ETHICAL CHALLENGES FOR EMPLOYEE BENEFITS PROFESSIONALS

Indiana Benefits Conference
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I. UNDERSTANDING THE REPRESENTATION

A. Who is your client?

1. Identifying your client

In connection with an employee benefits matter, a lawyer may be called upon to represent a variety of different types of clients, including one or more of the following entities or individuals:

- An employer (i.e., as plan sponsor or plan administrator)
- A plan (i.e., on administrative matters or in litigation)
- A committee of the plan sponsor (i.e., an administrative, investment, or plan design body)
- An individual (i.e., a plaintiff, or an executive, or an individual fiduciary)
- An insurer (i.e., the payor or administrator of certain benefits)
- A service provider (i.e., a financial institution, an institutional trustee, an investment advisor, an accounting firm, an actuary, or a third-party administrator)

An attorney-client relationship with one entity or individual can easily cause a lawyer to assume the representation of another entity or individual. For example, an employer (client 1) may ask its outside counsel to represent its ERISA pension plan (client 2) in litigation and advise its administrative committee (client 3) on questions related to administrative claims

by plan participants. Understanding which of those three clients you are advising at any given time has important ramifications, as discussed below, on matters such as the interests you must take into account in forming your advice and the application of the attorney-client privilege.

2. Avoiding inadvertent representations

Employee benefits matters often cause a lawyer to represent an entity. Doing so exposes a lawyer to the risk of inadvertently representing the client's constituents.

A lawyer employed by an organization represents the organization "acting through its duly authorized constituents." Ind. Rule of Prof'l Conduct 1.13(a). In benefits matters, a lawyer may work with any number of different constituents to discharge an organization or entity's work. For example, a lawyer may work with members of a corporation's board of directors, members of a corporation's committees (such as an employee benefits committee, investment committee, or administrative committee), individual executives, with members of the corporation's human resource or finance departments, or with leaders of a corporation's lines of business or facilities.

For a lawyer, working with an entity's constituents poses the risk of inadvertently forming an attorney-client relationship with a constituent. This is particularly true with benefits matters in which a constituent is carrying out a fiduciary function under ERISA for which the constituent faces personal liability for a loss caused by the fiduciary's breach of duty. ERISA § 409. In that case, the constituent may ask you for advice that relates not to the organization's legal needs, but instead to the constituent's own legal needs. You must be wary of this circumstance because it may be difficult to distinguish between advice a constituent requests for the organization's benefit or his own benefit—and that is important because, if the constituent

engages in a breach of fiduciary duty, the organization and fiduciary may have adverse interests, and you may face a conflict of interest by reason of your attorney-client relationship with both.

B. In what capacity do you represent your client?

In a benefits matter, once you have identified your client, you must determine whether your client seeks advice in a fiduciary or non-fiduciary capacity. Stated differently, you must determine whether your client seeks advice as a fiduciary or as a so-called "settlor." Doing so allows you to confirm whose interests you may take into account in forming your advice to the client (or for whose benefit, as a legal matter, your client has requested the advice).

Under ERISA, a fiduciary is an individual who exercises discretionary authority or control over the management or assets of a plan. ERISA § 3(21). Every ERISA plan must identify in its governing document one or more "named fiduciaries" who have authority to control and manage the plan's administration. ERISA § 405(c). The plan's named fiduciary is often the sponsoring employer or a person or committee appointed by the employer. Fiduciary duties also arise by conduct. Anyone, regardless of title or capacity, becomes a fiduciary if he or she exercises discretionary authority or control with respect to a plan's assets or administration. A person also is a fiduciary if he or she renders investment advice for a fee. If a plan identifies the employer as the named fiduciary, the individuals who carry out the employer's fiduciary role by exercising authority and control over plan administration will themselves become fiduciaries by the exercise of this discretionary authority.

