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Multiple Legal Representation of ERISA Plans and Employers Following Allegations of Fraud and Malfeasance

ELWYN C. LEE*

A private pension plan is one established by an employer, a group of employers, or a group of employees, rather than by a local, state, or federal government. In 1940 an estimated four million employees were covered by private pension plans; by the early 1970's this number had grown to more than thirty million employees. These private pension plans were expected to cover approximately forty-two million employees by 1980 with plan assets valued at between $225 and $250 billion. In an attempt to regulate this rapid accumulation of funds, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA). ERISA substantially supersedes prior legislation and generally preempts state law in the area. It contains comprehensive provisions dealing with

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* B.A. 1972, Yale University; J.D. 1975, Yale Law School. Assistant Professor, University of Houston Law Center. While this article was going to press, the American Bar Association House of Delegates began voting on the Model Rules of Professional Conduct (Final Draft 1981). See N.Y. Times, Feb. 8, 1983, at 1, col. 2; see also notes 130-36 & accompanying text infra.


6 Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1976), provides that, except for causes of action arising prior to January 1, 1975, the ERISA provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA section 514(c)(1), 29 U.S.C. § 1144(c)(1) (1976), provides that "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." State insurance, banking, or securities regulations are not invalidated,
funding,7 vesting requirements,8 prudent investment standards,9 and especially strict guidelines for the adoption and administration10 of a private pension plan.

The purpose of ERISA was to remedy prior ineffective pension fund acts.11 In 1958, after a comprehensive investigation of abuses in the administration and investment of private fund assets,12 Congress enacted the Welfare and Pension Plans Disclosure Act of 195813 to protect plan participants from unauthorized use of pension funds. The 1958 Act created plan administrators who were required to make certain disclosures.14 The Act was amended in 1962 to make theft, embezzlement, and bribery or kickbacks involving pension funds and pension officials federal crimes.15 Even with this amendment the 1958 Act proved to be unenforceable and consequently ineffective.16

Events in the decade following passage of the 1962 amendment demonstrated the inadequacy of the 1958 Act;17 it failed to regulate the private pension system and therefore offered little protection to the rights and benefits due to millions of American workers.18 It became evident to Congress that the 1958 Act's disclosure requirements were too limited and that the Act lacked substantive fiduciary standards.19 The chief procedural weakness of the Act was its reliance upon the initiative of individual employees of the business to police the management of the plan.20

14 Id. at § 5, 72 Stat. at 999 (repealed by ERISA).
16 See generally sources cited note 2 supra.
17 See note 13 infra.
18 In a senate hearing on pension plan legislation Senator Dent noted that "in an investigation of a certain union management fund we found that the number of persons in the lifetime of that fund that had received any benefits at all were less than one out of 10 covered by the fund over a period of 40 years." Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046, and H.R. 16462 Before the Subcommittee on Labor of the Committee on Education and Labor, 91st Cong., 1st & 2d Sess. 262 (1970) (remarks of Sen. Dent). Instances of lost pension benefits due to inadequate disclosure are detailed in R. NADER & K. BLACKWELL, YOU AND YOUR PENSION 4-11 (1973). See also sources cited note 11 supra.
19 See sources cited note 11 supra.
20 See sources cited note 11 supra.
Resulting ineffectiveness caused private pension funds to be terminated, and caused participating employees to be denied benefits upon which they and their families had been relying for retirement. Congress passed ERISA in order to respond to a public outcry for governmental intervention and to establish minimum standards designed to assure equitable character and financial soundness of the employee benefit plans.

Although much discussion has focused on the undesirability of premature or unwarranted termination of pension plans and imprudent investment of funds, the central concern of ERISA is the plan’s participants’ ability to realize the total benefits due them. It is important to apply this central concern while analyzing the consequences of a fiduciary’s actions because the effectiveness of ERISA depends in large measure on intense scrutiny of fiduciary duty.

This article will address the question of whether a court is required to disqualify attorneys who simultaneously represent a private employee pension plan governed by ERISA and the employer in a lawsuit brought by a plan participant or beneficiary who has alleged fraud and malfeasance on the part of the plan administrators and the employer. Concomitantly, the article will question whether the plan administrators are obligated under ERISA to seek independent outside counsel in this situation.

The problem can be illustrated by the following hypothetical drawn from the structure used by a large American corporation. Assume that a major corporation, identified as M-corp, has a division named M-div.

\[\text{\textsuperscript{21}} \text{See sources cited note 11 supra.}\]
\[\text{\textsuperscript{22}} \text{See sources cited note 11 supra. In enacting ERISA, Congress took note of this outcry in its congressional findings and declaration of policy:}\]
\begin{quote}
\text{The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the continued well being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; ... that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; ... that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.}\n\end{quote}


H.R. Rep. No. 533, supra note 2, at 11, reprinted in [1974] U.S. Code Cong. & Ad. News at 4649. ("[T]he 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.").
Pursuant to ERISA, M-div adopts an employee pension benefit plan with more than 100 participants. Although M-div is the sponsor of the benefit plan, M-corp is the ultimate employer of the plan participants. M-corp’s counsel advise M-div on establishing the plan and creating a structure for administering the benefits and complying with ERISA. M-corp’s attorneys continue to provide legal advice to M-div pertaining to the administration of the plan, its day-to-day implementation, and the application of the plan provisions to particular facts. Files of the plan are kept in M-corp offices by M-corp employees. However, the terms of the plan reserve the power to amend the plan to M-div and give the authority to control and manage the operation and administration of the plan to three named fiduciaries, who, for purposes of this article, may be identified as A, B, and C. All three are employees of M-corp and plan administrators.

A participant in the benefit plan, identified as P, sues the benefit plan and M-corp in federal court. The suit is based on allegations that certain aspects of the M-div benefit plan administration do not comply with ERISA, and that fraud and malfeasance by the plan administrators and by M-corp have permitted M-corp to retain money that belongs to P and other participants of the benefit plan. P seeks damages, injunctive relief,

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Section 502(d)(1) of ERISA, 29 U.S.C. § 1132(d)(1) (1976), provides that “[a]n employee benefit plan may sue or be sued under this title as an entity . . . .” One goal of section 502(d)(1) is to ensure that a plan participant with a grievance has a civil remedy:

The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA as well as the amendments made to the Welfare and Pension Plans Disclosure 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 to participants.

H.R. REP. No. 533, supra note 2, at 17, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 4655. In Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982), the court noted that ERISA established, "in clear and unmistakable terms, that a pension fund is an independent entity, separate from the employer." Id. at 910. The court declared that "despite an employer's close involvement with and funding of the Plan, it [the plan] nevertheless exists as a fully separate legal entity." Id.

For example, section 203(b)(2)(A) of ERISA, 29 U.S.C. § 1053(b)(2)(A) (1976), defines the term "year of service" as "a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service." The plan administrators may apply a rule for computing a year of service for vesting purposes that is different from the 1,000 hour rule. The application of a different vesting rule could have two effects: first, such application could be fraudulent if documents filed with the government by the plan called for the 1,000 hour rule, and second, such application could result in the employer's retaining employer contributions to pension plan accounts after the plan administrators find such contributions nonvested. As another example, there could be a group life insurance policy whose premiums are paid only by plan participants. If the policy provides for refunds of surplus premium payments in the form of dividends to plan participants, the failure to disclose the existence of the refunds as required by the Depart-
and an accounting. If $P$ prevails on the merits of his suit, M-corp will be required to repay millions of dollars in withheld funds to plan participants and beneficiaries. M-corp's counsel have elected to defend the plan with the aid of a large outside law firm that has represented M-corp on a retainer basis for years. The named fiduciaries $A$, $B$, and $C$ have consented to have the plan represented by the same law firm representing M-corp. M-corp's inside and outside counsel have informed $A$, $B$, and $C$ that these counsel can exercise independent professional judgment in deciding what is necessary for the plan and $A$, $B$, and $C$ have accepted said counsel. $P$ objects to the absence of independent outside counsel defending the plan and moves to have the law firm and M-corp's inside counsel disqualified from their simultaneous representation of M-div's plan and M-corp.

