tribune Co., 797 F.2d 458, 466 (7th Cir. 1986).

327. See, e.g., Harris v. Pullman Standard, Inc., 809 F.2d 1495 (11th Cir. 1987); Ellenburg, 763 F.2d 1091; Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984); Henne v. Allis-Chalmers Corp., 660 F. Supp. 1464 (E.D. Wis. 1987).

328. The conclusion is in accord with the one reached earlier, on other grounds, that plan attorneys should be subject to ERISA's fiduciary-related policies. See supra text accompanying notes 91-109.
law of plan attorneys and the preemption-based authority to develop, say, a common law of plan-related restitution\(^\text{329}\) or a common law of plan-related contracts.\(^\text{330}\) Courts simply have not yet recognized that they have this quite conventional authority.

In principle, we could now end our examination of the authority of courts to develop plan attorney common law and proceed to a discussion of the substantive content of a plan attorney common law that would carry out the purposes of ERISA. We will not do so. It will prove to be more valuable for us to stop and look even more closely at the sources of authority for plan attorney common law, including authority other than preemptive authority, and to consider also the rationales for developing such a body of law.

There are three reasons for taking a closer look at the sources of authority for a plan attorney common law. One reason is practical. Courts may have common lawmaking power with respect to plan attorneys, but it does not necessarily follow that they will exercise it, or exercise it as fully as they could. We have already noted the institutional reluctance of courts to develop federal common law and explained how that reluctance limits the areas in which courts will make federal common law. But reluctance of another sort can also, at times, be detected in the cases. Decisions not to announce common law rules are sometimes based not so much on concerns for federalism or separation of powers as on a generalized discomfort with common lawmaking. This discomfort may cause a court to decline to act on lawmaking authority that clearly exists.\(^\text{331}\) If the conclusions reached so far are to be accepted and put to practical use, we need to see why judicial reluctance to exercise common lawmaking power would be abdication of an important responsibility.

Another reason for a closer look at the foundations of plan attorney common law is that, before one begins to develop substantive rules, one ought to be clear about what the ultimate purposes of the rules should be. It is not enough to say that the rules governing plan attorneys should further ERISA's policies, and leave it at that. Which policies and purposes, in particular, should guide the substantive rule development? To answer this question, we need to give some

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329. See, e.g., Whitworth Bros. Storage Co., 794 F.2d 221.
331. See, e.g., Nieto, 845 F.2d 868; Pappas, 923 F.2d 549.
thought to the question of why plan attorneys should be singled out as a discrete subject for consideration.

A final reason for taking a closer look is that preemption is not the only source of lawmaking authority. Another one is the delegated authority to develop common law rules. Indeed, we shall see that there is delegated authority with respect to some of the most fundamental and most important aspects of the plan attorney’s relationship with the plan, with the fiduciaries, and with the participants and beneficiaries. We shall also see that the inherent judicial power over attorneys makes proper the exercise of great discretion in these areas. Thus, as we explained above, it is important to understand the scope of this delegated lawmaking power, since it affects the proper character of rulemaking on the part of courts.

A. The Rationale for Plan Attorney Common Law

Why should courts single out plan attorneys for special common law treatment? Why should courts bother to exercise their common lawmaking power with respect to plan attorneys? The basic reason is that, even though plan attorneys are not one of the central concerns of ERISA, as a practical matter they are integral to the world of benefit plans. They have tremendous capacity to do good, by promoting the purpose of ERISA, as well as tremendous capacity to do harm, by undermining the purposes of ERISA. Their conduct must be regulated, and regulated in a systematic way that recognizes their special role.

Of all the non-fiduciaries connected with plans, plan attorneys probably have the most responsibility and influence. They counsel plan fiduciaries on the propriety of contemplated transactions. They counsel the plan in cases of benefit disputes. They represent the plan and its fiduciaries in litigation. They represent the plan and its fiduciaries in dealings with regulators, such as the Department of Labor. Their constant guidance is necessary, because plans and their fiduciaries must adhere strictly to plan documents and must comply with a regulatory regime backed by heavy sanctions including civil and criminal liability. Their normal role has been deemed not to give rise to plan fiduciary status. Yet, in actual practice, they may have great discretion and substantial influence with respect to plans — enough to justify extension of ERISA’s policies (if not its express standards) to the regulation of their plan-related activities. In this regard they differ from other important non-fiduciaries, such as auditors and actuaries, whose roles are less discretion ary and more limited in scope.
Because of this influence, rules to guide the conduct of plan attorneys may serve as an important prophylactic for implementing ERISA’s fiduciary principles. ERISA itself has prophylactic sets of express auxiliary rules. As we have seen, ERISA’s disclosure rules and writing requirement are designed largely to complement and facilitate enforcement of ERISA’s fiduciary rules. In much the same way can rules to guide plan attorney conduct complement ERISA’s fiduciary rules and help induce proper conduct by plan fiduciaries.

They can do it in two ways. One way is for plan attorney common law to invest plan attorneys with responsibility, commensurate with influence, to help induce proper fiduciary conduct. Since plan attorneys are in a critical position to be able to deter and correct fiduciary wrongdoing, federal common law should provide them with appropriate standards for exercising that capacity. This is exactly the same rationale that has underlain efforts by the SEC to regulate the professional conduct of securities lawyers. Thus, the SEC’s comments on the “public implications” of the securities lawyer’s role can be applied, with obvious modifications, to benefit plan attorneys:

We have previously noted the peculiarly (sic) strategic and especially central place of the private practicing lawyer in the investment process and in the enforcement of the body of federal law aimed at keeping that process fair. . . . [T]he task of enforcing the securities laws rests in overwhelming measure on the bar’s shoulders. . . . Very little of a securities lawyer’s work is adversary in character. He doesn’t work in courtrooms where the pressure of diligent adversaries and alert judges checks him. He works in his office where he prepares prospectuses, proxy statements, opinions of counsel, and other documents that we, our staff, the financial community and the investing public must take on faith. This is a field where unscrupulous lawyers can inflict irreparable harm on those who rely on the disclosure documents that they produce. Hence we are under a duty to hold our bar to appropriately rigorous standards of professional honor.332

Development of rules to guide plan attorney influence and conduct may help to induce proper fiduciary conduct in yet another way. Plan attorney common law may be developed to help ensure that the plan attorney’s conduct serves as a guide for the conduct of fiducia-

ries. If the plan attorney is influential, and his guidance respected, exemplary conduct by him that is motivated to further the goals of ERISA may demonstrate to plan fiduciaries how they should act in order to further the purposes of ERISA. Again, this consideration is one that has been recognized as important in the context of corporate finance. As former Chief Justice Stone explained in his well-known, Depression-era speech about the public responsibilities of corporate attorneys:

[T]he very conditions which have caused specialization, which have drawn so heavily upon the technical proficiency of the Bar, have likewise placed it in a position where the possibilities of its influence are almost beyond calculation. The intricacies of business organization are built upon a legal framework which the current growth of administrative law is still further elaborating. Without the constant advice and guidance of lawyers business would come to an abrupt halt. And whatever standards of conduct in the performance of its function the Bar consciously adopts must at once be reflected in the character of the world of business and finance. 333

What these considerations suggest is that the common law of plan attorneys should be rooted in the actual role and practical influence of plan attorneys, to the extent that that role and influence itself can promote the main purposes of ERISA.

But the federal common law of plan attorneys should not be only a body of hortatory standards with no enforcement mechanisms, or only weak ones. The power of plan attorneys to influence fiduciary conduct to the better is also power to influence it to the worse. And the power to deter fiduciary wrongdoing is the power also to facilitate it. As Chief Justice Stone also emphasized in the speech just quoted, "departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession. . . . "334 A plan attorney common law must also be remedial, with provisions for civil liability to back up its rules.

Indeed, this remedial component is essential, not merely desirable; for what exacerbates the threat of harm by plan attorneys is the prevalence of a practice which, while convenient, tends to muddle the plan attorney's sense of loyalty: the practice of functioning simultane-

334. Id. at 9.
ously as both plan attorney and as attorney for the employer or fiduciary with respect to non-plan matters. An attorney who does this might be tempted to advance the employer’s or fiduciary’s non-plan interests, to the possible detriment of plan interests, while he is acting in his role as plan attorney. He might be so tempted because of habitual identification with the employer’s or fiduciary’s interest, because of the natural desire to retain the employer or fiduciary as client, or because of venality. But whatever the reason, unless there are standards of conduct, backed up by the threat of liability, plan attorneys would face no deterrent to causing or assisting in harm, and participants and beneficiaries would lack a remedy against this source of potential wrongdoing.

B. The Sources of Judicial Discretion

In implementing these purposes through the development of plan attorney-related common law, courts will carry out the congressional policies reflected in ERISA. They also have substantial discretion in determining how best to do so. There are two sources of such discretion: delegation by Congress and inherent judicial power.

1. Common Law from Delegation

Two main areas exist of delegated common lawmaking authority with respect to plan attorneys. One area of delegated lawmaking concerning plan attorneys we have already discussed: fiduciary responsibility and remedies. As we have seen, the delegation of common lawmaking authority with respect to those areas is extraordinarily sweeping, and it is generally agreed that the resultant authority extends beyond the mere authority to develop rules for plan fiduciaries. Just how far beyond it does extend remains an unsettled issue, but on any plausible view it encompasses at least some areas of plan attorney conduct.

A parsimonious approach to the scope of the delegation would go only as far as to allow courts to develop rules of liability for persons (perhaps, only for parties in interest) who participate in a fiduciary’s breach of duty. Traditional trust law contains rules governing this kind of non-fiduciary conduct as an integral remedial compo-

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It is not difficult to find authorization in ERISA for courts to develop a common law governing participation in a breach, based on principles similar to those found in trust law. This understanding of delegated, fiduciary-related lawmaking would bring much of the remedial component of plan attorney common law within the ambit of the courts' delegated and discretionary lawmaking authority.

But a more expansive approach to delegated, fiduciary-related lawmaking is possible. ERISA's fiduciary rules are designed to be general expressions of basic principles; they are not framed narrowly. As general guidelines meant to be judicially developed, they could easily serve as a set of principles from which the courts could derive common law rules applicable to those persons who, in some, but not all material respects, are like plan fiduciaries. This would be a method of rule development analogous to the traditional process by which principles of trust law, which were initially developed to govern trustees, functioned as the source for laws governing fiduciaries other than trustees. Under this approach to the courts' delegated lawmaking authority, courts would be deemed authorized to proceed by analogy to develop rules for persons such as plan attorneys whose level of discretion and influence, while substantial, is not quite enough to confer ERISA fiduciary status on them. This approach goes beyond the parsimonious one, and would bring much of the prophylactic component of plan attorney common law within the ambit of delegated lawmaking.

At least in the case of plan attorneys, the latter, more expansive approach, is the better one, and the parsimonious approach is unnecessarily limited. The latter approach more realistically deals with the fact that plan attorneys share many of the characteristics of plan fiduciaries; the fact that ERISA's fiduciary policies necessarily must constitute the proper source of principles for rules of plan attorney regulation; and the fact that much of plan attorney law should be

336. See Restatement (Second) of Trusts § 326 ("[a] third person who . . . has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust").

337. See infra text accompanying notes 472-478. In 1989, Section 502(l) was added to ERISA to require the Secretary to impose a civil penalty on persons who participate in a fiduciary's breach of duty or violation of the statute. See Omnibus Budget Reconciliation Act of 1989, Pub-L. No. 101-239, § 2101, 103 Stat 2123.

338. Such as is the case with executors, administrators, guardians, receivers, and, to a lesser extent, corporate directors and officers. See generally G. Bogert, supra note 111, §§ 12-16.
auxiliary to ERISA fiduciary law and designed to promote it. Courts unquestionably have substantial discretion in the implementation of ERISA's fiduciary policies, and there is no sound reason for limiting the exercise of discretion only to the development of rules for fiduciaries.

Discretion regarding plan attorney common law emerges also from the other important delegated lawmaking authority concerning attorneys. ERISA recognizes that there will be "counsel" for employee benefit plans who provide "legal" services to them. In this way, ERISA implicitly recognizes the existence of a certain role to be played with respect to plans: that of benefit plan attorney. But the role is not defined anywhere in the statute. What, then, does it mean for someone to be legal counsel for a plan?

Congress left it up to the courts to supply the answer. The institution of "attorney" is idiosyncratic, and Congress's failure to define the role has very different consequences than its failure to define, say, "auditor" or "employer." An attorney cannot be an "attorney" and cannot provide "legal" services independently of any system of laws. A person cannot become an attorney simply by diligence and hard work. A person is an attorney only to the extent he is recognized as one by some authority and only to the extent that the authority places him within a network of duties and responsibilities to individuals, the public, and the courts. ERISA recognizes the institution of "plan attorney," but does no more. Since some authority must develop the network of duties and responsibilities in which plan attorneys are located, and since it cannot be the states, ERISA must be read as delegating the responsibility to the federal courts. At the very least, federal courts must be understood to be authorized (and obligated) to develop rules governing the fundamental relationships between the plan attorney and the plan, the fiduciaries, the participants and beneficiaries, the public, and the courts.

