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SECRETS, LIES & ERISA: THE SOCIAL ETHICS OF MISREPRESENTATIONS AND OMISSIONS IN SUMMARY PLAN DESCRIPTIONS

ALISON MCMORRAN SULENTIC*

INTRODUCTION

Consider four words. Secrets. Lies. Omissions. Misrepresentations.

Do these words share a common meaning? Is telling a secret the moral equivalent of telling a lie?[1] Is an omission always a misrepresentation?[2]

If not — if distinguishing the secret from the lie and the lie from the misrepresentation is a task that depends on context — then let's ask another question. Who should be able to tell us what these words mean and when it is right to use them - the person who speaks or the person who hears? As lawyers trained in the art of contract interpretation, we could turn to the tools that help our profession to cope with these questions in the courtroom, in the office and at the client's worksite. "It's a contract of

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* Baker Botts L.L.P. This Article was written while I was employed as an Associate Professor of Law at Duquesne University School of Law. Earlier drafts of this paper were presented to the University of St. Thomas School of Law Faculty Colloquium Series (September 2006) and the First Annual Colloquium on Current Scholarship in Labor & Employment Law, Marquette University (October 2006). I offer my thanks to Duquesne University for providing a sabbatical semester during which I was able to write the bulk of this Article and to the John Marshall Law Review for the opportunity to present this paper in its final form. I am also grateful to Jacki Mirowitz for her research assistance. The views set forth in this Article are my own and do not reflect any position adopted by Baker Botts L.L.P. or its clients.

1. *See, e.g.*, Fischer v. Phila. Elec. Co. (Fischer II), 96 F.3d 1533, 1539 (3d Cir. 1996) (describing the duty to disclose changes in benefits after "serious consideration" of a specific proposal to implement a change in benefits has been undertaken by senior management with the authority to make the change); McAuley v. Int'l Business Machines Corp., 165 F.3d 1038, 1043 (6th Cir. 1999) (adopting Fischer II test).

2. *See, e.g.*, Barnes v. Lacy, 927 F.2d 539, 543-44 (11th Cir. 1991) (stating that a retirement window was a one-time only program that did not constitute a misrepresentation simply because the employer later changed its policy to provide a second opportunity).

adhesion, so the language must be construed contra proferentum." "No, there was a meeting of the minds." "She knew what she was doing when she made this unfavorable bargain." "Of course, he knew there was a contract — he cashed the check, didn't he?" These are, of course, legitimate and necessary conventions that help lawyers to figure out the terms of any contract or agreement.

But how might our understanding change if we were to lay aside these interpretive tools for a few moments and consider the language of contracts or disclosure statements *before* lawyers begin to mediate between the reader and the text and *before* a judge must listen to arguments about the correct meaning of a text? Secrets, lies, misrepresentations or omissions — what do these words mean to a speaker and how does the listener interpret them?[3] Is it the speaker's fault if the listener does not understand his words? Or is the listener's incomprehension somehow of his own making?

Somewhere near the heart of these questions lies the answer to crafting a text that meets the needs of both writer and reader — to be understood and to understand. Cast in this light, a text such as an employee handbook or a summary plan description does not simply memorialize a business arrangement. Instead, the choice of language and content in such a text also reveals and reinforces a social relationship between employer and employee. Because individual and collective decision-making in the workplace depends in part on the appraisal of communications, the ethics of workplace administration must address the use of language in communications between employers and employees.[4] Simply put,

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3. Recent scholarship notes that deception can take many forms:

> [D]eception consists of an articulated and complex communicative act that assumes different patterns. Different kinds of lies can be distinguished: the *prepared lie* which is utilised mainly to avoid further repercussions, the *unprepared lie* which is utilised when confronted with an embarrassing situation, the *pedagogic lie*, as seen, for example, in the reassurance of a child and the *white lie* utilized to avoid losing face. Consequently, we can propose the existence of a family of deceptive acts in which truth and falsehood are not always separated by a clearly defined line, instead they may appear in blurred or merged contexts.

Luigi Anolli, Michela Balconi & Rita Ciceri, *Linguistic Styles in Deceptive Communication: Dubitative Ambiguity and Elliptic Eluding in Packaged Lies*, 31 SOC. BEHAV. AND PERSONALITY 687, 688 (2003).

4. The impact of language and delivery on decision-making draws scholarly attention to many different points of workplace relations. For example, the receptivity of employees to subjective criticism in performance appraisals varies depending upon the employee's identification with the evaluator. In this context, language coming from an evaluator who shares demographic characteristics with the employee is perceived differently from the same language used by an evaluator who shares few similarities with the employee. The decisions to accept or reject legitimate criticism may thus be affected not only by the words, but by the speaker. *See* Kwok Leung, Steven L. Sue & Michael W. Morris, *When is Criticism Not Constructive? The Roles of*

any decision made on the basis of such communications engages the social relationships in a workplace.[5]

The construction of ordinary workplace communications is thus inescapably tied to normative questions of social ethics.[6]

Fairness Perceptions and Attributions in Employee Acceptance of Critical Supervisory Feedback, 54 HUM. REL. 1155, 1156 (2001) (identifying the processes that "determine whether negative feedback is useful or counterproductive").

5. *See* Denise M. Rousseau, *Schema, Promise and Mutuality: The Building Blocks of the Psychological Contract*, 74 J. OCCUPATIONAL AND ORGANIZATIONAL PSYCHOL. 511, 512 (2001) (explaining that "post-hire socialization continues the processing of new information regarding the employment relationship and promises related to it"); Jennifer R. Dunn & Maurice E. Schweitzer, *Feeling and Believing: The Influence of Emotion on Trust*, 88 J. PERSONALITY & SOC. COGNITION 736, 745-46 (2005) (describing the distortion that emotion can make on judgment and providing examples relevant to the workplace, including performance appraisals).

6. This statement reflects my agreement with Sissela Bok's defense of applied ethics as a serious discipline. Bok herself identifies her interest in "practical moral problems that arise in everyday life" and "how ways of dealing with these problems express, but also shape, character and in turn human lives." Sissela Bok, Hasting Center's Knowles Beecher Award: At the Juncture of Theory and Practice: Remarks on Receiving the Henry Knowles Beecher Award, (Feb. 9, 1996), *in* 26 THE HASTINGS CENTER REPORT 5, 8 (February 1996). I also find the contributions of Lawrence and John Jost to be instructive. The Josts (and in particular John Jost) are prolific scholars who have made significant contributions to our understanding of system justification in inequitable workplace relationships. The Josts write,

> As philosophers, social scientists, and citizens, we must learn to think in more complex terms about how to: (a) expose children and adults to environments which teach them moral values, (b) appreciate the role of the environment in contributing to (im)moral behavior without abdicating all forms of personal accountability, and (c) create situations that will pull for moral rather than immoral behavior. At a minimum, this kind of non-eliminativist situationalism means that we should avoid creating "moral hazards" for others by placing them in situations where there are strong temptations to lie, cheat, or steal.

Lawrence J. Jost & John T. Jost, *Virtue Ethics and the Social Psychology of Character: A Critique of Harman's 'Eliminative Situationalism,'* (Stanford Univ. Graduate Sch. of Bus., Draft Research Paper Series No. 1595, 1999), *available at* http://www.gsbapps.stanford.edu/researchpapers/library/ rp1595 .pdf. For further discussion of law and business ethics, see Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 961 (2006); Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come Let Us Reason Together*, 29 J. CORP. L. 469, 470 (2004) (examining the troubled relationship between law and business). For a discussion of the contributions of social identity theory and theories of "psychological contract" to employee relations, see Gerard P. Hodgkinson, *The Interface of Cognitive and Industrial, Work and Organizational Psychology*, 76 J. OCCUPATIONAL AND ORGANIZATIONAL PSYCHOLOGY 1, 11-12 (2003) (discussing how social identity theory has been employed as part of the industrial action analysis as well as outlining Rouseeau's psychological contract analysis). *See* Lakshmi Ramarajan & Sigal G. Barsade, *What Makes the Job Tough? The Influence of Organizational*

Language is one of the strongest fibers in the social web of human relationships.[7] Whether spoken or written, language is one of the most important ways in which a person connects to and, at the same time, remains distinct from another person. The context in which language may influence decision-making extends from simple communications between a worker and his or her supervisor to the most sophisticated statement of employment policies. However, language may be used to convey a truth or a falsehood.[8] As the primary means of explaining an employee's eligibility for benefits, the summary plan description offers a key example of the problems that language may create and the course corrections which a deeper understanding of social ethics might suggest.

This Article examines the effectiveness of mandated disclosures and reporting required by the Employee Retirement Income Security Act of 1974 ("ERISA").[9] By no means do I

Respect on Burnout in the Human Services (forthcoming), *available at* http://www.knowledge.wharton.upenn.edu/papers/1327.pdf (discussing the impact of organizational respect on an employee's self-perception and commitment to the workplace community).

7. For a discussion of the obstacles presented by poor communication between health care providers and patients with disabilities, see Mari-Lynn Drainoni, Elizabeth Lee-Hood, Carol Tobias, Sara S. Bachman, Jennifer Andrew & Lisa Maisels, *Cross-Disability Experiences of Barriers to Health-Care Access: Consumer Perspectives,* 17 J. DISABILITY POL'Y STUD. 101, 107 (2006) (citing difficulties in communication arising from not only language barriers, but also from hearing disabilities).

8. Part II of this Article draws on the work of Aristotle and Aquinas to convey some of the philosophical underpinnings of "virtue ethics" in relationship to lying. However, the focus on "virtue ethics" is not intended to dismiss the contributions of other disciplines to our understanding of lying and miscommunication. Recent scholarly literature on lying and deception is vast and draws from many disciplines. *See, e.g.*, Steve Kirby, *Telling lies? An exploration of Self-Deception and Bad Faith,* 6 EUR. J. PSYCHOTHERAPY, COUNSELLING & HEALTH 99, 109 (2003) (examining the different fields of cognitive psychology and existential philosophy which both suggest that "desire and anxiety reduction are key motivating factors underlying self-deception and bad faith"); L. Bowers, *Manipulation: Searching for an Understanding,* 10 J. PSYCHIATRIC & MENTAL HEALTH NURSING 329 (2003) (summarizing psychology literature on three alternative methods used to interpret manipulation by identifying it as "normal," "unconsciously motivated," or the result of "cognitive distortion").

