

Best Interest and Best Practices #4: What is the Baseline for A Committee to Act in the Best Interest of Its Participants? (Part 1)

Drinker Biddle

Article By

[Fred Reish](#)

[Drinker Biddle & Reath LLP](#)

[FredReish.com](#)

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This is the fourth of a new series of articles titled “The Bests.” The series focuses on Best Interest and Best Practices. Those topics give me flexibility to discuss a range of subjects that affect both service providers, including advisors, and plan sponsors, including 401(k) and 403(b) committees.

The recent decision in the case of [Sacerdote v. New York University](#) is a classic story of the good and bad of plan committees. Let’s start with the bad.

Five current and former committee members testified at the trial. But not all of the testimony was helpful.

In the opinion, the Court said that the testimony of one of the co-chairs “was concerning.” The court went on to say:

She made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics; she displayed a surprising lack of in-depth knowledge concerning the financial aspects of managing a multi-billion-dollar pension portfolio and a lack of true appreciation for the significance of her role as a fiduciary. In a number of instances, she appeared to believe it was sufficient for her to have relied rather blindly on [the investment advisor’s] expertise. As a matter of law, blind reliance is

inappropriate.

The court further noted that:

She bluntly testified that “[i]t’s not my job to determine whether the fees are appropriate” for the Plans.

With regard to another committee member, the court said that she “was similarly unfamiliar with the basic concepts relating to the Plan, such as who fulfilled the role of administrator for the Faculty Plan. When asked about her inability to remember Plan details, [the committee member] responded that she has a ‘big job’ (referring to her human resources role, not her Committee membership) and her role on the Committee is one of many responsibilities she has. This suggested that [the committee member] does not view herself as having adequate time to serve effectively on the Committee.”

The court also said, about another committee member, “that he did not even know whether he was, at the time of the trial (in April 2018), still a member of the Committee—and thus whether he bore a fiduciary responsibility to thousands of NYU participants.”

And, finally, the court said “Several Committee members stated that they did not independently seek to verify the quality of ‘investment advisors’ advice; rather, they simply relied on it.”

If this were the end of the story, this article would be about bad practices, rather than best practices. However, there is more.

The court went on to say: “While the Court finds the level of involvement and seriousness with which several Committee members treated their fiduciary duty troubling, it does not find that this rose to a level of failure to fulfill fiduciary obligations.”

How is that possible?

Sadly, I will leave you hanging for a week, until I post Part 2 of this article. However, I don’t want you to be disappointed. So, let me give you a preview. There were other committee members, some of whom were fairly sophisticated and very engaged. However, there is even more than that. The court noted two or three other steps taken by the committee that saved NYU and the committee members from a litigation disaster. My next article will cover that.

POSTSCRIPT: One lesson from this case, independent of the committee actions that saved the day for NYU, is that committees should have formal programs for fiduciary education. The fiduciary education should cover, at the least: Who is a fiduciary and what are the fiduciary responsibilities? How do fiduciaries fulfill those duties in the real world? How do fiduciaries review and examine the advice that they receive? And, how do fiduciaries monitor the costs and compensation related to their service providers and plan investments? That education should be reinforced at least annually, together with updates on current developments. Finally, new committee members should be educated about their roles and responsibilities when they start serving.

The views expressed in this article are the views of Fred Reish, and do not necessarily

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Part 2- [Best Interest and Best Practices: Improving Retirement Outcomes #2](#)

Part 3- [Best Interest and Best Practices #3: Best Practices for Plan Sponsors: Projection of Retirement Income](#)

Part 5 - [Best Interest and Best Practices #5: What is the Baseline for A Committee to Act in the Best Interest of Its Participants? \(Part 2\)](#)

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