

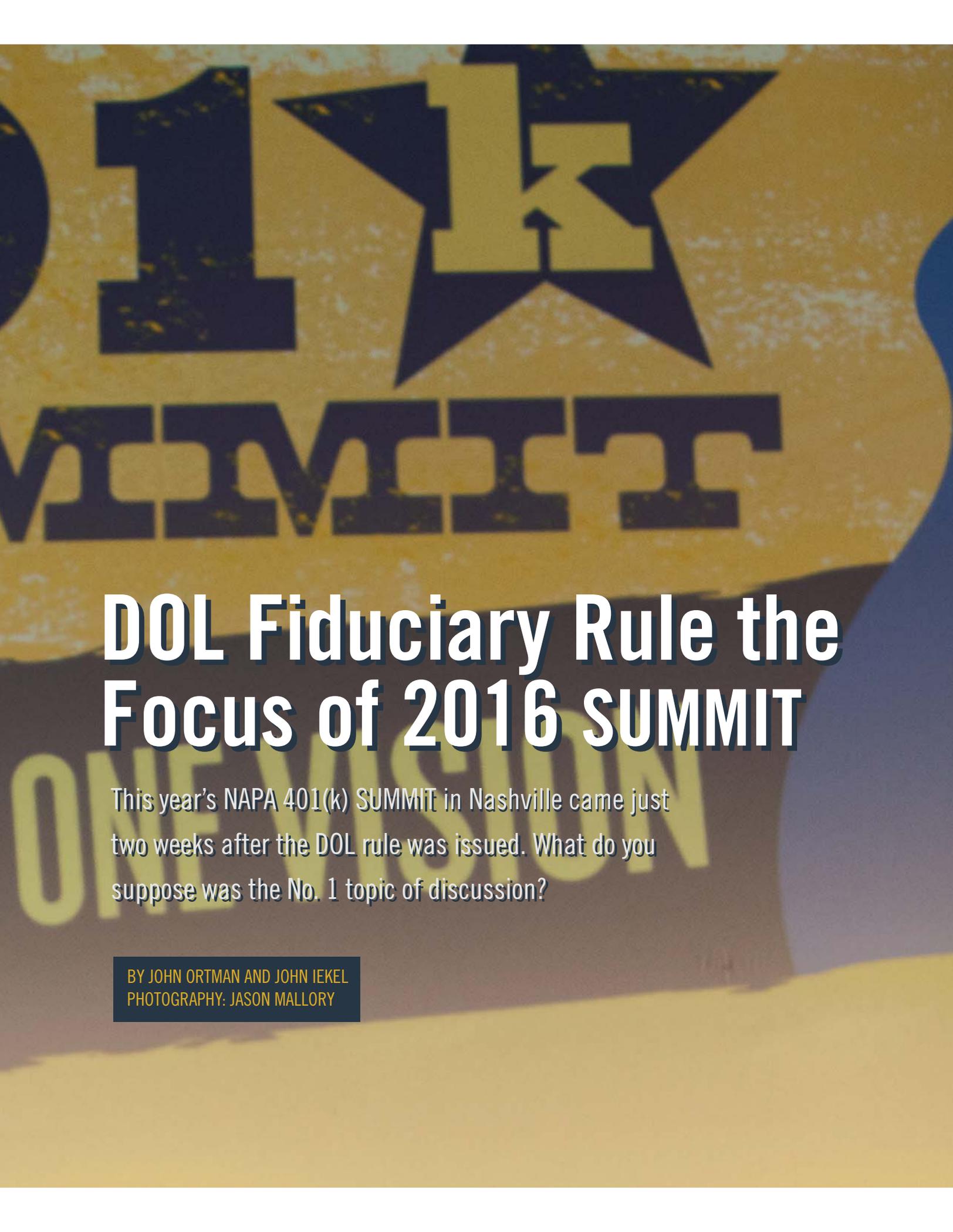
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NAPA Executive Director Brian Graff provided a treetop-level overview of the DOL's final fiduciary rule.



