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PART 2

ARE YOU A SELF-PROCLAIMED OR A RECOGNIZED EXPERT?

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Not all advisors can be experts at a level that can survive the scrutiny expert witnesses must endure, but an understanding of expertise in the legal and academic sense of the term holds lessons for all advisors, no matter how advanced their current practice.

In the previous article (*Plan Consultant*, Spring 2012, p. 28) I outlined the three bodies of knowledge used to determine an advisor's claim of expertise and establish standards used by attorneys who hire expert witnesses. They also establish a prudent pattern for plan sponsors to use when selecting an advisor. Those bodies of knowledge include:

1. Rule 702 of the Federal Rules of Evidence,
2. The Supreme Court's decision in *Daubert v.*

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EXHIBIT 1

SIMILARITIES BETWEEN VARIOUS BODIES OF KNOWLEDGE

	Daubert	Rule 702	Academia	ERISA
Experience	●	●	●	●
Education	●	●	●	●
Knowledge		●	●	●
Skill		●	●	●
Process/Standards	●		●	●
Training	●	●		
Characteristics			●	
Passion			●	

Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and

3. *The Cambridge Handbook of Expertise and Expert Performance*.

Rule 702 regulates and governs the admission of expert testimony, the U.S. Supreme Court clarified these standards in *Daubert*, and *The Handbook* is a compendium of current and historic research compiled by leading authorities that have examined and tested methods to evaluate the characteristics of experts. If these three bodies of knowledge are viewed through the lens of ERISA, you find they share similar and complementary characteristics. (See Exhibit 1.)

Although some courts have relied on experience alone as a measure of expertise, the other characteristics cited shouldn't be ignored. For example, an advisor with 10 years of experience and 30 ERISA plan clients might appear to be an ERISA expert, but at what? The advisor could be an expert at retailing or wholesaling plans, plan design, investments, fiduciary compliance, fee assessment, compliance testing, recordkeeping, communications, or education.

It should come as no surprise, based on the complexities of ERISA, that it's rare to find someone who is an expert in all of its facets. As the *Cambridge Handbook* says, "There is little transfer from high-level proficiency in one domain to proficiency in other domains—even when the domains seem, intuitively, very similar." As a result, a plan sponsor must assess the advisor's expertise as well as the advisor's bench depth to determine if the team can offer comprehensive services with expertise.

ERISA Criteria for a Fiduciary Is not the Same as an Expert

To the surprise of many, there is statutory language that articulates the criterion a "person" must meet in order to be appointed to a fiduciary role. That criterion is found under ERISA Section 411, which details the prohibitions that prevent a person from serving in a fiduciary role to any plan. It's important to stress that every plan sponsor should ensure that all persons appointed to a fiduciary role meet ERISA Section 411. This could also apply to non-ERISA plans subject to state fiduciary laws that closely mirror ERISA fiduciary standards.

To avoid embarrassment, brand damage, and the expense of litigation, it's recommended that every plan sponsor conduct a background check to confirm compliance with ERISA Section 411 before appointing individuals to a fiduciary or service-provider role. Keep in mind that any advisor who's registered with the Securities and Exchange Commission or a state securities department has met ERISA Section 411. In fact, it could be argued that ERISA Section 411 has more application to the employees of the plan sponsor who serve in a fiduciary capacity than to an advisor.

Relationship Is a Bonus, not a Reliable Criterion, for Determining Expertise

Plan sponsors have a full plate of obligations and pressing corporate objectives that take precedence over the retirement plan. To most "C" level executives, inundated with other pressing business matters, their appointment as a fiduciary on the retirement plan is a black hole that drains the company of valuable resources. As a result, there's a high demand for outsourcing many fiduciary duties to an advisor.

In many cases a plan sponsor will outsource various duties to a local advisor. Assuming that the relationship between fiduciary and advisor isn't a prohibited transaction (a blood relative, for instance), retaining a local advisor who is capable of delivering necessary services for the establishment or operation of the plan at a reasonable cost offers many conveniences.

