

**WHY A WRITTEN REQUEST FOR PLAN DOCUMENTS BY  
AN ATTORNEY REPRESENTING A PLAN PARTICIPANT  
OR BENEFICIARY SHOULD TRIGGER A PLAN  
ADMINISTRATOR'S DUTY OF DISCLOSURE UNDER  
ERISA, 29 U.S.C. § 1024(B)(4)**

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I. INTRODUCTION

With today's rising cost of living, increased cost of health care, and longer life expectancy,<sup>1</sup> most working Americans place considerable value on an employer's pension plan, health insurance, and other benefit plans.<sup>2</sup> Imagine an employee, or former employee, engaged in a dispute over benefits or pension. Perhaps the dispute involves an employer's unilateral decision to terminate its pension plan, institute a cheaper plan, and pocket several million dollars in the process.<sup>3</sup> Perhaps the employer changes supplemental life insurance carriers and, in the process, a forty-year veteran of the company loses coverage.<sup>4</sup> Finally, imagine a retiree whose spouse suffers a fatal heart attack and stroke within one month of the employee's retirement, only to find out that medical coverage was not properly transferred from the employee plan to the retirement plan.<sup>5</sup>

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<sup>1</sup> See Diane Stafford, *Employers Cut Benefits as Health Care Costs Rise*, LEXINGTON HERALD-LEADER, June 25, 2003, at C2. Nine out of ten employers surveyed by the Society for Human Resource Management in 2003 averaged an eighteen percent cost increase in employee benefits since 2002. *Id.* Furthermore, this rising cost of benefits has lead employers to diminish available benefits in the areas of health care, employee stock options, matching charitable contributions, and employee flex-time scheduling. *Id.*

<sup>2</sup> See Anne-Marie M. Miles, *ERISA Section 104(b)(4): What Documents Do Employees Have a Right to Demand From Their Employers?*, 39 WM. & MARY L. REV. 1741, 1741-45 (1998).

<sup>3</sup> See *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1065 (6th Cir. 1994).

<sup>4</sup> See *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 69-71 (3d Cir. 2001).

<sup>5</sup> See *Jandek v. AT&T Corp.*, No. 95 C 1439, 1996 WL 147919, at \*1 (N.D. Ill. March 29, 1996).

Further imagine that the employee has sought the advice and representation of counsel in resolving the dispute. During the course of representation, counsel has requested certain plan documents and instruments from the plan administrator. Many Americans likely assume that their attorney is fully authorized to request these plan documents on their behalf. After all, most employees would probably not know where to begin in resolving these sorts of legal issues; if the employee knew how to resolve the problem, it is unlikely the employee would have hired an attorney. However, a written request for plan documents made by an attorney on behalf of a client does not always trigger a duty of disclosure on the part of the plan administrator.<sup>6</sup>

The Employee Retirement Income Security Act (ERISA)<sup>7</sup> does not require that employers provide their employees benefits, but rather controls the law of employee benefit plans.<sup>8</sup> In governing the law of employee benefit plans, ERISA imposes a duty to disclose certain information to employees.<sup>9</sup> Summary plan descriptions,<sup>10</sup> annual reports,<sup>11</sup> terminal reports,<sup>12</sup> instruments which establish or operate the plan,<sup>13</sup> and information regarding vesting all are covered by this duty of disclosure.<sup>14</sup> However, courts interpret the duty of disclosure under § 1024(b)(4) differently.<sup>15</sup> The Tenth and Third Circuit Courts of Appeal both have found that a written request by an attorney representing a plan participant or beneficiary triggers a duty of disclosure on the part of the plan

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<sup>6</sup> See *Bartling*, 29 F.3d at 1072.

<sup>7</sup> 29 U.S.C. §§ 1001-1461 (2000).

<sup>8</sup> See MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 315 (2d ed. 1999).

<sup>9</sup> See BARBARA J. COLEMAN, *PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT* 4 (3d. ed. 1989).

<sup>10</sup> 29 U.S.C. § 1024(b)(4) (Supp. 2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 29 U.S.C. § 1025(a)(2000).

<sup>15</sup> Compare *Moothart v. Bell*, 21 F.3d 1499, 1503 (10th Cir. 1994) (holding that an attorney is entitled to request plan documents on behalf of his client, so long the request is clear and puts the plan administrator on notice of the information sought), and *Daniels v. Thomas & Betts Corp.*, 29 F.3d 66, 77 (3d Cir. 2001) (holding that a representation by an attorney that he is making a request on behalf of a plan participant or beneficiary triggers a duty to disclose under § 1024(b)(4)), with *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994) (holding that a plan administrator was not obliged to disclose documents to an attorney representing a plan participant without written authorization from the plan participant or beneficiary).

administrator under § 1024(b)(4).<sup>16</sup> The Sixth Circuit Court of Appeals, on the other hand, has found that, absent written authorization by the plan participant or beneficiary, a written request for plan documents by an attorney does not trigger a duty of disclosure.<sup>17</sup>

This Article argues that an attorney's written request on behalf of a plan participant or beneficiary should trigger the plan administrator's duty of disclosure under ERISA § 1024(b)(4) without prior written authorization of the client. Part II provides the background for the current circuit split. It begins with a historical overview of ERISA, then discusses the ERISA duty of disclosure in general terms. Part II concludes with a discussion of recent district court opinions interpreting § 1024(b)(4). Part III discusses both sides of the current split in authority.

Part IV explains the various legal arguments for and against imposing a duty of disclosure and provides support for the authors' conclusion that an attorney's written request should trigger such a duty. First, Part IV looks at the plain language of § 1024(b)(4). Second, Part IV considers how recent opinions have interpreted the legislative history and congressional objectives behind ERISA's disclosure requirements. Third, this section analyzes the impact of Department of Labor Advisory Opinion Letter 82-012A on § 1024(b)(4) analysis. Fourth, the section discusses those opinions which base their rationale on whether an attorney's written request for plan documents places a plan administrator on sufficient notice of the information sought. Finally, this section considers the long-standing presumption that an attorney is authorized to speak on behalf of and represent his or her client.

## II. BACKGROUND

ERISA is a large, highly-technical, and complex piece of legislation.<sup>18</sup> Before discussing § 1024(b)(4) and the duty of disclosure, it is necessary to set the stage with some background on ERISA. This Part begins with a brief discussion of the history of ERISA, its scope, and some of the Congressional goals in its enactment. It then discusses ERISA's duty of disclosure in general terms. This Part concludes by discussing some recent district court opinions addressing the duty of disclosure under § 1024(b)(4).

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<sup>16</sup> See *Daniels*, 29 F.3d at 77; *Moothart*, 21 F.3d at 1503.

<sup>17</sup> See *Bartling*, 29 F.3d at 1072.

<sup>18</sup> See COLEMAN, *supra* note 9, at 1.

### A. *Historical Overview*

As recently as the early twentieth century, pension and benefit plans were unheard of for many American workers.<sup>19</sup> The few existing pension plans were largely unregulated and often financially insolvent.<sup>20</sup> However, in the first half of the twentieth century, several Congressional actions put the wheels of pension reform in motion: the Revenue Acts of 1921 and 1942 and the Social Security Act.<sup>21</sup> The Revenue Act of 1921 created a huge incentive for employers to make pension contributions on behalf of employees by allowing a tax deduction for such contributions.<sup>22</sup> Additionally, the 1942 Revenue Act disallowed deductions where the employer included only executives, officers, or highly-compensated employees and not the rank and file.<sup>23</sup> The Social Security Act, on the other hand, showed a clear governmental intent, in the aftermath of the Great Depression, to provide all working Americans with a baseline retirement income.<sup>24</sup>

Nonetheless, neither the Internal Revenue Code nor the Social Security Act did anything to regulate existing private pension plans.<sup>25</sup> The first attempt at any meaningful pension reform came in 1958 with the enactment of the Welfare and Pension Plans Disclosure Act (WPPDA).<sup>26</sup> While the WPPDA required plan administrators to furnish plan descriptions and file annual reports with the Department of Labor and with plan participants, it did not provide any enforcement mechanisms or safeguards for existing employee plans.<sup>27</sup> The notion that informed plan participants could adequately regulate and enforce plan administration without government oversight fell short of the mark.<sup>28</sup>

The dam finally broke in 1963,<sup>29</sup> when Studebaker Corporation closed its South Bend, Indiana manufacturing facility and put several thousand employees out of work.<sup>30</sup> Since Studebaker's employee pension plan was

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<sup>19</sup> See MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 635 (1994) (indicating that as late as the early 1930's there were only about 300 companies with pension plans).

<sup>20</sup> *Id.*

<sup>21</sup> See COLEMAN, *supra* note 9, at xiii; ROTHSTEIN, *supra* note 19, at 635-36.

<sup>22</sup> See ROTHSTEIN, *supra* note 19, at 636.

<sup>23</sup> See COLEMAN, *supra* note 9, at xiv.

<sup>24</sup> See ROTHSTEIN, *supra* note 19, at 635-36.

<sup>25</sup> *Id.* at 636.

<sup>26</sup> *Id.* at 637.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> See Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 B.C. L. REV. 201, 203 (1995).

<sup>30</sup> *Id.*

under-funded, over 6,900 employees lost pension benefits.<sup>31</sup> Public uproar over the debacle motivated Congress to act.<sup>32</sup>

Congress began searching for an improved means of regulating, administering, and enforcing private pension plans.<sup>33</sup> Although the WPPDA imposed certain reporting requirements, a more comprehensive regulatory scheme was needed.<sup>34</sup> Congress sought to address a number of concerns within the private pension system.<sup>35</sup> These concerns included: regulating vesting requirements, ensuring adequate funding of plans, providing a reinsurance program to protect workers, creating a system whereby benefits were portable to other plans, and imposing certain fiduciary responsibilities and disclosure requirements on plan administrators.<sup>36</sup> The WPPDA was premised on the notion that by requiring basic reporting and disclosure of raw information to plan participants, those participants could bring their own enforcement actions against plan administrators.<sup>37</sup> That notion failed.<sup>38</sup> Congress, when it began drafting ERISA, sought to expand both the scope and detail of reporting and disclosure requirements.<sup>39</sup> Plan administrators would be required to furnish information in substantial detail.<sup>40</sup> Participants would be fully apprised as to exactly what benefits the participant was entitled, what procedures were required to obtain those benefits, what circumstances might prevent receipt of benefits, and how benefit funds were invested and managed.<sup>41</sup> In addition, the information would be “written in a manner calculated to be understood by the average plan participant.”<sup>42</sup> A participant’s rights would be safe 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.”<sup>43</sup>

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<sup>31</sup> See *id.* (citing *Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the Joint Economic Comm.*, 89th Cong., 2d Sess. 104-28 (1966) (statement of Clifford M. MacMillan, Vice President, Studebaker Corp)).

