

## **THE CLIENTS AREN'T LISTENING**

### **Whitfield and Cohen (A haberdashery in Independence, Missouri?)**

On March 7, 1988, Judge Sweet of the Southern District Court of New York found Malcolm Cohen personally liable for \$637,412.00 for violating his fiduciary responsibilities with respect to the investments of the Miller Druck employee benefit plan. Whitfield v. Cohen 9 EBC 1739

According to the Court and the Department of Labor, for a trustee to prudently invest ERISA plan assets, he must do the following:

1. Evaluate the qualifications of the investment person.
2. Examine his experience in the type of investments you want. (If you want government bonds, what is his experience in government bonds?)
3. Examine his experience with other plans like yours. (By implication, you do not want to be the first pension fund on the block with a new money manager.)
4. Evaluate the educational credentials of the person responsible for investing.
5. Ascertain that the manager has the appropriate federal and state registrations as an investment manager.
6. Make or have made an independent assessment of the manager's qualifications including:
  - a. His reputation in the investment industry.
  - b. The reference of other clients.
  - c. The advice of a consultant.
7. Examine his past performance record.
8. Determine the reasonableness of the fees.
9. Review the contract and other documents which govern relationship.
10. Insure that adequate reporting and periodic accounting is made available.

With respect to the investments of ERISA related funds, the frightening question is, "How many other trustees out there aren't listening"?

In January, 2011, the SEC recommended a universal standard of fiduciary that would apply to financial planners, investment advisors and brokers.

Amidst congressional disagreement (what's new about that?), final rule making will probably occur in 2011.

If you think back to how courts apply the principles of the "Duck Theory" and a litany of cases against stockbrokers, it really doesn't matter. The standard applies in practice.