2. Common Law and Inherent Judicial Power

We have already discussed the respect in which the inherent

power of courts over trusts is a source of discretion in plan-related 
common lawmaking. Let us now consider the impact of the inherent 
power of courts to regulate attorneys on judicial discretion to make 
plan-attorney common law.

Judicial authority over attorneys is wide-ranging. It includes 
broad power to set standards of conduct, even outside the process of 
litigation, and to issue penalties, sanctions, and remedies for viola­
tions of those standards. It includes the power to regulate all aspects 
of the attorney-client relationship, the attorney-court relationship, 
attorney-attorney relationships, and even attorney conduct that is not 

The rationale for some source of extensive regulation of attorneys
is based on the position of power and influence that attorneys nor­

345. See, e.g., In re Imming, 131 Ill. 2d 239, 255, 545 N.E.2d 715, 722 (1989). In

Maryland State Bar Ass'n v. Agnew, the court stated:
The professional ethical obligations of an attorney, as long as he remains a 
member of the bar, are not affected by a decision to pursue his livelihood by 
practicing law, entering the business world, becoming a public servant, or em­

dbarking upon any other endeavor. If a lawyer elects to become a business man, 

he brings to his merchandize the professional requirements of honesty, upright­
ness, and fair dealing. Equally, a lawyer who enters public life does not leave 
behind the canons of legal ethics. A willful and serious malefaction committed 
by a lawyer-public servant brings dishonor to both the bar and the democratic 
institutions of our nation, and its destructive effect is thereby magnified.

candor and honesty. In fact, it can be said that the presence of these virtues in members of the bar comprises a large portion of the fulcrum upon which the scales of justice rest. 346

But on the other hand, power to do good is also power to do bad, and attorneys have the capacity to wreak extensive harm:

Every attorney occupies a position in our society of particular trust and confidence. A client comes to an attorney with the expectations that the resources of our legal and judicial system that are at the attorney’s disposal will be used to insure the client’s fair treatment. It is not merely money that is at stake when an attorney embarks on the representation of a client. Livelihood, professions, reputations, familial relations and even physical and mental health can all be affected by the actions of an attorney. 347

Because of the power, influence, and importance of attorneys in so many respects, it is essential that attorneys should be very carefully regulated by some branch of government. But still, why should that branch be the judiciary? 348

Much of the answer to this question is historical: the institution of attorney developed as that of an “officer” of the court, a person whose main responsibility in that office was to represent individuals in litigation. Thus, as courts are wont to explain, regulation naturally falls to them:

The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system. . . . It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our . . . government. 349

This historical explanation has important application to common

346. Agnew, 271 Md. at 549, 318 A.2d at 814.
lawmaking regarding plan attorneys, even though, as we have emphasized, plan attorneys are not principally litigators. For the fact that there is a long history of judicial regulation of attorneys puts common lawmaking concerning plan attorneys in a broader context: it shows the plan-related common lawmaking to be only a specialized case of the kind of regulatory activity that courts have traditionally engaged in without legislative authorization. Making law to govern attorneys is a normal judicial function, and is one in which courts, by tradition, have great discretion. Courts are the most experienced regulators of attorney conduct, and there is no reason that they should not continue exercising discretion when making law to govern plan attorneys.

Tradition, though, is not the sole or even best justification for discretionary judicial regulation of attorneys. To better understand the rationale for judicial regulation, one must realize that courts are not the only non-legislative regulators of attorney conduct. The SEC has been held to possess implied power to regulate attorneys who appear before it, as has the ICC, the Board of Tax Appeals, and many other federal agencies. The principle underlying the decisions to such effect is that, where an administrative agency is delegated power to develop rules to carry out the purpose of a statute, and where attorneys play an essential role in the system regulated, the agency has implied power to regulate the conduct of those attorneys so as to help the agency discharge its duties. The reasoning was quite clearly explained in Touche Ross & Co. v. SEC, where the power of the SEC to regulate attorneys was justified as follows:

In the general rulemaking provisions of the federal securities laws, Congress has provided the Commission with "broad authority" to adopt those rules and regulations necessary for carrying out the agency's designated functions. . . .

The chief purpose of the 1933 Act was to "provide investors with full disclosure of material information concerning public offerings of securities in commerce." . . . The role of the . . . legal

350. See Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979); Davy v. SEC, 792 F.2d 1418 (9th Cir. 1986).
353. See, e.g., Koden v. United States Dep't of Justice, 564 F.2d 228 (7th Cir. 1977) (Immigration and Naturalization Service); Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953) (International Claims Commission).
354. See Goldsmith, 270 U.S. at 121.
355. 609 F.2d 570 (2d Cir. 1979).
[profession] in implementing the objectives of the disclosure policy has increased in importance as the number and complexity of securities transactions has increased. By the very nature of its operations, the Commission, with its small staff and limited resources, cannot possibly examine, with the degree of close scrutiny required for full disclosure, each of the many financial statements which are filed. Recognizing this, the Commission necessarily must rely heavily on both the accounting and legal professions to perform their tasks diligently and responsibly. Breaches of professional responsibility jeopardize the achievement of the objectives of the securities laws and can inflict great damage on public investors. As our Court observed in United States v. Benjamin, 328 F.2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964), “In our complex society the accountant’s certificate and the lawyer’s opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar.”

Rule 2(e) thus represents an attempt by the SEC essentially to protect the integrity of its own processes. If incompetent or unethical accountants should be permitted to certify financial statements, the reliability of the disclosure process would be impaired.356

This consideration has obvious bearing on benefit plans. Courts have special responsibility for such plans, both delegated and inherent. They have been delegated substantial authority to develop rules to help further the policies of ERISA. As we have seen, attorneys play a pervasive and essential role in this judicially-guided benefit plan system, analogous, in some respects, to the role played by securities attorneys in the securities law system. Thus, for the purpose of helping the courts fulfill their own roles with respect to plans, discretionary judicial regulation of plan attorneys is as necessary and proper as is discretionary administrative regulation of attorneys in any administrative system where attorneys play an essential role.

IV. PLAN-ATTORNEY RELATIONSHIPS

Now that we have seen, in overview, why a federal common law of plan attorneys is necessary, what it can accomplish, and what discretion courts have in developing it, let us turn to some of the substantive topics and problems that any such body of law must address.

Common law rules are best worked out by the courts as they test

356. 609 F.2d at 580-81.
policies to see whether and how well they work in concrete cases. Our principal task here is to identify and explain relevant policies and general principles for use by the courts, rather than develop a corpus of rules ourselves. Some specific rules will, of course, emerge as appropriate ones, and some specific rules (in particular, ones that have no grounding in ERISA's policies) will be found unacceptable. But in the main, what will be developed in the remainder of this article are approaches and principles to be used in developing plan attorney common law.

We start, in this section, with some basic principles governing the plan attorney's relationships with the plan, with fiduciaries, and with participants and beneficiaries. It is important to start here for, as we have seen, ERISA's preemption of state attorney law and ERISA's delegation to courts of discretionary lawmaking power concerning plan attorneys requires courts to start from scratch and to define the plan attorney's relationships in a manner consistent with ERISA.

A. The Client

Rules that govern attorneys invariably presuppose the existence of a limited number of individuals to whom the attorney has special responsibilities.358 Where the attorney represents a plan it is obvious that the individuals with whom he might have special relationships are the plan, the fiduciaries, and the participants and beneficiaries. The plan and its fiduciaries are the individuals with whom the plan attorney will have direct and continuing contact, and to whom he will give legal advice and assistance. The participants and beneficiaries are the ones whose interest the plan and its fiduciaries — and thus, arguably, the plan attorney — must ultimately serve. The task in developing a common law of plan attorneys, then, is largely the task of developing rules to clarify and guide the relationships between the plan attorney and members of those three classes.

In developing any new area of law it is always tempting to start with an analogy to a more familiar, more established body of law — tempting because it is a familiar, indeed, perhaps the most common, method of legal reasoning, and because it is a method that can elimi-

357. See B. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 23 (1921) (quoting M. Smith, Jurisprudence 21 (1909). "Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.").

nate the need for reasoning from principles to rules. The traditional law governing attorneys is based on a special relationship called the "attorney-client relationship." It would seem that, by assuming the plan attorney to have a client in one or more of those three classes, one could rely on the traditional rules of the attorney-client relationship by analogy, in which case the task of developing the new area of law would become so much easier.

At first glance, use of the analogical approach seems reasonable. After all, ERISA admits the role of plan attorney. Since it does so, one might suppose that it necessarily recognizes the role of plan client as well. But that supposition would be incorrect. As we shall see, the traditional concept of client cannot be applied in cases of plan representation.

1. The Paradigm of Client

Let us consider first whether a plan can be a client.

To begin the analysis, we need to understand what a client is. We immediately face difficulty, though, because there is no generally applicable definition of "client." Since they build on the concept, the sources that one would naturally consult for such a definition are professional codes such as the Model Code of Professional Responsibility and Model Rules of Professional Conduct. Yet these codes contain no such definition. Instead, they rely on an implicit paradigm, and frame rules appropriate to that paradigm. Such an approach raises the question of whether the implicit paradigm can properly be applied to plans.

Both the Model Code and the Model Rules presuppose, as the paradigm of a client, an individual seeking legal representation for himself in a lawsuit. This is a very narrow conception of client. The problems involved in extrapolating it to other entities — such as


360. For example, the "Scope" section of the Model Rules of Professional Conduct states that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).

361. It is true that the Model Rules, to a greater extent than the Model Code, recognize that lawyers have roles other than that of advocate, and that clients have needs for lawyers other than in litigation. However, the Model Rules emphasize the advocacy role of lawyers, and even where they do not deal with advocacy issues, they suppose that the
corporations — and to non-adversarial contexts — such as non-litigation counseling — are well-known and have been much discussed in the literature. Yet to try to apply this paradigm to plans is not merely problematic; it is incoherent. One must avoid being misled by the fact that plans are legal entities under ERISA. They are essentially programs or activities. An unfunded severance plan for a small business, for example, is likely to be a regular, but sporadic, practice; and it may amount to little more than the payment of benefits to the rare, laid-off employee in an amount subject to the employer's reasonable discretion. A program such as this no more fits the traditional paradigm of client than does a lottery. A plan may be an entity but it is nothing at all like a person.

2. The Functional Approach to Client Identity

A more sophisticated approach to the concept of client is available. Consider why one should ever need to define or explain the concept of "client." After all, in both law and everyday life we usually get by perfectly well without worrying about the meaning of such basic concepts. We need careful definitions only when some problem arises whose resolution turns on the concept's careful application. What, then, is the kind of problem that might ever require us to understand exactly what "client" means?

A definition of "client" is needed when there is uncertainty over who the client is, and thus uncertainty over with whom the lawyer has a special relationship. This suggests that any workable definition of "client" should mainly concern itself with client identity, and that what one really needs is not some type of dictionary definition, but a lawyer is at work advancing an interest of the client that is in conflict with interests of others.

Moreover, although the Model Rules try to expand the concept of client, they really do not stray far from the paradigm of the client as individual person. For example, Rule 1.13, labelled “Organization As Client,” in effect makes the lawyer for a corporation or other enterprise the lawyer for the enterprise's managers. The commentary to the rule states that, “[s]ince an organization can act only through its constituents, generally the lawyer's duty to the 'entity' is indistinguishable from the lawyer's duty to those agents acting on behalf of the organization.” ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter ANNOTATED RULES] 143 (1984). Thus, under the Model Rules, representation of the enterprise is simply a specialized form of representation of individuals.

362. See generally C. WOLFRAM, supra note 147, § 6.7; G. HAZARD, supra note 358, at ch. 2.

363. See G. HAZARD, supra note 358, at ch. 3.
practical test that allows one to determine who the client is in any representation — on any occasion on which a lawyer is taken to be acting as such in a given situation.\textsuperscript{364} What we need, then, is a functional approach that lays down criteria for identifying who plays the role of client in a given situation. The approach need not presume anything about the nature of the client; it merely presupposes that there must be one.\textsuperscript{365}

In the traditional view, there are two essential characteristics had by a client in a representation. One is the characteristic of being the person or entity whose interest the lawyer is obligated to advance, to the exclusion of others, in the representation.\textsuperscript{366} The other is that of being the person or entity who controls the representation, as a principal controls an agent.\textsuperscript{367} Those two characteristics are counterparts

\textsuperscript{364} See id. Thus, the operative concept is "client in the representation," rather than "client." This approach to defining the concept of client requires, at the least, some rudimentary concept of "lawyer." On a chicken-and-egg analysis, the concept of "lawyer" comes first.