The chief sources of possible constraints on such multiple representation are the fiduciary duties under ERISA and the codes of professional conduct for attorneys. Following a discussion of the structure of the pertinent part of ERISA, this article presents an analysis of the effect of these sources of constraints and concludes that when fraud and breach of fiduciary duty are so alleged, counsel should be disqualified under ERISA from representing the plan and the sponsoring corporation.

**The Pertinent Structure of ERISA**

In section 3 of ERISA, Congress defined an employee benefit plan 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." Simply stated, an employee pension benefit plan...
under ERISA is a plan established and maintained pursuant to a written agreement that provides for benefits and establishes a mechanism for administering such benefits. The intent of such a broad definition was to give the most complete protection to plan participants and beneficiaries for whom such plans are established. Every plan must provide a procedure for establishing and carrying out a funding policy, describe procedures under the plan for allocation of responsibilities for the operation and administration of the plan, provide a procedure for amending the plan, and specify the basis on which payments are made to and from the plan.

Each employee benefit plan has a plan sponsor that may be, and in many cases is, the employer. In addition to a plan sponsor, an employee benefit plan must have a "plan administrator," who has full responsibility for operation of the plan, including meeting certain disclosure and reporting requirements. When a plan administrator is not designated by the operative plan instrument, the plan sponsor is the plan administrator. Thus, inasmuch as the plan sponsor may be the employer, the plan administrator may be the employer or the employer's designated employee.

Each plan must have at least one named fiduciary who serves as plan

to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
(i) provides retirement income to employees, or
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(7), 29 U.S.C. § 1002(7) (1976), defines a participant as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(8), 29 U.S.C. § 1002(8) (1976), defines beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan who is or may become entitled to a benefit thereunder."


ERISA § 402(a), 29 U.S.C. § 1102(a) (1976). See also Id. at § 3(16)(B), 29 U.S.C. at § 1002(16)(B), which defines "plan sponsor" as
(i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.


ERISA § 3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), (1976). In the case of a plan for which the administrator is not designated and a plan sponsor cannot be identified, such person as the Secretary of Labor may by regulation prescribe the plan administrator. Id. at (iii), 29 U.S.C. at § 1002(16)(A) (iii).
REPRESENTATION OF ERISA PLANS

administrator, and, if plan assets are held in trust, the plan must have at least one trustee. The named fiduciary that normally appoints such trustee is the plan administrator. A plan may have as few or as many fiduciaries as are necessary for its operation and administration.

Under ERISA’s reporting provisions, plan administrators are required to file the plan’s annual report, copies of a summary plan description, and other documents with the Secretary of Labor. The summary plan description must be accurate, easily comprehensible by the average plan participant, and sufficiently complete to inform participants and their beneficiaries of their rights and obligations under the plan. The annual report must contain a financial statement comprised of information on the plan’s expenses, its assets and liabilities, significant changes in the plan’s benefits, the number of persons covered, and transactions involving the plan.

The effect of ERISA’s funding safeguards is to ensure the existence of sufficient plan financing and reserves for the satisfaction of a plan’s pension liabilities to participants and their beneficiaries. This is accomplished by providing minimum standards for employer contributions to defined benefit plans, an increase in the maximum federal income tax deduction for employer contributions, more extensive governmental supervision of private pension plans, and the imposition of civil sanctions in addition to the loss of tax advantages for violation of the funding provisions. Fiduciaries administering the funds must also diversify plan

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34 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1976); Id. at § 403(a), 29 U.S.C. at § 1103(a) (1976 & Supp. IV 1980). See also Id. at § 408(b)(2), 29 U.S.C. at § 1108(b)(2) (1976); Id. at § 406(c)(3), 29 U.S.C. at § 1106(c)(3) (1976), discussed respectively at notes 76 & 78 infra.
36 Question FR-12, 29 C.F.R. § 2509.75-8 (1981).
39 Prior to the adoption of ERISA, a pension plan was required to fund the interest on past service liabilities, but was not required to fund the past service principal liabilities. S. REP. No. 127, supra note 3, at 9-10, reprinted in [1974] U.S. Code Cong. & Ad. News at 4846. ERISA sections 301-303, 29 U.S.C. §§ 1081-1083 (1976 & Supp. IV 1980), require that employer contributions to defined benefit plans be sufficient to fund present costs and to amortize past service costs over a maximum number of years in equal annual installments.
in order to reduce the risk of substantial losses of assets, unless it is clearly prudent not to do so. The assets of the plan must never inure to the benefit of any employer.46

Employee benefit plans are covered by the Labor and Treasury Department provisions of ERISA and the Internal Revenue Code.47 On August 10, 1978, President Jimmy Carter sent to Congress a reorganization plan designed to simplify and improve the unnecessarily complex administrative requirements of ERISA.48 The message that accompanied this plan stressed the need to reduce duplication in administration of ERISA, especially the overlapping authority of the Departments of Treasury and Labor to issue regulations and decisions.49 One change reserves for the Labor Department statutory authority to oversee fiduciary conduct.50

FIDUCIARIES' OBLIGATIONS TO PLAN BENEFICIARIES
AND PARTICIPANTS

With respect to the fiduciary obligations owed to plan participants and beneficiaries, ERISA differs in important ways from the 1958 Act.51 It contains a new section that sets forth responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans, including a "prudent man" standard for evaluating the conduct of all fiduciaries.52 It also bars from responsible fiduciary positions for five years after conviction or end of imprisonment, whichever is later, all persons convicted of certain crimes.53 Clearly, the effort was to rectify the deficiencies in the 1958 Act.54

The class of persons called "fiduciaries" is responsible for the establishment and administration of employee benefit plans.55 ERISA defines the term "fiduciary" broadly; even though a person has not been officially designated as a plan fiduciary, he may be one because of his conduct relative to the plan. ERISA defines a fiduciary as a person who performs any of three functions: first, exercising any discretionary authority or

50 Message of the President, note 48 supra.
51 See generally sources cited note 11 supra.
discretionary control in the management of a plan or exercising any authority or control in the management or disposition of its assets; second, rendering investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of a plan, or holding any authority or responsibility to do so; and third, holding any discretionary authority or discretionary responsibility in the administration of a plan.64 Thus, depending on the discretion and authority exercised or whether investment advice is given, the following persons may be considered fiduciaries: the employing corporation, its board of directors, trustees, investment consultants, actuaries, attorneys,67 investment managers, insurance salesmen, and the named fiduciaries of a plan.68 The fiduciary status of “named fiduciaries”69 is self-evident and, consequently, so is their exposure to liability for failure to meet those fiduciary responsibilities. Other fiduciaries have varying responsibilities and exposure to liability.70