Those conveniences, however, must be weighed relative to the advisor's capabilities; he or she may possess excellent communication skills and the ability to deliver superb participant education but offer little else in technical understanding of ERISA. In such cases, the fiduciary will find it necessary to evaluate the qualifications of the local advisor's internal or external team to determine if they have the expertise to deliver all the needed services. Plan sponsors who hire advisors on the basis of high entertainment value and little else will find the "good ole boy" approach passé, obsolete, and ineffectual at

mitigating litigation risk under the new regulatory environment.

Bottom line: Retain experts, not friends, and especially not relatives.

ERISA Fiduciary Standards Dictate Hiring Experts Where Expertise Is Needed

A person responsible for appointing an advisor engages in a fiduciary act. Selecting an advisor requires the person to act prudently and with a duty of loyalty and care. Those duties require a fiduciary to exercise their authority and control in the best interests of the participants. Therefore, retaining an advisor is prudent when the fiduciary lacks the necessary expertise to execute their duties in the best interests of the participants.

ERISA imposes an obligation on fiduciaries to assess their own personal strengths and weaknesses to determine what expertise is needed to fill a supporting role. Once a fiduciary determines the expertise needed, a search can be conducted for an expert. Expert advisors have characteristics that are distinctly different from generalists. Unlike generalists, experts possess subject matter expertise in one or more areas of ERISA. Failure to engage in a due diligence process to determine an advisor's expertise may lead to the employment of a generalist. If a generalist is unable to deliver the expertise needed, the fiduciary may be subject to personal and corporate risk. This includes the potential of claims for fiduciary imprudence, breach of duty, breach of loyalty, and excessive fees. To mitigate this risk and avoid underwriting it with corporate and personal assets, a plan sponsor is well advised to hire experts using a thorough due diligence process and purchase fiduciary insurance with corporate assets.

What Does a Due Diligence Process Look Like?

To mitigate risk, a fiduciary must engage in a documented prudent process to analyze, sort, score, evaluate, compare, and select a qualified advisor expert. This involves engaging in a request for proposal (RFP) process used in any vendor search. The appropriate party to conduct or participate in the RFP process includes the plan sponsor, ERISA attorney, CPA/auditor, and/or an independent advisor who doesn't seek advisor engagements.

Since the majority of advisors are generalists, a plan sponsor must look beyond licensing or registration status, which is easier to obtain than a license to cut hair in most states. But licensing shouldn't be ignored. While licensing, credentials, and certifications are an indication of personal achievement and dedication to continuing education, they are not an end-all qualifier of expertise. Suffice to say, if you can't be predictive you must be comprehensive to build a solid defense for a selected advisor. To document a comprehensive due diligence process, a customizable independent and objective electronic ERISA Advisor Evaluator™ RFP system is a valuable tool. (See www.erisaadvisorevaluator.com or www.erisaadvisorevaluation.com.)

Recent Regulatory Changes Create Unexpected Consequences for Advisors Claiming Expertise

The new plan and participant level fee disclosure rules in ERISA Sections 408(b)(2) and 404a-5 create new risks for advisors unanticipated by the passage of the new regulations. For the first time, advisors must disclose their services rendered for fees received, fiduciary status, and source of compensation. Ignoring potential prohibited-transaction violations common in small communities where nepotism and the associated conflicts are more prevalent, a significant area of risk for advisors is tied to the disclosure of services for commissions received.

For many commission-based advisors, a service agreement hasn't been provided in the past. To comply with the new regulations, advisors will now be required to provide a written disclosure of their services. It should come as no surprise that many advisors will be tempted to include services in their disclosure that they have never provided in the past. In fact, they may even be tempted to promise services in the future that they cannot or do not provide. In both scenarios, the advisor is vulnerable to a claim of unreasonable compensation and, ironically, it's a claim that may be filed against the advisor by the plan sponsor. To manage this risk, an advisor will need to:

1. Develop a written service agreement;
2. Carefully consider the menu of services offered;
3. Assess the ability to deliver services at the level of an expert; and
4. Document when those services are delivered.

Steps You Can Take to Elevate Your Position as an Expert

Any advisor who is serious about his or her craft as an ERISA expert will give serious consideration to each of the following steps to create a mounting body of evidence to support a claim of expertise. Since experience is a key factor in determining expertise, it behooves an advisor to build a resume of activity over long periods of time in each step.