<sup>32</sup> See Miles, *supra* note 2, at 1743 (citing Muir, *supra* note 29, at 203-04).

<sup>33</sup> See S. REP. NO. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839-4842.

<sup>34</sup> See *id.*

<sup>35</sup> *Id.* at 4844.

<sup>36</sup> *Id.* at 4844-47.

<sup>37</sup> See H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 4657.

<sup>43</sup> *Id.* at 4649.

After nearly ten years of drafting and debate, ERISA became law in 1974.<sup>44</sup> The purpose of ERISA is to regulate the “establishment, operation, and administration of two types of employee benefit plans.”<sup>45</sup>

B. *ERISA and the Duty of Disclosure*

1. *ERISA’s Structure and the General Duty of Disclosure*

ERISA encompasses four titles.<sup>46</sup> Title I concerns the protection of employee benefit rights.<sup>47</sup> The seven parts of Title I include: Reporting and Disclosure; Participation and Vesting; Funding; Fiduciary Responsibility; Administration and Enforcement; Continuation of Health Coverage; and Group Health Plan Requirements. Title II governs the tax ramifications of plan coverage and modifies the Internal Revenue Code accordingly.<sup>48</sup> Title III divides and describes the jurisdiction, enforcement, and administration authority between the Department of Labor and the Department of Treasury.<sup>49</sup> Finally, Title IV deals with plan termination and creates the Pension Benefit Guaranty Corporation.<sup>50</sup>

Title I requires extensive reporting and disclosure of certain plan documents by plan administrators.<sup>51</sup> This includes furnishing such documents to the plan participant or beneficiary and filing certain reports with the Department of Labor.<sup>52</sup> These documents include: summary plan descriptions,<sup>53</sup> annual reports,<sup>54</sup> statements of a participant’s total accrued benefits,<sup>55</sup> terminal and supplemental reports,<sup>56</sup> and any plan modifications

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<sup>44</sup> Muir, *supra* note 29, at 204 (citing ERISA: THE LAW AND THE CODE v (Dana J. Domone ed., 1994)).

<sup>45</sup> COLEMAN, *supra* note 9, at 1.

<sup>46</sup> Miles, *supra* note 2, at 1744; ROTHSTEIN, *supra* note 8, at 459.

<sup>47</sup> Miles, *supra* note 2, at 1744 (citing 29 U.S.C. §§ 1021-1031).

<sup>48</sup> *Id.* (citing Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 898-994 (1974) (“codified as amended in various sections of I.R.C. (1994)”).

<sup>49</sup> *Id.* (citing 29 U.S.C. §§ 1201-1242); ROTHSTEIN, *supra* note 8, at 459.

<sup>50</sup> Miles, *supra* note 2, at 1744 (citing 29 U.S.C. §§ 1301-1461); ROTHSTEIN, *supra* note 8, at 459.

<sup>51</sup> See 29 U.S.C. §§ 1021-1031.

<sup>52</sup> See 29 U.S.C. § 1021(a)-(b).

<sup>53</sup> 29 U.S.C. § 1022.

<sup>54</sup> 29 U.S.C. § 1023.

<sup>55</sup> 29 U.S.C. § 1025(a)(1).

<sup>56</sup> 29 U.S.C. § 1021(c).

or changes.<sup>57</sup> Section 1024 outlines the mechanics of how, when, and where a plan administrator must file and furnish plan information.<sup>58</sup>

Section 1024 contains specific guidance for the filing and furnishing of various plan documents.<sup>59</sup> Subsection (a) outlines filing requirements with the Secretary of Labor.<sup>60</sup> Subsection (b), on the other hand, outlines disclosure requirements to plan participants and/or beneficiaries.<sup>61</sup> Section 1024(b)(4) requires that a plan administrator furnish copies of the latest summary plan description, annual report, terminal report, bargaining agreement, trust agreement, contract, or other instruments upon written request of a plan participant or beneficiary.<sup>62</sup> ERISA mandates disclosure of these documents because each document is critically important in apprising the participant or beneficiary of the plan status and ensuring participants have access to plan benefits.<sup>63</sup>

The summary plan description (SPD) is perhaps the most important of these documents.<sup>64</sup> The summary plan description comprehensively describes benefits available under the plan and illustrates how the plan operates.<sup>65</sup> The SPD must include the names and addresses of key plan personnel, a description of the available benefits, requirements for eligibility, events that would result in disqualification from eligibility, procedures for obtaining benefits, procedures for appealing a denial of benefits, and an indication of whether the plan is insured by the Pension Benefit Guaranty Corporation.<sup>66</sup> The SPD is intended for use by the participant or beneficiary, must not be misleading, and must be written using language understandable by the average worker.<sup>67</sup>

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<sup>57</sup> 29 U.S.C. § 1021(b).

<sup>58</sup> See 29 U.S.C. § 1024.

<sup>59</sup> See *id.*

<sup>60</sup> 29 U.S.C. § 1024(a).

<sup>61</sup> 29 U.S.C. § 1024(b).

<sup>62</sup> 29 U.S.C. § 1024(b)(4). This Section provides in part: "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." *Id.*

<sup>63</sup> See ROTHSTEIN, *supra* note 8, at 465-67.

<sup>64</sup> See ROTHSTEIN, *supra* note 8, at 466.

<sup>65</sup> Coleman, *supra* note 9, at 101.

<sup>66</sup> Coleman, *supra* note 9, at 101.

<sup>67</sup> Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 982 (1993) (citing 29 C.F.R. § 2520.102-2).

The annual report is equally important. The annual report is a detailed, comprehensive report on the financial status of the plan.<sup>68</sup> Thorough review of the annual report should indicate the financial solvency of the plan.<sup>69</sup> Some of this financial information includes: fund balances, assets, liabilities, changes in financial position, and funding levels.<sup>70</sup> Much of this detail is duplicated in required reports to the Department of Treasury and the Internal Revenue Service.<sup>71</sup>

In addition to the SPD and the annual report, a plan administrator is required to disclose various other documents.<sup>72</sup> The terminal report is essentially a final annual report, filed when a plan is closing its affairs. It describes the plan's final financial position. Where a plan is materially modified, the plan administrator may also be required to disclose such modifications that would otherwise be included in the SPD.<sup>73</sup> Finally, the plan administrator may be required to disclose copies of the bargaining agreement or contract of employment, if applicable.<sup>74</sup>

Section 1024(b)(4) describes which documents must be disclosed<sup>75</sup> and when such disclosure must be made.<sup>76</sup> However, it is unclear whether a written request made by an attorney who is representing a plan participant or beneficiary also triggers the duty of disclosure.<sup>77</sup> The following district court opinions address this issue.

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<sup>68</sup> *Id.* at 982-83.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See* Janae L. Schaeffer et al., *ERISA Basics: A Primer on ERISA Issues*, N97EBAB A.B.A. Legal Educ. F-1, \*F-4 (1997).

<sup>72</sup> Bintz, *supra* note 65, at 983.

<sup>73</sup> Coleman, *supra* note 9, at 106.

<sup>74</sup> 29 U.S.C. § 1024(b)(4).

<sup>75</sup> 29 U.S.C. § 1024(b)(4). Plan administrators must furnish copies of "the latest updated summary plan description, the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." § 1024(b)(4).

<sup>76</sup> 29 U.S.C. § 1024(b)(4). Disclosure is required "upon written request of any participant or beneficiary." § 1024(b)(4).

<sup>77</sup> *Compare* Jandek v. AT&T Corp., No. 95 C 1439, 1996 WL 147919 (N.D. Ill. Mar 29, 1996) (holding that given the presumption of authorized representation, it was unreasonable for a plan administrator to decline to provide plan documents to the Plaintiff through counsel), *with* Bartling v. Fruehauf Corp., 29 F.3d 1062 (6th Cir. 1994) (holding that a plan administrator is not required to disclose plan documents to an attorney representing a plan participant or beneficiary without written authorization from the client).

## 2. *Setting the Stage: Opinions Leading to the Current Split*

The following district court opinions help set the stage for the current circuit split. These four cases address the issue of whether an attorney's written request for plan documents triggers a § 1024(b)(4) duty of disclosure head on. The first three of these oft-cited opinions pre-date the current circuit court split and provide an analytical foundation upon which later circuit courts base much of their rationale. Although the last case, *Jandek v. AT&T*, was decided after the current circuit split, it is the first opinion to recognize the split and to discuss the legal arguments on both sides. The *Jandek* case provides a necessary summary of the issue and preview of the federal circuit courts' analysis. A thorough understanding of these cornerstone opinions is crucial to an understanding of the issue and the current split of authority in the federal circuit courts.

### a. *Porcellini v. Strassheim Printing Co.*<sup>78</sup>

*Strassheim Printing Co.* was a small business, owned and operated by the Strassheim family.<sup>79</sup> William G. Strassheim was the company's president until late 1978 or early 1979, when his son, Ronald G. Strassheim, took over the company's day-to-day operations.<sup>80</sup> Although semi-retired, the elder Strassheim remained active in the company's affairs, making occasional visits to the office and working from home as a part-time employee.<sup>81</sup> *Strassheim Printing* maintained two employee benefit plans in compliance with ERISA: a Pension Trust and a Profit-Sharing Trust.<sup>82</sup> Although R.E.G. Estate Planning Associates (R.E.G.) served as professional administrator for both trusts, each trust had a separate plan administrator.<sup>83</sup> *Strassheim Printing Co.* was the plan administrator of the Pension Trust, while Ronald G. Strassheim was the plan administrator of the Profit-Sharing Trust.<sup>84</sup>

Michael C. Porcellini worked for *Strassheim Printing* for approximately eighteen years and was the most senior manager not related to the Strassheims.<sup>85</sup> Ronald G. Strassheim fired Porcellini on July 2,

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<sup>78</sup> 578 F. Supp. 605 (E.D. Pa. 1983).

<sup>79</sup> *Id.* at 606.

<sup>80</sup> *Id.* William G. Strassheim resumed control of the company's daily decision-making from March through December of 1980 while Ronald was recovering from a car accident. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 606-07.

<sup>84</sup> *Id.* at 606.