The fiduciary responsibility section of ERISA codifies and applies to fiduciaries of benefit plans certain principles developed in the law of trusts.71 The legislative history of ERISA indicates that the section is necessary for the following reasons: first, a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable;72 second, reliance on conventional trust law is insufficient to protect adequately the interests of plan participants and beneficiaries;73 and third, even when the law of trusts applies, a participant is not equipped to safeguard either his own rights or the plan’s assets74 unless he has detailed information about the plan, access to the courts, and standards by which he can measure the fiduciaries’ conduct. A fiduciary must

67 Attorneys, accountants, actuaries, and consultants will ordinarily not be considered fiduciaries absent specific actions to the contrary. Question D-1, 29 C.F.R. § 2509.75-5 (1981). This is so because they typically lack the discretionary power and authority to make plan policy and render no investment advice with respect to any plan money or other property. The performance of administrative functions within a framework of policies and procedures made by others does not make a person a fiduciary. Examples of such ministerial tasks include the calculation of benefits, preparation of employee communications, maintenance of employment records, preparation of reports, collection of contributions, and processing of claims. See Question D-2, 29 C.F.R. § 2509.75-8 (1981).
69 Little & Thrailkill, Fiduciaries Under ERISA: A Narrow Path to Tread, 30 VAND. L. REV. 1, 4-5, 8 (1977).
70 ERISA section 402, 29 U.S.C. § 1102 (1976), requires that every employee benefit plan shall provide for one or more “named fiduciaries” who jointly or severally control and manage the operation of the plan. The named fiduciaries may appoint others to perform fiduciary responsibilities. ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (1976).
73 Id. at 12, reprinted in [1974] U.S. CODE CONG. & Ad. NEWS at 4650.
74 Id.
75 Id.
conform to the documents and instruments governing the plan to the extent they are consistent with the regulatory provisions of ERISA.65

There are two major standards used to guide and restrict the actions of a fiduciary—the exclusive benefit rule and the “prudent man” standard. ERISA section 404(a)(1)66 states the exclusive benefit rule as follows: “[A] fiduciary shall discharge his duties with respect to [an employee benefit 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 . . . .” One commentator has gone so far as to predict that the Department of Labor would take the position that section 404(a)(1) of ERISA is a “statutory embodiment of the common law duty of loyalty,”67 while others seem to believe that the best construction of the exclusive benefit rule in section 404 is found in the regulatory treatment given to section 401 of the Internal Revenue Code.68 ERISA’s exclusive benefit rule becomes even stronger when read in conjunction with its “prudent man” rule. Section 404(a)(1)(B)69 of ERISA specifies that a fiduciary must 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.” There has been disagreement about whether the statutory language of section 404(a)(1)(B) creates a “[s]uper-prudent man rule” that places an additional burden upon a fiduciary to exercise the same skill and care that an expert in the area of pensions would exercise.70 Although this issue was the subject of considerable congressional debate in 1970 over an Administration bill on employee benefit legislation,71 the question still has not been answered clearly.72

68 Little & Thrailkill, supra note 58, at 11-12 (Section 401 of the Internal Revenue Code, which provides for establishment of a trust operated exclusively for the benefit of the participant, was coupled with section 503 of the Code, which prohibits certain transactions between a plan and the executor of the trust or person who created the trust, to form a general exclusive benefit rule).
70 See Sanchez, Cain, Wood, The Pension Reform Act of 1974: Fiduciary Responsibility and Prohibited Transactions, 6 TAX ADVISOR 86, 91 (1975). The authors assert that the ERISA prudent man rule is stricter than the common law prudent man rule governing trustees who administer trusts. Id. at 91-92 & n.72. The common law duty is to “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” Id. at 91 & n.72 (quoting 2 A.W. Scott, THE LAW OF TRUSTS § 174 (3d. Ed. 1967)).
72 The House Report, while not providing an answer, provides a starting point for considering the question by stating: “It is expected that courts will interpret the prudent
These primary statutory guides to fiduciary behavior do not expressly address the question of whether fiduciary plan administrators such as A, B, and C should engage the counsel of M-corp to represent the plan in the litigation described in the hypothetical problem. Clearly, a fiduciary should not make a decision which would inure to the benefit of himself or allow plan assets to inure to the benefit of the employer. The simultaneous representation of M-corp and the plan by M-corp's counsel would not directly allow plan assets to benefit the employer or the fiduciary plan administrators. The structure of ERISA presents a slight paradox in that the exclusive benefit rule requires that fiduciary decisions be made solely for the benefit of plan participants and plan beneficiaries, but the statute simultaneously allows a dual role for the employer with respect to administration of the plan. The employer or its employees can be the plan sponsor and plan administrators. A fiduciary under ERISA who is charged with observing the standards that ERISA imposes may also be a full-time employee of the plan sponsor. Thus, Congress envisioned no inherent conflict of interest between the employer and the plan participants and beneficiaries. Nonetheless, the individual plan administrator whose salary derives ultimately from M-corp may have an inherent personal conflict when M-corp is accused of fraud and millions of dollars in damages are sought; however, ERISA makes clear in the exclusive benefit rule what loyalty should guide the administrator's behavior. The regulations leave no doubt that the fiduciary duty is paramount in that a fiduciary may be required to resign his position...
Engaging M-corp's counsel is not contrary to any express provision of ERISA. Assuming that a choice must be made, that choice must be guided by the exclusive benefit rule and by the "prudent man" rule. The prudence of engaging M-Corp's counsel depends on the circumstances and whether the typical administrator with similar skills, diligence, care, and prudence would reach the same conclusion. Putting aside questions of competence, it could be thought prudent to engage attorneys who have knowledge of M-div and who have participated in decisions with respect to the specific employee benefit plan. Concurrently, assuming a prior administrative rejection of P's claims by A, B, C, the plan administrators might plausibly reason that engaging M-corp's counsel in that situation would be a cost-efficient way of pursuing the litigation inasmuch as the defenses of M-corp and the plan might be identical or at least complementary. This financial saving would be consistent with that part of the exclusive benefit rule which obligates the fiduciary to discharge his duties for, inter alia, the purpose of "defraying reasonable expenses of administering the plan." On the other hand, if, during the administrative process, the denial of P's claim for vested benefits was based in large part on advice from attorneys working for M-corp, then prudence and the exclusive benefit rule might require a fiduciary to insist upon independent legal evaluation of P's claim once the allegations of fraud and malfeasance surface.

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77 Question FR-10, 29 C.F.R. § 2509.75-5 (1981). When a majority of trustees appear ready to take action which would violate ERISA, it becomes incumbent upon minority trustees to take reasonable and adequate measures to prevent the transaction. Id. These steps could include seeking an injunction, publication of the vote on the issue, or notification of the Department of Labor. Id. Mere resignation by any of the minority trustees without any action to prevent the imprudent conduct of the majority is not enough to avoid liability for the majority's action. Id. A trustee may be liable for the actions of other trustees under ERISA § 405, 29 U.S.C. § 1105 (1976) (fiduciary may be liable for breach of fiduciary responsibilities of another fiduciary if he knowingly participates in act or omission of another fiduciary that constitutes breach).

78 Counsel to a private pension plan is a party in interest. ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A) (1976). A party in interest is prohibited under section 406, 29 U.S.C. § 1106 (1976), from engaging in specific transactions with a fiduciary. However, the prohibitions of section 406 do not apply to transactions such as the making of reasonable arrangements with a party in interest for legal or other services necessary for the establishment or operation of the plan. ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2) (1976).