9. For additional scholarship on ERISA's disclosure requirements, see Lorraine A. Schmall, *Keeping Employer Promises When Relational Incentives No Longer Pertain: 'Right Sizing' and Employee Benefits,* 68 GEO. WASH. L. REV. 276, 317-25 (2000); Lorraine A. Schmall, *Telling the Truth About Golden Handshakes: Exit Incentives and Fiduciary Duties,* 5 EMP. RTS. & EMP. POL'Y J. 169, 199-204 (2001). As with many aspects of ERISA scholarship, the contributions of practitioners in the form of continuing legal education materials should not be overlooked. *See, e.g.*, Pamela D. Perdue, *The Evolving Area of ERISA Disclosure,* 2 A.L.I. - A.B.A COURSE OF STUDY MATERIALS ¶ 1 (October, 2001) (explaining that one of the purposes of ERISA was to confirm

challenge the importance of full disclosure of plan terms and the benefits of employee education concerning employee benefits. But I do question whether the obligation to explain the terms of an employee benefit plan in a "summary plan description" (or, in benefits lingo, an "SPD") really accomplishes the purpose of providing workers with the information they need in order to make informed decisions? Even bolstered by ERISA's strict fiduciary standards, disclosure does not guarantee complete information or insure effective communication.

Part I of this Article describes ERISA's current requirements for the disclosure of the terms of employee benefit plans and locates the function of the SPD in what Judge Posner has dubbed "ERISA Land."[10] Part II addresses the practical consequences of modern SPD drafting techniques in terms of modern scholarship on lying, secrecy and social ethics.[11] Part III endorses an

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that both beneficiaries and participants knew of their rights); Wilber H. Boies & Nancy G. Ross, *Communicating with Employees about Benefits: A Central Issue in ERISA Administration and Litigation*, 30 INST. ON EMP. LAW 487, 491 (2001) (intending to provide lawyers as well as "plan administrators with guidelines for better communications with employees regarding benefits plans and plan changes.").

10. Justice Posner has used this phrase at least twice. *See* Health Cost Controls of Ill., Inc. v. Wash., 187 F.3d 703, 712 (7th Cir. 1999) (noting confusion that arises in "ERISA land" from a series of documents not clearly labeled); Operating Eng'rs Local 139 Health Benefit Fund v. Gustafson Constr. Corp., 258 F.3d 645, 655 (7th Cir. 2001) (explaining that a ban on contractual penalties should not extend into ERISA land).

11. Lying and truthfulness are issues that often occupy the attention of legal scholars. For additional legal scholarship on lying, see Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195, 196 (1996) (arguing that one must accept that a certain amount of lying is required in client representation); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 776 (1997) (exploring investigative lies); Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833 (1997) (analyzing the broad characterization of existing rights designed primarily to protect the innocent); Jeffrey M. Lipshaw, *Of Fine Lies, Blunt Instruments and Predictability: The Right to Lie in Business Acquisition Agreements* (2006) Tulane Public Law Research Paper No. 06-0000, *available at* http://www.ssrn.com/abstract=900021 (discussing the law of fraud as an omission or half-truth; Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 47 (1994) (stating types of deception as well as providing an ethical framework with which to identify and analyze both legal and non-legal situations involving deception); Daniel J. Morrissey, *Moral Truth and the Law: A New Look at an Old Link*, 47 SMU L. REV. 61 (1993) (exploring dissatisfaction with the legal system and its distance from its essential purpose of justice); Anita L. Allen, *Lying to Protect Privacy*, 44 VILL. L. REV. 161, 161-62 (1999) (identifying lying that lurks behind public perspective); Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. Ethics & Pub. Pol'y 679 (2000); William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. OF LEGAL ETHICS 433, 463 (1999) (positing

alternative reporting structure that would rely upon commonly agreed and shared definitions and a more uniform method of disclosure of benefit plan terms. I argue that these techniques should facilitate better decision-making by plan participants by enabling them to rely on certain terms with uniform meanings and on formats that will permit them to more readily recognize and understand plan terms.

I. DISCLOSURE REQUIREMENTS UNDER ERISA

> "[A] sign's a kind of a tease," Augustus said. "It ought to make a man stop and consider just what it is he wants out of life in the next few days."
>
> - LARRY MCMURTRY, LONESOME DOVE.

In calling a sign "a kind of a tease," Augustus McCrae is well within the boundaries of modern contract law. Any law student who is ready to pass the bar should be able to tell you that some statements are simply affirmations of value that do not have enough substance to be promises or warranties. Something more complete — more reliable, more substantive — is necessary in order to transform words into promises.

Just as a sign hanging outside a grocery store cannot tell you everything about the procedure within, a summary plan description generally is not a complete statement of the terms of a plan. The SPD is more than a "tease," but less than a comprehensive plan document.[12] The purpose of the SPD is to inform participants of their rights and duties under a plan in a manner that permits them to understand the essential elements of the plan's structure.

A. Statutory Goals for SPDs

When Congress enacted ERISA more than thirty years ago, improved communications between plan sponsors and plan participants figured so prominently among its goals that the importance of disclosure occupies a central place in the introduction to the statute:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and

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that when honesty and important values conflict, honesty should not always prevail).

12. *See, e.g.*, Louderback v. Litton Indus., Inc., No. 06-2023-JWL 2007, WL 2404255, at *4 (D. Kan. Aug. 23, 2007) (powerpoint slides reflecting highlights of benefit program did not include required elements and "is so lacking in any detail that it cannot be deemed a summary plan description.").

safeguards be provided with respect to the establishment, operation, and administration of such plans.[13]

ERISA establishes a system of reporting and disclosure that relies on four basic strategies.

- First, a plan must provide a satisfactory response to a participant's legitimate request for information. If the participant wants to see the plan document, the plan administrator must hand it over.[14]

- Second, even if a participant does not want or does not seek information, a plan administrator must provide him with a Summary Plan Description.[15] The Pension Protection Act of 2006 also requires that individual benefit statements be distributed on (1) a quarterly basis for individual account plans that permit participants to direct their own investments, (2) at least annually for individual account plans that do not permit participant-directed investments and (3) at least once every three years for defined benefit plans.[16]

- Third, the plan administrator must provide notices at specific times during the participant's life.[17] The most well-known example of these notices is probably the COBRA notice that informs participants in a group health plan of

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13. *See* 29 U.S.C. § 1001(a) (2000).

14. *See* 29 U.S.C. § 1024(b)(2) (2000) (explaining that copies of updated SPD and other plan instruments are to be available for examination by a plan participant); 29 U.S.C. § 1024(b)(4) (2000) (declaring that upon written request, administrator must furnish a copy of latest SPD and plan instruments to plan participant). *See, e.g.*, Reddy v. Schellhorn, No. 05 C 639, 2006 WL 642647, at *4 (N.D. Ill. Mar. 8, 2006) (ordering an employer who failed to respond to request for copy of severance plan document to pay $20.00 per day for each of the 511 days of noncompliance).

15. *See* 29 U.S.C. § 1022(a) (2000) (requiring SPD to be furnished to participants); § 1024 (b) (dictating timing and manner of distribution of SPD to participants); *see, e.g.*, Haynes v. K-VA-T Food Stores Inc., No. Civ.A. 104CV00096, 2006 WL 1933313 at *3-4 (W.D. Va. July 13, 2006) (holding that plan administrator breached its fiduciary duty by failing to provide SPD to employee). *But see* Exarhakis v. Visiting Nurse Serv. of N.Y., No. 02-CV-5562 (ILG), 2006 WL 335420, at *12 (E.D.N.Y. Feb. 13, 2006) (stating "this Circuit requires a threshold showing of '"likely prejudice"' where an ERISA claim is premised on incomplete or inaccurate information").

16. *See* 29 U.S.C. § 1025(a)(1) (2000) (explaining that this was amended by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 508 (2006)); *see also Memorandum from Robert J. Doyle, Director of Regulations and Interpretations, to Virginia C. Smith, Director of Enforcement, Regional Directors, U.S.* Dep't of Labor, Employee Benefits Security Administration Field Assistance Bulletin (Dec. 20, 2006) (discussing changes to ERISA).

17. 29 C.F.R. § 2520.104b-1(a) (2007).

the opportunity to continue coverage for a stated period of time.[18] However, notices are required in many other situations as well.[19]

- Fourth, ERISA requires a significant amount of information to be filed with government offices (primarily, the Department of Labor, although many plans are also subject to additional filing requirements under the Internal Revenue Code).[20]

Common sense suggests that clarity, accuracy and veracity should be among the attributes of any writing intended to inform its readers. In describing the general properties of an SPD, however, Congress did not rely solely upon the common sense of the inhabitants of ERISA Land. Instead, the statutory text makes its objectives very plain. An SPD:

> [S]hall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan.[21]

The statutory text thus provides the basis for evaluating the substantive information provided in a text (does it "reasonably apprise" participants of their rights?) and the manner in which this information is conveyed (is it "written in a manner calculated to be understood by the average plan participant?").

Section 102(b) of ERISA provides an extensive list of the information that must be included in an SPD.[22] In rough terms,

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18. 29 U.S.C. § 1166 (2000).

19. *See, e.g.*, 29 U.S.C. § 1055(c)(3)(A) (2000) (stating the requirements for notice of right to make an election to waive the qualified joint and survivor annuity distribution option; § 1169(a)(5)(A)(i) (stating that notification must be made to participant and alternate recipients of plan administrator's receipt of a medical child support order). For a useful summary of the many notice and reporting requirements under ERISA, see Department of Labor Employee Benefits Security Administration, *Reporting and Disclosure Guide for Employee Benefit Plans* (August 2006) (noting, however, that the publication had not been updated for the Pension Protection Act), *available at* http://www.dol.gov/ebsa.

20. *See, e.g.*, 29 U.S.C. § 1023 (2000) (explaining requirements for filing annual report); § 1024(a)(1) (timing for filing of annual report).

21. 29 U.S.C. § 1022(a) (2000).