# DOL Fiduciary Rule the Focus of 2016 SUMMIT

This year's NAPA 401(k) SUMMIT in Nashville came just two weeks after the DOL rule was issued. What do you suppose was the No. 1 topic of discussion?

BY JOHN ORTMAN AND JOHN IEKEL  
PHOTOGRAPHY: JASON MALLORY

Like most 15-year-olds, this year's NAPA 401(k) SUMMIT was a little bit rowdy, a little bit refined — and a whole lot in between. Most of all, though, the SUMMIT's first visit to downtown Nashville was, by all accounts, the biggest and best ever.

In its 15<sup>th</sup> year, the 2016 SUMMIT — now the largest annual gathering of 401(k) advisors, service providers, industry insiders and thought leaders in the industry — drew nearly 1,700 attendees for its general sessions, workshops and networking opportunities. Not to mention a block party featuring a charity concert by singer/actor Charles Esten benefiting the Leukemia and Lymphoma Society.

Let's take a look at some of the highlights of this year's SUMMIT.

#### **Graff: Meet the New Reality**

"We can't walk away from this. It's not going anywhere." American Retirement Association CEO and NAPA Executive Director Brian Graff captured the new environment ushered in by the Department of Labor in its final fiduciary rule, opening the SUMMIT with a discussion of the rule and some of the most important ways that it affects the industry.

"We've got to recognize that today the DOL is America's retirement sheriff," Graff said. But, he also noted, "We are very much in the figuring-this-out mode." American Retirement Association President Marcy L. Supovitz, in her remarks immediately before the session, expressed a sentiment similar to Graff's assessment, remarking, "Now the emphasis shifts from 'whether' to 'how.'"

But the "how" is not what it could have been. NAPA President Joseph DeNoyior, as well as Supovitz and Graff, noted the role that ARA and NAPA had in making comments and influencing the DOL as it revisited and modified the rule when it was in its proposed form.

The NAPA PAC "made a difference," said Graff, concerning the way the rule addresses rollovers, which he called "a huge issue for us." When the rule came out, he said, it was "very restrictive," but that changed after "many, many meetings" and much other activity by NAPA PAC members. Among the results of that effort was that the DOL

changed the rule to clarify what constitutes advice in the context of rollover compensation; another was the level fee funding exemption. "Critically," said Graff, "as compared to the full best interest contract (BIC) exemption, this streamlined exemption gets you out of the contract requirement."

#### *Enforcement by Litigation?*

Graff pointed out that the DOL "did a lot of things with the contract that improved it," but also noted that the DOL left intact the ability of trial lawyers to pursue class action lawsuits. The full BIC contract is not under ERISA, Graff said — it is a contract under

## STONESTREET ADVISOR GROUP WINS 401(k) LEADERSHIP AWARD



The advisory team at StoneStreet Advisor Group in Pearl River, N.Y. is the winner of the 2016 NAPA 401(k) Advisor Leadership Award.

Barbara J. Delaney, AIF™, the firm's founder and Principal, received the award on behalf of the team during a general session at the NAPA 401(k) SUMMIT in Nashville. She was joined by representatives of the other two finalists for this year's Leadership Award:

- LeafHouse Financial Advisors, in Austin, Texas
- Plante Moran Financial Advisors, in Southfield, Mich.

Delaney has been in the financial industry since 1981. In 2009 she merged her firm with Avenir Equity and Wall Street Access and renamed the new firm StoneStreet Equity. Recently, she formed StoneStreet Advisor Group to support their continuing efforts in supporting Worksite Financial Solutions, an innovative way to engage participants in every step of their careers. **For more on all three finalists, see page 36.**



Members of “Grand Theft Audio,” composed of students at the W.O. Smith Music School in Nashville, entertained the opening night crowd — and accepted a donation to the school from NAPA.

state law principles. As a result, “There’s going to be a cottage industry of lawyers who are going to be BIC arbitrators” and who will be looking to pursue class action lawsuits under the full BIC.