<sup>85</sup> *Id.*

1981.<sup>86</sup> Following his termination, Porcellini made oral requests to both William G. and Ronald G. Strassheim regarding his accrued benefits under each plan.<sup>87</sup> After receiving no information from either, he met with Robert Gladden of R.E.G. to discuss some options with regard to accrued plan benefits.<sup>88</sup> Although Gladden provided rough estimates as to Porcellini's accrued benefits, Gladden was unable to provide the exact amounts.<sup>89</sup> In December of 1981, Porcellini hired Howard J. Casper to represent him in obtaining funds held in the Pension and Profit-Sharing Trusts.<sup>90</sup>

On December 9, 1981, Casper wrote a letter to William G. Strassheim on behalf of his client, Porcellini.<sup>91</sup> His letter requested copies of the trust documents for both plans, copies of the trusts themselves, and copies of the annual report filed with the Department of Labor.<sup>92</sup> Casper also demanded payment of all amounts due Porcellini under both plans.<sup>93</sup> After a series of communications with William G. Strassheim and R.E.G., Porcellini received a check for \$802.18 from the Pension Trust on January 8, 1982, and a check for \$10,382.44 from the Profit-Sharing Trust on February 12, 1982.<sup>94</sup>

On April 8, 1982, Casper again wrote William G. Strassheim to inform Mr. Strassheim that Porcellini had received three checks in partial payment of the amount owed to him.<sup>95</sup> Casper again requested various plan documents to ascertain whether Porcellini had received all the money due to him.<sup>96</sup> On July 1, 1982, R.E.G. forwarded the requested documents to Casper.<sup>97</sup>

On August 24, 1982, Porcellini filed suit in the United States District Court for the Eastern District of Pennsylvania seeking attorney fees and

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 607.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 608.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 608-09. In January of 1982, William G. Strassheim allegedly mailed requested plan documents directly to Mr. Porcellini, without a cover letter. *Id.* Mr. Porcellini denied receiving these documents. *Id.* at 609. Despite this dispute, the court concluded that Mr. Strassheim did send the requested documents within thirty days of request. *Id.* at 612.

<sup>95</sup> *Id.* at 609.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

statutory penalties for failure to furnish the requested documents.<sup>98</sup> Porcellini alleged that his attorney's written requests satisfied § 1024(b)(4) and that Strassheim's failure to furnish the requested documents in a timely fashion subjected him to statutory penalties under § 1132(c).<sup>99</sup> In analyzing the claim, the court considered the December 9 and April 8 written requests separately and also considered the requests with regards to the two separate trusts.<sup>100</sup>

First, the court considered the defendant's argument that under § 1024(b)(4), requests must be "in writing" and made to a "plan administrator."<sup>101</sup> Defendants argued that there was no violation of § 1024(b)(4) since Ronald G. Strassheim, plan administrator of the Profit-Sharing Trust, never received a written request for plan documents.<sup>102</sup> Porcellini pointed out that he was never informed that Ronald was the plan administrator.<sup>103</sup> Thus, according to Porcellini, the defendants should be estopped from asserting that Porcellini's written request was not made to the plan administrator, Ronald Strassheim, since Porcellini was unaware of Ronald's status as plan administrator.<sup>104</sup> Initially, the court seemed to agree with Mr. Porcellini.<sup>105</sup> Nonetheless, the court held that "[n]o proper written request was ever made upon the administrator of the profit-sharing trust."<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *See id.* at 610. 29 U.S.C. § 1132(c)(1) (2000) provides in part:

Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

<sup>100</sup> *Porcellini*, 578 F. Supp. at 611-12.

<sup>101</sup> *Id.* at 611.

<sup>102</sup> *Id.* at 611 n.1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 616.

Next, the court considered the two written requests separately.<sup>107</sup> Citing no legal authority, the court found that Casper's written request to William G. Strassheim, of December 9, 1981, was a proper request for plan documents under ERISA<sup>108</sup> even though the pension plan administrator was Strassheim Printing Co.<sup>109</sup> Although his son, Ronald, was technically the company president, the elder Strassheim was still an employee, was actively involved in the decision-making process, and was considered by many to still hold a position of power.<sup>110</sup> William G. Strassheim was authorized to act on behalf of the company in its role as plan administrator.<sup>111</sup> The court accepted Mr. Strassheim's assertion that he mailed plan documents to Mr. Porcellini in January of 1982.<sup>112</sup> Therefore, the court determined that Casper's written request satisfied § 1024(b)(4) and that Strassheim's mailing complied with the thirty-day requirement of § 1132(c), thus ruling out statutory penalties.<sup>113</sup>

On the other hand, the court found that statutory penalties were proper as to the April 8, 1982, request.<sup>114</sup> The court again found that Casper's letter satisfied § 1024(b)(4),<sup>115</sup> but also found that Strassheim's failure to mail the requested documents until July of 1982 violated § 1132(c)'s thirty-day requirement.<sup>116</sup> The court ultimately awarded attorney's fees under § 1132(g) and statutory penalties of twenty-five dollars per day from May 2, 1982 through July 1, 1982.<sup>117</sup>

Understanding of the *Porcellini* opinion is critical for two reasons. First, the *Porcellini* court found that an attorney's written request on behalf of his client-participant was sufficient to trigger a § 1024(b)(4) duty of disclosure.<sup>118</sup> Second, *Porcellini* is a foundational decision, cited by nearly every subsequent court to address this issue.<sup>119</sup>

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<sup>107</sup> *Id.* at 611-13.

<sup>108</sup> *Id.* at 611 n.1.

<sup>109</sup> *Porcellini*, 578 F. Supp. at 611.

<sup>110</sup> *Id.* at 611-12.

<sup>111</sup> *See id.* at 611 n.1, 612.

<sup>112</sup> *Id.* at 612.

<sup>113</sup> *See id.*

<sup>114</sup> *Id.* at 614.

<sup>115</sup> *See id.* at 612 (stating that "[t]his letter, once again, constituted a proper request in accordance with Section 1132(c)").

<sup>116</sup> *Id.* at 614.

<sup>117</sup> *Id.* at 616.

<sup>118</sup> *Id.*

<sup>119</sup> *See Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061 (M.D. Ala. 1988); *Flick v. Borg-Warner Corp.*, 892 F.2d 285, 295 (3d Cir. 1989); *Davis v. Featherstone*, 97 F.3d 734, 738 (4th Cir. 1996).

b. Curry v. Contract Fabricators Incorporated Profit Sharing Plan<sup>120</sup>

Alexander Curry worked for Contract Fabricators in Montgomery, Alabama, for approximately thirteen years.<sup>121</sup> He participated in the company's employee benefit plan for the last ten years of his employment.<sup>122</sup> The plan, when adopted in 1971, imposed a two-year waiting period on any departing employee who went to work for a competitor within a five hundred mile radius of Montgomery.<sup>123</sup> Although the plan was amended in 1977 to eliminate the two-year waiting period, the plan administrator retained discretionary authority to deny payment of benefits until an employee reached age sixty-five.<sup>124</sup> The company president, Victor M. Haber, was plan administrator.<sup>125</sup>

In September of 1983, Curry quit, citing a personality conflict with his supervisor.<sup>126</sup> When Curry inquired about payment of vested benefits, Haber lied by informing Curry that since he might go to work for a competitor, he would have to wait two years.<sup>127</sup> Two years later, Curry returned and Haber still refused to pay.<sup>128</sup> Curry then hired an attorney who made oral and written requests for plan documents to substantiate the refusal to pay.<sup>129</sup> When Haber still refused to furnish plan documents, Curry filed suit in the United States District Court for the Middle District of Alabama alleging various ERISA violations.<sup>130</sup>

After Curry filed suit, Haber tendered the requested and documents and eventually paid the amount due.<sup>131</sup> Nonetheless, one of Curry's claims sought statutory penalties and attorney's fees under § 1132(c) for Haber's

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<sup>120</sup> 744 F. Supp. 1061 (M.D. Ala. 1988).

<sup>121</sup> *Id.* at 1064.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* The plan administrator had sixty days following an employee's termination to decide whether to grant early benefits or require the employee to wait until age sixty five. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Haber was aware that the amended plan no longer contained the two year waiting period. *Id.* Furthermore, Curry alleged that Haber's subsequent refusal to provide plan documents was designed to cover up the lie. *Id.* at 1065.

<sup>128</sup> *Id.* at 1064.

<sup>129</sup> *Id.* at 1064.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

failure to comply with Curry's § 1024(b)(4) request for plan documents in a timely fashion.<sup>132</sup>

One of the issues before the court was whether a written request by an attorney representing a plan participant satisfied § 1024(b)(4) and § 1132(c).<sup>133</sup> The court expressly adopted the holding of *Porcellini*<sup>134</sup> and declared that a written request by an attorney representing a plan participant was proper under § 1024(b)(4).<sup>135</sup> A written request for plan documents need only provide the plan administrator "clear notice of the information requested."<sup>136</sup> The court concluded that the written request by Curry's attorney put Haber on clear notice of the documents sought.<sup>137</sup>

c. *Algie v. RCA Global Communications, Inc.*<sup>138</sup>

On May 16, 1988, MCI Communications Corporation (MCIC) bought RCA Global Communications (RCAG) through a stock purchase.<sup>139</sup> Two weeks later, MCIC fired twenty three non-union employees.<sup>140</sup> According to these employees, MCIC waited until May 30 to terminate their employment to avoid paying higher severance benefits under the RCAG plan.<sup>141</sup> MCIC informed the employees of the termination within three days of the buy-out, and never called upon the employees to provide services for MCIC, simply waiting them out.<sup>142</sup> The employees claimed they were "hired to be fired."<sup>143</sup>

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<sup>132</sup> See *id.* at 1065-66.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1066. The court rejected Haber's argument that under *Schlomchik v. Ret. Plan of Amalgamated Ins. Fund*, no civil penalty could be assessed without some showing of prejudice on Curry's part. *Id.* (rejecting the holding of *Schlomchik*, 502 F. Supp. 240 (E.D. Pa. 1980), *aff'd*, 671 F.2d 496 (3d Cir. 1981), in favor of adopting the holding of *Porcellini*). Haber argued that since Curry eventually received the plan documents and payment owed, he suffered no prejudice. *Id.* The court found that since the purpose of § 1132(c) was punitive in nature, whether Curry suffered any real prejudice was only one factor to consider. *Id.*

<sup>135</sup> *Curry*, 744 F. Supp. at 1066.

<sup>136</sup> *Id.* (citing *Wesley v. Monsanto Co.*, 554 F. Supp. 93, 98 n.6 (E.D. Mo. 1982), *aff'd*, 710 F.2d 490 (8th Cir. 1983)).

<sup>137</sup> *Id.*

<sup>138</sup> 891 F. Supp. 839 (S.D.N.Y. 1994).