ERISA § 404(a) sets forth the principal standards of conduct for fiduciaries. Under that section, a fiduciary has duties to act prudently and exclusively in the interests of plan participants and beneficiaries, to diversify plan investments, and to follow the terms of the

documents and instruments governing the plan, to the extent those documents are consistent with ERISA. Whenever a fiduciary performs a fiduciary function—that is, makes a decision relating to the control or investment of plan assets or the administration of an ERISA plan—he or she must comply with these standards of conduct.

In contrast, whenever a client makes a settlor (or non-fiduciary) decision, ERISA's fiduciary standards are inapplicable. When making a settlor decision, for example, your client need not act exclusively in the interests of plan participants and beneficiaries; instead the client may act in his or her (or the employer's) own interest. For benefit plans, settlor decisions involve an exercise of discretion that does *not* pertain to plan administration or plan assets but, rather, to the plan's design or the employer's business operations.

Any advice you provide a client who is acting as an ERISA fiduciary must be suited to assist your client in satisfying ERISA's standards of conduct for fiduciaries. Any advice you provide a client who is not acting as an ERISA fiduciary need not be so tailored.

C. Good practices for managing the attorney-client relationship

Particularly when representing an entity with which you have more than one attorney-client relationship (i.e., you represent the employer, its plan, and its fiduciaries), in every communication you should identify the client to whom you are providing advice. Similarly, if circumstances arise in which a constituent's interests are (or could become) adverse to an entity client's interests, you should inform the constituent that you do not represent him, and that he may wish to obtain his own counsel. *See* Ind. Rule of Prof'l Conduct 1.13, Comment 10 (Clarifying the Lawyer's Role).

When representing an entity that performs both fiduciary and settlor functions, it is important for your communications with the client to identify the capacity (fiduciary or settlor) in which the client has requested the advice. To facilitate this, some clients separate their consideration of fiduciary and settlor decisions by, say, assigning settlor decisions to a settlor committee and assigning fiduciary decisions to a fiduciary committee. A lawyer, then, may provide advice to one committee or the other, but never to both at the same time. That reduces the likelihood that the lawyer and client will confuse whether the matter on which the lawyer is providing advice is a fiduciary or settlor function.

II. PROTECTING THE ATTORNEY-CLIENT PRIVILEGE

A. Entity representation

Three categories of people are within the attorney-client privilege: (i) the client or prospective client; (ii) the lawyer; and (ii) the agents of the client and lawyer. *See* C. McCormick, Evidence § 91 (J. Strong 4th ed. 1992). If you represent an entity (i.e., an employer/plan sponsor) on employee benefits matters, you may communicate with many different employees of your client, including executives and members of the employer's finance or human resource departments. Some of those employees may not be "agents" of the client who are legally considered to be within the privilege; and whether they are varies from state to state and, within limits prescribed by the Supreme Court, from circuit to circuit. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) (establishing a five-factor guide for determining whether the attorney-client privilege applies to communications between a corporation's legal counsel and lower-echelon corporate employees). A lawyer must take similar considerations into account when working with a former employee of an entity client, or another service provider to a client.

B. The "fiduciary exception" to the attorney-client privilege

Whether you are representing a client who is acting in a settlor or fiduciary capacity not only affects the standards that govern your client's conduct, it also affects the application of the attorney-client privilege. Legal advice you provide to your client who is acting in a settlor capacity will almost always be protected by the attorney-client privilege. But under the so-called fiduciary exception to the attorney-client privilege, in certain circumstances, the legal advice you provide a client who is acting in a fiduciary capacity may not be protected from discovery by plan participants and beneficiaries.

1. The origin of the fiduciary exception

The fiduciary exception to the attorney-client privilege has its roots in shareholder derivative actions in which corporate shareholders sought to discover communications between corporate fiduciaries and their counsel for the purpose of determining whether those fiduciaries breached their fiduciary duties to the shareholders. The seminal case is *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). *Garner* reasoned that:

> where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

Id. at 1103-04. Under that reasoning, *Garner* held that, against a showing of cause, a corporate fiduciary may not use the privilege to prevent the discovery of information

from the fiduciary by a shareholder that is relevant to whether the fiduciary breached its duties to that shareholder.