#### *BIC or BIC Lite?*

He also emphasized the importance of the provisions that concern being a level fee fiduciary. “This is very important. The only thing that you can get in connection with the advice to the plan or the IRA,” said Graff, “is a level fee. There is no other remuneration beyond the fee.”

Graff said that he sees the rule’s treatment of rollovers as universal, noting, “This thing covers everything.” Still, he said that while all transactions are covered, it will take future guidance from the DOL to clarify how some of the details regarding how the rollover rules will be applied.

A key question a firm must answer, said Graff, is “Is it BIC? Or is it ‘BIC Lite’ (*i.e.*, the rule’s level comp exception)?” With the BIC, an advisor has more liability and more compliance costs, but also greater flexibility. With BIC Lite, there is less liability, less compliance costs, but also much less flexibility. Each community “must decide for themselves what makes the most sense,” he said.

#### *Participant Education and Distributions*

Another important matter, Graff noted, is plan education. As originally drafted, he said, the rule would have stopped advisors from providing important education “that connects the dots between what the plan provides and what the employee or participant needs.” But now “basically, it does a pretty good job of getting us to the place we were before.”

And the original rule did not allow an exemption for distributions from small 401(k) plans. This is another matter about which the ARA and NAPA testified. “Now if you want to use a full BIC on a 401(k), you are free to do so,” Graff said, noting that “we’re very grateful that they changed that.”

#### **DOL Rule’s Impact: Industry Execs See Opportunity in Disruption**

How one views the DOL’s final fiduciary rule depends on your vantage point and how you will have to apply the rule. That was the message of three prominent industry execs who participated in a panel discussion on the impact of the rule on their business models and operations.

Offering their insights were J. Fielding Miller, CEO of CAPTRUST Financial Advisors; Edward O’Connor, Managing Director for Retirement Strategy at Morgan Stanley; and William R. Chetney, CEO of GRP Advisor Alliance.

“This is a big win” for the RIA model, said Miller. Chetney said he considers it “interesting to see how broker-dealers react” and that it is a little challenging for them from some perspectives, but that it also creates some clarity. To O’Connor, “it’s a matter of interpretation” and the biggest challenge is that now “we have to think of the best way to document the best interest consideration for investors and to demonstrate it when challenged.”

All three were relieved that the point-of-sale provisions that were in the rule in its proposed form were removed from the final rule.

#### *Disruptive Impact*

The disruption is “tremendous” for advisors, in Chetney’s view. O’Connor agreed, saying that “there are going to be a lot of smaller firms that will be struggling to comply with the rule.” Miller was the most blunt of all, saying, “This is going to thin out the herd,” and calling it “prime hunting season for our industry.”

**TOP PHOTO:** NAPA's 2016-2017 President Sam Brandwein (R) congratulated predecessor Joe DeNoyior.

**MIDDLE:** Panelists Marcy Supovitz, Brad Campbell, David Levine and John Carl (L-R) provided expert insight into the DOL's final fiduciary rule.

**BOTTOM:** Charles Esten with Marcy Supovitz, NAPA's Founding President.

For good measure, O'Connor reminded attendees that the other shoe has yet to drop. "And let's not forget, the SEC is coming. This is going to continue," he said.

#### *Stay Put?*

Moderator Nevin Adams posed a question to the panel: Will the rule result in a trend of encouraging participants to keep their assets and accounts where they are, and to forgo the common practice of transferring them at times such as changing jobs?

Miller said he thinks so, responding that he thinks there will be less movement out of plans and that one of the results will be that there will be a lot more money in plans and left in plans. Chetney agreed, and said that because of the rule, plan sponsors and participants won't leave as much of a trail as they had in the past as a result of changing jobs.