<sup>139</sup> *Id.* at 842-43.

<sup>140</sup> *Id.* at 842.

<sup>141</sup> *Id.* at 843.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

Thirteen of the employees retained counsel who then requested various plan documents from RCAG in writing.<sup>144</sup> When RCAG failed to furnish the requested information, the employees filed suit alleging various ERISA violations.<sup>145</sup> Among these claims, the employees sought civil penalties for violation of § 1024(b)(4) for RCAG's failure to comply with the attorney's written request for plan documents.<sup>146</sup>

The United States District Court for the Southern District of New York held that an attorney's written request on behalf of his clients, former employees, triggered a plan administrator's duty to disclose the requested plan documents.<sup>147</sup> The court relied on *Curry* and *Porcellini* in declaring that "the fact that the request was made by the former employees' attorney does not exempt it from the requirements of the statute."<sup>148</sup> Thus, the written request made by the employees' attorney was proper under § 1024(b)(4).<sup>149</sup>

d. *Jandek v. AT&T Corporation*<sup>150</sup>

On March 31, 1994, Raymond Jandek retired from AT&T with ten years of service.<sup>151</sup> He filled out the necessary paperwork to transfer medical coverage from the Management Employees Plan to the Retiree Plan for both him and his wife, Joan.<sup>152</sup> Unbeknownst to the Jandeks, the Retiree Plan required that participants make certain provisions for Medicare coverage.<sup>153</sup> Raymond and Joan mistakenly believed their coverage under the Retiree Plan to be identical to that under the

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 869. Despite RCAG's assertion that the employees were no longer RCAG plan participants, the court found that their "eligibility for benefits was at least arguable and hence they were 'potential participants.'" *Id.* at 869 (citing *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992), *cert. denied*, 506 U.S. 822 (1992); *Kascewicz v. Citibank, N.A.*, 837 F. Supp. 1312, 1321 (S.D.N.Y. 1993)).

<sup>148</sup> *Id.* at 869 n.22. (citing *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1066 (M.D. Ala. 1988); *Porcellini v. Strassheim Printing Co.*, 578 F. Supp. 605, 611 (E.D. Pa. 1983)).

<sup>149</sup> *Id.*

<sup>150</sup> No. 95 C 1439, 1996 WL 147919 (N.D. Ill. Mar. 29, 1996).

<sup>151</sup> *Id.* at \*1. One of the central issues was whether Mr. Jandek actually retired on March 31 or April 1. *Id.* If he retired on April 1, then his existing coverage under the Management plan would extend 30 days and cover his wife's illness. *Id.* However, if he retired on March 31, as AT&T asserts, he was without coverage. *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Management Plan and never made any arrangements with Medicare.<sup>154</sup> On April 30 of that year, Joan suffered a debilitating heart attack and stroke.<sup>155</sup> Prudential, AT&T's insurance carrier, denied claims for the amount that would have otherwise been paid by Medicare.<sup>156</sup>

The Jandeks hired an attorney who requested copies of various plan documents under both the Management and the Retiree Plans.<sup>157</sup> When these requests were denied, the Jandeks sued alleging violation of § 1024 for failure to furnish plan documents within thirty days after receipt of a written request.<sup>158</sup>

The United States District Court for the Northern District of Illinois recognized a split in authority over whether an attorney's written request triggers a duty of disclosure (the Sixth Circuit's holding that an attorney's request does not trigger § 1024 will be discussed in Part III).<sup>159</sup> First, the court noted that although the Seventh Circuit had not ruled on the issue,<sup>160</sup> it had discussed the issue in *Anderson v. Flexel, Inc.*<sup>161</sup> While the *Anderson* court did not rule directly on point, the court did recognize a "legal presumption that an attorney has the authority to act on behalf of the person he represents."<sup>162</sup> Second, the court refused to distinguish *Porcellini* and its progeny, since both *Porcellini* and the present case involved requests for plan documents made by former employees.<sup>163</sup> Finally, the court cited the Tenth Circuit's opinion in *Moothart v. Bell*<sup>164</sup> when noting "AT&T's responsibility to supply a copy of the documents

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at \*3.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at \*4 (discussing *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994) (holding that a plan administrator is not obligated to release documents to a plan participant's attorney without prior written authorization); *Moothart v. Bell*, 21 F.3d 1499 (10th Cir. 1994) (concluding that an attorney's written request triggers a duty of disclosure, so long as the request is clear, without the prior written authorization of the client); and *Anderson v. Flexel, Inc.*, 47 F.3d 243, 249 (7th Cir. 1995) (questioning the *Bartling* opinion without ruling on the issue)).

<sup>160</sup> *Id.* The *Anderson* court refused to rule on the issue because the defendant did not contest counsel's right to request plan information. *Id.* (quoting *Anderson*, 47 F.3d at 249).

<sup>161</sup> 47 F.3d 243 (7th Cir. 1995).

<sup>162</sup> *Jandek*, No. 95C 1439, 1996 WL 147919, at \*4 (quoting *Anderson*, 47 F.3d at 249).

<sup>163</sup> *Id.*

<sup>164</sup> 21 F.3d 1499 (10th Cir. 1994).

based on a good faith request by the plaintiffs' attorney."<sup>165</sup> The court ultimately relied on the Seventh Circuit's "presumption of authorized representation" in finding that AT&T was under a duty to disclose plan documents.<sup>166</sup>

Collectively, these four cases set the stage for the current circuit split. The first three cases address the issue head-on and provide an analytical framework for later courts to base their decision-making. The final case, *Jandek v. AT&T*, introduces courts' analysis on both sides of the issue and illustrates the current circuit split.

### 3. DOL Advisory Opinion Letter 82-021A

In Advisory Opinion Letter 82-021A, the Department of Labor addressed whether trustee meeting minutes, treasurer's reports not part of the annual report, and various state government reports, were subject to disclosure under § 1024(b)(4).<sup>167</sup> The Department found that a plan administrator was obligated to disclose plan documents only to a plan participant or beneficiary and not to a third party without prior written authorization.<sup>168</sup> Specifically, the DOL stated:

[I]f information is required to be furnished to a participant or beneficiary under section 104(b)(4) [29 U.S.C. § 1024(b)(4)], the information must also be furnished to a third party where the participant or beneficiary has authorized in writing the release of the information to such third party. Absent such authorization, it is the Department's view that a plan is not required by section 104 of ERISA to provide such information to persons who are neither participants nor beneficiaries.<sup>169</sup>

Courts relying on this language to support or refute any duty of disclosure after an attorney's written request for plan documents accord the

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<sup>165</sup> *Jandek*, No. 95C 1439, 1996 WL 147919, at \*4 (citing *Moothart v. Bell*, 21 F.3d 1499, 1054 n.4 (10th Cir. 1994)).

<sup>166</sup> *Jandek*, No. 95C 1439, 1996 WL 147919, at \*4.

<sup>167</sup> *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070 (6th Cir. 1994) (discussing DOL Advisory Opinion Letter 82-021A).

<sup>168</sup> *Id.* at 1072.

<sup>169</sup> *Id.* (quoting DOL Advisory Opinion Letter 82-021A, at 3).

DOL's Opinion varying degrees of deference.<sup>170</sup> Courts generally observe great deference to DOL interpretations of ERISA.<sup>171</sup>

[W]e must defer not only to the regulations promulgated by administrative agencies charged with the enforcement and interpretation of ERISA and the Internal Revenue Code but also, when a regulation can be interpreted in more than one plausible way, we must recognize and defer to the agencies' interpretation of the regulation.<sup>172</sup>

Thus, courts are generally required to follow DOL interpretations "unless there are compelling indications that it is wrong."<sup>173</sup> In the current split, some courts distinguish DOL Advisory Opinion Letter 82-021A based on lack of attorney-client relationship and, therefore, find it inapplicable.<sup>174</sup> On the other hand, some courts afford the DOL great deference and find 82-021A applicable.<sup>175</sup>

### III. SPLIT OF AUTHORITY

As the *Jandek* case and discussion of DOL Advisory Opinion Letter 82-021A illustrate, the circuits are split over whether a written request by an attorney made on behalf of a plan participant or beneficiary triggers a plan administrator's duty of disclosure under § 1024(b)(4). In the Sixth Circuit, an attorney's written request does not trigger a duty of disclosure unless the plan participant or beneficiary has provided prior written authorization for the release.<sup>176</sup> On the other hand, the Tenth Circuit and the Third Circuit both recognize an attorney's written request as triggering a plan administrator's duty of disclosure.<sup>177</sup> Finally, a recent opinion from

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<sup>170</sup> Compare *id.* (affording great deference to the DOL's interpretation of ERISA) with *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66 (3d Cir. 2001) (finding that lack of attorney client relationship was a distinguishing fact which required the court to afford DOL Advisory Opinion Letter 82-021A less deference).

<sup>171</sup> *Bartling*, 29 F.3d at 1072 (citing *Blessitt v. Ret. Plan for Emp. of Dixie Eng. Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988)).

<sup>172</sup> *Blessitt*, 848 F.2d at 1168 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980)).

<sup>173</sup> *Id.* at 1168 (citing *Red Lion Broad. Co. Inc. v. F.C.C.*, 395 U.S. 367, 381 (1969)).

<sup>174</sup> *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001).

<sup>175</sup> *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994).

<sup>176</sup> *Id.*

<sup>177</sup> *Daniels*, 263 F.3d at 77; *Moothart v. Bell*, 21 F.3d 1499, 1502-04 (10th Cir. 1994).

the Seventh Circuit indicates that had an attorney's oral request only been in writing, it would have triggered a duty of disclosure.<sup>178</sup>

A. *The Sixth Circuit Stands Alone*

In *Bartling v. Fruehauf*,<sup>179</sup> the Sixth Circuit Court of Appeals declined to impose a duty of disclosure on plan administrators after receipt of an attorney's written request on behalf of plan participants or beneficiaries.<sup>180</sup> The Kelsey-Hayes Company, a subsidiary of Fruehauf Corp., incorporated its SPECO Division into SPECO Corporation.<sup>181</sup> As part of this corporate re-structuring, the Fruehauf Retirement Committee announced that it was terminating its existing Pension Plan effective December 31, 1986, and instituting a new plan effective January 1, 1987.<sup>182</sup> Certain filings with the Internal Revenue Service and the Pension Benefit Guaranty Corporation, made in conjunction with the new Pension Plan, indicated that several million dollars in Pension Plan assets would revert to Kelsey-Hayes rather than roll over into the new plan.<sup>183</sup>

Approximately seventy-eight salaried, non-union employees hired an attorney, Ronald L. Kahn, to assist them in ensuring they received the full benefits due.<sup>184</sup> On July 13, 1987, Kahn sent a letter to the plan administrator requesting a series of documents needed to verify the accuracy of vested amounts.<sup>185</sup> When Fruehauf refused to fully comply with Kahn's request, the plaintiffs filed suit.<sup>186</sup> Part of the relief sought included statutory penalties under § 1132(c) for Fruehauf's refusal to provide the requested documents in a timely fashion under § 1024(b)(4).<sup>187</sup>

In addressing the plaintiffs' § 1024(b)(4) claim, the court relied almost exclusively on Department of Labor Advisory Opinion Letter 82-021A.<sup>188</sup> In that letter, the Department interpreted a request for plan information under § 1024(b)(4) from a third party as not triggering a duty of disclosure "absent such [written] authorization."<sup>189</sup> The court noted that § 1024(b)(4)

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<sup>178</sup> Michael v. First Comm. Bank, No. 02-2065, 2003 WL 21580277, at \*4 (7th Cir. 2003) (unpublished opinion).