22. 29 U.S.C. § 1022(b) (2000). For the required contents of a summary plan description, see 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102-3 (2007). While a plan administrator is required to provide an SPD, an employee should not assume that any communication about the plan may substitute as an informal SPD. *See* Miehls v. Henkel Corp., No. 04-CV-72287-DT, 2005 WL 1639443, at *4 (E.D. Mich. July 13, 2005) (holding that a plan brochure that did not meet the basic requirements of an SPD and clearly referred to a plan document could not serve as an SPD); *see also* Gridley v. Cleveland Pneumatic

this list can be broken down into six categories:

- information that should assist a participant in locating the plan sponsor and the fiduciaries who are charged with the administration of the plan, as well as the agent for service of process;[23]

- instructions on how a participant may obtain copies of the plan document and, if applicable, a related collective bargaining agreement; [24]

- technical information concerning the type of the plan (pension or welfare benefits), the nature of its administration (such as third-party administration, insurance, self-insurance, etc.) and the plan's funding arrangements;[25]

- an explanation of the requirements for eligibility to participate in the plan and eligibility to receive benefits under the plan;[26]

- a description of the benefits provided under the plan and any limitations or exclusions that might be applicable to a claim for benefits;[27] and

- a statement notifying participants of their rights and obligations under ERISA.[28]

These requirements have grown increasingly extensive over the years, due in part to the implementation of subsequently enacted

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Co., 924 F.2d 1310 (3d Cir. 1991) (ruling that an overview booklet that does not contain required information is not an SPD). *See generally* Donald R. Saxon, *An Unpleasant Surprise: The Unrealized Responsibility of Employers Who Sponsor Fully Insured Welfare Benefit Plans,* 9 HR ADVISOR: LEGAL & PRAC. GUIDANCE 27 (2003) (stating that "while the certificates of insurance typically provided by HMOs and health insurance carriers provide a lot of valuable information . . . they do not rise to the dignity of an SPD").

23. 29 C.F.R. § 2520.102-3(b)(1)-(4),(f)-(i) (2007).

24. 29 C.F.R. § 2520.104b-1(b) (2007); 29 C.F.R. § 2520.102-3(i) (providing a collective bargaining agreement).

25. 29 C.F.R. § 2520.102-3(d)-(e).

26. 29 C.F.R. § 2520.102-3(j).

27. 29 C.F.R. § 2520.102-3(l).

28. 29 C.F.R. § 2520.102-3(t). A recent opinion from the Northern District of Georgia underscored the importance of this provision when it awarded $32,400 in statutory penalties to a claimant who had not received notice of her rights under ERISA, while simultaneously upholding the denial of her claim for failure to exhaust administrative remedies. Palmeri v. Coca-Cola, Inc., No. 1:01-CV-3498-TWT, 2006 WL 2523027, at *6-8 (N.D. Ga. Aug. 28, 2006).

laws such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[29] and in part to the Department of Labor's response to a 1997 report by the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry[30] and the 2005 reports of the ERISA Advisory Council on communications regarding employee benefit plans.[31]

Of course, error, deceit or thoughtless editing may cause an SPD to omit some required information.[32] Ticking off each element in the list of information required in an SPD demands arduous attention to detail. In substance, the required list is so comprehensive that the task may require little creativity in deciding whether to address a topic or to omit it. In many instances, the statute simply makes the answer clear.

The more challenging assignment is to create an SPD that provides the required substantive information while achieving the more elusive goal of writing "in a manner calculated to be understood by the average plan participant."[33] The Department of Labor regulations suggest that decisions concerning how the SPD is to be written are fiduciary matters in which "the plan administrator shall exercise considered judgment and discretion."[34] The regulations advise the plan administrator to consider "such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan"[35] and to eschew the practice of "exaggerating the benefits or minimizing the limitations."[36] The Department of Labor specifically encourages "the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross-references and a

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29. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191 (1996); *see also* 45 C.F.R. § 160.101-160.552 (2006) (containing the HIPAA Administrative Simplification regulations).

30. *See* President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, http://www.hcqualitycommission.gov (last visited March 19, 2007).

31. ERISA Advisory Council on Employee Welfare and Pension Plans, *Report of the Working Group on Health and Welfare Benefit Plans' Communications* (November 2005), *available at* http://www.dol.gov; ERISA Advisory Council, *Report of the Working Group on Communications to Retirement Plan Participants* (November 2005), *available at* http://www.dol.gov.

32. *See, e.g.*, Greeley v. Fairview Health Services, 479 F.3d 612 (8th Cir. 2007) (deciding a case where an SPD contained a typographical error that indicated that benefits would be payable until age sixty-seven, when in fact the cut-off date was age sixty-five).

33. 29 C.F.R. § 2520.102-2(a) (2007).

34. *Id.*

35. *Id.*

36. 29 C.F.R. § 2520.102-2(b).

table of contents."[37] Neither the size, style nor prominence of typographical fonts, nor the relative positions of language describing what is and what is not covered in the plan escape the Department of Labor's notice.[38] Administrators of plans that cover employees who, in significant numbers, are not literate in English must comply with additional regulatory requirements in order to inform the employees of their rights.[39] If the details of a regulation are in any way proportionate to the problem that the regulation addresses, then difficulty in understanding SPDs must be very great indeed.

B. *Drafting the Tactical and Practical SPD*

A close look at the process used to construct an SPD may reveal systemic shortcomings that explain the deficiencies of the SPD and the social consequences of these defects in the workplace. Despite this Article's focus on the failure of many SPDs to inform participants of their rights in a meaningful way, it is important to note that these problems do not necessarily emerge as the result of bad faith on the part of the plan sponsor or plan administrator. Breakdowns in communication may result from externalities such as the potential for legal damages or the barriers posed by poor literacy rates. Changes in the wider economy may also create circumstances to which a previously adequate SPD cannot respond. Moreover, in some cases, it is possible that miscommunication arises from a poor fit between the participants' own perception of their employee benefit needs and the media through which the employer has elected to provide those benefits.[40]

Viewed from this broader perspective, the problematic SPD reflects an equally problematic legal, economic and social climate that exceeds the confines of the employer-employee relationship. Extracted from this larger context, a faulty SPD might seem to suggest employer malfeasance. In some cases, this certainly might be the most accurate explanation for discord between the participant and the plan administrator. If so, an effective resolution of the ethical problem stemming from an inaccurate SPD may indeed be confined to rectifying an employer's deviant behavior. However, this narrow perspective hides the very real possibility that the source of confusion has little to do with an

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37. 29 C.F.R. § 2520.102-2(a).

38. 29 C.F.R. § 2520.102-2(b).

39. *Id.*

40. *See, e.g.*, James Kalamas, Gene Kuo and Drew Ungerman, *Designing Better Employee Nenefits: Adopting a Product Developer's Approach to Designing a Benefits Package can Help Employers get More Value from their Health Care Investments*, THE MCKINSEY QUARTERLY: THE ONLINE JOURNAL OF MCKINSEY & CO. (June 2005), *available at* http://www.mckinsey quarterly.com.

employer's intentional wrongs and may be found instead in systemic weaknesses that cannot be corrected by assigning blame to one party.

In order to pave the way to an endorsement of standardized language as a tool to improving workplace communications, this section of the Article provides a brief overview of the compelling empirical evidence that participants do not understand their SPDs and identifies some of the weaknesses that allow such misunderstanding to creep into the process of drafting an SPD.

1. *The Problem: Literacy and Complexity*

In 1998, President Clinton received a report from the President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry that suggested that communications between plan sponsors and plan participants had not improved in the twenty-four years since ERISA was passed.[41]

In 2004, the National Association of Insurance Commissioners commissioned an in-depth survey of twenty-four randomly selected people, who differed in geographic, educational and ethnicity.[42] According to the study, consumers "indicated limited understanding of the insurance disclosures they read."[43] Even among those who said they understood part or all of the disclosures, subsequent comments often revealed "how limited their understanding actually was."[44] Moreover, members of the focus group who read the disclosures reported feeling frustrated, intimidated, and/or "irritated and indicated that reading the

41. President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Quality First: Better Health Care for All Americans* (1998), *available at* http://www.hcqualitycommission.gov/final/ (last visited March 19, 2007). One commentator writes,

> From the standpoint of business ethics, false or misleading advertising is universally regarded as immoral and illegal. For pharmaceutical products, however, 'truth in advertising' is hampered by the nature of th einformation, which is cloaked in arcane scientific language and adorned with impenetrable and often misleading or erroneous statistical data. In the absence of transparency, pharmaceutical 'truth' has become socially constructed by physicians, pharmacists, and even lawyers and juries who are legally empowered to serve as the translators and interpreters of this otherwise inscrutable, if not unreliable, information.

Ronald F. White, *Direct-to-Consumer Advertising and the Demise of the Ideal Model of Health Care*, XI THE INDEP. REVIEW 223, 233 (Fall, 2006).

42. See James J. Bason & Mary Ann Mauney, University of Georgia Survey Research Center, *National Association of Insurance Commissioners Insurance Disclosure Focus Group Study* (2005); *see also* Brenda J. Cude, *NAIC Disclosure Guidelines and Process,* Draft of September 6, 2006, *available at* www.naic.org/documents/committees_d_cpwg_naic_disclosure_guidelines_process_cudecomments.

43. *Id.* at 3.

44. *Id.*

disclosures made them feel less confident as insurance consumers."[45]

The frustration reported by the participants in this very limited survey is consistent with the findings of an October 2006 study on the "readability" of SPDs that was conducted by the Employee Benefit Research Institute.[46] Literacy scholars report that forty-three percent of Americans score at or below the basic literacy standard, which is defined as the ability to read and understand sentences.[47] The EBRI research team conducted an empirical examination of the SPDs for forty plans to determine the level of "readability" of SPDs.[48] The team concluded that the average "readability" of SPDs assumes a reading level equivalent to that of a first-year college student.[49] Moreover, a comparison of the readability scores of all of the SPDs in the study indicated that the most easily comprehensible SPDs were pitched to a ninth grade reading level, while the most complex SPDs assumed a reading level characteristic of a college graduate.[50] What makes these statistics particularly disturbing is the researchers' warning that readability assessment cannot predict comprehension.[51] In other words, a person may be capable of reading a document and still fail to understand its contents.

2. The Drafting Process

If the results of these empirical studies are correct (and anecdotal information provides every reason to believe that they are), then the confusion surrounding SPDs must stem, at least in part, from the ways in which an SPD is drafted. Three possible points of weakness in the drafting process are (1) the dominant role of the plan administrator and the insignificant role of plan participants in the drafting process; (2) the possibility that several parties will independently review and adjust the draft SPD in ways that complicate the final text; and (3) the possibility that artful drafting techniques will add to the difficulty of the text without an offsetting clarification of its terms.

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45. *Id.*

46. Colleen E. Medill et al., *How Readable are Sumary Plan Descriptions for Health Care Plans*, 27 EBRI NOTES (October 2006), *available at* http://www.ebri.org.