Another seminal case is *Riggs National Bank of Washington v. Zimmer*, which applied the fiduciary exception in the trust context. 355 A.2d 709 (Del. Ch. 1976). *Riggs* involved a dispute between the trustees and beneficiaries of an estate concerning tax matters. The trustees had sought legal advice from outside counsel regarding those tax matters. The outside counsel provided the trustees with a memorandum on the subject. Concerned that the trustees had breached their fiduciary duty in deciding how to address the tax matters, the beneficiaries sought to discover the memorandum from the trustees. The trustees refused to produce the memorandum, claiming it was protected by the attorney-client privilege.

Riggs held that the beneficiaries were entitled to discover the memorandum. The court based its decision on the purpose for which the trustees obtained the memorandum: to fulfill their fiduciary duties to make an informed decision on a matter in which the beneficiaries' interests were at stake. Allowing the beneficiaries to discover the memorandum from the trustees put the beneficiaries in a position to assess whether the trustees were adhering to the proper standard of care in managing the trust estate. The court concluded that the memorandum was subject to the fiduciary exception because the trustees were fiduciaries, and they had procured and relied on the memorandum in making a fiduciary decision.

2. <u>The fiduciary exception in ERISA cases</u>

Since *Garner* and *Riggs* were decided, a number of courts have applied the fiduciary exception in ERISA cases. Whether and to what extent it applies in ERISA cases varies from circuit to circuit. The Seventh Circuit, for example, has suggested that the fiduciary

exception only allows a plan participant to pierce the attorney-client privilege for the limited purpose of discovering information relevant to an alleged breach of fiduciary duty. *Bland v. Fiatallis North America, Inc.*, 401 F.3d 779, 787 (7th Cir. 2005). Other circuits apply the fiduciary exception in ERISA cases more broadly. *See In re Long Island Lighting Co.*, 129 F.3d 268, 271-72 (2d Cir. 1997) ("The employer's ability to invoke the attorney-client privilege to resist disclosure sought by plan beneficiaries turns on whether or not the communication concerned a matter as to which the employer owed a fiduciary obligation to the beneficiaries. . . . Thus, an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.").

However, even circuits that follow the "Long Island" rule recognize that the fiduciary exception is limited to circumstances in which the fiduciary and the participant or beneficiary *share a mutuality of interest.* Courts, therefore, generally refuse to extend the fiduciary exception to situations in which the fiduciary's and participant's or beneficiary's interests are divergent. *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992) (fiduciary exception not applicable to fiduciary's communications with counsel retained for purpose of defending lawsuit by participant).

Although this is an area of developing law, lawyers who advise ERISA fiduciaries should be aware that, whenever they provide legal advice on matters in which their clients are acting as a fiduciary, it is possible that a participant or beneficiary may be able to discover that advice through the fiduciary exception.

III. PRACTICAL CONSIDERATIONS

A. In-house counsel

Under ERISA, an in-house lawyer may represent *both* a plan sponsor (i.e., his or her employer - the company) and its fiduciary plan administrator (i.e., the "benefits committee"). ERISA does not require that a plan administrator consult outside counsel in the course of a plan's administration. *Estate of Schwing v. The Lilly Health Plan*, 562 F.3d 522 (2009); *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1531-32 (3d Cir. 1988).

B. Backdating versus retroactive effective dates

Attending to benefits matters frequently involves the execution of dated documents. Executing dated documents presents the opportunity to backdate. As a lawyer, if you become aware that a client has backdated or may backdate a document, you should proceed with caution.