80 While it may appear that attorneys employed by M-corp should be prohibited from advising the plan administrators regarding the merits of P's administrative claim for benefits because of the attorneys' seeming loyalty and bias toward the financial interest of their employer, such a result is not required. In the administrative context "[w]hen an attorney advises a fiduciary about a matter dealing with the administration of an employer's benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries" under ERISA. Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982). Inasmuch as P is a beneficiary, the attorneys for M-corp would be required to fairly assess the merits of P's claim for benefits.
Even assuming that M-corp's counsel had nothing to do with the administrative response to P's claims, the fiduciary duty might require resort to independent counsel. Should the plan attorneys, who are also counsel for the employer, meet the fiduciary criteria and thus be subjected to the loyalty constraints in the exclusive benefit rule, a serious conflict of interest would arise when the employer is sued by a plan participant and beneficiary. M-corp's inside counsel—and outside counsel, depending on the nature and extent of advice previously given concerning the plan—might qualify as fiduciaries. The attorney's status as a fiduciary may preclude him from defending the employer. Section 406(b)(2) of ERISA provides that a fiduciary shall not, with regard to a plan, act in his individual or other capacity on behalf of a party whose interests are adverse to those of the plan or its participants or beneficiaries. The purpose of this provision is to prevent "a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." A possible resolution of the problem may be found in section 408(c)(3), which provides that a fiduciary is not prohibited from serving as an officer, employee, agent, or representative of a party in interest while also serving as a fiduciary. This exception certainly does not grant freedom to engage in prohibited transactions. Section 408(c)(3) prevents unequivocally prohibited transactions under section 406 from being invalidated simply because they are self-dealing by making it possible to justify the transactions by demonstrating their fairness and reasonableness. This exception, therefore, appears to be for the narrow purpose of allowing employees of the owner to serve as fiduciaries and as such would have a minimal impact on the prohibitions of section 406 of ERISA. Where a fiduciary provides legal service, it is expected that such arrangements will allow for termination upon reasonably short notice if the arrangement becomes "disadvantageous."

Sections 406 and 408 of ERISA were considered in Curren v. Freitag, a case involving a collectively bargained union pension fund established by a trust agreement which required sixteen trustees, eight appointed by the employees and eight from the employer associations in accord with

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81 See text accompanying notes 66 & 67 supra; see also note 57 supra.
87 Id. The term "disadvantageous" is not defined but could encompass situations of serious conflict.
29 U.S.C. § 186(c)(5)(B). The plaintiffs, trustees appointed by the employers, brought suit alleging defects in the structure and operation of the fund and sought to hold the trustees representing the union personally liable under ERISA fiduciary provisions. The defendants counterclaimed against the employer trustees collectively and against the plaintiff trustee, Curren, individually for violating ERISA section 406(b)(2) by actively representing certain contractors who refused to make required contributions under the plan. The counterclaim asserted that Curren advised two employers to resist audits ordered by the fund and to refuse payment demands because, in his opinion, the audits were properly authorized by the fund trustees. Curren responded that he had given his opinion, but that such opinion was as director of labor relations of an employers association and that his activities in that capacity did not violate his fiduciary duties to the fund. The court found that Curren's actions were in a general way adverse to the interests of the beneficiaries of the fund because increased collection costs would result from his admonition to employers to refuse payments. Though aid and comfort to an adverse party, those acts, said the court, did not constitute a violation of section 406(b)(c), 29 U.S.C. § 1106(b)(2). Citing section 408 of ERISA as the controlling authority, the court noted that because section 408 allowed Curren to act in both capacities, it would be illogical to require him to cease rendering advice to the employers, especially in light of the provisions of the Labor Management Relations Act which required employees and employers to be equally represented in administering this fund. The court held that to give the section the reading urged by the

90 Id. at 670.
91 Id.
92 Id.
93 Id. at 671.
94 Id. at 672.
95 Id. at 673.
96 Id.
97 Id. at 672. The court admits that there may be some inherent conflict between the ERISA fiduciary duty and prohibited transactions provisions and the provisions of the Labor Management Relations Act requiring equal representation by labor and management in the control of employee trust funds. Id. at 671. But compare NLRB v. Amax Coal Co., 453 U.S. 322 (1981), where the tension generated by equal employee-employer representation in the joint administration of pension trust funds was explored and resolved. The court emphasized that "[a]lthough § 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee." Id. at 333 n.16. After examining the legislative history of section 302(c)(5)(B) of the LMRA which requires an equal balance between employer and union appointed trustees, the court found no congressional intent to allow an employer to direct or supervise the decision of a trustee it has appointed nor any congressional intent to permit a trustee to administer the fund in the interest of the party appointing him. Id. at 329-31. "In sum," said the Court, "the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party." Id. at 331-32 (footnote omitted).
counterclaimers would require a fiduciary who also serves as an employee of a party in interest not to inform or advise his employer of his opinion regarding the propriety of actions taken by the fund. The court emphasized that the critical distinction between proper behavior and impermissible "dealing" was between "advocating a course of action or a solution and having the power to take that course or implement that solution." This interpretation would prohibit a fiduciary who is serving dual roles from holding a position that authorizes him to accept, on behalf of the plan, a compromise settlement of less than the amount properly due the plan, but would not prohibit the fiduciary from advising his employer that the plan might accept such a reduced amount.

In the hypothetical problem involving M-corp, the interest of the beneficiaries would be to pursue vigorously the question of the legality of M-corp's retaining certain funds, while the interest of defendant M-corp and its attorneys would be to vigorously contest P's claims and to preserve M-corp's financial position. Thus, the decision by the plan administrators to have the plan represented by the attorneys of M-corp could violate section 406, which proscribes fiduciary actions on behalf of a party with interests adverse to those of the participants and beneficiaries. If any M-corp attorney is deemed a fiduciary of the plan, the probability of violating section 406 of ERISA increases because of the possibility of settlement discussions. Under the logic of Curren, the section 406 and section 404 duty of an attorney fiduciary to operate solely for the benefit of the plan beneficiaries and the plan participants would prohibit the attorney, if he is a fiduciary in a position that authorizes him to accept a settlement, from accepting a compromise settlement of less than the amount due the plan. This position during settlement negotiations would be inconsistent with that attorney's corresponding duty to M-corp to limit the financial cost of settlement.

ERISA must be read in light of its overall purpose. Congress enacted ERISA as a comprehensive remedial statute and liberal construction is