47. *Id.* at 2.

48. *Id.* at 3.

49. *Id.* at 7-8.

50. *Id.* at 7.

51. *Id.* at 8.

a. Weaknesses in SPD Drafting (1): Participants Do Not Participate

Here is a truism well-known throughout ERISA Land: Plan beneficiaries rarely (if ever) participate in drafting SPDs.

This practice is certainly pragmatic and largely understandable. First, the legal responsibility for issuing an SPD lies with the plan administrator, whose duty of loyalty is owed to the plan *participants* — plural.[52] An individual participant's interests and goals may differ from those of the plan as a whole and the plan members as a group. The plan administrator's duty to the entire group of plan participants may suggest priorities that differ from individual needs. Second, the possibility of litigation against the plan requires the plan administrator to consider assuming or overseeing the role of the plan as potential defendant.[53] A plan administrator may well enjoy significant latitude in determining just how much defensive language makes its way into the SPD.[54] Limiting the number of people who receive and review drafts should also reduce the possibility that participants might place an unwarranted faith on representations that appear only in a draft document.

In contrast to these defense-friendly strategies, a participant is more likely to envision the role of a potential plaintiff with a claim against the plan. Indeed, the very purpose of the SPD is to provide the plaintiff with notice of the benefits due to him under the plan.[55] Moreover, the Department of Labor requires that each SPD include a notice of the participant's rights under ERISA.[56] This information is provided to the participant so that he or she can take the steps necessary to enforce his rights — a goal very different from the defensive concerns of the party whom a wronged beneficiary is likely to sue.[57]

However, the pragmatic decision to limit the drafting process to include only the plan administrator and the plan's service providers does come at a price. Without active participation by

52. 29 U.S.C. § 1104(a)(1) (2000).

53. *See generally* 29 U.S.C. § 1132 (2000) (detailing procedures for civil enforcement).

54. *See generally*, Saxon, *supra* note 22 (detailing the roles of employers and administrators).

55. 29 U.S.C. §1022 (2000).

56. 29 C.F.R. § 2520.102-3(t) (2007).

57. *Frizzell v. Raytheon Group Life Ins. Plan* illustrates the problem that a beneficiary may face when the SPD fails to provide such information. In *Frizzell*, an SPD did not describe the effect of divorce on a spouse's enrollment in a welfare benefit plan. The Northern District of Texas ruled that the plan administrator's denial of life insurance benefits was incorrect because the SPD did not state whether divorce from the participant effectively terminated the spouse's participation in the plan. Frizzell v. Raytheon Group Life Ins. Plan, No. 3:06-CV-0313-G, 2007 WL 507043 (N.D. Tex. Feb. 16, 2007).

plan participants, a plan administrator may find it difficult to determine whether an SPD is in fact readable by the plan participants.[58] In theory, an extraordinary scrupulous plan administrator might make a considerable financial outlay in order to obtain an outside opinion on the "readability" and comprehensibility of the document. However, such expenditures remain, at best, uncommon, and, even if such a course were undertaken, the prospect of success seems obscure. It remains far more likely that an SPD will be reviewed for accuracy and defensive language than for clarity and comprehensibility.

b. Weaknesses in SPD Drafting (2): Too Many Cooks

There are certainly many ways to produce an SPD. The following are four common practices:

- *The "Hey, Big Spender" approach*: A consultant designs the plan document and SPD. The SPD is reviewed by a third-party administrator (if any), by in-house decision-makers (usually by legal, human resources and possibly public relations), and is then reviewed by outside counsel.

- *The lawyers control the world approach*: Outside counsel writes the SPD, which is then reviewed by in-house decision-makers and other relevant parties.

- *The insurers control the world approach:* A service provider, such as an insurer or TPA writes the SPD, followed (one hopes) by review by in-house decision-makers and outside counsel.[59]

- *The budget approach*: In-house decision-makers write the document and (again one hopes) counsel reviews it.

As each of these scenarios suggests, the job of drafting an SPD may fall to the lot of a person whose area of expertise does not necessarily coincide with the substance of the relevant plan or the practices in a particular industry. For example, a person who is responsible for writing or reviewing an SPD may not be an expert in the complex conditions alluded to in a medical plan SPD. A lawyer who has a solid grounding in employment law may not have an equal facility with the intricate tax regulations concerning pension distribution provisions. While external service providers and in-house public relations employees may provide valuable

58. *See* Medill et al., *supra* note 46 (explaining the high level of reading required to understand an SPD).

59. *See, e.g.*, *How Aetna Can Assist Plan Sponsors to Comply with New Summary Plan Description (SPD) Requirements*, *available at* http://www.aetnaushc.com/about/pdf /dol_AetnaAssistance_802.pdf (describing techniques for plan sponsors to issue SPD's that comply with the requirements of ERISA).

insight into the drafting process, the opportunities for inaccuracy are still present. Inconsistencies that arise in this manner are not necessarily the result of incautious language or negligent judgments. They represent instead the opportunity cost of a particular drafting strategy in which a variety of service providers influence an outcome.

c. Weaknesses in SPD Drafting (3): Artful Drafting 101

Drafting a legally compliant SPD that conceals as much as it discloses is such a simple exercise that even a hackneyed phrase such as "artful drafting" seems too pompous to describe the work. Instead, what one lawyer decrees as artful drafting, another may consider to be very good evidence of his or her duty to anticipate and to minimize the client's potential liability.

Here is a simple example. Look at one of your own SPDs and see if you can find a statement that your employer reserves the right to amend the terms of the plan at any time, with or without notice. How many secrets or omissions might hide behind that statement? How much confidence will you place in your SPD? What might someone who is not schooled in the details of ERISA law make of this phrase? And yet, if a "reservation of rights" clause is a part of the governing plan document, then including it in the SPD is only prudent and a failure to do so would rightfully be considered a failure of candor.[60]

In the alternative, an SPD might be drafted with such attention to detail and with such loyalty to the terms of the controlling plan document that the SPD itself becomes incomprehensible.[61] An SPD that goes to extreme lengths in disclosing each and every piece of information that might be remotely relevant to its operation certainly cannot be said to be incomplete or to lack candor. But what if the average reader cannot understand it, or does not have the time or patience to read it? What if the drafter's assessment of the reading skills and knowledge base of the plan participants outstrips their reality? A "tell-all" SPD might also fail to inform the worker who reads it.

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60. *See, e.g.*, *A Summary Plan Description of XYZ Sample Company Profit Sharing 401(k) Plan*, http://www.benefitplans.com (stating that "[a]lthough the Plan is intended to be permanent, the Employer can amend or terminate the Plan at any time.").

61. In 1997, Pensions & Investments awarded the 1997 Defined Contribution Investment Education Award to Rank America for its humorous and colorful investment education materials for Hard Rock Cafes. The winning materials defined an SPD as "'a boring book with lots of important legal stuff.'" Fred Williams, *Humor, Dazzling Graphics Garner Awards*, PENSIONS & INVESTMENTS (February 3, 1997), *available at* http://www.pionline.com.

The significance of the SPD is not lost on the federal courts.[62] As the Third Circuit stated in *Burstein v. AHERF*, "[t]he SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan."[63] Likewise, the courts seem well aware of the danger of an inaccurate, incomplete or incomprehensible SPD. Just how the federal common law of ERISA should deal with this problem remains more obscure.

One approach to a dispute that turns on a difference between an SPD and a plan document is to favor the terms of the SPD when they are more generous to the participant.[64] Several traditional principles of contract and trust interpretation strengthen this argument. Courts sometimes turn to the notion that an ambiguity in a contract must be construed against the drafter.[65] Moreover, courts are not likely to forget (and plaintiffs will surely remind them) that the plan administrator is responsible for the dissemination of the SPD to plan participants.[66] Both fiduciary theory and arguments rooted in law and economics suggest that the plan administrator is best placed to prevent an error in the summary plan description, thus tipping the scales in favor of the plan participant.[67] Although claims of detrimental reliance and promissory estoppel have met with uneven fates over the years, it is also possible that a sense of justice — or perhaps just desserts — may lie within some decisions that give the terms of the SPD priority over the conflicting terms of the plan document.[68]

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62. *See, e.g.*, Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365 (3d Cir. 2003).

63. *Id.* at 378 (holding that "where a summary plan description conflicts with the plan language, it is the summary plan description that will control").

64. *See, e.g.*, Weis v. Accidental Death & Dismemberment Benefit Plan of Kaiser Found. Health Plan Inc., 442 F. Supp. 2d 850, 853 (N.D. Cal. 2006) (holding that "[t]he SPD's more generous language could reasonably create different expectations than the more onerous language of the Policy").

65. *See, e.g.*, Collinsworth v. AIG Life Ins. Co., 404 F. Supp. 2d 911, 916-17 (N.D. Tex. 2005) (ruling that "[t]he rule of contra proferentum that applies to ambiguous policy terms applies with equal force to ambiguous terms in the summary plan description").

66. 29 U.S.C. § 1021 (2000).

67. *See, e.g.*, *Frizzell*, 2007 WL 507043 (denying motion for summary judgment).

68. In *Burstein*, 334 F.3d at 380-81, the Third Circuit recognized that it parted company with some of the other circuits in ruling that a plan participant need not prove reliance in order to claim benefits on the basis of a conflict between an SPD and a plan document. Thus, in other jurisdictions, a plaintiff who is unable to show detrimental reliance on an erroneous SPD may not be successful in persuading a court to honor the terms of the erroneous SPD, rather than the terms of the accurate plan document. *See, e.g.*, Greeley v. Fairview Health Services, 479 F.3d 612 (8th Cir. 2007) (dealing with an SPD that contained a typographical error that indicated that benefits would

This type of jurisprudence generally bodes ill for the sponsor or fiduciary of an employee benefit plan. Plan sponsors who encounter this approach know that the SPD's terms may prevail even when the plan document clearly states that the terms of the plan document control any dispute. Moreover, a conflict between the SPD and the plan document is almost always raised when the terms of the SPD favor the participant, for the practical reason that plaintiffs are less likely to build their arguments on the strength of an SPD if the conflicting plan document actually provides a more favorable basis for their claim.