As an initial matter, when working in the benefits area, you must be careful to distinguish between "backdating" and "retroactive effective dates." Backdating is the falsification of the date on which a document is executed (and wrongful). Providing for a document to have a retroactive effective date, however, is sometimes permissible, as with plan amendments that are executed during a so-called remedial amendment period (which the IRS allows to be deemed effective before the date on which the amendment was actually executed).

In recent years, a number of companies have been sued for allegedly backdating benefits documents, such as stock option award agreements. *See, e.g., In re Juniper Networks, Inc. Securities Litig.*, 264 F.R.D. 584 (N.D. Cal. 2009); *In re Silicon Storage Tech. Inc. S'holder Derivative Litig.*, 2009 WL 1974535 (N.D. Cal. 2009). As cases such as

these highlight, backdating benefits documents can lead to civil claims for breach of fiduciary duty, securities violations, and accounting fraud. Under certain circumstances, backdating benefits documents can lead to criminal violations. *See U.S. v. Reyes*, 577 F.3d 1069 (9th Cir. 2009) (affirming criminal conviction and sentencing of corporate officers found guilty of falsifying corporate records in connection with backdating stock option agreements).

C. Compliance with the tax code

1. Prohibited transactions

ERISA prohibits fiduciaries from engaging in, or permitting a plan to engage in, two types of so-called prohibited transactions. The first type are known as "party-in-interest" transactions, which are described in ERISA § 406(a). These are certain transactions between a plan and a party closely related to the plan. The second type, described in ERISA § 406(b), are self-dealing (or conflict-of-interest) transactions involving a fiduciary.

The consequences of engaging in a prohibited transaction include liability for breach of fiduciary duty (which includes personal liability for an individual fiduciary), and liability under the Code and ERISA for the penalties and taxes on parties-in-interest or "disqualified persons" (the Code equivalent of a "party-in-interest"). Under ERISA, the DOL may assess a civil penalty against parties-in-interest who engage in prohibited transactions. Generally, the penalty may not exceed 20% of the amount involved in the transaction.

Where a prohibited transaction involves a retirement plan qualified under Code § 401(a), Code § 4975 imposes an initial excise tax equal to 15% of the amount involved in the transaction. (The ERISA civil penalty and the Code § 4975 excise tax cannot both be applied to the same transaction).

An additional penalty or tax equal to 100% of the amount involved in the transaction is assessed if the transaction is not "corrected" by the time the DOL or IRS issues a notice that the excise tax is deficient. A prohibited transaction can be "corrected" by undoing the transaction to the extent possible, but in any event placing the plan in a financial position that is no worse than the position it would be in had the disqualified person or party-in-interest acted under the highest fiduciary standards.

D. Co-fiduciary liability

Under certain circumstances and subject to certain limitations, an ERISA fiduciary will be held liable for a breach of fiduciary duty committed by another fiduciary. ERISA § 405. To be liable, you must know that the other person is a fiduciary with respect to the plan, that he or she committed or participated in the act or omission that constituted a breach, and that his or her act or omission was a breach of fiduciary duty. You also can be liable for a co-fiduciary's breach of fiduciary duty if, by breaching your own fiduciary duties under ERISA, you enable the co-fiduciary to commit a breach.

If you are advising an ERISA fiduciary who learns of a co-fiduciary's breach, you should advise your client to take all reasonable and legal steps to prevent or remedy the breach. Your client's resignation in protest of a breach is not enough – your client must take affirmative action (including, if required, instituting a lawsuit against the fiduciary under ERISA or reporting the matter to the Department of Labor). If your client fails to take all reasonable steps necessary to remedy the breach, your client will be liable for the breach, as well.

E. "Up the ladder" reporting obligations

As discussed earlier, on benefits matters, a lawyer is often called to advise an entity. When you do, you are required to report "up the ladder" to a higher authority of the entity if you determine that the entity's constituent with whom you are working is acting or intends to act in a manner that violates a legal obligation to the entity or is otherwise injurious to the entity. Ind. Rule of Prof'l Conduct 1.13(b).