\textsuperscript{365} An example of such a functional definition is the one contained in proposed FED. R. EVID. 503. That definition was to be used in framing rules of client-attorney privilege, and defined "client" as:

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

Rules of Evidence, 56 F.R.D. 183, 235 (1973). The operative functional concept here is that of being "rendered professional legal services": to identify the client — the holder of the privilege — one need only determine who it is that is rendered the legal services. (At one place, the Model Rules similarly identify the client as the most comprehensive legal entity — that is a recognized entity rather than a mere collection of individuals — for which the attorney is performing services in the representation. See ANNOTATED RULES, supra note 361, at 154-55.)

Unfortunately, a definition such as that contained in FED. R. EVID. 503 (or the Model Rules) has only limited utility, and cannot be used as a general rule for identifying the client. The reason for this is that one often needs a rule for identifying the client precisely in order to determine who receives, or is entitled to receive, the lawyer's services. Thus, the test presupposes the identification to have been accomplished. Any useful definition must be broader than this.

\textsuperscript{366} See G. HAZARD, supra note 358, at 3, 37. This aspect of the client is what gives rise to problems of conflict of interest. See ANNOTATED RULES, supra note 361, at 73.

\textsuperscript{367} "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a). Cf. Model Code of Professional Responsibility EC 7-7 to 7-8. See also ANNOTATED RULES, supra note 361, at 157 ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters").
of the two major kinds of uncertainty over who the client is: uncertainty over whose interest should be advanced, and uncertainty over whose directions the attorney should follow. Thus, we combine the two characteristics into a two-part functional definition of "client in the representation."

It is not difficult to see that this functional concept breaks down in the plan context. Prima facie, the plan would seem capable of being the client under this test. In a routine representation, the plan's immediate interest — for example, that of obtaining the most advantageous contract terms or winning the lawsuit — is usually clear and may be treated as the sole interest to be advanced by the attorney. And, where the plan engages the attorney, it controls the representation. 368

But this model of the plan as functional client works only in the simple case, where neither of the uncertainties relating to client identification arises. That is to say, it works only when the test is not needed. For suppose that the representation is not routine, and the interest of the plan on an issue — for example, whether to accept a settlement proposal — is uncertain. The client, rather than the attorney, controls the representation, and must decide what to do. 369 To whom does the plan attorney turn for guidance?

At first sight, the answer seems obvious. The Model Rules of Professional Conduct provides that: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." 370 This rule seems only common sense. If one follows it, the plan attorney should turn to the plan fiduciaries. Indeed, there would seem to be no plausible alternative.

But turning to the plan fiduciaries for guidance has curious consequences. As we have seen, ERISA fiduciaries must be loyal to the ongoing activity of paying benefits to participants and beneficiaries, and are required to act "solely in the interest of the participants and

368. The Model Code would even seem to encompass this kind of relationship, for it provides that: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a ... person connected with the entity. In advising the entity, a lawyer should keep paramount its interests. ..." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18.

369. The Model Rules provide that "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a).

370. Id. Rule 1.13(a).
beneficiaries. . . .”371 Thus, when a fiduciary, in his capacity as the representative of the plan, consults with or gives directions to an attorney, the fiduciary can be acting properly only if he is acting to further the interest of the participants and beneficiaries in receiving their benefits. Accordingly, the interest which the attorney ultimately must advance is not some interest of the plan entity — the presumptive client — but that of the participants and beneficiaries in receiving their benefits. Indeed, there is no “plan interest” to be advanced by the plan attorney separate and differing from the participants’ and beneficiaries’ interest in receiving benefits.

But this means that the functional test for the client leads to a bifurcation. The participants and beneficiaries, as those whose interest is to be advanced, have one of the functional characteristics of the client. And the fiduciaries, as the persons who control the representation, have the other functional characteristic of the client. The plan itself has neither.

Such a bifurcation can arise in other settings — for example, in representation of incompetents. But bifurcation is not the end of the difficulties in the attempt to apply the concept of client in the plan context. For the fiduciaries cannot always fulfill the role of persons directing the representation. Trouble arises because the fiduciaries are not managers in the way corporate officers are and they are not ranked hierarchically. Suppose that the plan fiduciaries disagree as to whether a proposed course of conduct is in the best interest of the participants and beneficiaries. Suppose, for example, they cannot decide whether to settle or continue a lawsuit. The attorney knows that the participants’ and beneficiaries’ interest is to be advanced; but whose instructions does he heed on how to do so? The named fiduciary? The fiduciary who has been allocated discretion for the matter — if there is only one?

And even if there is a single fiduciary who is authorized to act and speak with respect to the matter, suppose that that fiduciary wishes to pursue a course which the attorney knows is not in the best interest of the participants and beneficiaries. Because the attorney must advance their interest, may he disregard the fiduciary’s wishes? Indeed, must he disregard them? And if he may (or must) do so, what happens if he cannot turn to the other plan fiduciaries for guidance? Who, then, speaks for the plan and ultimately for the partici-

pants and beneficiaries? Should the attorney consult the participants? If so, which ones? Should he decide himself?

We reach exactly the same set of problems and questions in the related case, where a fiduciary engages an attorney for the purpose of representing him solely in his capacity as a fiduciary. The attorney may presumptively treat the fiduciary as the client, but he must do so with caution, for there is no genuine interest of the fiduciary to be furthered by the attorney.\footnote{372} For if the fiduciary is acting as a fiduciary, he must act solely in the interest of the participants and beneficiaries. As in the case of direct plan representation, the attorney's ultimate obligation is to advance the participants' and beneficiaries' interest. But again, what if other fiduciaries disagree with the fiduciary who engaged the attorney about the proper course of conduct? The attorney cannot take refuge in any supposed obligation of loyalty to the first fiduciary. Or what if the fiduciary seeks to act in a way the attorney knows not to be in the best interest of the participants and beneficiaries? There plainly is no important difference between an attorney who represents the plan and an attorney who represents the fiduciary.

To salvage the concept of client in the plan context, one might be tempted to treat the participants and beneficiaries as the collective client.\footnote{373} After all, they do have one of the attributes of a client. But this would be a mistake. Although the plan attorney may have duties to the participants and beneficiaries and must act to further their interest, the participants and beneficiaries generally lack authority to make decisions as to how their interest is to be furthered. ERISA not only reposes discretionary responsibility for the plan in the plan fiduciaries; it divests the participants and beneficiaries of such responsibilities. Even in those special cases in which participants retain some control over investment or management of their aliquot interest in plan assets, they are expressly not made fiduciaries with respect to the plan and have no discretionary authority or responsibility with re-

\footnote{372. This is not the case where an attorney represents, for example, a plan sponsor in a non-fiduciary capacity. The sponsor may act in its own interest with respect to the plan, and the sponsor's attorney may work to advance it. For this reason we limit the subject of this article to attorneys who represent plans and plan fiduciaries.}

spect to the plan. In those circumstances, the plan fiduciaries remain obligated to exercise independent judgment and may override a participant’s choice, if it is a proper exercise of fiduciary responsibility to do so. ERISA compels a separation of the two essential characteristics — that of the person whose interest is to be advanced and that of the person with authority to give direction to the lawyer — which the paradigm of client fuses in a single person.

3. Why Plan Attorneys Do Not Have Clients

The concept of client in the plan context does not work, and the question of who the client is leads quickly to questions about the relationship between the plan attorney and the fiduciaries, participants, and beneficiaries. A plan is an activity carried out for the sole purpose of providing benefits to participants and beneficiaries, and the plan attorney must ultimately serve the participants’ and beneficiaries’ interest. But what does this mean? Does the attorney have a fiduciary-like duty of loyalty to them? If so, what is its scope? Does he have a duty of disclosure? A duty of care? A duty to keep confidences? Does he have any duties or responsibilities to the plan fiduciaries? If so, how are those duties reconciled with the duties to the participants and beneficiaries? These are the kinds of questions that the federal common law of attorneys must answer. The concept of client simply does not contribute to their resolution.

Proposing at the outset of analysis that the plan attorney necessarily lacks a client may seem to be a drastic step. After all, problems with the concept of client always arise in the representation of an organization, yet no one has suggested that the concept of client be dispensed within those other areas. Why, then, should it be dispensed with here? The reason lies in two essential differences between a plan and a corporation or other business entity to which the concept of client is still comfortably applied.

First, the duty of corporate managers is not narrowly focused on serving the common shareholders alone or any other single group. Officers and directors have obligations to preferred shareholders, bondholders, creditors, and employees as well. When a corporate of-

374. See ERISA § 404(c)(1), 29 U.S.C. § 1104(c)(1).
ficer consults with an attorney on behalf of the corporation, he speaks
on behalf of an admixture of interests whose proper balancing is his
continual responsibility. The corporation is a complex enterprise
whose goals are broad and which has an interest separate from those
of the shareholders or any other constituent. The resolution of the
competing interests is the corporate interest;376 and only because there
is a corporate interest distinct from the interests of the shareholders377
and others it is useful, or even intelligible, to say that there is a corpo-
rate client distinct from the shareholders or any other group.378

By contrast, a plan is simply a program for paying benefits; it is
not an entity to which we may ascribe interests. But, even if it were
intelligible to do so, there still could be no plan interest to be ad-
vanced distinct from that of the participants and beneficiaries.

Second, the kinds of representations engaged in by attorneys for
corporations and other business enterprises tend to have a strong ad-
versarial character. The business attorney may be advocate, negotia-
tor, or counselor. Those roles generally involve dealings with persons
outside the enterprise; presume that the outsider’s interest is adverse
to that of the enterprise; and involve assisting the client to gain an
advantage over (or avoid being disadvantaged by) the adverse inter-
est.379 Certainly plan attorneys will advocate, negotiate and counsel.
But these activities are not exhaustive and are not the most important
plan attorney functions. Plans and plan fiduciaries transact business
with outsiders only as an incident of their main purpose of providing
benefits to participants and beneficiaries. Unlike business enterprises
and their managers, plans and their fiduciaries are not intrinsically
adversarial to anyone; and they will not necessarily engage an attor-
ney to help disadvantage someone else. Indeed, a plan attorney’s
most useful role may be that of assisting the plan fiduciaries to carry
out their duties of serving the participants and beneficiaries. Because

376. Pierce, The Code of Professional Responsibility in the Corporate World: An Ab-
377. Shareholder interests are not always the primary ones. The Bankruptcy Code,
for example, requires subordination of shareholder interests to those of creditors, and this
in turn affects the corporation-attorney relationship in bankruptcy proceedings. See
378. Significantly, “when a close corporation is indistinguishable from its owners,
lawyers have been held to represent the owner, in disregard of the entity form.” ANNO-
TATED RULES, supra note 346, at 148.
379. See Hoffman, On Learning of a Corporate Client’s Crime or Fraud — The Law-
yer’s Dilemma, 33 BUS. LAW. 1389, 1389 n.2 (1978).
the plan attorney’s principal responsibility is not to represent the plan or a fiduciary against someone else, it is less important that the attorney have a working concept of client as embodiment of the interest he represents against all others.

B. Privilege

Our conclusion about the plan attorney’s having no client immediately suggests another important question. The existence of the attorney-client privilege is usually thought to depend on the client-status of the person who communicates with the attorney. Because the concept of client has no place in the world of plan attorneys, does it follow that the attorney-client privilege must be absent as well?

1. The Current State of the Law

Interestingly, in some cases, federal courts have concluded that the answer is yes. Rule 501 of the Federal Rules of Evidence delegates to the federal courts plenary power to develop rules of privilege, including rules to govern the attorney-client privilege. One rule that has been developed is that, when an attorney renders legal services to a plan fiduciary which relate to matters within the fiduciary’s area of responsibility, the fiduciary cannot shield his communications with the plan attorney from disclosure to plan participants and beneficiaries in subsequent litigation brought by them. At least in these circumstances, there is no attorney-client privilege.

In developing this rule, courts have not relied on the policies underlying ERISA, or even considered the question of the rule’s consistency with those policies. Instead, courts have relied on supposed analogies between the plan fiduciary/plan participant relationship and more familiar relationships involving corporations and trusts.


381. See supra text accompanying notes 313-327.


383. This rule does not itself prevent there from being a privilege between the fiduciary and litigation counsel which shields communications during the litigation. Cf. Panter v. Marshall Field & Co., 80 F.R.D. 718, 724 (N.D. Ill. 1978) (comparable rule in shareholder derivative suits). That issue of privilege must be dealt with separately.
One justification for finding no privilege, or at least a greatly constricted privilege, in the plan context is the corresponding rule in the shareholder litigation context. In *Garner v. Wolfinbarger*, the Fifth Circuit Court of Appeals held that where a corporation or its management is sued by shareholders, allegedly for "acting inimically to stockholder interests," the privilege of the corporation and its management to refuse to disclose communications with attorneys for the corporation is "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."