At least two drafting techniques have emerged in response to the practical problems encountered by plan sponsors who find that that their SPDs have run afoul of their plan documents. The first approach is to draft the SPD in a manner that minimizes the participant's reliance on its terms. This strategy might best be described by recalling the adage that "the best defense is a good offense." A fully executed strategy might involve several tactics: first, the use of words such as "may" rather than "shall"; second, repeated references to the sole discretionary authority of the plan fiduciaries to interpret ambiguous terms and supply missing terms; third, the inclusion of a clause that describes the employer's reservation of the right to amend the plan at any time, with or without notice; and fourth, the inclusion of the now familiar "Circular 230" language that reminds document readers not to rely on any representations as tax advice.[69] The purpose of each of these tactics is to discourage the participant from actual or feigned reliance on the content of the summary plan description. A barebones SPD that incorporates these features may leave the participant in some confusion about the content of his benefit plans.[70]

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be payable until age sixty-seven, when in fact the cut-off date was age sixty-five); *see also* Fitzpatrick v. Porter Cable Corp., No. 06-0385(DRD), 2006 WL 1084089, at* (D.N.J. April 26, 2006) (explaining that plaintiff's reliance on advice of human resources director was unreasonable when the plain terms of the SPD were unambiguous and erroneous advice was given more than one year prior to eligibility for plan benefits).

69. *See generally* David Pratt, *Standards of Practice for Pension Practitioners*, 39 J. MARSHALL L. REV. 667, 684-99 (2006).

70. These strategies can, of course, be undertaken without any intentional bad faith. However, the use of such techniques is also consistent with a "packaged lie in a formal situation," as described in the work of Luigi Anolli, Michela Balconi and Rita Ciceri of the Center for Communication Psychology at the Catholic University of Milan. Anolli et al., *supra* note 3, at 688. In reviewing previous research on linguistic styles associated with "packaged lies," this team found numerous and sometimes conflicting observations of techniques associated with lying, including:

> "an ambiguous and equivocal speech style" with "a scant number of factual utterances," the use of leveling terms such as "all" or "nobody," the selection of varying word choices and "a greater use of irrelevant and

The second approach sometimes adopted by plan sponsors might be called the "kill them with kindness" strategy. A plan sponsor might prefer to rely upon an SPD that so fully explains the terms and conditions of the plan that it is almost indistinguishable from the plan document itself. In some cases, the SPD actually does serve as the plan document, thereby collapsing any distinction between the functions of a governing document and a summary description.

The Eighth Circuit's 2007 opinion in *Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Gamboa* noted that Wal-Mart "attempted to eliminate ERISA land confusion in identifying the plan documents" by establishing a "plan wrap document" that set forth the general terms of the plan and incorporated by reference each "welfare program" established by the employer. [71] The court also stated:

> [A] written arrangement that is offered by one or more Employers and incorporated into this Plan by identification in Appendix A and which provides any employee benefit that would be treated as an 'employee welfare benefit plan' under Section 3(1) of ERISA if offered separately.[72]

While Appendix A listed an arrangement, "Wal-Mart Associates' Group Health Plan," the self-funded group health plan operated without a contract or a specific "written arrangement" as defined in the plan wrap document.[73] The court endorsed the plan administrator's decision to treat the summary plan description as the plan document.[74] The court's willingness to accept the SPD as

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> misleading information";
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> a "reticient and elliptic linguistic style by reducing the information content of the utterance to a bare minimum" and reliance on language that is "concise," "brief," "incomplete" and "typically assertive"; or
>
> linguistic "depersonalization" which permits "the interlocutor . . . [to] avoi[d] responsibility for his/her own utterances, shifting the communicative focus to external cues of the context" and which is characterized by "the use of the impersonal 'one' and of the plural 'we.'"

Anolli et al., *supra* note 3, at 688-89. The research team's own investigations considered lying as "a two-way relational game" that varies depending on whether the interlocutor is "an able or naïve liar" and whether the recipient is "a victim or . . . a probing agent." *Id.* at 708. They concluded that interlocutors who interacted with a "compliant and truth-biased hearer" were "verbose and repetitive. . . in an effort to be believable and persuasive," while a "suspicious and lie-biased recipient" evoked in the interlocutor a "concise, indirect and assertive" style of speech that avoided "supplying the required information." *Id.*

71. Admin. Comm. of the Wal-Mart Stores, Inc. Assoc.' Health and Welfare Plan v. Gamboa, 479 F.3d 538, 542 (8th Cir. 2007).

72. See *id.* (citing appellant's appeal).

73. *Id.* at 543.

74. *Id.* at 544.

an integral part of the plan document was made easier by two factors. First, the SPD stated that "portions of the book serve as part of the official plan document."[75] Second, the difficulty of locating and identifying a plan document is all too familiar to courts that have examined sadly disorganized writings with the difficult task of discerning which, if any, might be the plan document. Citing the Second Circuit's opinion in *Feifer v. Prudential Insurance Co. of America*,[76] the Eighth Circuit warned that refusing to treat the SPD as the written documentation required under ERISA would create a "nonsensical" incentive to employers to evade ERISA's mandates simply by arguing that no plan could exist in the absence of a formally designated plan document.[77]

The "kill them with kindness" strategy offers substantial advantages in terms of clarity and completeness. Such an SPD deters arguments that a participant did not know about a particular feature of a plan by providing detailed explanations of each medical procedure covered under a health plan or an in-depth explanation of the manner in which a pension benefit is calculated. The fast-paced changes in medical technology can make this a difficult assignment with regard to a health-care plan, although this problem can usually be resolved by relying on "catch-all" language to address future scientific developments. A more extreme version of this general approach might suggest drafting a single document that could serve both as SPD and plan document.[78]

Neither the "best defense" approach or the "killing with kindness" approach necessarily falls short of the standard of legal compliance. It is also probable that, for some participants, neither writing style will respond to any real need for information. If there are limits on the terms of the plan, then a participant who reads an SPD written in the style of the "best defense" certainly should know about it. Likewise, the "killing with kindness" SPD is not unlike the owner's manual to a vehicle; the reader might not want to know all of the information that it contains until he or she needs it. When the reader does need it, this second kind of SPD can prove to be a reassuring resource.

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75. *Id.*

76. *See* Feifer v. Prudential Ins. Co. of Am., 306 F.3d 1202, 1208 (2d Cir. 2002) (holding that ERISA was structured so that plans would be governed by written documents).

77. *Gamboa*, *supra* note 71, at 544.

78. B. David Joffe, *Are Your Welfare Benefit Plans in Order?* BOULT, CUMMINGS, CONNERS & BERRY, PLC, Mar. 23, 2006, http://www.boultcummings.com/Publications/detail.aspx?id=f664ceae-b3ff-48ad-ba86-0087c7e45bf5.

The practical problem with writing and reading an SPD, however, is that the statutory mandates are two-fold. First, the SPD has to provide adequate content for which it provides specific guidelines, and second, it must do so in a manner that is comprehensible.[79] Combined with the systemic problems associated with the drafting process, ERISA's lack of clear guidelines on what it means for an SPD to be comprehensible may reinforce the tendency of drafters to respond to their perceptions of external threats in a way that is more likely to reflect the interests of the plan sponsor and the plan administrator in defending the plan.

II. LYING, SECRETS AND SOCIAL ETHICS

> [H]e was trying to figure out how to lead that noble and meaningful life and coming to the conclusion that some deception was necessary.
>
> - DAN O'BRIEN, BUFFALO FOR THE BROKEN HEART.

A. Communication Challenges in General

1. Purpose of Communication: Social Relationship and Social Ethics

Any meaningful discussion of social ethics must begin by exposing the normative values by which a given society governs its relationships. It is possible, for example, that normative assumptions in different societies may produce very different ethical judgments with regard to very similar problems. In the United States, for example, the positive law set forth in ERISA and its related regulations is obviously one source that informs norms in workplace ethics. There are also unwritten cultural norms that govern relationships between employers and employees. The ethical meaning and assessment of any particular problem will necessarily vary in accordance with the stance one adopts towards normative goals.

Philosopher Sissela Bok has argued that it is possible to identify a minimum set of core values that are common to most human societies — in her words, "a limited set of values so down-

79. The work of Yuval Feldman and Alon Harel on the relative efficiency of promulgating generalized standards versus specific rules goes some way towards explaining the difficulty in enforcing the requirement that SPDs be comprehensible. Feldman and Harel argue that where policy seeks to enforce behavior that is contrary to social norms, legislation will be more effective when it sets forth specific rules. In contrast, "[s]tandards provide people with more room to interpret reality in a way that supports their self-interest." Yuval Feldman & Alon Harel, *Social Norms and Ambiguity of Legal Norms: An Experimental Analysis of the Rule v. Standard Dilemma,* in STANDARDS, RULES AND SOCIAL NORMS 20 (2006), *available at* http://www.ssrn.com.

to-earth and so commonplace as to be most easily recognized across societal and other boundaries."[80] She proposes three categories of values that must be addressed in order for any group of people to function in community: (1) "positive duties regarding mutual support, loyalty, and reciprocity"[81]; (2) "negative duties to refrain from harmful action"[82]; and (3) "norms for at least rudimentary fairness and procedural justice in cases of conflict regarding both positive and negative injunctions."[83] Bok argues that these "minimalist moral values" can serve as the "basis on which to build negotiation and dialogue about how . . . they are honored" and the "criteria and a broadly comprehensible language for critique of existing practices."[84] Bok writes of trust as a "social good" and argues:

> Trust is the prime constituent of the social atmosphere. It is as urgent not to damage that atmosphere by contributing to the erosion of trust as it is to prevent and attempt to reverse damage to our natural atmosphere. Both forms of damage are cumulative; both are hard to reverse. . . . When trust is damaged or decimated, through violence, dishonesty, betrayal, injustice, or the failure to nurture the young and those in need, these relationships suffer.[85]

The effort to identify and to affirm common values makes it possible for the members of different groups to trust one another.

In some ways, ERISA regulates the disclosure of the terms of an employee benefits plan with a similar emphasis on the importance of establishing "trust" and mutual understanding between the plan sponsor, the plan administrator and the participant.[86] Because the relationship between narrator and

80. SISSELA BOK, COMMON VALUES 1 (Univ. of Mo Press 2002). Bok understands that "[t]he very possibility of a common basis or foundation for morality, long debated throughout the history of philosophy, has been increasingly challenged in recent decades." Sissela Bok, *What Basis for Morality? A Minimalist Approach*, 76 MONIST 349, 350 (July 1993). Instead of demanding "absolute guarantees or unanimity," a "minimalist approach . . . seeks out the values that are in fact broadly shared." *Id.* at 353. Bok argues:

> A basis for morality thus interpreted calls for no extrahuman or superhuman guarantees of objectivity or absoluteness. It offers, rather, a common groundwork or footing upon which to undertake dialogue, debate, and negotiations within and between otherwise disparate traditions: a set of values that can be agreed upon as a starting point for negotiation or action.