#### *Advisors Still Needed*

Does the rule put advisors in jeopardy? Not necessarily, the panelists said. "I don't think we've dis-invented the advisor," said Chetney. O'Connor was even more confident, remarking, "Clearly there's a huge need for Americans to be helped" in building retirement income, and "individual responsibility is not going away. Individuals have to take care of their own lives."

#### *Gaze into the Crystal Ball*

Adams asked the panelists to gaze into the crystal ball and offer their take on the rule's effects five years from now.

"We see this as a really, really good opportunity to grow," said Miller. Plan sponsors, he said, are "inundated with lots of information," and his firm hopes that results in requests for proposals. "There is opportunity" in the disruption the rule creates, he said.

But Miller added that there is a risk — the rule could result in a disclosure that nobody reads.

O'Connor said that the rule emphasizes that "you need to be a specialist in this business" and that as a result of the rule's promulgation, "rollovers will be less important in anyone's business model" and that the multiple employer plan model will be embraced and accepted to a greater degree than it is now.

There is a "real opportunity for people to consider what they can do for customers that they don't do now," said Chetney, adding that the rule provides "a real opportunity to re-envision what we do for plan sponsors and participants."

#### **Campbell: 3 Ways Forward Under BIC Exemption**

As ERISA attorney and former head of the EBSA Bradford Campbell sees it after a little more than a week of study, advisors essentially have three options for dealing with the best interest





Some of the nation's top plan advisors under 40 — the 2016 NAPA “Young Guns” — shared the stage at the block party.

contract (BIC) exemption in the DOL's final fiduciary rule:

- Use the level fee option in the BIC exemption (or so-called “BIC Lite”). This approach offers the easiest compliance and little legal risk, but may not be available where affiliates receive compensation.
- Use the BIC exemption in the rule, with variable compensation for both the advisor and the financial institution. This approach entails the most compliance issues and risk of a lawsuit.
- Use the BIC exemption, with flat compensation for the advisor but variable comp for the financial institution. This approach requires complying with the full BIC conditions, but is easier to meet the incentive condition and entails somewhat less legal risk than full variability.

Advisors may also be able to avoid the need for the BIC exemption by providing education, not advice, to participants; using computer model-based advice; or offsetting some fees.

Campbell was joined by Joan Neri, a fellow counsel at Drinker Biddle & Reath

LLP, at a crowded workshop session on the SUMMIT's opening day.

#### *Better But Not All That Much*

Campbell cautioned the packed room not to get too carried away with the current wave of enthusiasm over the many improvements in the final version of the rule. “Remember that the baseline here was a proposed rule that *did not work*,” he declared. “The final rule *will*, but will require significant costs and changes.” He offered an example: “Disclosures have gone from impossible [conflicting with securities laws] to painful” — *i.e.*, a financial institution must disclose on its website how it compensates advisors, and recruits and retains them.

#### *Patience, Patience*

At this early stage, advisors need to be patient as financial institutions work through the complexities of the 1,000-plus page rule. “You’re going to see a lot of different approaches by financial institutions,” he advises. “Be patient; it will take a little while until you get answers you can implement.” And be

prepared for some pretty big changes as well: “This rule will significantly distort the marketplace,” Campbell declared.

#### **Tips on Negotiating Fees**

While advisor fees have gotten a lot more “reasonable” — meaning lower — in recent years, greater litigation risks resulting from the DOL's final fiduciary rule may create a counterweight, exerting upward pressure on fees, according to CapTrust's James E. (“Jeb”) Graham.

Graham offered his take on best practices in effective fee negotiating at a workshop session. He was joined by panelists Douglas G. Prince, Principal and CEO of ProCourse Fiduciary Advisors, and Tim B. DiSette of Trinity Planning Group, LLC.