<sup>179</sup> 29 F.3d 1062 (6th Cir. 1994).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 1064.

<sup>182</sup> *Id.* at 1065.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1065-66.

<sup>185</sup> *Id.* at 1065.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *See id.* at 1072.

<sup>189</sup> *Id.* (quoting DOL Advisory Opinion Letter 82-021A, at 3).

does not expressly require disclosure to attorneys or other third parties.<sup>190</sup> Rather, the text of the statute only requires disclosure to a plan participant or beneficiary after receipt of a written request.<sup>191</sup> Therefore, according great deference to the Department's interpretation of § 1024(b)(4), the court broadly applied Advisory Opinion Letter 82-021A to "all 'persons who are neither participants nor beneficiaries,'" including attorneys.<sup>192</sup> Fruehauf was not obligated to disclose plan documents to Kahn without the written authorization of his clients.<sup>193</sup>

The court rejected all of the plaintiffs' arguments.<sup>194</sup> First, the plaintiffs argued that the Advisory Opinion Letter applied only to requests from non-attorney third parties, not to attorneys.<sup>195</sup> In support of this argument, the plaintiffs pointed to the long-standing presumption that an attorney was authorized to act on behalf of the client.<sup>196</sup> The court, however, broadly interpreted the Advisory Opinion letter as applying to all third parties, including attorneys.<sup>197</sup> Second, the court declined plaintiffs' invitation to follow *Porcellini* and *Curry*, which held that an attorney's written request was sufficient.<sup>198</sup> In the end, the *Bartling* court held that as a "matter of statutory interpretation . . . our traditional recognition of attorneys' authority to represent their clients must yield to the DOL's interpretation of § 1024(b)(4)."<sup>199</sup> Thus, in the Sixth Circuit, an attorney's written request for plan documents does not trigger a § 1024(b)(4) duty of disclosure without prior written authorization by the client.<sup>200</sup>

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<sup>190</sup> *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994).

<sup>191</sup> *Id.* at 1072 (quoting 29 U.S.C. § 1024(b)(4) in part).

<sup>192</sup> *Id.* at 1072 (quoting DOL Advisory Opinion Letter 82-021A).

<sup>193</sup> *Id.*

<sup>194</sup> *See id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (citing *Hill v. Mendenhall*, 88 U.S. (21 Wall) 453, 454 (1875) (holding that "[w]hen an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed"); *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982) ("referring to 'the body of case law holding that the appearance of an attorney for a party raises a presumption that the attorney has the authority to act on that party's behalf'")).

<sup>197</sup> *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994).

<sup>198</sup> *Id.* (citing *Curry v. Contract Fabricators, Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1066 (M.D. Ala. 1988) (citing *Porcellini v. Strassheim Printing Co., Inc.*, 578 F. Supp. 605, 611 (E.D. Pa. 1983))).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

B. *Recognizing an Attorney's Written Request as Triggering a Duty of Disclosure*

Although the Sixth Circuit requires prior written authorization from the plan participant or beneficiary before imposing a duty of disclosure, two circuits have imposed a duty to disclose upon receipt of an attorney's written request.<sup>201</sup> The Tenth Circuit imposes a duty of disclosure, so long as the attorney's written request clearly places the plan administrator on notice of the information sought.<sup>202</sup> The Third Circuit also imposes a duty of disclosure upon an attorney's written request.<sup>203</sup> However, the Third Circuit's analysis expressly rejects the Sixth Circuit's holding from *Bartling* and looks to whether the plan administrator has any reason to question the attorney's authority.<sup>204</sup> One last circuit, the Seventh, has indicated in dicta that an attorney's written request would trigger a duty of disclosure, but has not ruled directly on point.<sup>205</sup>

1. *Moothart v. Bell*<sup>206</sup>

Roughly three months before the Sixth Circuit decided the issue, the Third Circuit heard the case of *Moothart v. Bell*.<sup>207</sup> Linda Moothart resigned her position as legal secretary with the law firm of Bell & Pollack in August of 1988.<sup>208</sup> She had four years seniority.<sup>209</sup> The following year, Moothart's attorney, Richard Finke, made a written request for copies of Bell & Pollack's summary plan description, summary annual report, and employee fringe benefit manual.<sup>210</sup> In a series of rather heated letters, Bell & Pollack refused to furnish the requested documents.<sup>211</sup> Nearly a year later, Ms. Moothart sued for violations of ERISA under § 1132(c) and § 1024(b)(4).<sup>212</sup>

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<sup>201</sup> See *Daniels v. Thomas & Betts*, 263 F.3d 66, 77 (3d Cir. 2001); see also *Moothart v. Bell*, 21 F.3d 1499, 1503 (10th Cir. 1994).

<sup>202</sup> *Moothart*, 21 F.3d at 1503.

<sup>203</sup> *Daniels*, 263 F.3d at 77.

<sup>204</sup> *Id.*

<sup>205</sup> *Micheal v. First Comm. Bank*, No. 02-2065, 2003 WL 21580277, at \*4 (7th Cir. 2003) (unpublished opinion).

<sup>206</sup> 21 F.3d 1499 (10th Cir. 1994).

<sup>207</sup> *Id.* The court decided the opinion in April of 1994, while the Sixth Circuit decided *Bartling* in July. See *Bartling v. Fruehauf*, 29 F.3d 1062 (6th Cir. 1994).

<sup>208</sup> *Moothart*, 21 F.3d at 1501.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 1501-02.

<sup>211</sup> *Id.* at 1502.

<sup>212</sup> *Id.*

In deciding whether Finke's written request satisfied § 1024(b)(4), the court relied on the *Curry* opinion.<sup>213</sup> The court stated that "[a]n attorney . . . is entitled to request plan information on behalf of the participant if the request is clear and puts the administrator on notice of the information sought."<sup>214</sup> Without elaborating on the specific form of the written request, the court noted that a mere demand for payment of benefits was insufficient.<sup>215</sup> The key to determining whether a writing constituted a proper statutory request was whether the writing puts the plan administrator on clear notice of the information sought.<sup>216</sup> In this case, the letters from Moothart's attorney clearly put the plan administrator on notice of the documents requested.<sup>217</sup>

## 2. Daniels v. Thomas & Betts Corporation<sup>218</sup>

Charles Daniels worked for Thomas & Betts Corporation (T&B) for nearly forty years: from 1955 until his death in 1993.<sup>219</sup> During this period, he participated in T&B's supplemental life insurance plan.<sup>220</sup> He elected coverage at a rate of one and a half times his annual salary.<sup>221</sup> In 1992, just prior to Mr. Daniels' death, T&B restructured its life insurance plan under a new carrier.<sup>222</sup> Under the new plan, participants could elect a coverage level as a whole multiple of their existing salary, not as a fractional multiple of salary.<sup>223</sup> When Mr. Daniels completed the form to transfer his coverage to the new plan, he checked the box for "none" in the area for electing a coverage multiple.<sup>224</sup> Apparently, Mr. Daniels believed his existing coverage would be grandfathered in and that "none" was the

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<sup>213</sup> *Id.* at 1503 (citing *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1066 (M.D. Ala. 1988)).

<sup>214</sup> *Id.* (citing *Curry*, 744 F. Supp. at 1066).

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* (citing *Fischer v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990) (holding that a scribbled note at the bottom of a social security award certificate did not constitute a valid statutory request for plan information)).

<sup>217</sup> *Id.* at 1504.

<sup>218</sup> 263 F.3d 66 (3d Cir. 2001).

<sup>219</sup> *Id.* at 69.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 69-70. Prior to 1993, Charles purchased coverage amounting to one and a half times his salary. *Daniels*, 263 F.3d at 69-70. Under the new plan he could purchase coverage at a multiple equivalent to none, one, two, three, four, or five times his salary, but not one and a half times his salary. *Id.*

<sup>224</sup> *Id.* at 70.

appropriate election.<sup>225</sup> Following Daniels' death, his wife, Ida, received payment representing one times Mr. Daniels' salary, not the one and half times she expected.<sup>226</sup>

Mrs. Daniels hired an attorney who made a written request for benefit plan documents.<sup>227</sup> After T&B delayed 291 days in responding to the request, Mrs. Daniels filed suit.<sup>228</sup> The action alleged various ERISA violations, including failure to furnish plan documents under § 1024(b)(4).<sup>229</sup> In holding that a written request by an attorney on behalf of a plan participant or beneficiary triggers a duty of disclosure, the Third Circuit Court of Appeals considered ERISA's legislative history, DOL Advisory Opinion Letter 82-021A, the presumption of authorized representation by an attorney, and those opinions similarly recognizing an attorney's request as triggering a duty of disclosure.<sup>230</sup>

First, the court looked to the ERISA's legislative history.<sup>231</sup> The court found that Congress intended broad disclosure under ERISA.<sup>232</sup> By allowing this broad disclosure, participants and beneficiaries could best decide how to enforce their rights.<sup>233</sup> The court determined that the objective of broad disclosure is best served by allowing an attorney to request plan documents on behalf of his or her client.<sup>234</sup>

Second, the court considered DOL Advisory Opinion Letter 82-021A and the Sixth Circuit's interpretation of the letter from *Bartling v. Fruehauf Corp.*<sup>235</sup> The court agreed with the Sixth Circuit as to non-attorney third parties.<sup>236</sup> A request for plan documents by a non-attorney third party should not trigger an obligation to disclose.<sup>237</sup> However, given the traditional presumption that an attorney is authorized to represent his or her client, the court disagreed that the Advisory Opinion Letter should apply to

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<sup>225</sup> *See id.*

<sup>226</sup> *Id.* at 71.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 72-76.