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84 432 F. Supp. at 672.
89 Id.
100 Id. The applicability of the Curren interpretation to M-corp's situation is diluted somewhat by the court's emphasis on the fact that the trust fund in Curren was required to have equal labor and management representation on its board of trustees. See text accompanying note 97 supra.
101 Curren recommended specific legal counsel to the employers and held meetings concerning their defense in his office. 432 F. Supp. at 671. Had he been directing the legal action himself as an attorney his dual involvement may have been more closely scrutinized and criticized by the court. See Note, supra note 1, at 145 (concluding after analysis of Curren, that the "safest, most practical course for the attorney is the utilization of a separate employment arrangement with the pension plan, or at least the inclusion of some provision in the plan for retention of separate counsel in the event a conflict like that in Curren should arise. From a purely pragmatic approach, any litigation between a plan and its sponsoring employer would require the application of normal professional standards regarding conflict of interest, and as such the plan would require separate legal representation.".)
warranted to effect the statute's remedial purposes.\footnote{Gilliam v. Edwards, 492 F. Supp. 1255, 1261 (D.N.J. 1980); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 275-76 (E.D. Pa. 1977); Marshall v. Snyder, 430 F. Supp. 1224, 1231 (E.D.N.Y. 1977), aff'd, 572 F.2d 894 (2d Cir. 1978). See Marshall v. Craft, 465 F. Supp. 493, 496 (N.D. Ga. 1978).} ERISA is designed to safeguard the interest of plan participants and beneficiaries as part of the effort to maintain successful industrial relations, employment stability, and the flow of interstate commerce.\footnote{ERISA §§ 401, 29 U.S.C. § 1001 (1976).} Thus, ERISA imposes extremely strict standards of conduct on individuals and organizations occupying positions of trust with respect to employee benefit plans.\footnote{ERISA §§ 404, 406-409, 29 U.S.C. §§ 1104, 1106-1109 (1976 & Supp. IV 1980).} The legislative history is replete with indications of congressional concern that adequate protection for the interest of plan beneficiaries and participants beyond that available under conventional trust law be guaranteed.\footnote{See, e.g., S. REP. No. 127, supra note 3, at 28-29, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 4864-65; H.R. REP. No. 533, supra note 2, at 11-12, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 4649-51. See generally 120 CONG. REC. 29,194 (1974) (remarks of Rep. Biaggi); 120 CONG. REC. 29,932 (1974) (remarks of Sen. Williams); 120 CONG. REC. 29,951 (1974) (remarks of Sen. Bentsen); 120 CONG. REC. 29,962 (1974) (remarks of Sen. Beall).} In light of this legislative intent, the judgments of all persons whose loyalty to beneficiaries and participants is reasonably questionable should be excluded from any critical decisions. M-corp's counsel would have a duty toward M-corp and could not represent solely the interests of the plan beneficiaries and participants. Accordingly, the plan administrators ought to seek independent legal evaluation of their position and independent representation for the plan in the litigation hypothesized in the M-corp problem.\footnote{Counsel would have a conflict of interest not only if they represented both the plan and M-corp, but also if they represented both the plan and the plan administrators accused of fraud and malfeasance. See notes 153-72 & accompanying text infra. Because of the conflict between the administrators' interests and the plan's interests when there are allegations of fraud against the individual plan administrators, they should not select the independent legal counsel for the plan. Several alternative methods are available. Untainted and unac- cused co-fiduciaries, either corporate or individual, could be delegated that responsibility by the accused plan administrators or by the court. Alternatively, the plan administrators could select counsel subject to the approval of the court. Finally, the court could appoint independent counsel. While ERISA does not explicitly provide for the appointment of a receiver or substitute fiduciary, ERISA section 409(a), 29 U.S.C. § 1109(a) (1976), does make a breaching fiduciary "subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." This section has been construed to give the court power to appoint a receiver in an attempt to stabilize funds of employee benefit plans during the pendency of an ERISA action against officials of those plans. Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978), aff'd 430 F. Supp. 1224 (E.D.N.Y. 1977). See also Selig v. Morrison, 230 Ark. 216, 321 S.W.2d 769 (1959) (when trustee had personal interest in litigation involving trust estate antagonistic to that of beneficiaries, court affirmed appointment of a trustee ad litem to conduct litigation); A.W. Scott, THE LAW OF TRUSTS § 199.4 (3d ed. 1967) (court may suspend powers of a fiduciary and designate another to perform those duties).} Should independent counsel, after investigation and analysis, agree with the judgment of M-corp's counsel concerning the merit of P's case, the
question arises whether ERISA and its fiduciary guidelines would permit the plan administrators to engage M-corp's counsel for litigation. The motivation for considering such a move would be the possibility of reducing litigation expense. The possibility that some discovery may be needed before independent counsel could form an adequate opinion, particularly when there are allegations of fraud, may vitiate any anticipated financial saving; however, assuming that a real opportunity to save money exists, the possibility of future settlement discussions would seem to foreclose engaging M-corp's counsel even after receiving an evaluation from independent counsel.\textsuperscript{107} M-corp's counsel would have concerns about the interest of M-corp that could unavoidably affect their advice about settlement proposals in ways that would not be consistent with the exclusive interests of plan beneficiaries and participants. Such conflict should not be risked when the purposes of ERISA are at stake. This conclusion is strengthened by the analysis of the professional code of conduct for attorneys.

**PROFESSIONAL ETHICAL OBLIGATIONS OF THE ATTORNEY**

The Model Code of Professional Responsibility promulgated by the American Bar Association\textsuperscript{108} governs the ethical conduct of attorneys. The Code has been criticized for its failure to deal adequately with the problems of corporate counsel.\textsuperscript{109} Few of the provisions address directly the problems related to corporate counsel and those that do are often vague and confusing.\textsuperscript{110} Corporate lawyers struggle to apply rules designed for an advocate of an individual client to their role as counselors of a corporation. Nevertheless the Code provides some guidance for the resolu-


The Canons are . . . axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers . . . .

The Ethical Considerations are aspirational . . . and represent the objectives toward which every [attorney] should strive. They [provide guidance] in many specific situations . . . . The Disciplinary Rules . . . are mandatory in character. [They state] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.


tion of the problem of representation of both the plan and M-corp by M-corp's attorneys.

Under Canon 5 of the Code, a lawyer's judgment must be exercised solely for the benefit of his client and be free from compromising influences. Impermissible conflicts appear whenever an attorney is likely to prefer outcomes contrary to the client's wishes or interests—for example, when the client's interests conflict with the financial well-being of the attorney or some third party represented by the attorney. With respect to the hypothetical problem, M-corp's outside and inside counsel have personal financial interests in maintaining relations with M-corp; consequently, M-corp's counsel may tend to favor the wishes of M-corp over the interests of the plan. Ethical Consideration 5-14 precludes acceptance or continuation of conflicting employment when it dilutes loyalty and independent judgment. Ethical Consideration 5-15 directs the attorney to weigh carefully the possibility of conflicting interests of multiple clients. Under Ethical Consideration 5-21, a lawyer subject to third party influence should consult his client and possibly withdraw.

Ethical Consideration 5-15 specifies in emphatic terms that a lawyer "should never represent in litigation multiple clients with differing interests," and that it is preferable that clients with potentially differing interests not be represented by the same attorney. "Differing interests' include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." The Code, by itself, does not require that the attorney terminate his relationship with the client at the first hint of conflict. Routes for ending various conflicts without destroying the attorney-client relationship abound. However, the rules appear to prefer withdrawal from represen-

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1. The canon states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981). See id. EC 5-1: "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client" and should not be affected by the lawyer's "personal interests, the interest of other clients, nor the desires of third persons."
2. Id. EC 5-2 (attorney should avoid employment if personal interests of attorney contrary to those of client).
3. Id. EC 5-14.
4. Id.
5. Id. EC 5-15.
6. Id. EC 5-21.
7. Id. EC 5-15.
8. Id. Definition 1.
9. See id. DR 5-104(a) (lawyer may enter into business transaction with client only upon full disclosure of potential conflict and with client's consent); id. DR 5-107(A) (attorney shall not accept compensation from nonclient without client's consent); id. EC 5-2 (attorney can avoid circumstances that might interfere with representation of his client); id. EC 5-3 (avoidance of acquisition of property rights that might adversely affect professional judgment); id. EC 7-9 (attorney may ask client for permission to forego action the attorney deems unjust even if in client's best interest); id. EC 7-17 (attorney under no obligation to conform personal opinion to that favorable to client).
tation because of conflict or the appearance of conflict. When independent judgment is impaired by multiple representation, the attorney’s obligation to withdraw is clear from Disciplinary Rule 5-105:

DR 5-105  Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.

