Group Legal Services Association

Solo, Small Firm, and General Practice Section

2014 Annual Conference

May 1-3, 2014, Las Vegas, Nevada

How the Relationship Between Counsel and Trustees Works

Thursday, May 1

2:50 pm - 3:50 pm

Presenters: Stephen Mogila, Pitta & Giblin LLP
Steve Ginsberg, Unifor Legal Plans

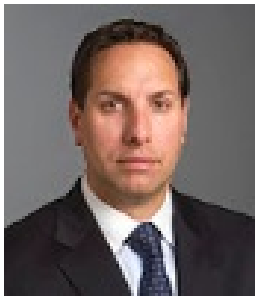
Stephen Ginsberg

Stephen Ginsberg is the Executive Director of the Unifor Legal Services Plan ("ULSP"), formerly the Canadian Auto Workers Legal Services Plan, which provides benefits to 87,000 active and retired members employed at GM, Ford, Chrysler and thirty other Unifor-represented workplaces in Canada.

ULSP delivers legal services using its own staff offices and a panel of approximately 1,000 Co-Operating Lawyers, who agree to charge fees in accordance with the ULSP Fee Schedule. Stephen has been involved in all aspects of ULSP operations since its inception in 1985.

Stephen has been active in the API for over twenty years, is a former API President, and currently serves on the API Conference Committee.

Stephen received his B.A. from the University of Toronto and his LL.B. from the University of Western Ontario. He was called to the Bar in1977, practised criminal law and family law in Toronto, and was Counsel to the Metropolitan Toronto police Complaints Board prior to joining the ULSP.



Stephen Mogila

Stephen Mogila is a partner at Pitta & Giblin LLP's Employee Benefits Law Practice. Mr. Mogila has practiced as an attorney in all aspects of employee benefits issues, including establishment, design, administration and termination of pension, profit-sharing, welfare and executive compensation plans. He advises employers, plan sponsors and administrators on the full spectrum of plan investment issues and transactions, mergers and terminations, government audits, participant communications, fiduciary responsibility matters, minimum funding issues, withdrawal liability, and prohibited transactions issues.

PITTA & GIBLIN LLP

Working Effectively with Fund Counsel

May 1, 2014

Stephen J. Mogila, Esq.

Overview

- Retaining Fund Counsel.
- How many counsels should be hired?
- Fund Counsel's fees.
- Role of Fund Counsel.
- Working with Fund Counsel.
- Trustees duty to monitor and evaluate.
- Attorney-client relationship and privilege.
- Attorney work-product privilege.

Authority to Hire Fund Counsel

- ERISA Section 402(c)(2)
  - Any employee benefit plan may provide that a plan fiduciary may employ one or more persons (including attorneys) to render advice with regard to any responsibility such fiduciary has under the plan.
- Plan Trust Agreement
  - Should contain an express authorization for plan trustees to engage advisors and counsel as necessary to enable the trustees to carry out the administrative and operations of the plan.
  - ERISA Section 404(a)(1)(D) requires plan fiduciaries to operate the plan in accordance with its terms and governing instruments of the plan.

Need to Retain Fund Counsel

- In light of fiduciary obligations under ERISA, overwhelming majority of trustees and plan fiduciaries engage legal counsel to a plan.
  - Retention of Fund Counsel may demonstrate that trustees are performing their fiduciary duties in a prudent manner.
  - Arguably, it could be viewed that an attempt to administer a plan without competent legal counsel is imprudent and subject to a breach of fiduciary duties under ERISA – particularly if the trustees are not experts in the field of ERISA law.
- Size of the plan is irrelevant; ERISA does not have a small plan exception from the fiduciary duties thereunder.

Whom Should Trustees Hire?

- ERISA does not contain any definitive guidance on how to find and select counsel. However, the trustees should ensure that:
  - Fund Counsel is well-trained, knowledgeable, experienced and competent lawyers in the field of ERISA and employee benefits;
  - The terms of the arrangement are set forth in a written contract;
  - Fees are reasonable; and
  - The plan has the ability to terminate the service agreement on short notice and without penalty.

Retaining Counsel

- No "one way" to do it.
  - Conduct a formal RFP search which is a good way to obtain wealth of information about the prospective firms and attorneys in a short period.
  - Referrals/References – Trustees /fiduciaries of other funds are an excellent source for recommendations for counsel.
  - Conduct face-to-face interviews – This is a good way to evaluate prospective counsel.
- Regardless of which option is used, it is important that trustees exercise procedural prudence in the selection process when retaining Fund Counsel.

Retaining Counsel

- Trustees must have a written retainer agreement with Fund Counsel that:
  - Identifies the scope of the representation;
  - Compensation and fees;
  - How the representation may be terminated and the process for that purpose; and
  - Other contractual considerations.

How Many Counsel Can the Trustees Hire?

- One or "as many more" as it takes to prudently and reasonably represent the interest of the plan and its participants.
- For collectively-bargained plans, it is common to have joint counsel which is typically attributed to the underlying nature of the bargaining aspect of such plans; provided that:
  - All fund counsel represents the entire Board of Trustees and, through them, all of the participants and beneficiaries of the plan; and
  - Charges are reasonable in the aggregate.