<sup>230</sup> *Id.* at 77-78.

<sup>231</sup> *Id.* at 77 (quoting *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 153 (3d Cir. 1987)).

<sup>232</sup> *Daniels*, 263 F.3d at 77. The court quoted the *Bruch* opinion for the proposition that, "ERISA's legislative history makes clear that Congress intended the information-producing provisions to enable claimants to make their own decisions on how best to enforce their rights." *Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *Id.* at 77-78 (quoting DOL Advisory Opinion Letter 82-021A).

<sup>236</sup> *Id.* at 77 (citing *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1072 (6th Cir. 1994)).

<sup>237</sup> *See id.*

attorneys as well as non-attorneys.<sup>238</sup> Finally, the court noted the Tenth Circuit's holding from *Moothart v. Bell*.<sup>239</sup>

### 3. Michael v. First Commercial Bank<sup>240</sup>

Although the *Michael* case lacks a holding on point, the case illustrates how the Seventh Circuit is likely to interpret an attorney's written request for plan documents. In August of 2000, Michael Kahn's health was failing due to leukemia.<sup>241</sup> He negotiated a termination agreement and voluntarily ended his employment with First Commercial Bank.<sup>242</sup> Kahn never converted his group life insurance policy to an individual policy.<sup>243</sup> After his death, the plan life insurance carrier denied benefits to his beneficiaries.<sup>244</sup> The beneficiaries, Kahn's daughter and her husband, brought suit alleging violation of § 1024(b)(4).<sup>245</sup> They argued that during negotiation of the termination agreement, Kahn's attorney requested, but did not receive, various plan documents which would have allowed Mr. Kahn to convert his group policy.<sup>246</sup>

The court rejected the plaintiffs' argument in short order and without reliance on authority.<sup>247</sup> Since the alleged request was oral, the court reasoned, that request could not satisfy § 1024(b)(4).<sup>248</sup> However, the court focused on the fact that the request was oral and not written, rather than the fact that the request was made by an attorney and not the beneficiaries themselves.<sup>249</sup> This emphasis on the written aspect of the request, as opposed to who was making the request, indicates the likelihood that the Seventh Circuit would hold that a written request by an attorney representing a plan beneficiary does trigger the plan administrator's duty of disclosure.<sup>250</sup>

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<sup>238</sup> *Id.* at 77 n.5 (citing *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982); *Anderson v. Flexel, Inc.*, 47 F.3d 243, 249 (7th Cir. 1995)).

<sup>239</sup> *Daniels*, 263 F.3d at 77 (citing *Moothart v. Bell*, 21 F.3d 1499, 1503-04 (10th Cir. 1994)).

<sup>240</sup> No. 02-2065, 2003 WL 21580277, at \*1 (7th Cir. July 7, 2003).

<sup>241</sup> *Id.* at \*1.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at \*4.

<sup>246</sup> *Id.* at \*1.

<sup>247</sup> *See id.* at \*4.

<sup>248</sup> *Id.*

<sup>249</sup> *See id.*

<sup>250</sup> *See id.*

## IV. ANALYSIS AND PROPOSAL

A. *The Legal Arguments*

Courts addressing this issue have based their decisions on a number of different legal arguments.<sup>251</sup> The prevalent rationales for imposing or refusing to impose an obligation to disclose plan documents after an attorney's written request include: statutory interpretation,<sup>252</sup> Congressional intent,<sup>253</sup> the impact of DOL Advisory Opinion Letter 82-021A, notice,<sup>254</sup> and the presumption of authorized representation.<sup>255</sup> While some courts have used only one rationale, others have relied on several.<sup>256</sup>

1. *Statutory Language*

A logical starting point for any ERISA analysis is the statutory text itself. The language of § 1024(b)(4) requires that a plan administrator disclose plan information "upon written request of any plan participant or beneficiary."<sup>257</sup> The text of this provision is unclear as to the form of such written request.<sup>258</sup> Title I provides little guidance as to the form of the written request, the necessary level of specificity, or whether an agent such as an attorney may speak on behalf of the participant or beneficiary in making such request.<sup>259</sup>

On the one hand, one might argue that a plan participant's attorney is not literally a "plan participant or beneficiary" and, therefore, cannot trigger the disclosure requirement. On the other hand, one might also argue that because an attorney is authorized to act on behalf of a client, the attorney's acts should be imputed to the client. Since the client is a participant or beneficiary, the attorney's acts on behalf of the client would fall within the "participant or beneficiary" designation. Since the statutory text of § 1024(b)(4) does not conclusively resolve the issue, courts next turn to Congressional intent.

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<sup>251</sup> See *Daniels*, 263 F.3d at 76-77; *Bartling*, 29 F.3d at 1070, 1072; *Moothart*, 21 F.3d at 1503-04.

<sup>252</sup> *Daniels*, 263 F.3d at 77; *Bartling*, 29 F.3d at 1070.

<sup>253</sup> *Id.*

<sup>254</sup> *Moothart*, 21 F.3d at 1503.

<sup>255</sup> *Daniels*, 263 F.3d at 76-77; *Bartling*, 29 F.3d at 1070, 1072; *Moothart*, 21 F.3d at 1503-04.

<sup>256</sup> See *id.*

<sup>257</sup> 29 U.S.C. § 1024(b)(4).

<sup>258</sup> See 29 U.S.C. § 1024(b)(4). See also COLEMAN, *supra* note 9, at 1 (describing ERISA as a large, highly technical, and complex piece of legislation).

<sup>259</sup> See 29 U.S.C. §§ 1021-1031.

## 2. Congressional Intent

After the plain language of the statute, the next logical step for many courts' analysis is Congressional intent. Examination of ERISA's legislative history provides much needed clarity and indicates that Congress intended broad disclosure. This section will first examine the House and Senate Reports from late 1973 and early 1974.<sup>260</sup> It is necessary to understand just why Congress was replacing the Welfare and Pension Plans Disclosure Act (WPPDA) and what Congress was trying to achieve through ERISA. After determining the overarching intent behind ERISA, it is then important to examine the purpose of ERISA's reporting and disclosure provisions. Finally, this section will look at how various courts interpret Congressional intent.<sup>261</sup>

As discussed in Part II, House and Senate reports from 1973 indicate that Congress sought to replace the WPPDA with a more comprehensive regulatory scheme.<sup>262</sup> Congress realized that simply imposing various reporting requirements, then leaving enforcement up to the individual plan participant in a private action, had fallen short of the mark.<sup>263</sup> In addition to imposing fiduciary status on plan administrators, Congress concluded that maximum disclosure was one of way to remedy and regulate irregular vesting requirements, inadequate plan funding, and other deficiencies in private pension plans.<sup>264</sup> In theory, a plan administrator who knew that plan information was open to disclosure and inspection would be more inclined to satisfy his or her obligations.<sup>265</sup>

In 1987, the Third Circuit Court of Appeals examined the legislative history of ERISA and determined that Congress envisioned maximum disclosure.<sup>266</sup> Plan participants could make informed decisions in the enforcement of their rights only if armed with sufficient information.<sup>267</sup> Courts on both sides of the current issue have acknowledged that Congress

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<sup>260</sup> H.R. REP. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639; H.R. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670; S. Rep. No. 93-127 (1973), *reprinted in* U.S.C.C.A.N. 4838.

<sup>261</sup> See *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070, 1072 (6th Cir. 1994); *Moothart v. Bell*, 21 F.3d 1499, 1503-04 (10th Cir. 1994).

<sup>262</sup> See S. REP. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839-4842.

<sup>263</sup> See H.R. REP. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

<sup>264</sup> See S. REP. No. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4839-4842.

<sup>265</sup> See H.R. REP. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

<sup>266</sup> *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 153 (3d Cir. 1987), *aff'd in part, rev'd in part on other grounds*, 489 U.S. 101 (1989).

<sup>267</sup> *Id.*

intended broad disclosure under Title I.<sup>268</sup> In *Daniels v. Thomas & Betts Corporation*,<sup>269</sup> the Third Circuit began its § 1024(b)(4) analysis with a citation to *Bruch*.<sup>270</sup> Specifically, the court cited *Bruch* for the proposition that one congressional objective of ERISA was wide-spread dissemination of plan information, enabling plan participants to make informed decisions.<sup>271</sup> The *Daniels* court concluded that this objective was best served by imposing a duty of disclosure upon an attorney's written request.<sup>272</sup>

Although the Sixth Circuit refused to impose a duty of disclosure on plan administrators after receipt of an attorney's written request without prior written authorization from the participant-client, the court did acknowledge, in *Bartling*, ERISA's broad-disclosure objective.<sup>273</sup> Quoting the United States Supreme Court in part, the *Bartling* court observed that "the purpose of ERISA's disclosure requirements is to ensure that 'the individual participant knows exactly where he stands with respect to the plan.'"<sup>274</sup> "This suggests that, all other things being equal, courts should favor disclosure where it would help participants understand their rights."<sup>275</sup> Nonetheless, the *Bartling* court relied on DOL Advisory Opinion Letter 82-021A and refused to distinguish requests made by non-attorney third parties from those made by attorneys.<sup>276</sup>

ERISA's legislative history indicates that Congress had in mind a regulatory scheme that would enable wide dissemination of plan information to average plan participants.<sup>277</sup> Circuits on both sides of the current issue acknowledge this clear congressional intent.<sup>278</sup> Nonetheless, the Sixth Circuit Court of Appeals paid mere lip-service to this clearly stated congressional objective.<sup>279</sup> The *Bartling* opinion quoted the United

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<sup>268</sup> See *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001); *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070 (6th Cir. 1994).

<sup>269</sup> 263 F.3d 66.

<sup>270</sup> *Daniels*, 263 F.3d at 77 (quoting *Bruch*, 828 F.2d at 153, for the idea that "ERISA's legislative history makes clear that Congress intended the information-producing provisions to enable claimants to make their own decisions").

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Bartling*, 29 F.3d at 1070 (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989)).

<sup>274</sup> *Id.* (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989)).

<sup>275</sup> *Bartling*, 29 F.3d at 1070.

<sup>276</sup> *Id.* at 1072.

<sup>277</sup> See *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001) (quoting *Bruch*, 828 F.2d at 153).

<sup>278</sup> See *id.*; *Bartling*, 29 F.3d at 1070.

<sup>279</sup> See *Bartling*, 29 F.3d at 1070-72.