1 CHOOSE A SPECIFIC DOMAIN TO MASTER

Primary ERISA subject matter domains include investments, plan design, expense analysis, communication/education, fiduciary services, recordkeeping/administration, and custody/trust services. Each domain provides an advisor the opportunity to specialize in sub-categories. For example, an expert in investments might specialize in stable value funds, target date analysis, or asset protection strategies.

2 PUBLISH OR PERISH

Write technical articles on your area of expertise at least once a year and campaign aggressively to have it published in a technical journal, not a sales magazine. Technical journals that subject articles to peer review are best, especially those journals that are peer reviewed by on-staff attorneys. To enhance efficiencies, write the article on a topic tied to a recent engagement that demanded a significant amount of your time in research.

3 SECURE STRATEGIC SPEAKING OPPORTUNITIES

Target industry conferences that focus on technical topics. A conference should be widely respected and attended by other recognized industry experts.

4 SECURE A DESIGNATION(S)

Experts are students of their craft so any designation that is domain-related is beneficial. Designations that are difficult to obtain offer premium value to their holders.

5 TALK IS CHEAP; PUT IT IN WRITING

Develop a curriculum vitae (CV) and post it on your website to disclose your expertise, experience, capability, and activity. Also, post articles and PowerPoints referenced in your CV on your website. (See CV example: www.fraplantools.com/uploads/David%20Witz%20Curriculum%20Vitae.pdf.)

6 DEVELOP DOCUMENTED PROCESSES

Processes may change but the need to document does not. Documentation is your proof of process. I suggest you leverage a web-based fiduciary governance system with a document lockbox tied to your website. The system should data stamp all documents; integrate investment, expense, and performance data; and provide a library of resources for you and your client. Leveraging technology is a cost-effective and efficient way to demonstrate process.

7 CREATE A FORMAL ENGAGEMENT AGREEMENT

The agreement should reflect services rendered, fees charged for the services rendered, and fiduciary status of services (although, ERISA dictates what services are fiduciary in nature). In addition, it's advisable to identify the services you don't provide.

8 TWO HEADS ARE BETTER THAN ONE

ERISA is a complex area of professional practice that requires years of experience to master any one domain. Create opportunities for a team approach to succeed. If the team delivers the services in a cohesive manner, it doesn't matter whether that team is proprietary, internal, or external. Even the Lone Ranger had Tonto.

9 TARGET MARKETING EFFORTS

It's important that your clientele reflect your subject matter expertise.

For many commission-based advisors, a service agreement hasn't been provided in the past. To comply with the new regulations, advisors will now be required to provide a written disclosure of their services.

This means the majority of your time, activity, and income are derived from your area of expertise.

10 TARGET PROFESSIONALS FOR COLLABORATIVE ENGAGEMENTS

One of the best ways to defend your process in court proceedings is by referencing attorneys and CPAs who have retained you as their advisor or, even better, as an advisor on a mutual client. The new regulations under ERISA 408(b)(2) and 404a-5 provide unique opportunities for fee-based advisors to develop business engagements with attorneys and CPAs.

11 PROTECT YOUR REPUTATION

Background checks are becoming a common practice. As a result, an advisor should obtain and review a personal comprehensive annual background check and be prepared to share it if requested.

12 INSURE YOUR CLAIM OF EXPERTISE

An expert should be able to present on request a certificate of insurance that clearly indicates the expert has affirmative fiduciary coverage. In addition, the expert should have the ability to prove the advisor has the capital reserves necessary to cover the deductible.

13 REVIEW YOUR FINRA AND/OR SEC REPORT

This should be done annually to confirm accuracy.

14 EMBRACE A FEE-BASED BUSINESS MODEL

Commissions are paid to sell a product and, by their nature, create an inherent conflict for ERISA plans. To avoid a conflict, adopt a fee-based professional business model.

15 PRACTICE

Elite experts engage in meaningful and continuous practice. According to the *Cambridge Handbook*, practice is also called " 'lived work' – what work consists of as it is lived as part of organizational life by those who do it." While actual engagements provide opportunities for practice, it's equally important to read and re-read technical books on ERISA.

These 15 action steps provide a general overview for advisors interested in securing their claim of expertise. Of course, there are many other variables this article doesn't address that must be considered when defending a claim of expertise. PC

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