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### Expert Opinions

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The judge in a recent excessive fee case decision had a lot to say – about the plan committee members – and the expert witnesses called to testify.

I'm talking about the recent decision in *Sacerdote v. N.Y. Univ.*, S.D.N.Y., No. 1:16-cv-06284-KBF, judgment 7/31/18, a suit brought by participants in plans of New York University (NYU). It was one of the first excessive fee suits filed against university 403(b) plans by the law firm of Schlichter, Bogard & Denton in August 2016.

Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York found for the plan fiduciaries on every claim in the case – though she apparently wasn't much impressed by key members of the plan committee, and their (lack of) knowledge and appreciation for their roles.

First to be called out was Margaret Meagher, co-chair of the New York University Plan Committee since its inception, who testified regarding the Committee's due diligence activities and her role. In her ruling, Judge Forrest noted that Margaret Meagher's testimony was "concerning" to the court, in that she "...made it clear that she viewed her role as primarily concerned with scheduling, paper movement, and logistics," and that 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 footnote, it was noted that "...she did not demonstrate the depth of knowledge one would expect from a fiduciary." It was an observation that the plaintiffs had shared in an amended claim filed earlier this year.

In a separate footnote, the court also called out Nancy Sanchez, another committee member, who is Meagher's supervisor. Noting that her testimony was "also troubling," the court noted that "not only did she fail to demonstrate a satisfactory understanding of key documents and her role as a fiduciary, but she also relied on Meagher to review certain key documents, and noted that she did not consider herself a fiduciary (but rather believed the Committee was the fiduciary)."

Then there was Martin Dorph, now NYU's Executive Vice President and a Committee member until 2017, who "also provided somewhat concerning testimony." Here the court noted as an example that "on the first day of his testimony, he did not even know whether he was currently a member of the Committee (and, accordingly, whether he was a fiduciary to thousands of employees)." However, the court acknowledged that Dorph's "testimony regarding NYU's information technology ("IT") transitions and their impact on recordkeeping consolidation was informative, detailed, consistent, and very credible."

In the ruling, Judge Forrest also noted that, during the trial, "certain witnesses testified that they — in effect — assumed that on financial issues (which constituted a significant portion of the

Committee’s mandate), they could defer virtually entirely to Cammack for expertise and information and rely on its recommendations,” going on to bluntly state, “This is incorrect.” She explained that the hiring or appointment of a co-fiduciary does not relieve the original fiduciary of its independent duties, that “no fiduciary may passively rely on information provided by a co-fiduciary,” and that a “fiduciary who delegates fiduciary responsibilities nonetheless retains a duty to exercise prudence” — a process that she likened to a “good old-fashioned ‘kicking the tires’ of the appointed fiduciary’s work...”. She went on to clarify that, “...the role of the advisor here — Cammack — does not now and never has entitled the Committee or its members to unthinkingly defer to Carmack’s expertise — even when Cammack was hired because it possessed expertise Committee members did not.” Rather, she said, in order to fulfill their duties, “...the Committee members must meaningfully probe Cammack’s advice and make informed but independent decisions.”

One might well wonder with so much apparent lack of knowledge<sup>1</sup> among key committee members about their roles and responsibilities how NYU managed to prevail in this case. The answer, it seems to me, is there *was* a process, and one that, as it turned out, was well documented. Judge Forrest cited a series of meeting dates, and minutes, noting that Cammack’s reports were typically distributed to all Committee members one week before a meeting, and that the evidence at trial supported receipt and review of these reports by Committee members. Moreover, she noted that at those meetings, and prior to making final decisions, Committee members asked questions about the information Cammack provided and its recommendations.

She also noted that those meetings “included discussions on topics that included review of investment options and performance, recordkeeping and other fees, overviews of fiduciary responsibility, streamlining the fund lineup, converting to lower-cost share classes, amendments to the Committee charter, reviews of the differences between certain annuity contracts and more recently available annuity offerings” — suggesting that the committee had reviewed and considered, even if they had not made changes that the plaintiffs alleged constituted a breach of their fiduciary duties.

And – while Judge Forrest found “...the level of involvement and seriousness with which several Committee members treated their fiduciary duty troubling,” she said this did not rise to a level of failure to fulfill fiduciary obligations. “Between Cammack’s advice and the guidance of the more well-equipped Committee members (such as CIO Surh), the Court is persuaded that the Committee performed its role adequately,” she wrote.

That doesn’t mean that ill-informed plan fiduciaries can completely rely on a good process, well documented, to solve *all* their litigation issues. But it surely suggests that it can help.

### Footnote

1. It wasn’t all bad news for the NYU plan committee. About Tina Surh, NYU’s Chief Investment Officer, and another committee member, the court noted: “Of the Committee members who testified, she was the most knowledgeable about the investment options in the Plans,” going on to state that she was “a highly credible witness and gives significant weight to her testimony.” The footnote states that Surh asked “a number of probing questions during Committee meetings and demonstrated that the Committee exerted decisionmaking authority independent from its financial advisor.” 

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