The trio identified the four factors that affect fees:

- Scope of service
- Cost of service (*e.g.*, overhead and size of the service team)
- Profit margin
- Industry comps for fees and services

# 401k SUMMIT

MANY VOICES, ONE VISION



Led by Ann Schleck (L), HR execs Kathryn Wall, Rhonda Curry and James Bunt (L-R) talked about what keeps them up at night — and how their plan advisors help.

### *Scope of Service*

At ProCourse, Prince said, about 90% of their clients are full-service, and the rest (mostly small plans, with the CFO typically responsible for HR) are in the stripped-down, “lite” version. Participant education is priced separately because of the legal risk they perceive in offering a certain number of onsite participant days, but subsequently delivering fewer days for one reason or another.

At ProCourse, it’s standard practice to map out ROI for each step in the client service process. “This helps us find inefficiencies and improve them,” said Prince.

At ProCourse, said Prince, they spent a lot of time determining the core services they will offer, and their business is focused on those core services. The firm was built in the \$2-\$50 million space, but is committed to growth, he says. ProCourse offers three basic services models, and adjusts fees with each add-on.

### *Value Prop*

In communicating the firm’s value proposition, DiSette says, “it’s important

to play offense, not defense.” For example, Trinity documents all meetings and participant calls into the service center. Then, at the annual fiduciary review meeting, DiSette says, “I turn the laptop around and show the committee the detailed logs” of how each caller’s concerns were resolved. “We all do so much work,” DiSette says, “but the CEO and CFO are too busy to see how much we do.”

Graham agrees with the importance of sweating these kinds of details. “If you’re not doing this kind of thing,” he asserts, “you should be.”

### *Be Ready with an Answer*

How do you justify your fee calculations to the CEO? “You need to have an answer to that question,” admonished Graham. He recommends describing the calculation as “part fixed, and part variable.” Your fee has to cover your fixed costs; “You shouldn’t take the case otherwise,” he said. The variable cost, he explained, is essentially a fiduciary risk premium. Additionally, it’s important to factor in complexities like location, which can necessitate higher-than-average travel expenses, he noted.

### *From Asset-Based to Flat Fee*

All of ProCourse’s clients are now on a hard-dollar fee arrangement, says Prince. At Trinity, said DiSette, two-thirds are a flat fee basis, with an automatic 3% annual cost-of-living increase. The firm will also lower its fees where that’s appropriate, he noted. As for when asset-based fees may still be the right choice in the small plan market, DiSette suggested that they may be most appropriate for small, growing firms.

### *The RFP as Time-Waster*

The panelists agreed that dealing with RFPs in cases where advisors are being used to benchmark the current advisor’s fees, or when the choice is predetermined, can be a frustrating waste of time. DiSette has a set of pointed questions for the plan sponsor (or, increasingly, consultant or law firm) that has issued the RFP, and won’t respond to the RFP without satisfactory answers.

DiSette recommends using LinkedIn to look for professional relationships between execs at the plan sponsor and other advisors. This can serve two purposes: as a way to flag



Singer/songwriter/actor Charles Esten (who plays Deacon Clayborne on the hit ABC series, “Nashville”) rocked the SUMMIT Block Party. Esten, a supporter of the Leukemia and Lymphoma Society, played for free, and NAPA donated \$10,000 to the Society.

potentially “wired” RFPs, as well as helping you win the case by flagging third party professional connections linking you to the decisionmakers at the plan sponsor.

### Climbing Everest: A New Perspective on Helping Pre-Retirees

Is a DC plan enough to get participants to where they need to be financially when they make that jump into retirement? What practical steps can advisors take to help participants get on track and stay there?

Jeanne Thompson, Fidelity Investments’ VP of Thought Leadership, revealed findings from new Fidelity research into those questions at a SUMMIT general session — research that offers a new way of looking at pre-retirees.