F. Attorney's fees and costs of litigation

ERISA includes a statutory departure from the so-called "American rule" by which each party to litigation pays its own attorney's fees and costs. Under ERISA § 502(g)(1), the court in its discretion may allow a reasonable attorney's fee and costs of action to either party (plaintiff or defendant). "[A] fee claimant need not be a 'prevailing party' to be eligible for an attorney's fees award under [§ 502(g)(1)]." *Hardt v. Reliance Standard Life Ins.*, 130 S. Ct. 2149 (2010). Instead, "a fees claimant must show 'some success on the merits' before a court may award attorney's fees under [§ 502(g)(1)]." To satisfy this standard, a claimant must achieve more than "trivial success on the merits" or a "purely procedural victory." A claimant satisfies the standard if "a court can fairly call the outcome of the litigation some success on the merits without conducting a 'lengthy inquir[y] into the question whether a particular party's success was 'substantial' or occurred on a 'central issue.'"

A lawyer must take into account the impact of ERISA § 502(g)(1) in staking out positions in litigation. The failure to do so (i.e., the pursuit of baseless positions) could result in the lawyer's client (or the lawyer himself or herself) being responsible for an award to fees and costs to opposing party.

G. Subrogation and reimbursement liens

Under ERISA, a plan may have equitable rights (usually subrogation rights or reimbursement liens) in monies that relate to the plan's assets, including past benefit payments from the plan's assets. ERISA § 502(a)(3). If you are involved in any representation in which these rights may be at stake, you must be mindful of their operation. Failing to do so could result in your client waiving rights (likely only if your client is the plan or a fiduciary) or facing an unintended recovery action by a plan.

For example, if you represent a client who was injured by a third party in an accident, and if an ERISA plan provided medical benefits to your client on account of the injuries he received in the accident, the ERISA plan may have subrogation rights in an action against the third party who caused the accident and/or an equitable lien by agreement against any recovery (including a settlement) your client receives from the third party. In this situation, ERISA § 502(a)(3) provides a fiduciary of the plan with a cause of action against your client to enforce the plan's equitable rights. *See, e.g., Sereboff v. Mid Altantic Medical Services, Inc.*, 547 U.S. 356 (2006); *Gutta v. Std. Select Trust Ins. Plans*, 530 F.3d 614 (7th Cir. 2008); *Admin. Comm. for the Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan v. Salazar*, 525 F. Supp. 2d 1103 (D. Ariz. 2007).

Similarly, if your client is receiving payments from a plan that has a reimbursement lien against a third-party payment your client receives after the plan's payments have begun, your client's failure to satisfy the plan's lien could result in the suspension of your client's benefit payments from the plan. *See Northcutt v. General Motors Hourly-Rate Employees Pension Plan*, 467 F.3d 1031 (7th Cir. 2006). This commonly occurs when someone

begins receiving payments from an ERISA-governed long-term disability plan, and then later receives a lump-sum award of Social Security disability payments. If the long-term disability plan has a lien against the Social Security award, and if your client fails to satisfy the plan's lien, the plan may suspend your client's benefits until it recovers its overpayment of benefits from your client.

IV. WHAT WOULD YOU DO?

A. Withdrawal by napkin-gram

B. Defined-benefit corporate expense plan

C. Baseball IRA

D. Pay Microsoft, then the TPA

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Overview

Gayle Skolnik represents employers, fiduciaries and service providers on all aspects of employee benefit law. She advises on plan design, implementation and administration; government compliance; benefits aspects of bankruptcies and restructuring and corporate transactions; fiduciary training; and governmental audits and investigations. Gayle crafts practical, cost-effective solutions to everyday problems that arise in the employee benefits world.

Fiduciary Compliance and Plan Governance

Gayle helps plan fiduciaries develop and implement effective governance structures and procedural practices. She conducts fiduciary training programs and represents fiduciaries in governmental audits and investigations. She also addresses prohibited transactions issues, assists in correcting operational errors and helps resolve benefit claims disputes.

