

# Legal Ethics in the Employment Law Context: Who is the Client?<sup>1</sup>

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For those of us who represent, interact with, or sue unions or corporations, it is important to understand who the client is for different purposes such as representation, the attorney-client privilege, and ex parte communications.<sup>2</sup> Understanding who the client is raises interesting ethical and evidentiary issues.

In particular, this paper focuses on the duty of confidentiality, the Kentucky ethics rule defining who an entity attorney represents, the attorney-client privilege, and ex parte contacts. Section I describes the duty of confidentiality and its relationship to the attorney-client privilege. Section II discusses the Kentucky law governing a corporate employer attorney's relationship to the client and summarizes the law applicable to a union attorney's relationship to the client. Section III considers how far down the chain of a command an employer or a union can assert the attorney-client privilege. Among other topics, it discusses the relevant Kentucky rule of evidence and related authority dealing with employers, cases regarding unions asserting the privilege, and fiduciary exceptions to asserting the privilege. Section IV addresses privileges related to the attorney-client privilege that a union may, in some circumstances, be able to assert. Finally, Section V discusses Kentucky law governing ex parte communications with employees of a represented employer.

## I. The Duty of Confidentiality

Kentucky Rules of Professional Conduct Rule 3.130(1.6)(a)<sup>3</sup> currently states in relevant part: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”

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<sup>1</sup> I had the idea for this paper based on prior continuing legal education sessions I have attended and independent of any academic writings. But for those interested in reading more about the topic, Sherman L. Cohn, The Organizational Client: Attorney-Client Privilege and the No-Contact Rule, 10 Geo. J. Legal Ethics 739 (1997) explores the same issue but without focus on the labor and employment context.

<sup>2</sup> This paper focuses on the legal entities of corporations and unions. Government agencies are also involved in labor and employment litigation and governed by these rules. However, the particulars of the application to governmental entities are beyond the scope of this paper. See e.g., KBA E-332 (Sept. 1988) (regarding government counsel blanket vetoes on contact of government employees); KBA E-372 (Nov. 1994) (regarding relationship between Equal Employment Opportunity Commission and affected employee).

<sup>3</sup> The Kentucky Rules of Professional Conduct Rule 3.130 will be referred to by the shorthand “Kentucky Rule” with the particular rule number throughout this paper. E.g., Kentucky Rule 1.6.

The Kentucky Supreme Court Commentary,<sup>4</sup> Comment 20 indicates that “[i]f a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable.”

Effective July 15, 2009, Kentucky Rule 1.6(a) will state, in relevant part: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>5</sup>

The Commentary effective July 15, 2009, Comment 11, indicates that “absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege . . . .”

While the professional requirement of confidentiality is broader in scope than the attorney-client privilege,<sup>6</sup> the lawyer must understand the evidentiary privilege in order to fulfill the ethical obligation to successfully invoke it.<sup>7</sup> Edward C. Brewer, III, The Ethics of Internal Investigations in Kentucky and Ohio, 27 N. Ky. L. Rev. 721, 760 (2000). Other jurisdictions generally have similar ethical requirements of confidentiality, so the requirement is equally applicable whether practicing in state or federal court. See Geoffrey C. Hazard, Jr., et al., The Law and Ethics of Lawyering 343 (4th ed. 2005).<sup>8</sup>

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<sup>4</sup> The Kentucky Supreme Court Commentary will be referred to as “the Commentary.”

<sup>5</sup> The new Kentucky Rule 1.6(a) is analogous to the current American Bar Association (“ABA”) Rule 1.6 (a).

<sup>6</sup> See, e.g., Banner v. City of Flint, 99 Fed. Appx. 29, 36 (6th Cir. 2004). Therein, the court reasoned that even if a client had waived the attorney-client privilege, the attorney could not disclose confidential information unless he had complied with Michigan Rule 1.6. Id. He had not complied with Rule 1.6 because he had not advised the client of the advantages and disadvantages of disclosing the confidences. Id. The Commentary effective July 15, 2009, Comment 3, explicitly states: “The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through the compulsion of law. The confidentiality rule, for example applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”

<sup>7</sup> The professional duty is broader than the attorney-client privilege of evidence law. Geoffrey C. Hazard, et al., The Law and Ethics of Lawyering 342 (4th ed. 2005). It includes information learned from third parties about the client. Id. But the professional duty does not permit an attorney to refuse to testify, whereas the attorney-client privilege does. Id.