In the M-corp hypothetical the extent of conflict between the plan and M-corp depends on the nature of P’s allegations. However, given ERISA’s fiduciary duties, several inherent points of diversity are apparent. First, the plan administrators are bound by ERISA to discharge their duties
solely for the beneficiaries and plan participants; accordingly, they would be required under ERISA to have the plan counsel evaluate the merits of P's claims, not from a defensive position in the first instance, but with a view toward determining whether M-corp has fraudulently withheld funds rightfully due plan beneficiaries and participants. M-corp's counsel, representing the plan, would be obligated under the Code as M-corp's counsel to defend against P's attempt to have M-corp disgorge millions of dollars. M-corp's counsel would explore and assert every reasonable defense. This would be especially true when M-corp's counsel has had a long relationship with M-corp as outside counsel. Independent counsel for the plan would be obligated to ensure that plan assets are not used to benefit the employer and would objectively scrutinize M-corp's retention of funds with a view toward recouping all monies unlawfully withheld. Even assuming complementary defenses between the plan and M-corp, the conflicts and differing interests of the plan and M-corp could become acute during any settlement discussions because M-corp would have financial concerns differing from those of the plan, which must always operate solely for the benefit of the beneficiaries and participants.

Disciplinary Rule 5-105(C) indicates that conflicting interests in the context of multiple representation are not always fatal to the attorney-client relationship: an attorney may represent multiple clients with potentially conflicting interests if it is "obvious" that he would be able to exercise independent professional judgment for each after full disclosure and client consent. Disciplinary Rule 5-105(C) and Ethical Consideration 5-15, read together, indicate that situations in which multiple representation is acceptable include nonlitigation circumstances in which the attorney has fully disclosed to both clients the extent of the conflict and received their consent. However, that mechanism of sanctifying multiple representation may not be available here because ERISA unequivocally demands action by the plan administrators exclusively and solely for the benefit of plan beneficiaries and participants. ERISA, properly construed, would seem to prohibit the plan administrators from consenting to such multiple representation since even a scintilla of doubt about the independent judgment of counsel should be resolved in favor of engaging truly independent counsel. Such doubt would exist in the M-corp case because of allegations of fraud by M-corp as well as by the plan administrators, and because

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124 See generally text accompanying notes 89-102 supra.
126 In Winpisinger v. Aurora Corp., 456 F. Supp. 559 (N.D. Ohio 1978), the court decided that trustees may be held liable for failing to act for the exclusive benefit of participants and beneficiaries in the administration of a benefit plan. Cf. Feagan v. Lang, 416 F. Supp. 53 (S.D. Fla. 1976) (trustees, motivated by fear that failure to enforce employer's obligation could subject trustees to personal liability for breach of their fiduciary duties, sued to recover $6,526 in delinquent contributions from employee who was subject to union plan).
of counsel's responsibilities to, and financial interest in, the corporate
defendant. The ERISA exclusive benefit rule and the purpose of ERISA
seem to require this view. Thus the Code's cure for conflicts—disclosure
and consent by the client when it is obvious that the lawyer can ade-
quately represent the interest of each—would be unavailable in the
hypothetical. The primacy of the implied dictates of ERISA over the Code
is reinforced because ERISA is a federal statute which preempts any con-
flicting state law. Codes of professional conduct are adopted by the states
and therefore preempted by ERISA to the extent there is conflict.

On January 30, 1980, the American Bar Association released its Discussion
Draft of the Model Rules of Professional Conduct to remedy some
of the shortcomings of the Model Code of Professional Responsibility.
The Final Draft of the Model Rules of Professional Conduct was released
on May 30, 1981. The rule pertinent to the propriety of multiple represen-
tation is rule 1.7 in the Final Draft. Rule 1.7 states that a lawyer's other
responsibilities will not be a bar to representation when, first, the im-
lications, advantages, and risks of common representation are disclosed;
second, the client consents; and third, the attorney believes the conflicting
interest will not adversely affect the best interests of the client.

128 See note 6 supra. Admittedly, the ERISA-mandated prohibition against multiple
representation by counsel of the plan and plan sponsor when there are allegations of fraud
and malfeasance is an inference rather than an express statutory provision. It could, however,
become express law in that it has been held that "Congress has invested the courts with
a duty to create law governing aspects of employee benefit plans not specifically regulated
by ERISA." Wayne Chem. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 321 (N.D.
Ind. 1977), modified, 567 F.2d 692 (7th Cir. 1977). The court found support in the remarks
of Senator Javits, speaking on behalf of the conference committee's version of ERISA.
The Senator stated: "In view of Federal preemption, State laws ... will be superseded.
It is also 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."
Id. at 321-22 (quoting 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits)).
129 See MODEL RULES OF PROFESSIONAL CONDUCT Preface to Draft (Discussion Draft 1980).
The Model Rules have provoked widespread criticism and discussion. The Association of
Trial Lawyers of America and the National Organization of Bar Counsel have proposed
revisions of the Code of Professional Responsibility in response to the Model Rules. Burke,
Third Competitor Enters New Ethics Code Debate, Nat'l L.J., Sept. 29, 1980, at 2. See also
130 MODEL RULES OF PROFESSIONAL CONDUCT (Final Draft 1981), reprinted in 67 A.B.A.J.
(Supp. 1981). If approved by the American Bar Association House of Delegates, the Final
Draft of the Model Rules will replace the Model Code of Professional Responsibility as
the primary statement of the ethical standard of the profession. Voting by the House of
Delegates is scheduled for February 1983. See Granelli, ABA Defers Ethics Code Vote, Nat'l
131 The MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (Final Draft 1981) contains
the general rule on conflict of interest: "A LAWYER SHALL NOT REPRESENT A CLIENT
IF THE LAWYER'S ABILITY TO CONSIDER, RECOMMEND OR CARRY OUT A
COURSE OF ACTION ON BEHALF OF THE CLIENT WILL BE ADVERSELY AF-
FECTED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT OR TO A
THIRD PERSON, OR BY THE LAWYER'S OWN INTERESTS."
132 Id.
The Notes accompanying rule 1.7 point out that the rule consolidates several provisions of the current Model Code of Professional Responsibility. One difference is that, while DR 5-105(C) requires that it be "obvious" that the attorney can provide "adequate" representation, the representation must reasonably appear compatible with the best interest of the client. The test in rule 1.7 is objective: "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The comment following rule 1.7 attempts to define conflict. It can "exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." The latter factor is relevant to the M-corp problem because the plan fiduciaries are bound to represent all the beneficiaries and participants and are limited in the extent to which they could compromise the rights of such persons.

Common representation of persons having similar interests is proper under the comment to rule 1.7 if the risk of adverse effect is minimal. Arguably, under ERISA M-corp or a plan sponsor ought to have the interests of the plan participants and beneficiaries at the top of its priorities. However, the propriety of concurrent representation can depend on the nature of the litigation. For instance, "a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation." Fraud, under the terminology of the Final Draft of the Model Rules of Professional Conduct, denotes conduct having a purpose to deceive, not merely negligent misrepresentation or failure to apprise another of relevant information. The instant situation contains allegations of fraud; however, the nature of the litigation and the gravity of the conflicts raised will determine the propriety of simultaneous representation—at least in cases in which ERISA is not involved. The set of circumstances in which concurrent representation is allowable under ERISA, if at all, must be extremely narrow in light of the strict duty

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130 Id. at notes (comparing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), DR 5-105(C), DR 5-107(B) (1981)).