Executive Compensation

Gayle works with employers to design, implement and administer effective executive compensation arrangements, including 409A and 457 deferred compensation plans, equity and phantom equity compensation programs, and executive employment and separation agreements. She has decades of experience assisting with the design of new executive compensation programs for companies affected by mergers, spin-offs, split-offs and other corporate reorganizations. She also has significant experience with executive compensation arrangements for colleges and universities and other nonprofit organizations.

Benefits Issues in Transactions, Bankruptcies and Restructurings

Gayle helps buyers and sellers address benefits issues arising in connection with mergers, acquisitions and other corporate transactions, from the due diligence phase through post-closing transition issues. She counsels fiduciaries, receivers and trustees in bankruptcy as they resolve the unique benefits issues that arise in bankruptcy and insolvency, including wind-up of benefit plans and representation before governmental agencies such as the PBGC.

Compliance Advice and Solutions

Gayle regularly helps employers stay in compliance with the complex rules and regulations that affect employee benefit plans, from health care reform to pension plan terminations and de-risking strategies.

Personal Interests

Gayle loves Broadway musicals and enjoys writing song parodies. (She even owns a rhyming dictionary.)

FAEGRE BAKER DANIELS

Leadership & Community

Civic Activities

- Indianapolis Hebrew Congregation — Past Member of Board of Directors
- Damar Services, Inc. — Past Member of Board of Directors

Firm Leadership

- Employee Benefits and Executive Compensation Group— Past Leader

Honors

- *Indiana Super Lawyers* — Employee Benefits/ERISA
- *The Best Lawyers in America* — Employee Benefits Law
- United Way Executive Women's Leadership Program — 1998 Graduate
- YWCA Salute to Women of Achievement Award — Nominee, 1998

Services & Industries

- Business & Transactions
- Benefits & Executive Compensation
- Litigation & Dispute Resolution
- Benefits Disputes
- Software Companies

Credentials

Bar Admissions

Indiana

Court Admissions

U.S. District Court for the Northern District of Indiana
U.S. District Court for the Southern District of Indiana

Education

Indiana University Maurer School of Law
J.D., summa cum laude, Order of the Coif (1982)

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Overview

Mike MacLean has been advising employers and fiduciaries on employee benefit and executive compensation design, strategy and compliance matters for over 25 years. Mike has significant experience helping companies and executives design and implement executive and incentive compensation arrangements, including deferred compensation, equity incentive, and severance/retention programs.

Mike counsels, defends, trains and shares knowledge on topics including:

- Deferred compensation arrangements and executive incentive plans
- Section 409A and other tax implications for deferred compensation plans
- Executive employment agreements and other employment matters
- Health and welfare plan compliance and administration
- Consumer-driven health plans and health savings accounts
- Wellness programs and employer on-site health clinics
- Affordable Care Act compliance and reporting
- COBRA compliance
- HIPAA privacy and security rule compliance for group health plans
- Benefits issues for tax-exempt employers
- Employee benefits issues in corporate transactions
- Multiemployer pension fund bargaining and withdrawal liability
- Severance plans and workforce reductions
- Americans With Disabilities Act compliance
- Family and Medical Leave Act compliance

Leadership & Community

Professional Associations

- American Bar Association
- Indiana State Bar Association
- Indianapolis Bar Association

FAEGRE BAKER DANIELS

Civic Activities

- International Violin Competition of Indianapolis — Board Member

Honors

- *The Best Lawyers in America* — Employee Benefits/ERISA Law, 2013-19, and ERISA Litigation, 2013-19 (ERISA Litigation Lawyer of the Year, 2019)

Services & Industries

- Business & Transactions
- Benefits & Executive Compensation
- Labor & Employment
- Human Resources & Compliance