<sup>8</sup> Violation of the professional duty can result in a malpractice case or in professional discipline or both. Id. It can also result, through agency principles, in an action in tort or contracts for damages or for injunctive relief. Id. Exploration of the latter topic is beyond the scope of this paper.

## **II. Who Can Claim to Be Represented?**

### **A. Governing Kentucky Rule**

Kentucky Rule 1.13(a) states, “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”<sup>9</sup>

The Commentary, Comment 2, indicates that the constituents of a corporation are “officers, directors, employees and shareholders.” The rule does not define who the constituents of an unincorporated association are but does state that they include “positions equivalent to officers, directors, employees and shareholders.” Comment 2.<sup>10</sup>

The Commentary further explains that “when one of the constituents . . . communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6.” Comment 3.<sup>11</sup> However, this does not render the constituent the client. The Commentary further provides that,

This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation . . . .

Comment 3.

### **B. Kentucky Rules on Entity Lawyer’s Interactions with Constituents and Unrepresented Persons**

Kentucky Rule 1.13(d)<sup>12</sup> states: “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identify of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”

Kentucky Rule 4.3 currently states,

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented

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<sup>9</sup> The rule is analogous to the ABA’s Rule 1.13(a).

<sup>10</sup> Effective July 15, 2009, this information will be contained in Comment 1.

<sup>11</sup> Effective July 15, 2009, this information will be contained in Comment 2.

<sup>12</sup> Effective July 15, 2009, this section will be Rule 1.13(f).

person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.<sup>13</sup>

Brewer notes the distinction between the "entity lawyer's duty to communicate [turning] on the existence of adverse interests, whereas the lawyer's duty in other cases turns on the non-client's apparent misunderstanding." Brewer, supra, at 788.

### **C. Kentucky Authority that Entity Lawyer Represents Corporation, not its Constituents**

"The law is generally settled that an attorney for a corporation does not automatically represent the corporation's constituents in their individual capacities, even on the same matters." Innes v. Howell Corp., 76 F.3d 702, 712 (6th Cir. 1996). In Innes, the Sixth Circuit applied Kentucky law and held that an attorney for a corporation did not represent the president of the corporation. Id. The corporate attorney had investigated the president of the corporation and discovered that the president had received payments from an independent contractor, alleged to be kickbacks. Id. at 706. The corporate attorney confronted the president and informed the parent corporation of the payments. Id. The president was terminated. Id.

The corporation sued the president for breach of fiduciary duty, and the president sued the corporation for wrongful discharge. Id. at 705. The president also filed suit against the corporate attorney for legal malpractice. Id. at 706. The jury found there was no malpractice because the corporate attorney did not represent the president. Id. at 707. The Sixth Circuit affirmed the verdict. Id. at 712.

The Sixth Circuit reasoned that unless there is clear consent, express or implied, to represent a constituent, the corporate attorney represents only the corporation. Id. at 712. Despite the fact that the president had been named in an environmental action and the corporate attorney had defended the action, the corporate attorney had not represented the president in his individual capacity. Id. The court reasoned that "simply the fact that [the president] might have been subject to personal liability" in the litigation "does not establish any legal relationship – [the corporate attorney] would have needed to take action on [the president's] personal behalf, not just action for the general good of the corporation." Id.

Caveat: It is not clear from the opinion whether the president was named in the environmental action in his individual capacity or only in his official capacity. If it was as an individual and the corporate attorney filed an answer, does the fact that the interests

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<sup>13</sup> Effective July 15, 2009, Kentucky Rule 4.3 will additionally state: "The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel." The current ABA Rule 4.3 adds. "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

of the president and corporation were not then adverse mean that the corporate counsel did so only as the attorney for the corporation?

#### **D. Authority that Entity Lawyer represents Union, not Constituents or Members**

There is no Kentucky or Sixth Circuit authority specifically addressing whether a union represents the entity or its constituents. There is likewise no authority on whether a union member is a constituent or third-party. But, by analogy to Innes, a union attorney would represent only the entity under Rule 1.13.