The rule of *Garner* is designed to help resolve competing interests. On the one hand, as the court there recognized, "management does not manage for itself and . . . the beneficiaries of its action are the stockholders." More specifically, the shareholders may be the ultimate beneficiaries of the communications with the attorney, and so may have a legitimate interest in knowing the contents of them. Thus, there is no basis for the absolute withholding of management-corporate attorney communications from the shareholders. But on the other hand, shareholders are not the only persons with a legitimate stake in the corporation, and corporate management must balance all the competing interests. The decisionmaking process of corporate management is often one in need of privacy. There are times when management communications with attorneys should be protected, even though the conduct to which the communications relates is alleged to be wrongful: "[I]t is difficult to envision the management of any sizeable corporation pleasing all of its stockholders all of the time, and management desires protection from those who might second-guess or even harass in matters purely of judgment." To resolve these competing considerations for and against disclosure to shareholders, the court in *Garner* laid down criteria for determining whether there existed, in a given case, good cause sufficient to defeat the privilege. The upshot is that, in the shareholder litigation con-

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386. *Id.* at 1101.
387. *Id.*
388. The Court identified the criteria as follows:
There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it
text, the corporation-attorney privilege is qualified. 389

The first case to consider the availability of the attorney-client privilege in the context of plan fiduciary litigation closely followed Garner, and by analogy held that the attorney-plan privilege is similarly qualified. 390 Subsequent cases, though, have generally gone further and concluded that plan fiduciaries should never be able to assert an attorney-client privilege against participants and beneficiaries. Drawing on the common law of trusts, these courts have held that "[w]hen an attorney advises a fiduciary about a matter dealing with the . . . plan, the attorney's client is not the fiduciary personally but, rather, the . . . beneficiaries." 391 As the leading state common law case on the subject explains:

As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees . . . cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of

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390. Fitzsimmons, 90 F.R.D. 583, 586 (N.D. Ill. 1981). Fitzsimmons did go beyond Garner in one respect, in that it held that the privilege was similarly qualified in suits brought under ERISA by the Secretary of Labor. A case that antedated Donovan, United States v. De Lillo, 448 F. Supp. 840, 841 (E.D.N.Y. 1978), contains dictum that "the 'client' may be viewed as the pension and retirement benefit fund, or possibly its board of trustees," and so "[a]n individual trustee would seem to have no proper personal interest in protecting against disclosure of communications which pertain to the fund's business."

Id.

preserving the full disclosure necessary in the trustee-beneficiary relationship is . . . ultimately more important than the protection of the trustees’ confidence in the attorney for the trust. 392

And on the basis of this principle, that the participants and beneficiaries are the true clients, the attorney-plan privilege has been held unavailable, not only in fiduciary litigation, but in benefit claim and other non-fiduciary litigation as well. 393

It is unfortunate that these approaches to the attorney-plan privilege have been developed without any regard for the policies of ERISA and without attention to the distinctive characteristics of employee benefit plans. Both the qualified-privilege and the no-privilege approaches are certainly plausible, and are superficially consistent with ERISA. But they are each based on freewheeling analogizing that is analytically suspect and that is useless in the hard cases.

Reliance on Garner’s qualified privilege approach is flawed analogizing because, as we have seen, benefit plans differ materially from corporations. Plan fiduciaries, unlike corporate officers and directors, are required to be loyal to only one interest group — the participants and beneficiaries — and they are not ordinarily called upon to exercise judgment in order to balance competing interests. Thus, the features of managerial decisionmaking that the Garner court relied on to sustain the privilege at all are much less prominent in the context of benefit plans. Hence, the scope of the privilege in the plan context (if it exists at all) is necessarily more limited than in the corporate context.

Yet the alternative approach equally involves flawed analogizing. Whatever sense it makes to call a trust beneficiary the client of the trustee’s attorney, it makes no sense to call the plan participants and beneficiaries the client of the plan attorney. They lack the very attribute of a client — decisionmaking authority — that underlies the rules governing communications with an attorney. 394

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sions drawn from categorizing the participants and beneficiaries as the client are based on a demonstrably false premise. An especially suspect conclusion reached under this approach is the facile extension of the rule of no privilege beyond the context of fiduciary litigation to all suits brought by a participant against a fiduciary.

Let us then examine the attorney-plan privilege, not as an isolated rule of evidence, but as a part of the common law of plan attorneys, and in light of ERISA's policies, to see what should be the appropriate rules.

2. **Should There be a Privilege?**

Any testimonial privilege is an exception to the general duty of all persons to provide testimony when called on to do so, and must be limited to the narrowest scope consistent with the policies that legitimate it.\(^{395}\) Let us consider when, if ever, communications between plan fiduciaries and plan attorneys should be privileged. To do so, it is useful to make some distinctions.

a. **Intra-Plan and Extra-Plan Litigation**

The first, and broadest, distinction to be made is between intra-plan litigation and extra-plan litigation.

Intra-plan litigation is between plan actors — fiduciaries, participants, beneficiaries, parties-in-interest, the Secretary of Labor — in their capacities as such. It includes claims under ERISA section 502(a) or any other civil remedy provision in ERISA; claims involving a plan that arise under section 302(c)(5) of the Taft-Hartley Act; and certain claims arising under the federal common law of benefit plans. The specific kinds of claims in this category will be discussed in more detail below.

Extra-plan litigation, on the other hand, is litigation between a plan or plan fiduciaries on the one side of the suit and persons not involved in the establishment or operation of the plan on the other side of the suit. It includes commercial and tort litigation with plan outsiders, and will normally arise from the plan's incidental business activities. Extra-plan suits usually will have nothing to do with the internal management, administration, or operation of a benefit plan.

This distinction is obviously rough, and it is easy to envisage bor-

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395. 8 J. WIGMORE, supra note 394, § 2291, at 554.
derline cases. Refinement of the distinction, though, is not possible until it has begun to be put to use in real cases. Still, the distinction is useful for making the key point, that plan privilege issues will arise in two very different kinds of suits: those arising from a plan's activities as a plan, potentially implicating ERISA's fiduciary and disclosure policies; and those arising from a plan's incidental activities. The point is important, because the factors bearing upon the existence and scope of any attorney-plan privilege are very different in the two kinds of cases.

b. The Privilege in Extra-Plan Litigation

In general, the question of the availability of the attorney-plan privilege in extra-plan litigation is an easy one. The paradigm for this category is litigation concerning a plan's business activities; a breach of contract action, for example. Ordinarily, there will be no special, ERISA-based duties running from the plan or its fiduciaries to the other party, which might justify modifying or eliminating the privilege. Nor are the issues in this kind of litigation likely to be governed by any ERISA policies that might affect the existence of the privilege. Thus, extra-plan litigation presumptively should be treated just like any other case of business litigation involving an organization. The rationale for according a privilege to attorney-corporation communications should apply equally to attorney-plan communications, and yield the same scope for the privilege.

c. Three Varieties of Intra-Plan Litigation

Intra-plan litigation presents more complex issues. To analyze this category properly, some further distinctions are needed.

As a first approximation, one may distinguish three main kinds of intra-plan litigation: fiduciary litigation, suits for benefits, and non-ERISA claims. These three classes are obviously not mutually exclusive: lawsuits often involve claims from two, or all three, classes. Nor are the three classes fully comprehensive: ERISA section 502(a) shows on its face that there may be ERISA suits that are neither fiduciary claims nor benefit claims. Nor are the boundaries between

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396. For example, an adversary proceeding by the trustee of a participant's bankruptcy estate for turnover of the participant's benefits or vested plan interest.
398. For example, a suit to compel an administrator to supply information. ERISA § 502(a)(1)(A) & (c), 29 U.S.C. § 1132(a)(1)(A) & (c) (1974).
the classes sharp. Still, it is convenient to begin with this classification scheme, for it helps to isolate the plan characteristics and the ERISA policies most significant for assessing privilege claims.

i. Fiduciary Litigation

Let us begin with the case of fiduciary litigation. The paradigm for this category is a suit against a fiduciary, under ERISA sections 502(a)(2) and 409(a), alleging a violation of ERISA sections 404, 405, or 406.

The prevailing view, discussed above, seems correct: there should be no attorney-plan privilege at all for pre-lawsuit communications relating to the challenged fiduciary conduct. However, this conclusion is not reached (as it is in current case law) through a formalistic labelling of the participants and beneficiaries as the clients. Instead, it is based on factors derived from ERISA; in particular, on the duty of loyalty of the plan fiduciary, and on ERISA’s strong policy of full disclosure.

The analysis is not complicated. To begin, all fiduciaries, of whatever kind, owe a duty of loyalty. Otherwise, they would not be fiduciaries. The reasoning of Garner shows that, because of this duty of loyalty, any attorney-client privilege involving a fiduciary as client or client representative must be qualified with respect to the persons to whom the loyalty is owed. In the case of plans, in particular, the fiduciary's duty of loyalty requires that the attorney-plan privilege be qualified with respect to participants and beneficiaries. It should also be qualified with respect to other fiduciaries and the Secretary of Labor, at least when they sue on participants’ and beneficiaries’ behalf. But, as the reasoning of Garner also shows, a fiduciary’s duty of loyalty is not a sufficient reason to nullify the privilege entirely.

In the case of ERISA plans, there is an additional factor that bears upon the privilege question: the disclosure policy. As explained above, ERISA requires plans to make extensive disclosures about fiduciary conduct. The disclosure policy is an adjunct to the fiduciary policies, designed to afford participants, beneficiaries, fiduciaries, and the Secretary of Labor an opportunity to review fiduciary conduct, and designed to facilitate the correction of wrongs when neces-

399. J. SHEPHERD, supra note 102, at 48.
400. See supra notes 69-82 and accompanying text.
sary. It also provides a strong incentive for fiduciaries to act properly. All secrecy about fiduciary conduct is inimical to this policy, especially secrecy that would interfere with oversight and correction of fiduciary wrongs by participants and beneficiaries. Because of this central policy, a fiduciary's conduct or decisionmaking, to the extent it might represent a breach of fiduciary duty, is not entitled to any privacy. Neither the fiduciary nor anyone else has any legitimate interest in maintaining that conduct or decisionmaking in secrecy from the participants and beneficiaries. As corollary, a fiduciary's communications with a plan attorney about matters challenged as a fiduciary breach are not entitled to privacy from the participants and beneficiaries (or their surrogates) in litigation about that conduct.

Thus, it is ERISA's disclosure policy, rather than any supposed status of the participants as clients, that requires the privilege to be unavailable. And, as a result, the scope of the disclosure policy must determine the scope of the region of no privilege.

ii. Benefit Claims

Very different considerations are involved in benefit claims. The paradigm for this category is a suit under ERISA section 502(a)(1)(B), by a participant or beneficiary who claims that his benefits were incorrectly computed.

In such cases, the participant or beneficiary sues on his own behalf, and seeks relief accruing only to himself. His claim is that a fiduciary was mistaken or acted outside his discretion; not that he breached a fiduciary duty to the detriment of the plan. Because fiduciary wrongdoing is not the crux of the claim, the strong policy of disclosure is not so compelling a reason against the privilege as it is in fiduciary claims. Yet the general considerations of fiduciary loyalty still militate in favor of qualification of the privilege under the Garner rationale. What, then, should be the appropriate rule?

The key is the fact that the result of the suit, unlike as in a fiduciary suit, will not necessarily benefit the entire plan or a large group of participants and beneficiaries. In fact, a decision in favor of the claimant may threaten to harm the interests of others, by leaving fewer assets, or fewer liquid assets, in the plan for payment of benefits to them. In benefit cases, the interest of the complaining participant may be in conflict with the interests of other participants and beneficiaries; perhaps, in conflict with all of them.

As a result, in deciding benefit claims, fiduciaries may have to balance legitimate, but conflicting interests. By doing so, the fiduciary
acts in a manner analogous to that of a corporate manager. A balancing rule of the type announced by Garner, which is designed precisely for fiduciaries who must resolve competing interests, seems appropriate for determining the availability of the privilege in these cases. However, the factors identified by the court in Garner, as significant for corporate misconduct claims, are not necessarily appropriate ones in the context of benefit claims. The factors courts should consider in determining whether to hold communications privileged in these cases must be worked out on a case-by-case basis. Clearly, though, they should be concerned largely with the presence or absence of intra-plan conflicts and the extent to which the fiduciary’s claimed error in determining benefits is alleged to result from something other than honest misjudgment.

iii. Non-ERISA Litigation

If an instance of intra-plan litigation should happen not to arise under ERISA or the federal common law of benefit plans, it would be unlikely to involve considerations of fiduciary loyalty, fiduciary discretion, or disclosure. If so, there would be little, if any, reason to qualify or eliminate the privilege. Individual cases might present specialized issues, but, in the main, litigation in this category should be treated just like extra-plan litigation for purposes of the attorney-plan privilege.

3. Difficult Cases

The categories just discussed are only a starting point for analysis, but they do suggest how to deal with mixed, intermediate and difficult cases.