Credentials

Bar Admissions

Indiana

Court Admissions

U.S. Court of Appeals for the Seventh Circuit
U.S. District Court for the Northern District of Indiana
U.S. District Court for the Southern District of Indiana

Clerkships

U.S. Court of Appeals for the Seventh Circuit, Hon. Michael S. Kanne, 1990-1991

Education

Indiana University Maurer School of Law
J.D. magna cum laude, Order of the Coif, Indiana Law Journal (senior managing editor) (1990)

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Overview

Phil Gutwein specializes in employee benefits law. He helps employers and fiduciaries design plans, operate within tax and benefits regulations, structure executive compensation, manage benefits issues during transactions and resolve benefits-related disputes (ERISA and non-ERISA).

ESOPs and Benefits Counseling

Phil represents selling shareholders, employers, trustees, third-party administrators and fiduciary ESOP committees regarding the structure, installation and administration of ESOPs, and counsels on the governance, sale and acquisition of ESOP-owned companies.
Phil also advises on executive and incentive arrangements, including deferred compensation, stock option, retention and severance plans.

Corporate Transactions

During transactions, Phil advises on:

- ESOP stock-purchase transactions (both initial and later-stage), and transactions involving the acquisition, sale, merger and restructuring of ESOP-owned companies
- Issues related to employee benefits plans in merger and acquisition transactions, including the assumption, termination, spin-off or adoption of, the conversion of company stock investments in a plan, change-in-control agreements and the allocation of liability (including withdrawal liability)
- Designing corporate transactions to comply with ERISA's sale-of-assets exemption to withdrawal liability
- Managing transactions for the acquisition, sale and closure of businesses dedicated to providing trustee and administrative services to employee benefit plans

Litigation, Government Investigations & Benefits-Related Disputes

Phil represents clients in benefits-related disputes involving both individual plaintiffs and class actions, including:

- Claims for benefits of all types (such as short- and long-term disability, medical, life, severance and pension)
- Claims for breach of fiduciary duty
- Claims for benefits-based discrimination (ERISA § 510 claims)
- Claims for equitable relief by or against plans and fiduciaries
- ERISA pre-emption
- Discovery disputes (including those based on ERISA's fiduciary-exception to the attorney-client privilege)
- The alienation of pension benefits
- The qualified status of domestic relations orders
- Claims by multiemployer plans for delinquent contributions and withdrawal liability (in arbitration and litigation)

- Claims under ERISA for attorneys' fees and costs
- ESOP litigation

Phil represents employers before the Internal Revenue Service and Department of Labor in both investigations (such as investigations of ESOP transactions or other qualified retirement plans) and compliance initiatives (such as filings under the IRS' EPCRS program and the DOL's VFCP and DFVCP programs).

Leadership & Community

Professional Associations

- The ESOP Association
- National Center for Employee Ownership (NCEO)

Civic Activities

- St. Thomas Aquinas Church and School — Volunteer
- Broad Ripple Haverford Little League — Volunteer
- Easter Seals Crossroads — Past Board of Directors
- Indiana Benefits Conference — Past Board of Directors
- Golden Hill Neighborhood Association, Inc. — Past Board of Directors

Honors

- U.S. District Court for the Southern District of Indiana — Pro Bono Honor Roll, 2016
- Martindale-Hubbell — Peer Review Rating: AV® Preeminent
- *Indiana Super Lawyers* — Rising Star, Employment Benefits/ERISA, 2011
- Governor's Fellowship, 1996-97
- Sherman Minton Moot Court Competition — Champion, 1999-2000

Services & Industries

Business & Transactions | Litigation & Dispute Resolution

Credentials

Bar Admissions

Indiana

Court Admissions

Indiana Supreme Court
U.S. Court of Appeals for the Third Circuit
U.S. Court of Appeals for the Seventh Circuit
U.S. Court of Appeals for the Ninth Circuit
U.S. District Court for the District of Colorado
U.S. District Court for the Northern District of Indiana
U.S. District Court for the Southern District of Indiana
U.S. District Court for the Eastern District of Michigan