Id. at 354.

81. BOK, COMMON VALUES, *supra* note 80, at 13.

82. *Id.* at 15.

83. *Id.* at 16.

84. *Id.* at 19.

85. *Id.*

86. For a discussion of the importance of trust law concepts for the protection of ERISA plan participants, see Schmall, *supra* note 9, at 279 (suggesting a legislative solution). For a discussion of the nature of trust and the extent to which a breach of trust may be rectified, see Maurice E.

reader is also a relationship between fiduciary and beneficiary, any ethical analysis of an SPD must take into account the social relationship between these parties. Even the most benign SPD implicates the central concerns of social ethics — such as the question of what defines the right relationship between people — if only because human beings can manipulate and misunderstand the language in which the SPD is written.[87] Looking at the SPD as a problem for social ethics recasts the problem of accuracy in summary plan descriptions in a different mold. If we look at mistakes and misrepresentations in an SPD as a social ethics problem, can we find a social ethics response?

The SPD, like any other document, is a means of communication between a narrator and a reader.[88] Unlike a novel

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Schweitzer, John C. Hershey & Eric T. Bradlow, *Promises and Lies: Restoring Violated Trust* 101 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 1 (2006) (discussing trust issues).

87. Misunderstandings can also arise simply because a speaker assumes that his listener has greater information than is actually the case. A recent study by communications specialists Shali Wu and Boaz Keysar of the University of Chicago produced the following conclusions:

> The more information participants shared, the more they used their own knowledge. This facilitated communication when they talked about shared objects, but increased confusion with information that was privileged to the directors. High-overlap directors [speakers whose knowledge of a topic significantly overlapped with the knowledge of their listeners] used more object names that were privileged compared to low-overlap directors, and high-overlap addressees were more confused than low-overlap addressees when trying to identify objects that were privileged to the directors. This shows that increase in knowledge overlap could benefit communication globally but could also introduce local inefficiencies.

Shali Wu & Boaz Keysar, *The Effect of Information Overlap on Communication Effectiveness*, 31 COGNITIVE SCIENCE 169, 177 (2007).

88. Recent work on the literary analysis of business texts is especially helpful on this point. Daphne Jameson advocates "increasing awareness of the difference between the writer's implications and the reader's inferences, a distinction often overlooked in analyses of both literary and nonliterary texts."*See* Daphne A. Jameson, *Implication Versus Inference: Analyzing Writer and Reader Representations in Business Texts*, 67 BUS. COMM. Q. 387-88 (2004). She explains:

> The implied writer is the writer's self-representation in the text. The whole live human being who writes is never exactly the same as the implied writer because it is impossible and unnecessary to convey all the elements of a person's character, personality, roles, and values in a given text. . . .
>
> The implied reader is the writer's expression of who the intended reader is. The whole, live human beings who read a text are not the same as the qualities the writer attributes to them.

Id. at 388. Complementary paradigms (inferred writer, inferred reader) describe the reader's assessment of the text. Thus, Jameson's work suggests that attentiveness to the "implied writer" and the "inferred writer" of an SPD will reveal both the persona that the drafter has adopted and evoke the reader's assumptions about the trustworthiness of this narrative voice.

or a newspaper article, however, the SPD's function is not simply to entertain or to provide a daily update of current events.[89] No one reads an SPD for pleasure or for daily news flashes. Unlike a contract, the SPD is not a collective expression of an agreement between equally placed consenting parties. The plan administrator and the participant do not bargain together to create language that meets their mutual needs. Instead, the function of the SPD is to provide and explain information about the benefits that the narrator must provide to the participants under the terms of a plan. This particular communication, therefore, does not memorialize an exchange between narrator and reader, but instead constitutes the fulfillment of the narrator's fiduciary obligation to the reader.[90] The SPD does not simply create or acknowledge a relationship between the narrator and reader. Instead, the SPD performs an essential function of that relationship — the duty of the narrator to act in the best interest of the participant by informing him or her of the terms of the plan.[91]

The remainder of this section considers the practical applications of trust as a social good in light of the reflections of Aristotle, Thomas Aquinas and Sissela Bok on veracity and lying. Each philosopher examines the complexity of communication in light of its social consequences. Bok recognizes Aristotle and Aquinas as fellow travelers in the search for moral choice,[92] and

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89. *See id.* at 388-89 (describing "[t]he process by which readers interact with a text, become aware of the writer behind the words, and participate in the creation of negotiated meaning is similar whether that text is a business report or bildungsroman, memo or melodrama, e-mail or elegy.").

90. *See, e.g.*, 29 U.S.C. § 1001(b) (2000) (containing Congressional findings and declarations of policy relating to the fiduciary duty addressed by ERISA).

91. It would be a mistake to regard the fiduciary function of the plan administrator solely as a product of ERISA's mandates. In addition to any requirements of ERISA, empirical research suggests that workers value employer-provided health insurance precisely because they believe that they would not be able to obtain comparable benefits on their own, even if they were to receive replacement income or cash contributions towards the purchase of health insurance. *See* Paul Fronstin, *The Tax Treatment of Health Insurance and Employment-Based Health Benefits*, ISSUE BRIEF NO. 295, EMP. BENEFIT RES. INST., Wash. D.C. June 2006, at 10. Moreover, workers expressed little confidence in their ability to make the best choice of health plans without the employer's participation in the decision. *Id.* at 21. The same report suggests that workers may be skeptical that they would actually receive cash income in replacement of health benefits. *Id.* at 13. Each of these observations suggests that even if ERISA did not mandate a fiduciary relationship, workers who are covered by employment-based health plans would nonetheless look to their plan sponsor or plan administrator to act as agents by negotiating with insurers on their behalf.

92. Bok, *supra* note 6, at 8; *see also* Sissela Bok, Lowell Lecture: The Pursuits of Happiness, (Oct. 14, 2003), *available at* http://www.pbs.org/now/society/happiness.pdf (discussing views of human happiness against the

expands their discussion to address modern business and professional ethics. Her work deliberatively explores the effect of lying, secrecy and other challenges in communications on social relationships in our modern world. In a New York Times review of Bok's 1983 book entitled *Secrecy*, Richard Sennett observed,

> The aim of [Bok's] book is to fashion an ethics of secrecy — when it is justified, when it is not. Like the California Supreme Court in the Tarasoff case, she is disposed to think that secrecy must end when public peril begins. What makes "*Secrets*" complex, however, is the author's acknowledgment that legal definitions of proper and improper secrecy will always miss the psychological and, indeed, theological rationales for secrecy. . . . Basically, this book argues that there is a break between secrecy in private and in public. What makes secrecy important as an interior experience cannot therefore easily be used to justify professional, military or governmental secrecy.[93]

It is in Bok's recurrent insight — that legal definitions do not always account for psychological or moral (in Sennett's words, "theological") considerations — that I hope to find the beginnings of solution for the problem of miscommunication in employee benefits.

2. *Problems in Communication: Aristotle and the Social Context of Virtue and Vice*

The social or relational ethics of communication is not a strictly modern concern.[94] Aristotle, for example, includes veracity among his list of virtues and specifically presents its characteristics in the context of human relationships.[95] Thomas

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background of human suffering, poverty, desease, and the inevitability of death); *see also* Beth Potier, *Sissela Bok Stalks the Notion of Happiness; Presents 'Field Notes' from Travels Through Happiness Studies*, HARVARD GAZETTE (Oct. 16, 2003) (reporting on Bok's public lecture on her academic work on "happiness"), *available at* www.hno.harvard.edu/gazette /2003/10.16/19-bok.html.

93. Richard Sennett, *Light on a Dark Subject*, N. Y. TIMES, Feb. 20, 1983, at 3.

94. Bok writes:

> Over the past decades, I have witnessed the growth and the increased sophistication of different domains of practical or applied ethics, such as those of medical or legal or engineering or government ethics. The study of practical ethics had paled into insignificance in American higher education in the first half of this century, after having been central to classical and medieval education, as well as to the academic curriculum in many societies up through the first half of the nineteenth century. Many of the greatest thinkers—Aristotle, Confucius, and Aquinas among them—had taken for granted that the study of ethics concerned how we would live our lives and best deal with the moral problems we encountered.

Bok, *supra* note 91, at 8.

95. ARISTOTLE, NICOMACHEAN ETHICS 1127a13-1127b32 (Roger Crisp ed.,

Aquinas, in his detailed *Commentary on Aristotle's Nicomachean Ethics*, observes that Aristotle's discussion of "amiability" and "veracity" marks a turning point between his analysis of the virtues in relationship to "external things" and the more dynamic consideration of "the virtues that relate to human actions."[96] Thus, Aristotle's understanding of both amiability and its close cousin, veracity, touch on the general area of (in Aquinas' words) "liv[ing] agreeably with others [through] proper actions in particular cases."[97] Aristotle himself notes that the "nameless" mean between obsequiousness and quarrelsomeness (a mean that Aquinas refers to as amiability[98]) bears a "remarkable resemblance to friendship," although it lacks friendship's "passion or affection for people with whom we associate."[99] A person whose habits are amiable "approves what he should and also disapproves what he should" and "act[s] similarly with strangers, intimates, and outsiders."[100]

Aristotle locates his discussion of veracity in the same realm of social relations as amiability (and, by implication, friendship).[101] Veracity concerns the "manifest[ation of] truth and falsehood by words, operations, and pretense."[102] A truthful person "seems to observe moderation, for he is a lover of the truth, and, being truthful where it makes little difference, he will speak the truth all the more where it does matter."[103] Aquinas observes that Aristotle's understanding of the virtue of truthfulness touches on social habits; a truthful person tells the truth with the aim of "living pleasantly with others, not by reason of love but by reason of its habit."[104] Thus, veracity contributes to the right ordering of social relationships by a proper habit of truth-telling, while boasting or false modesty distorts the possibility of "living pleasantly with others."

Aristotle's concern over the social cost of lying and misrepresentation reflects his belief that the habit of virtue was the central method by which people, individually and collectively, would achieve happiness. If veracity contributes to the possibility of social happiness, then boasting, false modesty and lying

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Cambridge University Press, 2000) (350 B.C.).

96. ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS ¶816 (C. I. Litzinger, O.P. trans., Dumb Ox Books, 1993) (c. 1270).