Consider, for example, a common case, where a person is sued for breach of fiduciary duty and defends on the ground that he is not a fiduciary. Since either the allegation or denial of fiduciary status might be specious, how should one proceed? To give full effect to the traditional attorney-client privilege in this case, or even to recognize it

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401. There is another important similarity between corporate managerial decisions and fiduciary determinations of benefit claims that results from their both being committed to the officer’s or fiduciary’s discretion. Both corporate officers and fiduciaries are protected from having their discretionary decisions second-guessed. In the corporate context, these decisions are insulated by the business judgment rule, see, e.g., Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 269 (Del. Ch. 1989), and in the ERISA context by the abuse of discretion standard, see Bruch, 489 U.S. 101.
pending a preliminary determination of fiduciary status, might encourage this defense in cases where its justification is weak. Encouraging avoidance of fiduciary obligations is not consistent with ERISA. But simply to treat the case as a straightforward fiduciary breach case, and apply the no-privilege rule, might lead to invasion of the privacy of communications that legitimately warrant protection. The problem becomes one of resolving these competing concerns.

A practical way to handle cases of this type, consistent with ERISA’s policies, would be to start with a presumption that there is no privilege — that the case truly involves a fiduciary claim — but allow the presumption to be rebutted by a strong and early showing that the defendant is not a fiduciary. The reason for starting with a presumption in favor of no privilege is that ERISA fiduciary status is a matter of degree. Merely because a person’s discretionary authority falls short of the amount needed to bring him within the fiduciary rules, it does not follow that he fully escapes the reach of ERISA’s policies — including those that justify qualification or elimination of the privilege. It is fair to suppose, as a general principle, that the greater the defendant’s difficulty in establishing that he fell short of the requisite degree of discretionary authority needed to make him a fiduciary, the more intimately he must have been involved in the management and operation of the plan, and the more he is arguably subject to ERISA’s fiduciary and disclosure policies. Since this approach is a pragmatic one, it may, of course, result in disclosure of communications in some cases where a trial subsequently shows that the communicant was not a fiduciary. But ERISA’s policies militate in favor of erring on the side of disclosure.

It is interesting to note that the arguments advanced here also suggest that the attorney-client privilege may properly be qualified even when the attorney in question is not a plan attorney. Consider the case where a person who is unequivocally not a fiduciary is sued for participation in a fiduciary’s breach of duty. In most cases, the non-fiduciary will owe no duty of loyalty to the plan participants. Thus, the normal privilege attaching to communications with his attorney cannot be qualified on the Garner rationale. But the non-fiduciary allegedly did bring himself within the ambit of ERISA’s policies,

402. See supra text accompanying notes 91-109.
403. This kind of federal common law claim is discussed in Section VI(A), infra notes 460-483, and accompanying text.
including its fiduciary and disclosure policies, by assisting the fiduciary to violate his duty of loyalty to participants. If pre-litigation communications with the non-fiduciary’s attorney relate to the fiduciary’s breach of fiduciary duty, ERISA’s disclosure policies may tell against recognition of the privilege. A further consideration is that the non-fiduciary who participated in the breach arguably should be in no better position than the fiduciary to withhold information about it.

As in the prior case, a workable approach to dealing with this situation would involve beginning with a strong presumption against application of the attorney-client privilege. Again, case-by-case development would be needed to work out the contours of this rule.

V. FIDUCIARY OBLIGATIONS OF THE PLAN ATTORNEY

Our discussion to this point, concerning the substance of plan-attorney common law, has provided some insight into the character of the relationships that the plan attorney has with the fiduciaries and with the participants and beneficiaries. Our goal, though, is to develop principles and rules that might govern plan attorney conduct within the context of those relationships. We begin that development here.

A. Disclosure and Cofiduciary Duties

The discussion of compelled, testimonial disclosure of communications with a plan attorney suggests a closely-related question: the extent, if any, to which a plan attorney is permitted or required to disclose information, on her own initiative, about a possible breach of duty or violation of ERISA. This is the so-called “client fraud”404 problem as applied to the plan “client.”

The client fraud problem arises in any comprehensive body of attorney law. It does so because a duty of loyalty is an essential part of any acceptable concept of attorney.405 That duty of loyalty invariably is understood to encompass a sub-duty on the part of the attorney not to use information gained in the representation adversely to the interests represented.406 Prima facie, the duty of non-disclosure in-

404. Hazard, supra note 341, at 291.
405. On the duty of loyalty in the federal common law of attorneys, see, e.g., In re Corn Derivatives Antitrust Litig., 748 F.2d at 161; In re “Agent Orange” Product Liab. Litig., 800 F.2d 14, 17 (2d Cir. 1986); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 (2d Cir. 1977).
406. RESTATEMENT (SECOND) OF AGENCY § 395.
cludes a duty not to disclose frauds and wrongs of the client; but that creates a very serious problem, for an attorney also has duties to persons and interests other than those to whom and to which his duty of loyalty runs. In particular, he has a duty to promote the administration of justice and to maintain the integrity of the judicial system; and this duty, arguably, encompasses a duty to prevent the perpetration of frauds in connection with his representation. Because of this latter obligation, an attorney’s duty of confidentiality arguably should not be absolute.407 But its proper scope — the determination of which is the “client fraud problem” — is a matter of some disagreement.

The plan attorney, as an attorney, surely has some duty or duties of loyalty with respect to the plan.408 What does the interaction between this duty or those duties of loyalty and the plan attorney’s duties to the public and to other interests entail about confidentiality and disclosure in the plan context? Specifically, what is a plan attorney to do when he has reason to believe that a fiduciary has committed a breach of duty?

To answer this question, we must first determine what sources to draw on for guidance.

1. The ABA Codes and the Emphasis on Confidentiality

Two sources that should not be relied on uncritically are the ABA’s Model Code of Professional Conduct and Model Rules of Professional Responsibility.409

407. For an argument that the duty of confidentiality should be absolute, see Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).

408. We defer discussion of the contours of the duties until Section B, infra notes 442-459 and accompanying text.

409. One reason is that their provisions were designed to reflect only minimum standards of conduct, compliance with which is sufficient to allow an attorney to avoid professional censure. They do not purport to reflect fiduciary standards or any standards of conduct, violation of which may result in civil liability. Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 655 F. Supp. 1573, 1575 (S.D. Fla. 1987), aff’d mem., 846 F.2d 753 (11th Cir. 1988); Bickel v. Mackie, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978), aff’d mem., 590 F.2d 341 (8th Cir. 1978); Annotated Rules, supra note 361, at 10. But see Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C.L. Rev. 281 (1979) (arguing for use as standards for civil liability).

The original *Canons of Professional Ethics*, adopted in 1908, instructed that:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.\(^\text{410}\)

The guidelines for professional conduct have greatly changed.\(^\text{411}\) While the *Canons* subordinated the lawyer's obligation of confidentiality to his responsibility to the public, the *Model Code* and *Model Rules* treat as virtually paramount the obligation of an attorney to keep confidential the information disclosed in the course of a representation.\(^\text{412}\) The elevation of this duty to such preeminent status is inconsistent with the policies of ERISA and the purposes of plan attorney common law.

Consider, for example, *Model Rule 1.6*, the prevailing, basic rule of confidentiality. It gives a very simple answer to the client fraud question, by providing, in relevant part, that: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."\(^\text{413}\) This sweeping rule, which imposes confidentiality on any "information relating to representation,"\(^\text{414}\) would clearly prohibit disclosure of any breach of fiduciary duty. The rule is purportedly based on the law of

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\(^{410}\) ~ CANONS OF PROFESSIONAL ETHICS Canon 41 (1908).


\(^{413}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a). The permissive (but not mandatory) exceptions have no substantial relevance to plan representation.

\(^{414}\) MODEL CODE DR 4-101, by comparison, prohibits disclosure only of privileged, "embarrassing" or "detrimental" information:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
attorney-client privilege and on the law of agency.\textsuperscript{415} However, neither putative source justifies so sweeping a rule of silence in the plan context.

Consider the first justification: the attorney-client privilege. As we have seen, no privilege attaches to communications with a plan attorney regarding fiduciary breaches, and many other communications with him are subject to only a qualified privilege. To the extent the rule of confidentiality is based on the law of privilege or its policies, it must be limited when sought to be applied to plan attorneys.

Consider next the other justification: principles of agency. That rationale also fails to justify any sweeping rule of confidentiality in the plan context. The common law rule, found in the Restatement (Second) of Agency, and expressly relied on by Rule 1.6, is that:

\begin{quote}
Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, \textit{in competition with or to the injury of the principal}, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.\textsuperscript{416}
\end{quote}

The thrust of the rule is not to blanket in secrecy all information obtained by an attorney or other agent. Rather, its main purpose is to protect the client's or principal's confidential business information against misuse by the agent. That purpose has nothing to do with a lawyer's knowledge of fiduciary breaches, and has little relevance to benefit plans, which do not normally have confidential business information.

Rule 1.6 is not an isolated idiosyncrasy, for the \textit{Model Rules} as a whole is structured so as to prevent disclosure of any non-public in-

\begin{itemize}
\item \textsuperscript{415} ANNOTATED RULES, supra note 361, at 61; \textit{see also} id. at 65 (legal background to Rule 1.6).
\item \textsuperscript{416} RESTATEMENT (SECOND) OF AGENCY § 395 (emphasis supplied).
\end{itemize}
formation known to an attorney. The Model Rules — in particular, the confidentiality provisions — represents the outlook of attorneys for whom representation is predominantly adversarial. It also represents the outlook of those attorneys who strongly identify with, if not adopt as their own, the interests of their clients. The result is an us-against-them outlook that inexorably leads to a de-emphasis of the lawyer's duties to the public. As one commentator has observed, the ABA codes invert the proper ordering of interests to be served by a lawyer, placing lawyer self-interest first and the interest of the public in the proper functioning of the legal system last. The Model Code and the Model Rules recognize few, if any, instances where a lawyer is even permitted, let alone required, to disclose client violations of laws.

But as we have seen already, plans are not businesses, plan attorneys do not play an essentially adversarial role, and ERISA announces a clear and prominent public interest in full disclosure of fiduciary wrongs as a prophylactic means to facilitate benefit plans' proper functioning. The law of plan attorneys cannot ignore these important facts. In framing rules of conduct for plan attorneys, one cannot impose on plan attorneys any duty of confidentiality so stringent as to absolutely bar them from disclosing fiduciary breaches.

2. The Cofiduciary Obligation of Plan Attorneys

What, then, do ERISA's policies require and permit of a plan attorney when he learns of a breach?

417. See also Model Rules of Professional Conduct Rules 1.13(c), 1.16, 4.1(b).
421. Indeed, the only substantial exceptions to the confidentiality rule are for cases of lawyer self-interest: collection of fees and protection against claims of malpractice and other wrongdoing. Model Code of Professional Responsibility DR 4-101(c)(4); Model Rules of Professional Conduct Rule 1.6(b)(2).
a. The Obligation to Take Action

There can be no doubt the plan attorney must do something; he cannot simply ignore the wrong.

Consider plan fiduciaries, by analogy. ERISA makes them responsible for the proper conduct of each other, imposing liability on a fiduciary whenever “he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”422 As we have seen, for many reasons ERISA’s disclosure and fiduciary policies should apply to plan attorneys, and ERISA’s fiduciary rules may serve as the starting point for common law development. With respect to knowledge of fiduciary wrongdoing, the same fiduciary and disclosure policies that underlie ERISA’s rule of co-fiduciary liability militate in favor of a rule requiring the attorney to take reasonable steps either to bring about a cure of the breach himself or to cause a fiduciary, or some other authorized person, to do so. Such a rule would help plan attorney common law fulfill its prophylactic function.

Significantly, another body of federal law that relies on disclosure as a means of protection and enforcement imposes similar remedial and disclosure obligations on attorneys. In the field of securities law, the SEC has taken the lead in compelling action by securities counsel who learn of client wrongs.423 As the SEC explicated its chosen standard in the leading case of In re Carter:424

When a lawyer with significant responsibilities in the effectuation of a company’s compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client’s non-compliance.

. . . .

Initially, counselling accurate disclosure is sufficient, even if his advice is not accepted. But there comes a point at which a reasonable lawyer must conclude that his advice is not being followed, or even sought in good faith, and that his client is involved

in a continuing course of violating the securities laws. At this critical juncture, the lawyer must take further, more affirmative steps in order to avoid the inference that he has been co-opted, willingly or unwillingly, into the scheme of non-disclosure.