Education

Indiana University Maurer School of Law
J.D., cum laude, Federal Communications Law Journal (notes editor) *(2001)*
Wabash College
B.A., magna cum laude *(1996)*

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Overview

Stephanie Boxell litigates complex business, ERISA, insurance coverage, class action and product liability disputes, as well as claims arising under the United States and Indiana constitutions, in both federal and state court. She is also certified in environmental law. Stephanie works closely with clients to understand their business and financial goals, which helps her achieve optimal results.

ERISA Litigation

Stephanie represents commercial clients, benefit plans and plan fiduciaries, third-party administrators, and insurance companies in disputes arising under ERISA, 29 U.S.C. § 1001, et seq., including those related to:

- Employee Stock Ownership Plans (ESOPs)
- Employee pension and welfare plans
- Long-term disability plans
- Severance plans
- Qualified domestic relations orders
- Multiemployer pension plans
- Equity awards

Constitutional Litigation

Stephanie advises and represents clients in disputes concerning federal, state and local agency decision-making and claims arising under the United States and Indiana constitutions, including claims arising under:

- The Due Process Clause
- The Equal Protection Clause and the Equal Privileges and Immunities Clause
- The dormant Commerce Clause
- The Fifth Amendment's prohibition on inverse condemnation

Commercial Litigation

Stephanie's work includes:

- Representing commercial clients in breach of contract, commercial tort, Uniform Commercial Code, product liability and trade secret disputes
- Representing fiduciaries and family members in disputes involving closely held corporations

Insurance Litigation

In the insuranace sector, Stephanie represents large and small commercial clients in insurance coverage disputes and advises commercial clients on their rights under insurance agreements.

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Industry Expertise

Stephanie has represented corporations, closely held shareholders, governmental agencies and entities, nonprofits, insurance companies, benefit plans and individuals and families.

Leadership & Community

- **Pro Bono**

- Representing nonprofit client as amicus in dispute over Indiana's wildlife statutes and regulations
- Representing prisoners pursuing claims arising under the United States Constitution

Professional Associations

- Indiana State Bar Association
- Indianapolis Bar Association
- Indianapolis American Inn of Court — Associate, 2016-present

Civic Activities

- Habitat for Humanity Women Build — Co-leader, 2015-present
- Indiana High School Mock Trial — Shortridge High School Coach, 2014-present
- Indiana University McKinney School of Law-Indianapolis Moot Court — Volunteer Judge
- Dress for Success Resume and Mock-Interview Workshops — Co-leader, 2014-15
- Wheeler Mission — Volunteer
- Junior Achievement, Indiana — Volunteer
- School on Wheels — Volunteer Tutor for Homeless Children

Honors

- Indiana *Super Lawyers* – Rising Stars, Business Litigation, 2017-18
- Leadership Indianapolis Civic Boot Camp — Graduate, 2017
- U.S. District Court for the Southern District of Indiana — Pro Bono Honor Roll, 2016
- Faegre Baker Daniels — Pro Bono Honor Roll, 2014-15, 2017
- Supreme Court Justice Anthony Kennedy Scholar, 2010-13
- National Environmental Moot Court Competition — Top Orator, Preliminary Rounds 1 & 3
- Dean's Tutorial Society — Fellow, 2011 and 2012
- Indiana University — Phi Beta Kappa

Services & Industries

- Litigation & Dispute Resolution

Credentials

Bar Admissions

Indiana

Court Admissions

U.S. Court of Appeals for the Seventh Circuit
U.S. District Court for the Northern District of Indiana
U.S. District Court for the Southern District of Indiana

Education

Indiana University Robert H. McKinney School of Law
J.D., summa cum laude, Indiana Law Review (articles editor) *(2013)*
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