134 Id. at comment.

135 Id. at.

136 See Winpisinger v. Aurora Corp., 456 F. Supp. 559 (N.D. Ohio 1978) (fiduciaries may not lawfully discriminate among similarly situated classes of participants; there is a duty to act solely in interest of all participants).

137 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (Final Draft 1981).


139 See id.
of ERISA fiduciaries. Illustrative of this goal is the classic formulation by Judge Cardozo of the standard of fiduciary conduct:

Many forms of conduct permissible to a workaday world for those actions at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

The attorney can be disciplined for a violation of the disciplinary rules of the Model Code of Professional Responsibility. Discipline is not, however, under the exclusive control of bar associations. The district court has the clear duty, as well as power, to disqualify counsel for improperly representing adverse interests. For the purpose of preserving the integrity of the court and the bar, the court in disqualification cases should apply the precepts for ethical, professional conduct as set forth in the Model Code of Professional Responsibility, and should not permit "[a] lawyer . . . to put himself in a position where, even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another . . . ."

Surprisingly few cases address the issue of disqualification from joint

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149 Circuit courts have repeatedly upheld district court orders disqualifying counsel for conflicts of interest. See, e.g., Schloetter v. Railoc of Ind., 546 F.2d 706 (7th Cir. 1976); Emle Indus., v. Patenex, Inc., 478 F.2d 562 (2d Cir. 1973). In cases in which the lower court denied disqualification, appellate courts have also remanded the issue of apparent impropriety and attorney disqualification for the district court to reconsider in light of its plain duty to disqualify counsel if their conduct is or appears to be improper. See, e.g., Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976), cert. denied, 429 U.S. 830 (1976); American Roller Co. v. Budinger, 513 F.2d 982 (3d Cir. 1975); J.P. Foley Co. v. Vanderbilt, 525 F.2d 1357 (2d Cir. 1975); Tomlinson v. Florida Iron & Metal, 291 F.2d 333 (6th Cir. 1961). Accordingly, the district court has the clear duty, as well as power, to disqualify counsel for improperly representing adverse interests. Even in cases involving only potentially adverse interests or the possibility of divided loyalty, courts have emphasized that all doubts should be resolved against the propriety of representation. See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978) (court stated that "[d]oubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification").
150 In a footnote, the court in Brennan's, Inc. v. Brennan's Restaurant, Inc., 590 F.2d 168, 172 n.5 (5th Cir. 1979), commented that "[a]s the profession's own expression of its ethical standards, the Code of Professional Responsibility, Ethical Considerations, and Disciplinary Rules provide substantial guidance to federal courts in evaluating the conduct of attorneys appearing before them." Accord Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954).
representation in an ERISA case. The only case to meet the issue head-on is *International Union, UAW v. Allis-Chalmers Corp.*, in which the court in a brief opinion denied the motion to disqualify. In *Allis-Chalmers* the plaintiff alleged that a joint venture agreement between Allis-Chalmers and another corporation violated ERISA. The defendants included Allis-Chalmers, the corporate sponsor of the plan, and Harris Trust and Savings Bank, a fiduciary trustee of the benefit plan. The court, in denying plaintiff's motion for dismissal, based its holding on two factors. First, the court stated that an attorney would not be disqualified on plaintiff's motion where a record leaves "no reason to believe that the purposes of ERISA will not be served by such representation."

Second, the court underscored the bank's consent to the concurrent representation, but only after a trust officer of the bank reviewed the situation with the bank's legal department and determined that, despite the dual representation, employer's counsel would be able to exercise independent professional judgment. Thus, the bank in *Allis-Chalmers* obtained a legal evaluation independent of the employer prior to consenting to multiple representation. In the M-corp problem A, B, and C, plan administrators and fiduciaries, received their legal guidance from M-corp's counsel who, unlike the bank's legal department, cannot reasonably be expected to give independent professional judgment because they derive their income ultimately from M-corp and have professional obligations to M-corp as well. Acceptance of M-corp's counsel by A, B, and C is imprudent and sufficient grounds for disqualification of M-corp's counsel under *Allis-Chalmers*. A, B, and C would have to engage independent outside counsel to act in a manner consistent with *Allis-Chalmers*.

Other cases brought under analogous statutes support such a requirement of independent legal counsel. Although not directly on point, *Yablom-
ski v. United Mine Workers illustrates the lengths to which courts have gone to disqualify inside counsel when disqualification is predicated upon significant infringement of a specific legislative policy in addition to rules of professional ethics. In Yablonski a dissident union group brought an action against the United Mine Workers of America (UMW) union and union officers seeking an accounting of union funds and seeking restitution of funds allegedly misappropriated. After withdrawal by a private law firm because of a mandate issued by the court of appeals upon finding a potential conflict of interest, the general counsel of the union sought to represent both the union and union officers in the action, and the dissident union group filed a motion to disqualify the general counsel. The lower court denied the motion and the appellants petitioned the court of appeals for further relief pursuant to the earlier mandate. Much of the appellees' argument was devoted to attempted justification of the UMW's representation by its inside counsel on the ground that its institutional interests as a union coincided with the individual defensive interests of the officers who were sued. As the court aptly stated, this approach "puts the cart before the horse." The court quoted the lower court's reasoning: "In trying to achieve a valid definition of an institution's interest, it would seem that counsel charged with this responsibility should be as independent as possible." The court further observed: "[R]epresentation of a labor union by counsel free of possibly conflicting obligations to adverse parties is directly related to attainment of the goals Congress envisioned when it passed the Labor-Management Reporting and Disclosure Act of 1959." The court concluded:

153 454 F.2d 1038 (D.C. Cir. 1971).
154 The court noted that "[t]he cases have reached apparently conflicting conclusions where the disqualification was sought upon ethical considerations alone." Id. at 1038 n.9. See, e.g., Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992, 994 (5th Cir. 1967), cert. denied, 390 U.S. 921 (1968).
155 A private law firm withdrew after the court of appeals issued a mandate in Yablonski v. UMW, 448 F.2d 1175 (D.C. Cir. 1971), to vacate an earlier district court denial of a motion to disqualify the firm. 454 F.2d at 1037.
156 454 F.2d at 1037.
157 Id. at 1041.
158 Id. (quoting Yablonski v. UMW, 448 F.2d 1175, 1181 (D.C. Cir. 1971)). In its earlier Yablonski decision an outside law firm retained by the UMW could not continue as dual counsel because the court found in the firm's past and ongoing representation of the UMW's president in other litigation the potential for conflict with obligations owing the UMW. Id. at 1177-80. The critical nature of the public interest inherent in the purpose of the statute in question was evident from the court's conclusion:

[T]he objectives of the Labor-Management Reporting and Disclosure Act would be much better served by having an unquestionably-independent new counsel in this particular case. The public interest requires that the validity of appellants' charges against the UMWA management of breach of its fiduciary responsibilities be determined in a context which is as free as possible from the appearance of any potential for conflict of interest in the representation of the union itself.