The lawyer is in the best position to choose his next step. Resignation is one option, although we recognize that other considerations, including the protection of the client against foreseeable prejudice, must be taken into account in the case of withdrawal. A direct approach to the board of directors or one or more individual directors or officers may be appropriate; or he may choose to try to enlist the aid of other members of the firm's management. What is required, in short, is some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the desires of a strong-willed, but misguided client.425

On other occasions, the SEC has gone so far as to impose on attorneys a duty to make public disclosure of corporate wrongs.426 The rationale is that lawyers have a duty to the public to protect the integrity of the legal system; a duty that may supersede the lawyer's duty to an individual client.427

Yet there is really nothing peculiar to ERISA or the securities laws in the position that a lawyer's duty to the public may supersede the duty of confidentiality. For example, in reaction to Model Rule 1.6, the Senate considered a bill that would have made it a misdemeanor for an attorney not to disclose certain client crimes and frauds.428 The proposed Restatement of the Law — The Law Gov-

425. Id.
427. See Kaplan, supra note 423, at 881.
428. The proposed Lawyer's Duty of Disclosure Act, S. 485, 98th Cong., 1st Sess. (1983), provided that:
   Sec. 2. Chapter 63 of title 18, United States Code, is amended by inserting immediately following section 1343 the following new section:
   "SEC. 1344. An attorney —
   "(a)(1) who has in the course of representing a client placed in any post office or authorized depository for mail documents that the attorney prepared or any other matter or thing whatever to be sent or delivered that could enable or assist the client to commit a criminal or fraudulent act, or "(2) who has prepared documents for or who has otherwise been instrumental in assisting a client who has placed in any post office or authorized depository for mail any matter or thing whatever to be sent or delivered in furtherance of a criminal or fraudulent scheme, and who "(b)(1) upon discovering that his client intends to commit a criminal or
Many states that have adopted the Model Rules have modified them so as to require or permit disclosure of crimes or frauds, at least in certain circumstances.430

Indeed, the Model Rules themselves recognize some obligation of disclosure. Geoffrey Hazard, the Reporter for the Model Rules, has argued that, notwithstanding Rule 1.6’s seemingly absolute requirement of confidentiality, the Comment to it invites an attorney who resigns because of his client’s wrong to do so in a way that signals to affected parties that a wrong is being committed.431 More clearly, Rule 1.13 provides, in relevant part, that:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in ac-

fraudulent act fails to make timely disclosure to Federal law enforcement authorities of such intended conduct in order to prevent such conduct, or (2) upon discovering that his client has committed a criminal or fraudulent act fails to make timely disclosure to Federal law enforcement authorities of his knowledge regarding such conduct in order to mitigate the consequences of his client’s criminal or fraudulent act in the furtherance of which the attorney’s services were used, shall be fined not more than $5,000 or imprisoned not more than one year or both.” Hearings on the bill elicited comments favoring an obligation of attorneys to correct or disclose crimes and frauds.

Id.

Much of the testimony at the hearings on the bill were in favor of imposing some remedial obligations on attorneys, even if not through criminal sanctions. See generally Lawyer’s Duty of Disclosure: Hearing on S. 485 before the Subcomm. on Criminal Law of the Sen. Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).


Following an attempt by the lawyer, if feasible, to dissuade the client, a lawyer may use or disclose confidential client information if and to the extent the lawyer reasonably believes:

(1) The client intends to commit a crime or fraud that threatens to cause substantial financial loss; and
(2) The lawyer’s use or disclosure is:
   (a) Reasonably appropriate to prevent the act; and
   (b) Necessary in view of the imminence of the substantial financial loss.

Id.

430. See generally 2 G. HAZARD & W. HODES, supra note 154, at 1259-61 (discussing state modifications).

431. Hazard, supra note 341, at 301-08. The Comment in question states that “Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.” ANNOTATED RULES, supra note 361, at 62.
tion, 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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law. (c) If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.432

Thus, notwithstanding Model Rule 1.6, there is wide agreement that an attorney who learns of a wrong in connection with a representation should not be required, or even permitted, to sit silently by. He has an obligation to use his knowledge and his authority to deal with the wrongdoing. Both ERISA’s co-fiduciary rules and corresponding rules in other contexts suggest that the conduct required of a plan

attorney in such case must be conduct that is reasonable under the circumstances. The standard for reasonability, of course, must be shaped by ERISA's fiduciary and disclosure policies.

b. The Contours of the Obligation

Under ERISA there are few specific rules for determining what remedial efforts by a plan fiduciary are to be deemed "reasonable" under the circumstances. The legislative history — the main guidance for case law development along with the common law of trusts — says only that if a fiduciary cannot correct the breach himself:

[T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach. 433

This general standard for plan fiduciaries obviously may be an important source of guidance. However, it clearly must be modified in order properly to be adapted to plan attorneys. Plan attorneys have powers and responsibilities different from those of plan fiduciaries, and one cannot mechanically require them to do what it might be appropriate for a plan fiduciary to do. A plan attorney, for example, has no standing under ERISA section 502(a) to bring suit against a wrongdoing fiduciary, and so cannot himself bring about court intervention to cure the problem. One must develop guidelines responsive to the powers and responsibilities of plan attorneys.

Co-fiduciary responsibility under ERISA is triggered when a fiduciary "knew or should have known" of a breach. 434 This should be


434. Hendershott, 840 F.2d at 342 ("knowledge of the breach can be inferred from surrounding circumstances raising a reasonable inference of knowledge"). The standard is derived from the common law of torts, G. BOGERT, supra note 111, § 565; Whitney v. Citibank, N.A., 782 F.2d 1106 (2d Cir. 1986) (fiduciary held liable where "on notice" of breach); and is generally consistent with the ABA Codes. See MODEL RULES OF PROFESSIONAL CONDUCT, Terminology, paras. 5, 8 (1983); Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977, 986.
the trigger for plan attorney responsibility as well, and cases purportedly based on rules of professional responsibility, that require actual knowledge of a wrong in order to trigger a disclosure obligation, must be rejected as inconsistent with the policies of ERISA. Note, however, that this standard is only a trigger to do something; it is not necessarily a trigger to make disclosure about the apparent breach.

Privilege considerations do not limit disclosure of wrongs to other fiduciaries — to the Secretary of Labor or the participants — as a permissible course of action. If a plan attorney reasonably believes that disclosure of a wrong to such a person is reasonable under the circumstances, there is no extrinsic rule to prevent his doing so.

But it does not follow that disclosure is always appropriate as a first step. Opponents of rules that permit or require disclosure of client wrongs invariably raise the argument that a rule affording strict protection for client information will induce clients to confide wrongs, and thus give the attorney an opportunity to convince the client to remedy them. As an empirical assertion, the claim is untested and probably untestable; but as a piece of common sense, it has obvious validity. A plan attorney may be an extremely influential counselor, and a rule always requiring disclosure might be counterproductive. Disclosure may be unnecessary, for example, where a breach has resulted from mistake or negligence, and the breaching fiduciary heeds the attorney’s advice to cure it. The plan attorney may reasonably determine that no further steps — for example, an effort to seek removal of the fiduciary — are necessary. A strict rule always requiring further disclosure might encourage fiduciaries to engage compliant attorneys, and might reduce the incentives for fiduciaries to consult with attorneys about questionable conduct. If the plan attorney is to be able to fulfill his proper and needed function, he should have some discretion to treat knowledge of wrongdoing as confiden- ...

436. Cj. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1): A lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.*

*Id.*

tial, even if the knowledge is not ultimately privileged against disclosure in litigation. Possession of discretion in this regard is consistent with the plan attorney's fiduciary-like role in the affairs of the plan.\textsuperscript{439}

Of course, there will be times when disclosure of a fiduciary's wrong is appropriate, either because the breaching fiduciary will not remedy the wrong or because the fiduciary, through the breach, has demonstrated unfitness for his role. For the protection of the plan, disclosure may be necessary so that further steps can be taken by those with power to do so. Normally, another fiduciary should be the first choice as the person to whom the disclosure is made. The fiduciaries are the persons with primary responsibility to manage the plan and to protect the interests of the participants. If that step fails, it may be appropriate to bring the breach to the attention of the Department of Labor or the participants and beneficiaries.

One further point is important. A plan attorney who learns of a breach, and who cannot convince the wrongdoer to rectify it, cannot be allowed the easy escape of resignation, as he is under the \textit{Model Rules}.\textsuperscript{440} To do so would be inconsistent with ERISA's fiduciary policies, which prohibit resignation by fiduciaries in such circumstances;\textsuperscript{441} inconsistent with the plan attorney's obligations to the ongoing activity of the plan and to the participants and beneficiaries; and would defeat the function of plan attorney common law as auxiliary to ERISA's fiduciary rules. A plan attorney is not a hired gun, a fungible who mechanically does the bidding of a plan fiduciary. He is


\textsuperscript{440} Resignation is easy under the \textit{Model Rules}. Rule 1.16(b) provides that: Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

\textit{Model Rules of Professional Conduct} Rule 1.16(b).

a person who may well be intimately involved in the workings of the plan; who is likely to be extensively relied on; who has responsibilities to the plan and its constituents; and who may be, in effect, a fiduciary with respect to the legal affairs of the plan. His obligations to the plan cannot be brought to an end at will, and his co-fiduciary obligations require no less than reasonable efforts to stop wrongs to the plan or to enlist the efforts of someone with power to do so.

B. General Fiduciary Standards

In our discussion above of the purpose and general character of plan attorney common law, we explained how ERISA’s fiduciary rules could be used analogically, to determine rules of conduct for attorneys, and perhaps other persons who are functionally similar to plan fiduciaries, in the same way that trust law standards may be used as a basis for rules governing other kinds of fiduciaries.442 We now make use of this approach for purposes of developing plan attorney fiduciary rules in the following way. As a working hypothesis, we treat plan attorneys as if they were a new kind of plan fiduciary. In particular, we begin our analysis of plan attorney fiduciary obligations by treating plan attorneys as if they were fiduciaries with respect to the legal affairs of the plan. This approach is particularly appropriate for an attorney who serves as general counsel for a plan.

The “legal affairs” of a plan consist mainly of the fiduciaries’ compliance with the plan document and with ERISA and its attendant regulations. Accordingly, to say that a plan attorney is a fiduciary with respect to the legal affairs of a plan is to assign him responsibility for such compliance. This perspective on the plan attorney’s status in a plan, and on his obligations, merely generalizes the principles, discussed above, that plan attorneys have obligations to take reasonable steps to help remedy a fiduciary’s non-compliance with the plan and ERISA, and that they have discretion in determining how best to try to accomplish this. This provides reassurance that the working hypothesis we use is not arbitrary, but is consistent with the conclusions already reached.

To determine the general fiduciary responsibilities of plan attorneys, let us start by examining ERISA’s rules of fiduciary responsibility. ERISA section 404(a) is the fundamental statement of such fiduciary rules. It provides that:

442. See supra text accompanying notes 336-342.
[An ERISA] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and

(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.\textsuperscript{443}

This standard cannot uncritically be applied to plan attorneys. Indeed, it cannot be applied without modification to anyone but a plan fiduciary. ERISA carefully specifies who shall be the fiduciaries with respect to plans, and imposes the network of specialized duties on them. The duties, in effect, functionally define an ERISA fiduciary. If some person other than a named fiduciary, trustee, administrator, investment advisor, or section 3(21) fiduciary could be made subject to these precise obligations, the definition of ERISA fiduciary would impermissibly be expanded beyond what Congress chose. How, then, should the duties be modified to take into account the special characteristics of plan attorneys?

I. The Plan Attorney’s Duty of Loyalty

The analogical approach of treating the plan attorney as essentially a fiduciary with respect to the plan’s legal affairs can be used to derive some basic conclusions about his duty of loyalty. As we have already seen, the interests he must advance and to which he must be loyal are, derivatively, the same as those which the plan fiduciaries must advance and to which they must be loyal.\textsuperscript{444} Thus, the plan attorney’s duty of loyalty with respect to the plan, like that of the plan fiduciaries, may be understood as a duty to the activity that is the plan. The duty may also be treated as parallel that of a plan fiduciary,

\textsuperscript{443} ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).
\textsuperscript{444} See supra text accompanying notes 358-379.
and be construed to include the normal incidents and corollaries, such as the prohibition on self-dealing,\(^\text{445}\) the duty not to act on behalf of others with adverse\(^\text{446}\) or conflicting\(^\text{447}\) interests, and the duty of impartiality.\(^\text{448}\) This is consistent, in any event, with an attorney’s traditional duties of loyalty to a client.

However, the analogy cannot be pushed much further. There are important and inescapable factors that necessitate differences between the duty of loyalty of the plan fiduciary and the duty of loyalty of the plan attorney. One factor is that plan attorneys — like all attorneys — owe a substantial duty to the public and to the administration of the legal system.\(^\text{449}\) A plan attorney, unlike a plan fiduciary, cannot be required to act “solely in the interest of the participants and beneficiaries” and cannot be required or permitted to act “for the exclusive purpose of providing benefits” and defraying plan expenses. Indeed, when duties with respect to the plan conflict with public obligations, the duties with respect to the plan may have to be subordinated.\(^\text{450}\)

Another factor is that the plan attorney must be understood to have obligations to the plan fiduciaries. Plan fiduciaries, to the extent they may be deemed to have duties to individuals connected with the plan, owe them only to participants and beneficiaries, and not to other fiduciaries. That is not the case with plan attorneys. Often, a plan attorney is hired to represent a fiduciary in his capacity as such. Even where he is hired by the plan, it is the fiduciaries with whom he deals. The plan attorney’s legal advice is given to the plan fiduciaries, and it is given mainly to assist the fiduciaries — rather than the plan\(^\text{451}\) — to comply with the law and fulfill their responsibilities. The advice is given from the perspective of the attorney’s superior knowledge and is


\(^{446}\) *Restatement (Second) of Agency* § 389.