97. *Id.* at ¶ 823.

98. *Id.*

99. ARISTOTLE, *supra* note 95, at 1126b11, 1126b20-22. For an excellent discussion of the possible legal implications of "friendship" and an insightful discussion of Aristotle's perspective, see Ethan J. Lieb, *Friendship & the Law*, 54 UCLA L. REV. 1 (2007).

100. ARISTOTLE, *supra* note 95, at 1126b16-19, 1126b22-26.

101. *Id.* at 1127a13-14.

102. *Id.* at 1127a17-20.

103. *Id.* at 1127b3-7.

104. ST. THOMAS AQUINAS, *supra* note 96, at ¶ 838.

threaten the ability of individuals and groups to reach that goal. In *The Politics*, Aristotle notes, with some piquancy, "[P]eople suppose that it is sufficient to have a certain amount of virtue, but they set no limit to the pursuit of wealth, power, property, reputation and the like."[105] In Aristotle's view, such an attitude is shortsighted because "it is not by means of external goods that men acquire and keep the virtues, but the other way round."[106] He writes:

> [T]he life which is best for men, both separately, as individuals, and in the mass, is the life which has virtue sufficiently supported by material resources to facilitate participation in the action that virtue calls for.[107]

In other words, lack of attention to the virtues jeopardizes individual well-being, impoverishes social relationships and, ultimately, the stability of the state.

Willfully abandoning the pursuit of virtue also seems to have social overtones. Lying, like other deviations from virtue, comes most easily when:

> people think that they can themselves most easily do wrong to others without being punished for it if they possess eloquence, or practical ability, or much legal experience, or a large body of friends, or a great deal of money.[108]

While this belief may be ill-advised, it reflects the wrong-doer's consciousness of living in social relationships and his implicit understanding that deviations from virtue lead to "doing wrong to others."

3. Problems in Communication: Aquinas and the Taxonomy of Lying

Thomas Aquinas saw "truth" as having two meanings. First, truth may be regarded as "a certain equality between the understanding or sign and the thing understood or signified."[109] This definition presents "truth" as a fact that is measurable by observation. Second, "truth may stand for that by which a person says what is true, in which sense one is said to be truthful."[110] This explanation of "truth" and "truthfulness" describes a virtue, understood by Aquinas to be a habit that tends towards the good.

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105. ARISTOTLE, THE POLITICS 1323a14 (T.A. Sinclair trans., Penguin Books, 1981) (c. 335 B.C.).
106. *Id.* at 1323a38.
107. *Id.* at 1323b36.
108. ARISTOTLE, RHETORIC, 1372a10-15 (W. Rhys Roberts trans., Franklin Library, 1981) (c. 335 B.C.).
109. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Q.109, A.1 (Fathers of the English Dominican Province, trans., Christian Classics, 1981) (c. 1275).
110. *Id.*

Aquinas' explanation of lying is more complex. He takes pains to distinguish between falsehood and lying. Three factors bear upon whether a statement is a lie or a falsehood: "the falsehood of what is said, the will to tell a falsehood, and finally the intention to deceive." Thus, Aquinas distinguishes between intentional falsehoods designed to deceive another party and falsehoods that result from error or mistaken assumptions. He explains:

> [T]he essential notion of a lie is taken from formal falsehood, from the fact, namely, that a person intends to say what is false; wherefore also the word *mendacium* (lie) is derived from its being in opposition to the *mind*. Consequently if one says what is false, thinking it to be true, it is false materially, but not formally, because the falseness is beside the intention of the speaker: so that it is not a perfect lie, since what is beside the speaker's intention is accidental, for which reason it cannot be a specific difference. If, on the other hand, one utters a falsehood formally, through having the will to deceive, even if what one says be true, yet inasmuch as this is a voluntary and moral act, it contains falseness essentially and truth accidentally, and attains the specific nature of a lie.[111]

While the *Summa Theologica* clarifies Aquinas' disdain for lying, he does distinguish between "telling a lie in order to deliver another from any danger whatever" (which he sees as unlawful) and the lawful practice of hiding the truth "prudently" by "keeping it back."[112]

Aquinas saw both aspects of truth—the verifiable fact and the disposition toward the good—in social terms. He wrote:

> Since man is a social animal, one man naturally owes another whatever is necessary for the preservation of human society. Now it would be impossible for men to live together, unless they believed one another, as declaring the truth one to another. Hence the virtue of truth does, in a manner, regard something as being due.[113]

Likewise, in theological terms, Aquinas sees lying as sinful not only because of "its inordinateness," but also because of the injury to "one's neighbor."[114]

This understanding of truth and lies reveals interesting consequences for the kind of statement that promises future action. Consider Aquinas' views on whether promises must be kept:

> A man does not lie, so long as he has a mind to do what he promises, because he does not speak contrary to what he has in mind: but if he does not keep his promise, he seems to act without faith in changing

111. *Id.* at Q.110, A.1.
112. *Id.* at Q.110, A.3.
113. *Id.* at Q.109, A.3.
114. *Id.* at Q.110, A.3.

> his mind. He may, however, be excused for two reasons. First, if he has promised something evidently unlawful, because he sinned in promise, and did well to change his mind. Secondly, if circumstances have changed with regard to persons and the business in hand. For, as Seneca states, for a man to be bound to keep a promise it is necessary for everything to remain unchanged: otherwise neither did he lie in promising—since he promised what he had in his mind, due circumstances being taken for granted—nor was he faithless in not keeping his promise, because circumstances are no longer the same.[115]

4. *Ethical Parameters for Measuring Communication Choices: Sissela Bok*

Sissela Bok has written extensively on lying, secrecy, deception and other aspects of moral choice. Her best known book *Lying: Moral Choice in Public and Private Life* appeared in 1978 (well before the corporate scandals of the present day but not that long after Watergate).[116] She followed this book with *Secrets: On the Ethics of Concealment and Revelation* in 1983 and, more recently, *Common Values*.[117]

In each of these works, Bok treats lying and secrecy as individual acts with profound consequences for the larger community.[118] Her interest in this topic began with a study of placebo prescriptions in clinical health care settings. She observed that many physicians "talk about such deception in a cavalier, often condescending and joking way, whereas patients often have an acute sense of injury and a loss of trust at learning that they have been duped."[119] In her words, "For [the patients] to be given false information about important choices in their lives is to be rendered powerless. For them their very autonomy might be at stake."[120] Surely, no plan administrator has ever created a "placebo" employee benefit plan, but the communication between physician and patient suggests a direct parallel to the communication between the plan administrator and a plan participant.[121]

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115. *Id.* at Q.110, A.3.

116. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (Pantheon Books, 1979).

117. SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION (Pantheon Books, 1982); SISSELA BOK, COMMON VALUES (University of Missouri Press 2002).

118. BOK, *supra* notes 116, 117.

119. *Id.*

120. *Id.* at xvii.

121. *See, e.g.*, Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201 (Mar. 1994) (examining many aspects of doctor/patient communications).

One of the critiques of Bok's work is that she is long on theory and short on solutions.[122] This critical approach would sum up her work as "lying is bad, so don't do it."[123] I have to admit a certain sympathy with Bok's position, however, even when it is stated in such an unnuanced and reductionist way. Here, Aristotle, Aquinas and many more modern commentators would agree with her. Lying is bad, and most of the time we probably should not do it, so why not say so? Certainly, Bok recognizes that some lies serve a social utility, but her general arguments do emphasize a moral choice or call to virtue that is not easily accomplished through legislative demands.[124] Indeed, Bok's more recent work suggests a discomfort with attempts to arrogate to one person or party the ability to define terms "for what is and is not social well-being."[125] Moreover, Bok's work also contemplates a more critical role for the person who hears a statement that may or may not be a lie. In a 1999 speech to a gathering of journalists, Bok preached in favor of the "good, old-fashioned editorial virtue" of "incredulity," which she called "indispensable to the rest of us as well."[126]

Critics find Bok's proposals for ethics codes and similar voluntary standards to be an uncertain guide to those who might wish to stamp out lying in society.[127] Mandatory codes of ethics and disclosure policies do go some way to encouraging candor, but do not, in themselves, guarantee compliance. For instance, a person may choose to lie and bear the punishment or may find a reason to justify (perhaps even glorify) noncompliance as a morally virtuous choice. In such cases, there is little punitive sanctions can do to shape or reform the prohibited conduct.

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122. *See, e.g.*, William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433 (1999).

123. *Id.*

124. BOK, *supra* notes 116, 117.

125. Sissela Bok, *Rethinking the WHO Definition of Health* 9 (Harvard Center for Population and Dev. Studies Working Paper Series Volume 14, No. 7 2004) (pointing out dangers of totalitarian definitions of terms such as "complete social well-being").

126. Sissela Bok, Remarks to the American Society of Newspaper Editors Journalism Credibility Project: On Credibility (April 1, 1998), *available at* http://www.asne.org.

127. An example of this type of criticism may be found in Margaret Battin's review of Bok's contribution to a book in which Gerald Dworkin and R.G. Frey contribute essays in favor of euthanasia, while Bok argues against the practice. Battin argues that Bok's arguments are essentially a "slippery-slope set of concerns about social effects" and "not fully persuasive." She notes that the slippery-slope argument assumes "predictive empirical issues" which, without evidence, she finds to be "unreliable" and that such arguments "tend to block out other major concerns that should be regarded as central too. . . " Margaret Battin, *On the Structure of the Euthanasia Debate: Observations Provoked by a Near-Perfect For-and-Against Book*, 25 J. HEALTH POLITICS, POL'Y AND LAW 415, 421-22 (2000).

However, it is not Bok's proposed solution that interests me so much as her explanation of the difference between lying and secrecy and the manner in which she conveys the social consequences of these actions in a network of relationships.[128] Bok argues that one of the stumbling blocks in the path of those who are uneasy with lying and deception is the practical acknowledgment that telling the whole truth and nothing but the truth is "out of reach."[129] She sees the preoccupation with truth as the reason why lying is a problematic topic both for those who believe that their religious or political beliefs give them access to the complete truth (thus justifying lies in the name of that truth) and for those who are skeptics and do not believe there is any truth at all (you will never get there, so why bother?).[130] But she argues that "this fact has very little to do with our choices about whether to lie or to speak honestly, about what to say and what to hold back."[131] These choices, she says, can be articulated and evaluated.