Compensation and Fees

- Prevailing Method is for Fund Counsel to bill an hourly rate based on a time charge basis.
- Fixed flat retainer fee with carve-outs for specified non-retainer services which may include among other:
  - DOL/IRS Audits.
  - Corrective submissions to the government.
  - Plan determination letter requests.
  - Litigation.
  - Preparing RFPs.
  - Negotiating certain provider contracts.
- In all cases the rates or fees must be **reasonable** which will depend on the facts and circumstances of the particular matter or arrangement.
- Talking with fellow trustees (or consultants) from other plans is an excellent source to determine what is market.
- Trustees have ongoing duty to monitor reasonableness of fees.

Role of Fund Counsel

- Virtually unlimited; can include legal advice on :
  - Establishment, design, administration/operational issues.
  - Regulatory compliance issues.
  - IRS/DOL audits.
  - Collections.
  - Investment issues.
  - Claims and Appeals.
  - Participant Communications.
  - Review and negotiation of service provider contracts.
- May be defined/limited by retainer agreement.
  - Establish scope of retainer services and non-retainer services.
- Works with other fund professionals.
- Trustees relationship with Fund Counsel should be one of mutual trust, confidence, integrity, and professional respect.

Working with Fund Counsel

- Trustees should establish good communications with Fund Counsel
  - Identify specific needs and goals.
  - Set agendas and be aligned on timing and deliverables; follow through on your part.
  - If practical, establish subcommittees or executive committees to address issues requiring authorization or special issues in between meetings.
  - Cultivate a practice of preventive law.
  - Don’t want to be penny wise and pound foolish.

Trustees Duty to Monitor and Evaluate

- Trustees have fiduciary responsibility to evaluate services provided by Fund Counsel.
- Criteria to evaluate Fund Counsel
  - Quality of work.
  - Comfort with advice.
  - How does Fund Counsel advice compare with what Trustees learn in educational conferences and seminars.
  - Work well with other Fund professionals.
  - Meets deadlines.
  - Reasonableness of fees.

Attorney-Client Relationship and Privilege

- Fund Counsel represents the full Board and the Fund, not individual trustees in a personal capacity.
- Issue of what communications with Fund Counsel are subject to attorney-client privilege is complex.
- As a general practice, in holding meetings (particularly on issues regarding litigation or potential litigation) need to be mindful of protecting attorney-client privilege; excuse all appropriate parties including other service providers. The presence of third parties at trustees' meetings will eliminate the confidentiality needed for privilege; except where third parties are necessary in the context of the advice sought and given.

Fiduciary Exception to Attorney-Client Privilege

- Courts have held that a fiduciary exception applies to trustees of a ERISA plan when participants seek privileged communications in the context of litigation.
  - Two rationales for this proposition: (i) the exclusive benefit duty under ERISA supersedes the claim of privilege; and (ii) participants (not fiduciaries) are real clients and, as a result, the attorneys have no privilege on communications with trustees that would otherwise be considered privileged.
  - The fiduciary exception only applies to communications regarding the administration of the plan (not to settlor functions such as plan amendments).
  - This exception, however, does not apply to (i) communications between companies (or unions) and their counsel relating to a multiemployer plan as those will be deemed settlor (not fiduciary) communications; or (ii) communications between a fiduciary and counsel regarding a fiduciary breach.
  - Courts are split on whether someone has to show "good cause" before receiving privileged communications under the fiduciary exception. In examining a "good cause" request, the courts weigh the benefit and harm that will occur if the fiduciary exception is applied.

Fiduciary Exception to Attorney-Client Privilege

- Fiduciary Exception Applied to **DOL Litigation** for breach of fiduciary duty under Section 502 of ERISA.
  - In Donovan v. Fitzsimmons, the court found that when the DOL sues on behalf of a participant and "stands in their shoes" the fiduciary exception applies since the DOL's interest are aligned with the participant's interests.
- Fiduciary Exception in a **DOL Investigation** – In an investigation, the DOL may have interests adverse to the participants and, therefore, an argument may be made that the fiduciary exception should not apply in this instance – particularly since the DOL has broad authority to investigate potential violations. In addition, the DOL may have to disclose privileged information it obtains to others (e.g., other government agencies or third parties in response to a Freedom of Information Act request).
  - Notwithstanding the foregoing, the Fourth Circuit found that the attorney-client privilege does not apply and the DOL need not show good cause to obtain privileged material, leaving the impression that there are no limits on what the DOL could obtain.

Work-Product Privilege

- This privilege applies to counsel's preparation and strategy in anticipation of litigation or during litigation.
- As with the issue of the fiduciary exception to the attorney-client privilege, there is a split of authority on whether the work-product privilege is subject to the fiduciary exception.
  - Most cases that have analyzed this issue in a ERISA fiduciary context have found that the exception does not apply and attorneys can continue to claim work-product privilege.