States Supreme Court as to “the purpose of ERISA,”<sup>280</sup> acknowledging that ERISA points toward disclosure.<sup>281</sup> At the same time, the court refused to distinguish attorneys from non-attorneys.<sup>282</sup> Thus a written request by an attorney is no different in the Sixth Circuit than a request from a non-attorney.<sup>283</sup> Given ERISA’s stated purpose of maximum disclosure,<sup>284</sup> the Sixth Circuit simply got it wrong.

### 3. *The Impact of DOL Advisory Opinion Letter 82-021A*

Two of the circuits addressing whether an attorney’s written request for plan information on behalf of a client triggers a plan administrator’s duty to disclose under § 1024(b)(4) have relied on DOL Advisory Opinion Letter 82-021A.<sup>285</sup> In the letter, the DOL interprets a plan administrator’s duty of disclosure under § 1024(b)(4).<sup>286</sup> As discussed in the Background section, the letter only requires disclosure to a third party “where the participant or beneficiary has authorized in writing the release of the information to such third party.”<sup>287</sup>

The Sixth Circuit interpreted this as imposing an obligation to disclose plan information to a third party, attorney or non-attorney, only after receipt of written authorization.<sup>288</sup> Without prior written authorization, a plan administrator is under no duty to disclose plan documents to a third party, be they an attorney or non-attorney.<sup>289</sup> Conversely, the Third Circuit distinguishes requests made by attorneys from those made by other non-attorney third parties.<sup>290</sup> While the *Daniels* court accepted the Sixth Circuit’s interpretation as to non-attorneys, the court expressly rejected

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<sup>280</sup> *Id.* at 1070 (quoting *Bruch*, 489 U.S. at 118).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 1072.

<sup>283</sup> *See id.*

<sup>284</sup> *See id.* at 1070; *see also* *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001) (holding that the legislative intent of ERISA is best served by imposing a duty of disclosure on plan administrators upon receipt of an attorney’s written request for plan documents made on behalf of a client).

<sup>285</sup> *Daniels*, 263 F.3d at 77; *Bartling*, 29 F.3d at 1072. The Tenth Circuit’s analysis did not include discussion of DOL Advisory Opinion Letter 82-021A. *Moothart v. Bell*, 21 F.3d 1499, 1503-04 (10th Cir. 1994).

<sup>286</sup> *See Bartling*, 29 F.3d at 1070 (discussing the facts surrounding DOL Advisory Opinion Letter 82-021A and two others).

<sup>287</sup> *Id.* at 1072 (quoting DOL Advisory Opinion Letter 82-021A).

<sup>288</sup> *Id.*

<sup>289</sup> *See id.*

<sup>290</sup> *See Daniels*, 263 F.3d at 77-78.

application of the Advisory Opinion Letter to requests made by an attorney on behalf of his or her client.<sup>291</sup>

The Sixth Circuit's *Bartling* analysis of § 1024(b)(4) relied almost exclusively on the DOL Advisory Opinion Letter.<sup>292</sup> The court recognized the long-standing presumption of authorized representation by an attorney.<sup>293</sup> Nonetheless, the court refused to apply the presumption in cases involving an attorney's written request for plan documents on behalf of a client.<sup>294</sup> As a matter of statutory interpretation, the court felt obligated to afford "great deference to DOL interpretations."<sup>295</sup> Since the DOL Advisory Opinion Letter did not distinguish between attorneys and non-attorneys, the court found that the letter applied to "all 'persons who are neither participants nor beneficiaries'; it does not exempt attorneys."<sup>296</sup> In this instance, the traditional presumption of authorized representation yielded in favor of the DOL's interpretation.<sup>297</sup>

It is possible to accept the Sixth Circuit's interpretation of the DOL Advisory Opinion Letter while still rejecting the court's conclusion that attorney requests do not trigger a duty to disclose. One might argue, for example, that the DOL letter excludes attorneys, but that that exclusion is inconsistent with the statutory text and legislative intent that augur for full disclosure. Under *Chevron* principles of deference, courts should disregard an agency rule that is inconsistent with the organic statute.<sup>298</sup>

However, it is also possible to interpret the DOL Advisory Opinion Letter as consistent with the proposition that attorney requests trigger a duty of disclosure. The DOL's Letter could be interpreted as assuming that an attorney is entitled to act on behalf of his or her client. By this argument, a request by a participant's attorney would be identical to a request by the participant him- or herself, and therefore would fall within the language of the DOL's Advisory Opinion Letter.

This approach is consistent with the Third Circuit's approach to non-attorney third parties.<sup>299</sup> However, the *Daniels* court distinguished

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<sup>291</sup> *Id.*

<sup>292</sup> *See Bartling*, 29 F.3d at 1070-73.

<sup>293</sup> *Id.* at 1072. (citing *Hill v. Mendenhall*, 88 U.S. (21 Wall) 453, 454 (1875); *Graves v. U. S. Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982)).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* (citing *Blessitt v. Ret. Plan for Employees of Dixie Eng'g Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

<sup>296</sup> *Id.* (quoting DOL Advisory Opinion Letter 82-021A).

<sup>297</sup> *Id.*

<sup>298</sup> *See Chevron*, 467 U.S. at 844.

<sup>299</sup> *See Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 77 (3d Cir. 2001).

attorneys from non-attorneys.<sup>300</sup> The court observed that the facts addressed by the DOL's letter did not involve a request by an attorney on behalf of a client.<sup>301</sup> The significance of the attorney-client relationship added a material factor which the DOL never considered.<sup>302</sup> The traditional presumption of authorized representation, considered in light of ERISA's objective of broad disclosure, swayed the court in favor of imposing a duty of disclosure without prior written authorization.<sup>303</sup>

Ultimately, however, the problem with the DOL Advisory Opinion Letter is that it, like the statute, neither considers nor addresses the issue of whether a participant or beneficiary's attorney is a "participant or beneficiary" for purposes of triggering the statutory duty to disclose. For that reason, courts often look elsewhere for guidance in resolving the issue.

#### 4. Notice

At least two courts have expressly based their decisions to impose a duty of disclosure on the element of notice.<sup>304</sup> These courts asked whether the attorney's written request clearly placed the plan administrator on notice of the information sought.<sup>305</sup> If so, the plan administrator was obligated to disclose the requested information.<sup>306</sup>

The oft-cited opinion of *Curry v. Contract Fabricators Incorporated Profit Sharing Plan*<sup>307</sup> relies almost exclusively on the aspect of notice.<sup>308</sup> Although neither *Curry* nor its progeny expressly define what constitutes "clear notice," there are some indicators.<sup>309</sup> A letter to the client's plan administrator requesting copies of the summary plan description, summary annual report, and employee fringe benefit manual constitutes sufficient notice.<sup>310</sup> Furthermore, where a plan administrator wrongly denies payment of benefits, a letter requesting "plan documents substantiating his

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<sup>300</sup> See *id.* (citing *Moothart*, 21 F.3d at 1503-04).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* (citing *Moothart*, 21 F.3d at 1503-04).

<sup>304</sup> *Moothart v. Bell*, 21 F.3d 1499, 1503 (3d Cir. 1994); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 744 F. Supp. 1061, 1066 (M.D. Ala. 1988).

<sup>305</sup> See *id.*

<sup>306</sup> See *Curry*, 744 F. Supp. at 1066 (citing *Wesley v. Monsanto Co.*, 554 F. Supp. 93, 98 n.6 (E.D. Mo. 1982)).

<sup>307</sup> 744 F. Supp. 1061 (M.D. Ala. 1988) (discussed *supra* Part II.B.2.b).

<sup>308</sup> *Id.* at 1065-67.

<sup>309</sup> See *id.* at 1066. See also *Moothart*, 21 F.3d at 1503-04 (holding that an attorney's written request placed the plan administrator on notice of the information sought and triggered the administrator's duty of disclosure).

<sup>310</sup> *Moothart*, 21 F.3d at 1502.

reason” for nonpayment also constitutes valid notice.<sup>311</sup> However, a bare demand payment does not constitute proper notice<sup>312</sup> nor does a note scribbled on the bottom of a social security award certificate requesting “policies covering my contract for salary continuation.”<sup>313</sup> Thus, whether a writing constitutes proper notice is a factual determination.<sup>314</sup>

#### 5. *The Presumption of Authorized Representation*

Parties seeking to impose a duty of disclosure without prior written authorization often rely on the historical presumption of authorized representation.<sup>315</sup> This long-recognized theory presumes that an attorney appearing on behalf of a client is authorized to do so.<sup>316</sup> This becomes important when an attorney’s written request for plan information under § 1024(b)(4) is denied for lack of prior written authorization.<sup>317</sup> According to the plan participant or beneficiary, the attorney’s authorization should be presumed, absent some valid reason to doubt it.<sup>318</sup> Plan administrators, on the other hand, generally argue that the DOL’s interpretation of § 1024(b)(4) trumps presumed authorization.<sup>319</sup> Courts on both sides of the issue recognize a valid presumption<sup>320</sup> of authorized representation.<sup>321</sup> The

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<sup>311</sup> *Curry*, 744 F. Supp. at 1064.

<sup>312</sup> *Moothart*, 21 F.3d at 1503.

<sup>313</sup> *Id.* (citing *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990)).

<sup>314</sup> *See Curry*, 744 F. Supp. at 1066.

<sup>315</sup> *Compare Daniels*, 263 F.3d at 78 (holding that the presumption of authorized representation on the part of an attorney is one reason why an attorney’s written request for plan documents triggers a plan administrator’s duty of disclosure), *and Jandek*, No. 95 C 1439, 1996 WL 147919, at \*4 (holding that “[g]iven the split within the circuits, and the Seventh Circuit’s emphasis on this presumption of authorized representation, it was unreasonable for AT&T to decline to provide documents to plaintiffs through their counsel”), *with Bartling*, 29 F.3d at 1072 (holding that an attorney’s traditional presumption of authorized representation yields to the DOL’s interpretation of § 1024(b)(4)).

<sup>316</sup> *Jandek*, No. 95 C 1439, 1996 WL 147919, at \*4 (relying on *Bartling*, 29 F.3d at 1072; *Anderson*, 47 F.3d at 249).

<sup>317</sup> *See Bartling*, 29 F.3d at 1070-73.

<sup>318</sup> *See id.* at 1072 (citing *Hill v. Mendenhall*, 88 U.S. (21 Wall) 453, 454 (1875); *Graves v. U. S. Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982)).

<sup>319</sup> *See id.*

<sup>320</sup> *See Anna Laurie Bryant & Richard A. Bales, Using the Same Actor “Inference” in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 281, 283 (1999), for a general discussion of presumptions.