What drives the decision to retire? Fidelity’s research identified five factors driving the decision to retire, Thompson said:

- **Financial** (assets, debt and the cost of health care)
- **Family** (caregiving responsibilities, grandchildren, spouse/partner)
- **Lifestyle** (desire for leisure, structure,

meaning in life)

- **Job** (passion, recognition, sense of identity)
- **Health** (stress level, physical stamina, mental acuity)

The research led the team at Fidelity to develop a three-stage model to better understand the changes that pre-retirees go through in the latter stages of their careers, Thompson explained — an evolutionary step from the traditional view of pre-retirees as a homogeneous group. Using the challenge of climbing Mt. Everest as a context, the three stages are, in chronological order:

- **Climbing.** Ending about 10 years before retirement, in this phase the pre-retiree is in good health and happy with his or her job. Finances are the main concern. Climbers are seeking help with understanding Social Security, financial planning, and working part-time with benefits.
- **Base Camp.** Stretching from about 9 years to about 2 years from retirement, in this phase pre-retirees are starting to feel like they’ve had enough; they’re less interested in new opportunities; and their physical stamina starts to decline. Base Campers are

seeking help with understanding Social Security, financial planning, retirement income help, and understanding health care options.

- **Summit.** This is typically the last 2 years or so before retirement. Pre-retirees have significantly less debt and more job-related stress, and want to spend more time with family. Summiters are seeking help with retirement income help and understanding post-retirement health care options.

### What Keeps HR Execs Up at Night?

A panel of three HR executives shared their experiences, perspectives and challenges, as well as what they value in their advisors, at a general session.

The panel, moderated by Ann Schleck of Ann Schleck & Co., featured:

- Rhonda Curry from Hornet Sports & Entertainment in Charlotte, N.C. (parent of the NBA’s Charlotte Hornets) (188 participants, \$6 million in assets);
- Kathryn Wall from Mary Washington Healthcare in Fredericksburg,



Keynote speaker Dr. Joseph Coughlin shared the results of research by the MIT AgeLab into the future of retirement advice.

Va. (5,710 participants, \$226 million in assets); and

- James Bunt from Continental Resources, Inc., in Bedford, Mass. (302 participants, \$36 million in assets).