\(^{447}\) *Id.* § 399.


\(^{449}\) *See supra* text accompanying notes 343-356.

\(^{450}\) An illustrative statement of this point is as follows:
Attorneys are officers of the court and their first duty is to the administration of justice. Whenever an attorney’s duties to his client conflict with those he owes to the public as an officer of the court, he must give precedence to his duty to the public. Any other view would run counter to a principled system of justice. Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248, 1251 (D. Minn. 1984).

\(^{451}\) By contrast, the corporate attorney’s advice is mainly to assist the corporation, rather than the corporate managers individually, to comply with the law. This is another important difference between corporate attorneys and plan attorneys.
given with the understanding and intent that it will be followed. Furthermore, as we saw above, the fiduciaries have one of the essential attributes of a client (or principal) in that they have authority to direct the plan attorney. A relationship of this kind, with these characteristics, is naturally considered a fiduciary relationship, with attendant duties of loyalty and care on the part of the plan attorney. Of course, in cases of conflict, the lawyer’s duty to the plan activity must take precedence over his duty to the fiduciaries, but in the routine case, where there is no conflict, obligations to the fiduciaries must be recognized and acted upon.

The plan attorney’s obligations are thus responsive to multiple interests — albeit ones that normally should be in harmony. The details of the plan attorney’s duties of loyalty can only be worked out through experience in balancing the influences and through case by case development. Still, a few general points can be made here to indicate how future development can and should proceed.

First, while liability litigation will surely be a setting for development of law on the subject, the litigation is likely to be, for the most part, suits claiming liability for participation in a plan fiduciary’s breach of duty. Plan attorneys, since they are not plan fiduciaries, have no significant control over plan assets, plan management, or plan administration. They are largely unable to profit significantly from wrongs to the plan committed alone. For that reason, wrongs done to plans by attorneys, which cause substantial monetary losses, are usually wrongs done as part of a plan fiduciary’s breach. In such cases, ERISA’s express fiduciary rules compel a view of the wrong as one in which the fiduciary is the principal malefactor and the attorney is only secondarily liable as a participant in the breach. This perspective is not likely to be changed by taking a more stringent view of the plan attorney’s duty of loyalty to the plan, because the plan fiduciaries still remain the ones primarily subject to ERISA’s fiduciary policies and expressly subject to the fiduciary rules. Hence, attorney liability cases generally do not and will not require substantial elaboration of


453. See, e.g., Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir. 1988), cert. denied sub nom. Klepak v. Dole 109 S. Ct. 2428 (1989) (fiduciary, rather than attorney who participated in the breach, was the one who “owed the primary responsibility to the Plan”).
the plan attorney’s duty of loyalty, except so far as is required to clarify their co-fiduciary responsibilities for plan fiduciaries’ breaches.\footnote{454}{See infra text accompanying notes 460-483.}

Correlatively, a likely focus for development of the law of plan attorney loyalty will be the area of conflicts of interest. This is the other significant area in which attorney duties of loyalty are regulated and clarified by the courts. There already is a small amount of law on the subject of conflicts in the representation of a plan and its fiduciaries. It is clear, for example, that a plan attorney who has represented a fiduciary in his fiduciary capacity generally cannot represent the fiduciary when he is sued for breach of fiduciary duty.\footnote{455}{E.g., Frank v. Ducy, 7 Employee Benefits Cas. (BNA) 2374 (N.D. Ill. 1986).}

His loyalty with respect to the plan must prevail. On the other hand, there normally should be no obstacle to the attorney representing the interest of the plan, or its participants and beneficiaries, against the fiduciary. In this area of law, confidentiality concerns — which normally might be an objection to such representation — are less important than in the traditional law of conflicts of interest, for the reasons discussed above.\footnote{456}{See supra text accompanying notes 398-401.}

An especially important area of development here should be that of conflicts problems involving interests of the plan and interests of the plan sponsor. As we have noted, it is common for a plan attorney also to be the attorney for the plan sponsor or the attorney for a fiduciary with respect to non-plan matters. But just as it is not necessarily an impermissible conflict for a fiduciary to be an officer or employee of the sponsor, it is not necessarily an impermissible conflict for the plan attorney also to have the sponsor as a client. Nonetheless, a situation of this kind certainly has the potential for trouble, and case by case development will be needed to work out guidelines for when the plan attorney’s loyalty to the plan has been or too easily may be undermined. The emerging law of conflicts on the part of employee-fiduciaries in benefit claim cases should have obvious relevance to these issues.\footnote{457}{E.g., Brown v. Blue Cross & Blue Shield, 898 F.2d 1556 (11th Cir. 1990); Lister v. Stark, 11 Employee Benefits Cas. (BNA) 1611 (N.D. Ill. 1989).}

2. Other Plan Attorney Duties

Loyalty may be the most important duty of the plan attorney, but there clearly are others. A plan attorney should be subject to the
same duty as a plan fiduciary to act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 458 This is substantially a statement of the trust law duties of care and prudence, which have always been held to apply to attorneys. 459 In practice, it states the rule for a federal common law of plan attorney malpractice. This duty, unlike that for loyalty, is one whose contours are likely to be substantially worked out in litigation concerning breaches. An obvious issue is how the standard of care should be construed. Should the standard be that for attorneys in general, or should it be a specialized, higher standard for plan attorneys?

The other ERISA duties specified in section 404(a) do not directly relate to plan attorneys. The duty to diversify investments is obviously not germane. Nor is the duty to act in accordance with plan documents. The conduct of plan attorneys ordinarily is not governed by the plan document. Conceivably, this duty, along with ERISA’s writing requirement, might suggest, by analogy, that there should be an obligation on the part of plan attorneys to reduce their engagement agreements to writing and act in accordance with them. Any such requirement, though, would have to be responsive to concrete problems, as they are presented in litigation, or otherwise.

VI. PLAN ATTORNEY LIABILITY

Thus far, we have dealt with what we previously called the prophylactic aspect of plan attorney common law. We now turn to its remedial aspect. Our task here will be easier. Plan attorney liability, as a subcategory of general non-fiduciary liability for participation in a fiduciary’s breach, is already a well-developed area of ERISA-related law. In the main, our task is only to determine what modifications of existing rules might be appropriate in order to bring the law into accord with the main principles we have found to govern plan attorneys.

A. Liability for Participation in a Breach

1. The Black-Letter Rules

Any non-fiduciary who knowingly participates in a breach of duty committed by an ERISA fiduciary may be held liable to the plan for damages resulting from the breach. Among the non-fiduciaries who have been held so liable are attorneys. Indeed, a substantial number of the reported decisions concerning participation in a breach have involved attorneys.

In framing rules for liability, courts have expressly drawn on the existing rules of the common law of trusts, and have adapted them, to the extent necessary, to conform to the policies of ERISA. The fundamental rule that has emerged was first stated in Freund v. Marshall & Ilsley Bank: "The wrong of participation in a breach of trust is divided into two elements, namely (1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge." The rule has

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462. See generally G. BOGERT, supra note 111, at ch. 43.


465. Id. at 642 (quoting G. BOGERT, supra note 111, § 901). In using the common law term "trustee," the court did not intend to limit the rule only to participation in breaches by ERISA trustees. The rule applies to participation in the breach of any ERISA fiduciary.
come to be further elaborated. It is not a prerequisite to liability that the participating non-fiduciary have profited from the breach;\footnote{\textsuperscript{466}} it is not a prerequisite to liability that the non-fiduciary have dealt directly with the breaching fiduciary;\footnote{\textsuperscript{467}} and it is not a requirement that the participating non-fiduciary have actual knowledge of the breach. Constructive knowledge is enough.\footnote{\textsuperscript{468}} Furthermore, liability is not limited to the amount (if any) that the non-fiduciary gained. Rather, liability extends to the full amount of the plan’s loss.\footnote{\textsuperscript{469}}

2. \textit{The Federal Common Law Character of Non-Fiduciary Liability Rules}

The legislative history of ERISA suggests that Congress may have intended at least some non-fiduciaries to be subject to liability under ERISA for participating in breaches of duty.\footnote{\textsuperscript{470}} However, ERISA’s fiduciary and civil enforcement provisions do not unambiguously permit actions against non-fiduciaries who participate in a breach. Thus, actions of this kind are better treated as claims arising under federal common law.\footnote{\textsuperscript{471}}

\textsuperscript{466} Lindemann, 853 F.2d 1298; Foltz, 627 F. Supp. at 1168.
\textsuperscript{467} Gerace, 635 F. Supp. 563.
\textsuperscript{469} Lindemann, 853 F.2d at 1303.
\textsuperscript{470} \textit{See} H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295, \textit{reprinted in III Legislative History, supra} note 22, at 4562, and in 1974 U.S. Code Cong. & Admin. News 5075: “Fiduciaries (and parties-in-interest) are to be personally liable under the labor provisions for losses sustained by a plan that result from a violation of these [prohibited transaction] rules.”
\textsuperscript{471} Some recent case law has tried to cast doubt on the propriety of imposing liability on non-fiduciaries who participate in a breach. The arguments of those cases are misguided.

The leading case that purports to limit the scope of non-fiduciary liability is Nieto \textit{v}. Ecker, 845 F.2d 868 (9th Cir. 1988). In \textit{Nieto}, the non-fiduciary in question was an attorney. Plaintiffs, participants in a multi-employer fund, sued the plan fiduciaries and the plan attorney for their failure to collect delinquent contributions from participating employers. This failure to collect was the principal (but not only) breach alleged. In a curious opinion, the Court of Appeals for the Ninth Circuit held that while the attorney could be held liable for participating in a prohibited transaction, neither he nor any other non-fiduciary could otherwise be held liable for participating in a fiduciary’s breach.

The holding makes little sense. ERISA prohibits fiduciaries from engaging in prohibited transactions but does not expressly impose liability on parties in interest who participate in them. Nonetheless, the Court in \textit{Nieto} permitted imposition of liability on parties-in-interest in such cases, reasoning that prohibited transactions are “illegal under the Act,” \textit{id.} at 873; that, to “leave plans and their participants with no recourse against
a. Authority for the Rules

The rules of liability for non-fiduciaries who participate in a breach have been worked out pursuant to the courts’ delegated power to develop a common law of fiduciaries.\textsuperscript{472} The propriety of imposing such liability on non-fiduciaries is clear. As explained above, ERISA’s delegation of common lawmaking power regarding fiduciary conduct is exceptionally broad, and is not limited just to power to develop rules for the conduct of plan fiduciaries.\textsuperscript{473} A fundamental

\begin{itemize}
  \item Persons clearly covered by the Act who violate its provisions \textit{is} not a result likely contemplated by Congress,” \textit{id.} at 874 n.6; and that, since the prohibited transaction is a violation of ERISA, there is authority under ERISA § 503(c)(2) to redress it, \textit{id.} at 874. But ERISA does not make prohibited transactions illegal: it simply prohibits fiduciaries from engaging in them. The Court could equally well have said that ERISA makes “illegal” all breaches of fiduciary duty in which a non-fiduciary participates. If it did so, by parity of reasoning it would have been forced to conclude that anyone who participates in a breach of duty would be subject to liability for doing so. But that is precisely the conclusion the Court strove to avoid.
  \item The Court’s arguments against general non-fiduciary liability are equally inconsistent. The first argument is that there can be no non-fiduciary liability for participation in a breach “under” section 409(a) because the section refers only to fiduciaries, and “[a]bsent an explicit directive from Congress,” one may not create federal common law claims. 845 F.2d at 871. To the extent the Court meant by “explicit directive” an unequivocal, express statutory instruction to create federal common law in an area, that has never been the standard. Indeed, if it were the standard, the \textit{Nieto} court itself could never have allowed a federal common law remedy against parties-in-interest. But if “explicit directive” means authorization implied from the statute, then the Court’s peremptory conclusion that there is no such authority simply begs the question and ignores, among other things, recent Supreme Court precedent exercising the authority to create federal common law. \textit{See, e.g., Firestone Tire & Rubber Co.}, 489 U.S. 101. In any event, the Court ignores the possibility that common lawmaking authority need not be delegated, but may arise from the preemption of state law.
  \item The court in \textit{Nieto} also argued that authorization to create a common law claim cannot be found in ERISA § 502(a)(3), because to treat that provision as allowing monetary recovery would render ERISA § 409(a) — which also allows monetary recovery — superfluous. \textit{Nieto}, 845 F.2d at 873. The argument proves too much. ERISA § 409(a) allows a court to order “such . . . equitable or remedial relief as the court may deem appropriate”; but, in slightly different words, so does section 502(a)(3) on its face. The Court’s argument, if correct, would lead to the absurd result that even equitable relief is unavailable under section 502(a)(3), because to allow it would render section 409(a) “superfluous.” The fact is that ERISA is not the most artfully drafted statute, and here Congress was simply repetitious. Nothing in section 409(a) can logically be read to prohibit the award of monetary relief under ERISA § 502(a)(3).
\end{itemize}


\textsuperscript{473} Nor is it limited just to the creation of remedies, as some, e.g., Comment, \textit{Nieto v. Ecker: The Propriety of Non-Fiduciary Liability Under Section 409}, 64 \textit{NOTRE DAME L. REV.} 271, 281 (1989), have argued.
legal principle is that a person should not knowingly assist a wrong­
doer in his wrongdoing. To this end, there are common law prohibi­
tions, such as those against participation in a breach of fiduciary duty\(^\text{474}\) and against inducing breach of contract;\(^\text{475}\) as well as statutory
and statutory-related prohibitions, such as those against aiding and
abetting crimes and securities law violations.\(^\text{476}\) This principle is fully
applicable to wrongs perpetrated in connection with benefit plans.\(^\text{477}\)
Arguably, Congress intended that the principle should apply as part
of its clear intent to federalize trust law principles.\(^\text{478}\) But, in any
event, for courts to apply the principle and impose liability for partici­
pation in a breach would help protect the interest of participants and
beneficiaries in receiving their benefits: directly, by imposing stan­
dards of conduct that make breaches by fiduciaries even more diffi­
cult; and, indirectly, by providing another source from which the plan
can be reimbursed for losses. Thus, to allow imposition of liability
would plainly further the purposes of ERISA.

b. **Special Considerations Relating to Attorneys**

In imposing liability on attorneys for participation in a breach,
courts have relied on the general rules described above. However,
there are special considerations that apply to plan attorneys. These
considerations, when properly taken into account in individual cases,
should make the rules of liability governing plan attorneys somewhat
different from the black-letter rules discussed above.