<sup>321</sup> *See Daniels*, 263 F.3d at 77; *Bartling*, 29 F.3d at 1070.

controversy surrounds just how much weight the presumption should be given.<sup>322</sup>

The law has long presumed that an attorney appearing on behalf of a client does so with full authorization.<sup>323</sup> The United States Supreme Court recognized this presumption in the 1875 case of *Hill v. Mendenhall*.<sup>324</sup> In *Hill*, the defendant challenged the court's jurisdiction on the grounds that he was never served process.<sup>325</sup> Nonetheless, the defendant's attorney appeared before the court to challenge the court's jurisdiction.<sup>326</sup> The Court reasoned that since the defendant authorized his attorney's appearance, the defendant had actual notice of summons.<sup>327</sup> In holding that jurisdiction was proper, the Court stated that "[w]hen an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed."<sup>328</sup>

In a more recent oft-cited opinion, *Graves v. United States Coast Guard*,<sup>329</sup> the Ninth Circuit Court of Appeals reiterated the presumption of authorized representation.<sup>330</sup> A diving accident left Leonard Graves a quadriplegic.<sup>331</sup> His attorney signed various claims documents as "attorney for Leonard Graves."<sup>332</sup> In holding that Graves's failure to sign for himself was not a jurisdictional defect, the court recognized "the body of case law holding that the appearance of an attorney for a party raises a presumption that the attorney has the authority to act on that party's behalf."<sup>333</sup> Therefore, the attorney's signature was valid on behalf of his client.<sup>334</sup>

In the context of § 1024(b)(4), this presumption of authorized representation indicates that there is no need for the client to submit prior written authorization.<sup>335</sup> Since an attorney's authorization is presumed, the attorney's written request for information should trigger a duty of

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<sup>322</sup> See generally *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994) (stating that the presumption of authorized representation yields to DOL Advisory Opinion Letter 82-021A's interpretation of § 1024(b)(4)).

<sup>323</sup> *Hill v. Mendenhall*, 88 U.S. (21 Wall) 453, 454 (1875).

<sup>324</sup> *Id.* at 453.

<sup>325</sup> *Id.*

<sup>326</sup> See *id.* at 454.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> 692 F.2d 71 (9th Cir. 1982).

<sup>330</sup> *Id.* at 74.

<sup>331</sup> *Id.* at 72.

<sup>332</sup> *Id.* at 74.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See *Daniels*, 263 F.3d at 77.

disclosure.<sup>336</sup> Many courts interpret the presumption of authorized representation in just this fashion.<sup>337</sup> Only the Sixth Circuit finds that the presumption of authorized representation does not apply in the context of an attorneys request for plan documents under § 1024(b)(4).<sup>338</sup>

In *Bartling v. Fruehauf Corporation*,<sup>339</sup> the Sixth Circuit acknowledged that an attorney is generally presumed to represent his client.<sup>340</sup> However, the *Bartling* court refused to apply this presumption in the context of an attorney's written request under § 1024(b)(4).<sup>341</sup> The court felt obligated to follow the DOL interpretation of § 1024(b)(4) provided in Advisory Opinion Letter 82-021A.<sup>342</sup> Since the DOL failed to distinguish written requests for plan information made by attorneys from those made by non-attorneys, the court opined that prior written authorization was required for all third parties, including attorneys.<sup>343</sup>

#### B. *The Solution: Follow Daniels and Moothart*

Although their rationales differ slightly, *Daniels* and *Moothart* reflect the correct solution to this issue.<sup>344</sup> There are three reasons why courts should follow *Daniels* and *Moothart* and impose a duty of disclosure on plan administrators after receipt of an attorney's written request for plan documents on behalf of a participant or beneficiary.<sup>345</sup> First, the clear weight of authority supports imposing a duty of disclosure.<sup>346</sup> Second, these two opinions cumulatively reflect and address each of the arguments for and against imposing a duty of disclosure. Finally, *Daniels* and *Moothart* illustrate the isolated and incorrect stance taken by the Sixth Circuit.

First, the weight of authority addressing this issue clearly points toward a duty of disclosure with no requirement of prior written

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<sup>336</sup> See *id.*

<sup>337</sup> See *id.*; *Jankek*, No. 95 C 1439, 1996 147919, at \*4.

<sup>338</sup> See *Bartling*, 29 F.3d at 1072.

<sup>339</sup> 29 F.3d 1062 (6th Cir. 1994) (discussed *supra* Part III.A).

<sup>340</sup> See *id.* at 1070.

<sup>341</sup> See *id.* at 1072.

<sup>342</sup> *Id.*

<sup>343</sup> See *id.*

<sup>344</sup> Compare *Daniels*, 263 F.3d at 76 (relying on the presumption of authorized representation and distinguishing a written request made by an attorney from a request by a non-attorney), with *Moothart*, 21 F.3d at 1502-04 (asking whether the attorney's written request placed the plan administrator on clear notice of the information sought).

<sup>345</sup> See *Daniels*, 263 F.3d at 76.

<sup>346</sup> See *id.*; *Moothart*, 21 F.3d at 1503; *Jankek*, No. 95 C 1439, 1996 WL 147919, at \*4; *Curry*, 744 F. Supp. at 1066; *Porcellini*, 578 F. Supp. at 611.

authorization.<sup>347</sup> Four district courts addressing the issue firmly impose a duty of disclosure upon receipt of an attorney's written request for plan documents.<sup>348</sup> Two circuit courts of appeal, the Third and Tenth, have adopted the reasoning of the several district courts by obligating plan administrators to disclose.<sup>349</sup> Without ruling directly on point, the Seventh Circuit has twice indicated that an attorney's written request for plan documents should trigger a plan administrator's duty of disclosure.<sup>350</sup> The Sixth Circuit alone refuses an attorney's written request for plan information absent prior written authorization of the client.<sup>351</sup> Thus, of those courts addressing the issue to date, a strong majority favor a strict duty of disclosure.

Second, while neither *Daniels* nor *Moothart* individually reflect all possible rationales, taken together they raise and address each of the arguments in favor of, and opposed to, imposing a duty of disclosure.<sup>352</sup> *Moothart* indicates that an attorney's written request should trigger the duty of disclosure, so long as it places the plan administrator on clear notice of the information sought.<sup>353</sup> *Daniels*, on the other hand, points to the broad-disclosure objective behind ERISA, the historically-recognized presumption of authorized representation, and expressly rejects significance the Sixth Circuit afforded DOL Advisory Opinion Letter 82-021A.<sup>354</sup> Taken together, these two opinions raise all of the major legal arguments in favor of imposing a duty of disclosure. Furthermore, they effectively dismiss the only argument that would require written authorization prior to imposing an obligation to disclose.

Finally, *Daniels* and *Moothart* illustrate the isolated and incorrect stance taken by the Sixth Circuit.<sup>355</sup> The Sixth Circuit incorrectly affords

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<sup>347</sup> *Id.*

<sup>348</sup> See *Porcellini*, 578 F. Supp. at 611; *Curry*, 744 F. Supp. at 1066; *Algie*, 891 F. Supp. at 869 n. 22; *Jandek*, No. 95 C 1439, 1996 WL 147919, at \*4.

<sup>349</sup> See *Daniels*, 263 F.3d at 77-8; *Moothart*, 21 F.3d at 1503.

<sup>350</sup> See *Michael*, No. 02-2065, 2003 WL 21580277, at \*4; *Anderson*, 47 F.3d at 249.

<sup>351</sup> See *Bartling*, 29 F.3d at 1072.

<sup>352</sup> Compare *Daniels*, 263 F.3d at 76-78 (relying on the presumption of authorized representation and distinguishing a written request made by an attorney from a request by a non-attorney), with *Moothart*, 21 F.3d at 1502-04 (asking whether the attorney's written request placed the plan administrator on clear notice of the information sought and looking at ERISA's legislative history).

<sup>353</sup> See *Moothart*, 21 F.3d at 1503.

<sup>354</sup> See *Daniels*, 263 F.3d at 76-78.

<sup>355</sup> *But cf. Bartling*, 29 F.3d at 1072 (indicating that a plan participant must provide prior written authorization before a plan administrator is obligated to release plan information to any third party requesting such information, even an attorney).

too much significance to DOL Advisory Opinion Letter 82-021A—an advisory letter that did not directly address the distinction between attorneys and participants/beneficiaries.<sup>356</sup> In requiring prior written authorization before imposing a duty of disclosure, the Sixth Circuit’s analysis is contrary to the obvious legislative intent behind ERISA, places too little import on the traditional presumption of authorized representation, and ignores the fact that an attorney’s written request very likely places the plan administrator on clear notice of the information sought.<sup>357</sup>

Thus, courts should follow *Daniels* and *Moothart*. Considering an attorney’s presumed authority to speak on behalf of a client and the broad disclosure intended by ERISA, a plan administrator should be under a strict duty to disclose plan documents under § 1024(b)(4) where an attorney’s written request for plan documents, made on behalf of a plan participant or beneficiary, places the plan administrator on clear notice of the information sought.

## V. CONCLUSION

An attorney’s written request for plan documents, made on behalf of a plan participant or beneficiary, should trigger a plan administrator’s duty under 29 U.S.C. § 1024(b)(4) to disclose where the plan administrator is on clear notice of the information sought. Congress enacted ERISA to provide a comprehensive regulatory scheme for private pension plans. Among the chief concerns was a need to ensure full access to relevant plan information for plan participants and beneficiaries. Since § 1024(b)(4) imposes a duty to disclose “upon written request of any plan participant or beneficiary,”<sup>358</sup> but is silent as to whether an attorney may make such request on behalf of a client, courts must decide. The Third Circuit and the Tenth Circuit correctly impose a duty of disclosure on plan administrators upon receipt of an attorney’s written request made on behalf of participant or beneficiary. On the other hand, the Sixth Circuit mistakenly subordinates the presumption that an attorney is authorized to speak on behalf of a client, a presumption recognized by the United States Supreme Court, to a DOL Advisory Opinion Letter that does not directly address the issue of whether attorneys may trigger a duty of disclosure on behalf of their clients.<sup>359</sup> The Sixth Circuit thus incorrectly requires prior written authorization before imposing a duty of disclosure upon plan administrators. The Third and Tenth Circuits reflect the better-reasoned approach.

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<sup>356</sup> See *Daniels*, 263 F.3d at 77.

<sup>357</sup> See *id.*

<sup>358</sup> 29 U.S.C. § 1024(b)(4).

<sup>359</sup> See *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994).