Bok argues forcefully that a lack of attention to applied ethics reduces our understanding of the moral dimensions of human life and the way in which humans treat each other. Instead, we should acknowledge that "it is possible to go beyond the notion that epistemology is somehow prior to ethics" or the notion that one's personal access to truth may be so privileged as to justify any lie that serves the truth.[132]

B. Ethical Perspectives in Application: Minimizing the Confusion

The concept of applied ethics recalibrates the problem of the incomprehensible SPD. If, as Aristotle, Aquinas and Bok all suggest, the "best" life is a life that tends towards the good and allows others to follow in the same direction, inaccuracies — whether outright lies, omissions of important facts or simple miscommunications — will detract from the pursuit of happiness for all who are affected by them. A writer's lies will distract not only his reader but also himself from the pursuit of the good and will fray the social fabric for both.[133] If the ultimate happiness of

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128. BOK, *supra* note 116, at 82-83.
129. *Id.* at 4.
130. *Id.* at 6-7.
131. *Id.*
132. *Id.* at 13.
133. Bok's reflections on the death of the French writer Simone Weil are illustrative on this point. In sympathy with the "victims of war, oppression, poverty and disease," Weil refused to eat, finally causing her own death (a conclusion reached by the coroner who examined her body). During the months leading to her death, however, Weil composed letters to her parents that spoke favorably of British food and kept them from the news of the dire consequences of her refusal to eat. Bok's portrait of Weil, while sympathetic, makes it clear that this strategy was tantamount to lying and cause profound

all depends upon the common pursuit of the virtuous life, then it makes sense to lessen the opportunity costs of doing good and increase the punitive effect of doing wrong. From a social ethics standpoint, we might ask how the process of writing SPDs can be changed so that writing an accurate and comprehensible SPD is the most efficient and simple choice.

To adopt an Aristotelian conceit, consider the possibility that a lengthy and intricate SPD might be akin to boasting, while a barebones approach replete with disclaimers suggests false modesty. For example, assume you have a fifty-page plan document in front of you and that the terms it contains are all correct. Let us go further and assume (this is not remotely possible) that the document fully explains every aspect of the plan, including the effect of prevailing market forces. Boasting might aggrandize the terms of the plan and the importance of reiterating every detail. However, empirical research has shown us that this approach — as Aristotle might have predicted — simply leaves most participants confused. Aquinas might go further and question whether a boastful SPD is even truthful.

Neither extreme responds fully to the aspiration underlying ERISA's disclosure requirements. An SPD that contains numerous disclaimers also suggests that anything short of photocopying that document is inaccurate. Along these lines, false modesty suggests that it does not really matter how one convey this information to participants, because one must always guard against the possibility that they might conclude that the plan provides more than it really does.

Neither of these extremes fulfills the mandates of ERISA. What Aristotelian philosophy might describe as the "mean" between these positions emerges in ERISA's exhortations of fiduciary obligations. The guiding principle of ERISA is that fiduciaries must act in the best interest of the participants of a plan. In terms of communicating plan terms, the statute is quite clear: An average participant must be able to understand. From an Aristotelian perspective, one might view this mandate as a call to practical virtue.

distress for Weil's inconsolable parents. Bok notes that Weil's "pre-occupation" with "self-abnegation" required, ironically, "that her focus stay on herself." The lies served Weil's purposes but not without imposing a cost on the social circles in which she lived. Such a lapse in a person of Weil's stature reinforces how difficult it can be to pursue a thoroughly moral life. Bok writes, "[a]n exemplary life is one we find astonishing, not because it is in some sense perfect from a moral point of view but because it is lived in the belief that it matters to think through how one should live, what goals one should strive for, and what it would mean to take them seriously." Sissela Bok, *"No One to Receive It"?: Simone Weil's Unforeseen Legacy*, 12 COMMON KNOWLEDGE 252 (2006).

III. UNIFORMITY AND UNDERSTANDING

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
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> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."
>
> - LEWIS CARROLL, THROUGH THE LOOKING GLASS.

In the broadest terms, this Article calls for a conscious effort on the part of plan sponsors and plan administrators to create SPDs that will add to trust in the workplace by providing transparent and understandable explanation of employee benefit plans. Yet the practical difficulties summarized in the first part of this Article are likely to be with us as long as an employer's decision to offer benefits remains voluntary and primarily responsive to the needs and aspirations of each individual workplace. ERISA continues to charge plan administrators with the responsibility for drafting SPDs and plan participants are unlikely to achieve higher rates of literacy than the American population in general.

When the normative values of trust and veracity are applied in a workplace setting, an obvious goal emerges for those involved in human resources administration. Social trust suggests conditions that allow plan administrators and participants to reach a common understanding of the ties that bind them — in this case, the employee benefit plan as described by the SPD.

The adoption of standardized definition of key terms — whether mandated by government or motivated by industry norms — may assist consumers in developing an understanding of the terms used in SPDs. For example, standardized terms are used in commercial law for the purpose of improving consumer understanding concerning warranties.[134] Definitions of terms relevant to employee benefits could likewise be standardized, either at the behest of the government or through industry responsiveness to consumer concerns. Many examples of potentially useful definitions are available from a wide variety of sources.

In some cases, for example, individual insurance companies have adopted uniform definitions of terms that are in widespread

134. *See, e.g.*, The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301 (2000) (attempting to federalize and standardize warranty law).

usage in the policies that insure the benefits under some plans or in the documents developed for the self-insured plans that the insurance company administers. For example, the term "experimental" is often used to describe the conditions under which certain medical procedures may be excluded from coverage in an employee health plan. A single insurance carrier may actually insure or serve as the third-party administrator for a large number of employers. By adopting a uniform definition of "experimental" in its insurance products and encouraging the use of the same definition in self-insured plans that it administers, the insurance carrier also encourages a common understanding of the term. While there is some sense in which the increasing uniformity of insurance policies suggests an organic, grassroots trend towards creating common definitions, serious consideration must be given to the wisdom of concentrating such a degree of unregulated discretion in the hands of private entities like insurance companies. Insurance companies are hardly disinterested parties when it comes to the payment of employee benefits.

An alternative source for uniform definitions might be found among voluntary industry associations that are focused specifically on supporting human resource professionals who are charged with the administration of employee benefit plans. While it is unlikely that such associations are completely free of bias, their specific interests in employee benefits policy may be more diffuse than the financial implications of individual insurance providers. In February 2006, the National Association of Insurance Commissioners charged its Consumer Protection Working Group to "develop minimum guidelines for the development and implementation of effective disclosures as well as standards to use in assessing disclosure effectiveness."[135] The same charge also urged the working group to identify "situations where disclosure is not reasonable or sufficient consumer protection."[136] In addition, the National Association of Insurance Commissioners provides Model Laws on many topics that could serve as the basis for state regulation or, in the alternative, as drafting guidelines for sponsors of private plans.[137]

Both insurance companies and voluntary associations will

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135. National Association of Insurance Commissioners, *Proposal for the Development of Minimum Guidelines for Consumer Disclosures*, NAIC, Feb. 27, 2006, http://www.naic.org (last visited Apr. 23, 2007); *see also* National Association of Insurance Commissioners, *2007 Charges to Committees*, NAIC, Dec. 10, 2006, http://www.naic.org/documents/committees_Charges.pdf. (last visited Apr. 23, 2007).

136. *Proposal*, *supra* note 135.

137. *See* National Association of Insurance Commissioners, *Model Regulation Service*, NAIC, (Oct. 2006), http://www.naic.org/documents/committees_models_index.pdf (last visited May 9, 2007).

likely influence the development of "best practices" in employee benefits administration. The best practices concept, which encourages the voluntary adoption of uniform standards for conducting business, is familiar to business professionals.[138]

Both federal and state governments serve as additional sources for the promulgation of uniform terms. Congress already provides the barebones of definitions in the statutes that impact employee benefit plans. The administrative agencies that oversee employee benefits regulation have issued scores of model plan amendments and trust language that creates uniformity. For example, the Bureau of Labor Statistics National Compensation Survey uses specific standardized definitions of health insurance terms that are reviewed periodically by the federal government's Interdepartmental Committee on Employment-based Health Insurance Survey.[139] At the state level, detailed legislation and regulation concerning the content of insurance policies also set forth usable definitions that could eventually become standardized.[140]

Clearly, a decision to use standardized terms would raise numerous practical questions — which terms? whose definitions? what kind of enforcement? — to name just a few. I do not mean to dismiss the difficulty of answering these questions or implementing the answers. In addition, consumer experience with the standardization of warranty terms under the Magnuson-Moss Act has not been an unqualified success.[141] While the terms that are used by the Magnuson-Moss Act — full and limited warranty — are in frequent use in commercial transactions involving consumers, the consumer's ability to understand the subtleties of these terms remains unclear.[142] However, simply because

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138. *See, e.g.*, Boris Kozolchyk, *The UNIDROIT Principles as a Model for the Unification of the Best Contractual Practices in the Americas*, 46 AM. J. COMP. L. 151 (Winter, 1998) (examining several specific elements of best practices ideas); Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And it Just Might Work)*, 35 CONN. L. REV. 915 (Spring, 2003) (reporting on the European best practices system as a model for American reform); Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975 (suggesting a best practices approach to securities regulation).

139. Department of Labor, Bureau of Labor Statistics, *Definitions of Health Insurance Terms*, http://stats.bls.gov/ncs/ebs/sp/healthterms.pdf (last visited May 10, 2007).

140. *See, e.g.*, Illinois Insurance Code, 215 I.L.C.S. 5/2 (2006) (containing definitions of relevant insurance terms); New York Insurance Code, NY CLS Ins. § 107 (2006) (standardizing definitions of insurance terms).

141. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (2000).

142. *See generally* Michael J. Wisdom, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979); Ellen M. Moore & F. Kelly Shuptrine, *Warranties: Continued Readability Problems after the 1975*

consumers have encountered problems with the implementation of programs such as the Magnuson-Moss Act does not mean that similar education efforts are bound to fail in the employee benefits arena.

In a larger sense, standardization of terms responds to the concerns that language may be manipulated or misunderstood in a way that breaches the trust between the plan administrator and the plan participant. It is not impossible to deceive or to misunderstand when communications are set forth in standardized language, but the use of clear and universal terminology certainly creates one more protective barrier between the reader and the possibility of deception or confusion. If, as Sissela Bok argues, social trust is an imperative goal for those who aspire to an ethically grounded society, then using standardized language is one small step in that direction.

Magnuson-Moss Warranty Act, 27 J. CONSUMER AFFAIRS 23 (1993).