One consideration is that plan attorneys have obligations which
other non-fiduciaries do not necessarily have. Non-fiduciaries gener­
ally have only a limited duty to the plan and its participants and
beneficiaries, that of not taking action which knowingly furthers or
benefits from a fiduciary's breach.\(^\text{479}\) Plan attorneys have many other
obligations that intersect with the obligations of plan fiduciaries. The
most important may be the disclosure and co-fiduciary obligations.
By virtue of these duties a plan attorney, unlike other non-fiduciaries,

\(^{474}\) Restatement (Second) of Trusts § 326.
\(^{475}\) Restatement (Second) of Torts § 766 (1977).
\(^{476}\) E.g., Stokes v. Lokken, 644 F.2d 779, 782-83 (8th Cir. 1981).
\(^{477}\) Cf. TIC Inv. Corp., 900 F.2d at 115 (since “estoppel principles generally apply
to all legal actions,” there is a presumption that they apply to ERISA actions).
\(^{478}\) See, e.g., Ross, 733 F. Supp. 1005.
\(^{479}\) Cf. G. Bogert, supra note 111, § 901 (trust beneficiary has right that third
persons shall not knowingly join with the trustee in a breach of duty).
may be obligated to take reasonable steps to remedy a fiduciary's breach, and his failure to do so may expose him to liability for participating in the breach. Thus, the disclosure rules discussed in section V(A) above are not only be guides to conduct; they are properly taken as rules of civil liability. This is very much different from the case of most other non-fiduciaries who, under traditional trust law principles, cannot be held liable for mere inaction.

Other duties of the plan attorney also affect the contours of his potential liability for participating in a breach. Because of the plan attorney's duty of care, for example, he, unlike other non-fiduciaries, might properly be subject to liability for negligent participation in a breach. In general, because of the loyalty and other obligations of the plan attorney, his liabilities for participating in a breach may closely resemble the co-fiduciary liabilities of a plan fiduciary under ERISA section 405(a).

Another consideration affecting the scope and character of plan attorney liability is that delegated lawmaking power regarding fiduciary principles is really not even needed to authorize a remedy for attorney participation in a breach. Judicial power over attorneys includes the authority to order attorneys who commit any breach of duty to make restitution for the amount of the loss. The power is a necessary incident to the judicial power to regulate attorney conduct, and is a means of enforcing the standards. Courts have ordered restitution both summarily, in the course of civil and criminal proceedings in which the attorney serves as advocate;\(^{480}\) and as part of formal discipline imposed for violating rules of professional conduct.\(^{481}\) It has even been suggested that, "[w]henever possible, the disciplinary process should facilitate restitution to the victims of the [attorney's] misconduct without requiring victims to institute separate proceedings at their own expense."\(^{482}\)

What these two considerations reflect is a point alluded to before: that attorneys who are held liable for participation in a fiduciary's breach often could just as well be held liable for breach of their own

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480. E.g., In re Paschal, 77 U.S. (10 Wall.) 483 (1870); State v. Grant, 487 A.2d 627 (Me. 1985).
482. ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS 6.12, Commentary (1979).
duties with respect to the plan. As a practical matter, it may not make much difference for the outcome of a case whether we consider a plan attorney's liability to be fiduciary or co-fiduciary.\(^{483}\) What is important, though, is for courts to recognize that, because of plan attorneys' fiduciary obligations with respect to plans — obligations that other non-fiduciaries lack — their potential liability in cases of plan fiduciary is broader than what is suggested by the canonical rule of \textit{Freund}.

\section*{B. Standing to Sue}

Under the common law of trusts, the trustee is ordinarily the only one permitted to sue third persons for wrongs to the trust. Beneficiaries normally have no standing to bring such actions and may do so only where the trustee cannot or will not enforce the claim.\(^{484}\) Should there be a corresponding limitation regarding suits against plan attorneys under federal common law?

It should depend on the kind of claim. As we have seen, many, if not most, claims against plan attorneys are framed as suits for participation in a fiduciary's breach. ERISA expressly gives participants and beneficiaries the right to bring suit against fiduciaries to remedy violations of ERISA, and there is no sound reason for not allowing joinder of participating non-fiduciaries in the suit. ERISA section 502(a)(3), which contains no express limitation on defendants within its reach, may be read as creating jurisdiction over suits by participants and beneficiaries against non-fiduciaries who have participated in a breach, and the common law of trusts itself permitted such actions by trust beneficiaries.\(^{485}\)

Different considerations are involved in claims, such as malpractice suits, involving plan attorneys alone. A plan document may delegate to one or more of the fiduciaries discretionary authority to bring suit and obtain satisfaction for the plan's claims.\(^{486}\) A decision by such a fiduciary not to sue cannot be set aside unless the decision

\begin{footnotesize}
\begin{enumerate}
\item The real difference lies in the plan attorney's susceptibility to suit under federal common law for wrongs committed without the involvement of a plan fiduciary. Other fiduciaries may or may not be subject to such liabilities.
\item G. Bogert, \textit{supra} note 111, § 869.
\item \textit{id.} § 955. And if joinder of a participating attorney is proper, so too should be a suit against the attorney alone.
\item See, e.g., 3 S. Young, \textit{Pension & Profit Sharing Plans (M-B)} Plan 14, at 14.06(c).
\end{enumerate}
\end{footnotesize}
represents an abuse of discretion.\textsuperscript{487} It would be inconsistent with this rule of deference to the fiduciary’s judgment to allow a participant or beneficiary to bring suit against an attorney when the appropriate fiduciary has decided not to do so.

Even where the fiduciaries’ authority to file suit and resolve claims is not subject to deference, there should be limits on the standing of participants and beneficiaries to sue directly. The fiduciaries will normally be in the best position to know whether the plan attorney has committed a wrong and as persons charged with responsibility for management of the plan, they should ordinarily have the initial say regarding the decision to sue. To allow participants and beneficiaries unfettered standing to sue plan attorneys, in matters that do not involve fiduciary misconduct, would undermine ERISA’s allocation of plan management responsibility to fiduciaries and possibly sanction interference with the fiduciaries’ fulfillment of their responsibilities.

This is not to say that a participant or beneficiary who is dissatisfied with a fiduciary’s decision not to sue has no remedy. He does have a remedy which is in the form of a suit against the fiduciary, on the theory that the failure to sue is itself a breach of duty. The remedy in a proper case might be an award of damages to the plan in an amount measured by the potential recovery in the unbrought suit. The remedy might even be an order appointing the participant as a special fiduciary for the purpose of bringing suit against the attorney. Such remedies would satisfy the interests of both the participants and beneficiaries in obtaining a remedy for a wrong, and of the fiduciaries in being able to carry out their plan management responsibilities without unnecessary interference.

\textbf{VII. SUBJECTS FOR FURTHER INQUIRY}

The topics examined above are only a few of the many in the common law of plan attorneys that generate important concerns. There are certainly many others that warrant attention.

One such issue is exculpation. ERISA disallows “any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA’s fiduciary provisions].”\textsuperscript{488} Should the policy re-

\textsuperscript{487} Firestone Tire \& Rubber Co., 489 U.S. 101.
\textsuperscript{488} ERISA § 410(a), 29 U.S.C. § 1110(a) (1974).
flected in the ERISA provision apply to attorneys? The legislative history of ERISA demonstrates Congress’s belief in the importance of abolishing exculpation as a means of strengthening the fiduciary protection of participants. In light of the great importance given to this modification of the law of trusts, it seems that a strong argument can be made that the policy should apply to plan attorneys as well. The result would be consistent with the policy expressed in the Model Code of Professional Responsibility, that “[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.”

The exoneration question suggests a broader question: are there any other provisions in attorney-plan (or attorney-fiduciary) contracts that are prohibited? For example, might ERISA’s prohibited transaction rule, limiting compensation to “reasonable compensation,” restrict the use of contingent fee arrangements? Similarly, are any conventional practices by attorneys made impermissible with respect to plans? For example, to what extent, if any, can a plan attorney hold plan property without having plan fiduciary status attach?

A plan attorney’s dealings with third parties also raise a large set of questions. There is no reason that many of the basic doctrines of agency law should not apply to the attorney-plan relationship. But the applicability of some agency law doctrines in the ERISA plan context is less certain. For example, a principal may be held vicariously liable for an agent’s tort where the agent “purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.” Yet vicarious liability is not a venerable doctrine: it is a recent addition to Anglo-American jurisprudence, and only in the twentieth century has it come to have wide acceptance

489. See supra text accompanying notes 83-90.
492. See Chapman v. Klemick, 750 F. Supp. 520 (S.D. Fla. 1990) (health plan paid benefits to participant subject to subrogation agreement; participant’s attorney became fiduciary with respect to funds received from third party that were to be paid over to plan).
493. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).
and applicability. Do the uncertain rationales of vicarious liability extend to ERISA plans and to attorney relationships with a plan?

A similar question arises with respect to contracts. An agent, acting within the scope of his apparent authority, may bind the principal to a contract that the agent had no actual authority to enter into. Should the principle apply so as to allow a plan attorney to bind a plan? Under what circumstances?

Finally, there is the practical question of whether at least some standards for plan attorneys should be codified, either by court rule or statute. Preemption and federal common lawmaking would de facto create a plan attorney bar. But there are as yet few rules governing this group of attorneys, and they are all rules developed through litigation. Without a set of clearly stated rules, attorneys may be unaware of their obligations; courts may be hesitant to develop common law rules; and state courts may continue to exercise disciplinary control over plan attorney conduct. Written rules governing plan attorneys might serve as a stimulus to development of this needed body of law.

CONCLUSION

This article has sought to establish three basic propositions: that states cannot regulate plan attorneys; that federal courts not only may, but must develop rules to regulate plan attorneys; and that there are special characteristics of plan attorneys which often require, for


496. RESTATEMENT (SECOND) OF AGENCY § 140.
their governance, rules different from those found in professional
codes and in the common law of benefit plans. In elaborating on the
last point, this article has reviewed some of the most important of the
special principles applicable to plan attorneys and some resulting gen­
eral rules. However, it has not tried to work out rules and standards
in any great detail. That is better done by courts, which, through the
resolution of specific controversies, can propose and test various rules,
so as to find the ones that work best.

The ultimate aim of this article is not simply to establish these
basic propositions; rather, its aim is to try to stimulate the process of
judicial lawmaking regarding plan attorneys. The role of plan attor­
ney is an emerging one. It develops and becomes refined as the pri­
ivate benefit plan system and public benefit plan regulatory system
themselves develop and become refined. Regrettably, there seems to
be a general lack of awareness that the role of plan attorney, as a
unique institution, even exists, and because of this lack of awareness,
there is little appreciation of either the possibility or need for a spe­
cialized body of plan attorney common law.

As the article has emphasized, the role of plan attorney is impor­
tant, and should not be left to haphazard regulation unconstrained by
the policies of ERISA. A plan attorney is an integral part of the plan
and is an integral part of the world that is within the ambit of ER­
ISA’s policies. To treat the plan attorney as if he were just another
business attorney does justice neither to him nor to the plan. If this
article helps to make attorneys and courts aware of the special role of
plan attorney and sensitive to the plan attorney’s special characteris­
tics, proper rules may then follow as part of the normal process of
common lawmaking.