Id. at 1179-80 (emphasis added).
159 454 F.2d at 1039.
In sum, a *sine qua non* of permissible union representation in a Section 501 action is the absence of any duty to another that might detract from a full measure of loyalty to the welfare of the union. House counsel no less than outside counsel must survive that test. In this instance, house counsel plainly do not.\textsuperscript{10}

More on point is the case of *International Brotherhood of Teamsters v. Hoffa*.\textsuperscript{116} The *Hoffa* court stated emphatically that when union officials are charged with a breach of fiduciary duty, the union (which acts for the union membership just as the plan administrators must act for its participants and beneficiaries) is entitled to an evaluation and representation of its interest by independent counsel unencumbered by potentially conflicting obligations of counsel in the employ of a defendant officer.\textsuperscript{116}2 In *Hoffa* individual union members, suing on behalf of the union membership, charged the union officers and trustees with breaches of their fiduciary duty.\textsuperscript{116}3 In particular the complaint in *Hoffa* charged that the officers made unauthorized disbursements in violation of fiduciary obligations imposed upon them by the Labor-Management Reporting and Disclosure Act of 1959 and sought injunctive relief and an accounting.\textsuperscript{116}4 *Hoffa* is similar to the M-corp problem, in which \( P \) has brought suit on behalf of similarly situated participants and beneficiaries of the M-div employee benefit plan. \( P \) has charged defendants, M-corp, and the plan administrators with fraudulent breaches of fiduciary duty, including the improper conversion of plan assets (for example, premium refunds). \( P \) also seeks injunctive relief and an accounting.

In *Hoffa* the union moved to be a party defendant.\textsuperscript{116}5 The court was receptive to that motion, leaving it open to renewal by subsequent independent counsel, but rejected the simultaneous representation of the union and union officers by identical counsel because of the conflict of interest.\textsuperscript{116}6 The court stated: "Where, as here, union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unencumbered by potentially conflicting obligations to any defendant officer."\textsuperscript{116}7

The *Hoffa* court cited with approval\textsuperscript{116}8 the case of *Milone v. English*,\textsuperscript{116}9 in which union officials were charged with fraud. The *Milone* court stated:

\textsuperscript{116}Id. at 1042.
\textsuperscript{116}2 Id. at 256.
\textsuperscript{116}3 Id. at 247.
\textsuperscript{116}4 Id. at 247-48.
\textsuperscript{116}5 Id. at 251.
\textsuperscript{116}6 Id. at 257.
\textsuperscript{116}7 Id. at 256 (emphasis added); accord, Murphy v. Washington American League Baseball Club, 324 F.2d 394 (D.C. Cir. 1963).
\textsuperscript{116}8 Id. at 255-56.
\textsuperscript{116}9 306 F.2d 814 (D.C. Cir. 1962).
If the charges have substance a sound resolution may be prevented by the very fact of dual representation during the process leading to a decision with respect to the charges. Different counsel would be required in this process. In other words, counsel who are chosen by and represent officers charged with the misconduct, and who also represent the union, are not able to guide the litigation in the best interest of the union because of the conflict in counsel’s loyalties. In such a situation it would be incumbent upon counsel not to represent both the union and the officers.\footnote{Id. at 817. It follows from this logic that the same counsel could not simultaneously represent the plan and the plan administrators who have been accused by $P$ of fraud and malfeasance.}

To the union’s contention that the similarity of the defenses offered by the organization and the individual defendants eliminated possible conflicts of interest, the court in Hoffa responded: “Potential, no less than actual, conflict disqualifies counsel from serving in a double capacity, and the potentiality of conflict is clearly present here.”\footnote{242 F. Supp. at 256.} The court elaborated:

Counsel representing an individual defendant must not only bend every effort to demonstrate that he did not violate his fiduciary obligations but must also assert any and all legitimate claims that, notwithstanding any violation adjudged, the organization is barred from attaching responsibility to him. But if . . . breach of duty be found, counsel representing the International [union] will be equally bound to seek restoration of the funds expended. In that event the interests of the International and the officer would become seriously adverse, and the responsibilities of counsel irreconcilably conflicting, and, however forthright and objective counsel serving both may endeavor to be, the duality of the role would be untenable.\footnote{Id. at 256-57.}

The same situation is presented in the M-corp problem. Should defendant M-corp, for example, be adjudged liable for converting millions of dollars, defendant benefit plan and its counsel would be obligated to seek restoration of those funds for the benefit of the plan participants and beneficiaries.

CONCLUSION

An examination of the statutory scheme and legislative history of ERISA reveals a deep concern on the part of lawmakers for public interest. A historical record of pension plan abuse and ineffective legislation was observed, and an attempt was made, through ERISA, to correct it by providing dependable employee benefit plans for millions of American workers.

The structure of ERISA does not contemplate a necessarily adversarial relationship between the employer and the employee benefit plan administrators. On the contrary, it contemplates the possibility of a dual
role for the employer and specifies, for example, that a plan administrator fiduciary can also be a paid employee of his employer. To prevent the overlapping responsibilities from being abused, and to ensure that the promise of ERISA will not be vitiated, the statute relies heavily on a strict standard of fiduciary conduct and penalizes breach. Thus, ERISA fiduciaries must act *solely* for the benefit of the plan participants and beneficiaries and in a prudent manner, even if they are employed by the same employer. Moreover, an attorney retained by the plan administrators must perform his duties in a manner consistent with the administrators’ obligations to the plan.

When a plan participant sues the plan and his employer, the plan administrators are obligated to select counsel to represent the plan. For reasons of efficiency, the plan administrators may justifiably consider engaging the employer’s inside and outside counsel, particularly when that counsel has intimate knowledge of the employee benefit plan. An attorney representing both the employer and the plan can maintain that role only if the interest of the plan and the employer are identical. When there are allegations of fraud against the employer, as in the hypothetical problem involving M-corp, conflict arises between the interest of the employer in defending against a claim for monetary damages, and the interest of the plan in aggressively pursuing the possibility that the employer owes money to the plan participants and beneficiaries. Even if there is little merit in the participant’s claims, potential for conflict exists between the plan and the employer when the possibility of settlement discussions is considered. Consequently, the fiduciary duties set forth in ERISA require that the plan administrators retain independent outside counsel who are untainted by adverse interests, personal or strategic.

The standards of conduct for attorneys offer further support for a requirement of independent counsel for the plan. Both the current and the proposed rules of professional conduct contain prohibitions against an attorney’s representing multiple clients who have adverse or differing interests that might impair the independent judgment the attorney owes each client. Each code contains an exception permitting multiple client representation after disclosure by the attorney and consent by the clients. For several reasons the exception is unavailable in a situation under ERISA involving litigation when there are allegations of fraud. The degree of conflict is greater when there are allegations of fraud. In that situation it would be difficult for counsel to conclude, as the current rules require, that it is “obvious” that he can adequately represent both clients. Such a conclusion becomes even more problematic when the ERISA duty of fidelity to the plan participants and beneficiaries is superimposed on the attorney’s general duty to represent each client zealously. The result of dual representation when there are allegations of fraud is some infringement upon the statutory policy of exclusive loyalty to the plan. The cases examined suggest that sound resolution of the charges may be
prevented by the very fact of dual representation; they further show that even if the canons of professional ethics raise only a rebuttable presumption against multiple representation, the disclosure and fiduciary policies embodied in a statute such as ERISA render the presumption irrebuttable when fraud is alleged.

The correct inference from the language of ERISA is that when there are allegations of fraud and breach of fiduciary duty, the allegations should be evaluated for the plan by independent counsel. Plan administrators should not extend, nor should attorneys accept, offers to represent multiple clients in this situation. If a court were presented with a case in which an attorney was representing multiple clients when fraud and breach of fiduciary duties were alleged, the court would, under ERISA, be obliged to disqualify the attorney.