### *Evolving Benefits Landscape*

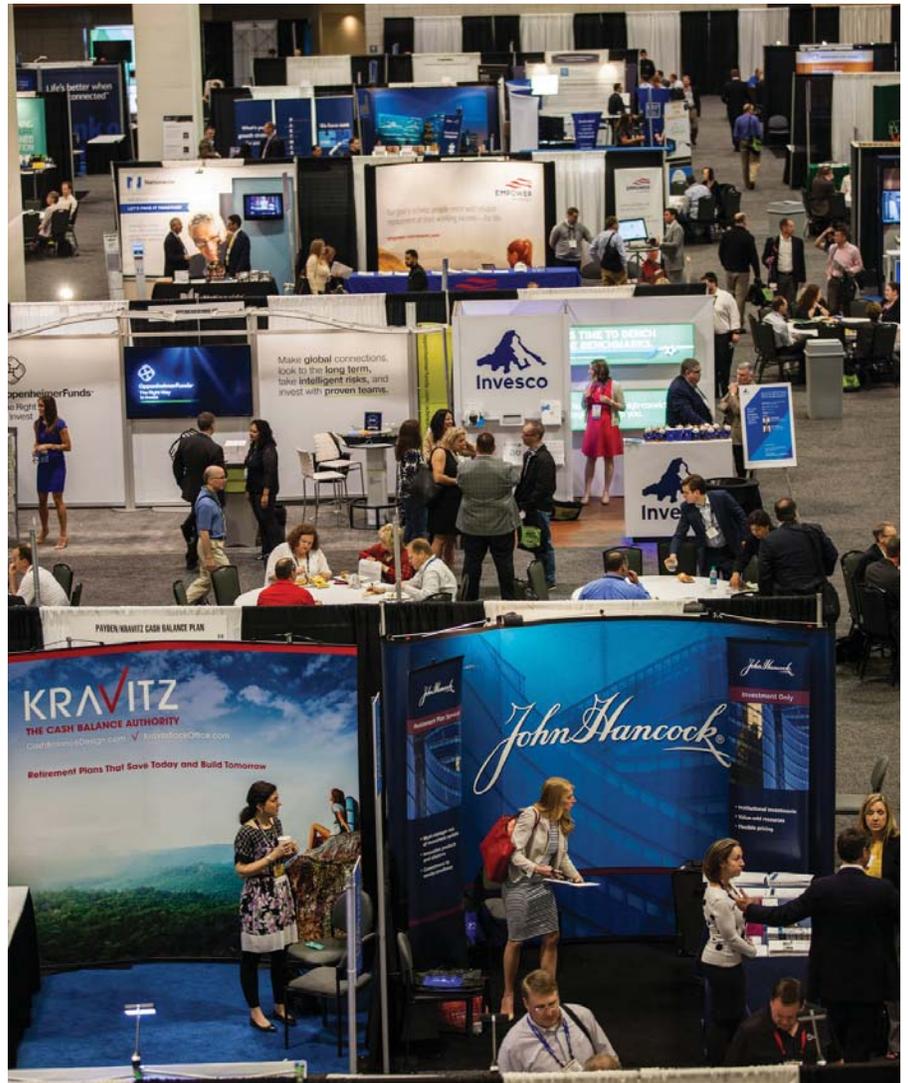
So what's keeping the three HR execs up at night? The complexity of today's benefits offerings, especially compliance requirements, topped Wall's list. She also cited the cost of benefits, ruing the increasing prevalence of benefits decisions that are driven by cost factors today; coping with employees' desire for transparency via things like social media and interactive communication; and the changing relationship with employees. That relationship, said Wall, has shifted from the employer's goal of taking care of participants' retirement readiness to providing tools that they use to take responsibility for that themselves. Mary Washington Healthcare's advisor is Jania Stout at Fiduciary Plan Advisors.

Curry said she depends on her advisor, Kathleen Kelly at Compass Financial Partners, to be an expert on changes in the field. "What's evolving? What does the fiduciary rule mean to me? Tell me what I need to do," she said. "Give me a 1-page summary and action steps." Curry suggested a general goal for advisors: Help her minimize the time she spends studying important issues and emerging trends and developments by emailing her succinct "must-read" lists of recommended content on the web.

Bunt shares his CEO's concern about translating today's complex benefits landscape to employees effectively. "We rely on our advisor (Jim Phillips at Retirement Resources) to do that," Bunt says. In particular, he says, employees are concerned about market volatility and its effect on their account balances. "What do I do?" they ask. How do you calm their fears and give them the right kind of guidance?" Bunt said he measures an advisor's success largely by looking at whether participants are getting the right information to tackle this issue, including appropriate benchmarks for deferrals and account balances.

### *Justify Your Life*

To fight commoditization, how does an advisor most effectively justify the "premium" charged for exceptional service? For Wall, it's the need for the advisor to help her integrate



The exhibit hall was a prime location for networking, learning and catching up.

all the benefits they offer, not just retirement, in a true Total Rewards concept — addressing health care and voluntary benefits as well as the retirement plan. Wall values advisors who can "be an integrator," she said, providing simple, easy-to-grasp information for her participants, like infograms, and can connect her with experts when that's needed.

To Curry, it's important to have an advisor who "gets me," she said, and can provide a frank evaluation of her "wild ideas" — as Schleck put it, "thinking outside the box but listening [to the client] and focusing on the client's business."

Bunt addressed the difference between

average, "me too" advisors and extraordinary ones. In his opinion, there are two key differentiators:

- the interaction of the advisor with participants — in particular, the advisor's use of tools, and the independence and impartiality of the advisor's advice to participants; and
- the advisor's ability to provide "throughput" information — for example, aggregated data provided at quarterly investment committee meetings that leads directly to improvements and new features in the plan. 