The majority of authority from other jurisdictions supports this interpretation. In cases too numerous to extensively discuss, courts have held that union attorneys cannot be sued by members for breach of confidentiality or malpractice and, in fact, are immune from damage claims.<sup>14</sup> See, e.g., Carino v. Stefan, 376 F.3d 156, 162 (3d Cir. 2004) (outside counsel retained by union to represent grievant is immune from malpractice claim based on deceiving grievant into withdrawing her grievance); Waterman v. Transp. Workers' Union Local, 100, 176 F.3d 150, 150 (2d Cir. 1999) (“a union’s attorneys may not be sued by an individual union member for actions taken pursuant to a collective bargaining agreement.”); Arnold v. Air Midwest, Inc., 100 F.3d 857, 862-63 (10th Cir. 1996) (holding that union attorney hired and paid by union to aid grievant represents union and that union attorney is immune from suit under Railway Labor Act); Breda v. Scott, 1 F.3d 908, 909 (9th Cir. 1993) (grievant cannot sue outside union counsel for malpractice in handling grievance); Montplaisir v. Leighton, 875 F.2d 1, 7 (1st Cir. 1989) (outside counsel engaged by and working for union is immune, under Civil Service Reform Act, from suit for legal malpractice); Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985) (in-house attorney handling grievance on behalf of union does not represent grievant and grievant cannot bring malpractice claim); Best v. Rome, 858 F. Supp. 271, 276 (D. Mass. 1994) (no malpractice claim available under state labor laws) aff’d, 47 F.3d 1156 (1st Cir. 1995); Leeann R. Gruwell Anderson, Note, Turning the Key: Ensuring Evidentiary Privilege as Labor Counsel, 45 Drake L. Rev. 491, 449-05 (1997); Jeremiah A. Collins & Seymour Waldman, Confidential Attorney-Client Communications in the Representation of Unions and Union Members 13 (May 13, 1999) (unpublished manuscript); but see Piper v. Yamaha Corp., 1992 U.S. Dist. LEXIS 1002 (W.D. Mich. Jan. 13, 1992) (holding that when outside counsel represents a union in federal court, to

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<sup>14</sup> Other cases, from federal district courts and state courts, so holding include the following. Link v. Rhodes, 2006 U.S. Dist. LEXIS 30346 (N.D. Cal. May 17, 2006); Garland v. U.S. Airways, Inc., 2006 U.S. Dist. LEXIS 89714 (W.D. Pa. Dec. 12, 2006); United Steelworkers v. IVACO, Inc., 29 Empl. Benefits Cas. (BNA) 2897 (N.D. Ga. 2003); Gwin v. Nat'l Marine Eng'rs Beneficial Ass'n, 966 F. Supp. 4, 7-8 (D.D.C. 1997); Weiner v. Beatty, 116 P.3d 829 (Nev. 2005); Nelson v. Haus, Roman & Banks, L.L.P., 724 N.W.2d 273 (Wis. Ct. App. 2006); Kertis v. Butler, 2003 Wash. App. LEXIS 2286 (Wash. Ct. App. Oct. 6, 2003); Mamorella v. Derkasch, 276 A.D.2d 152 (N.Y. App. Div. 2000); Niezbecki v. Eisner & Hubbard, P.C., 717 N.Y.S.2d 815 (N.Y. Civ. Ct. 1999); Brown v. Me. State Employers Ass'n., 155 L.R.R.M. (BNA) 2124 (Me. 1997); Frontier Pilots Litig. Steering Comm., Inc. v. Cohen, Weiss & Simon, 227 A.D.2d 130 (N.Y. App. Div. 1996); Sellers v. Doe, 650 N.E.2d 485 (Ohio Ct. App. 1994); Collins v. Lefkowitz, 584 N.E.2d 64 (Ohio Ct. App. 1990); Aragon v. Pappy, Kaplon, Vogel & Phillips, 262 Cal. Rptr. 646, 654 (Cal. Ct. App. 1989).

appeal for enforcement of arbitration decision, material issue of fact remains as to the existence of an attorney-client relationship with the grievant).

Likewise, the majority of authority has not disqualified a union attorney in the run-of-the mill breach of duty of fair representation (“DFR”) case where a conflict of interest is asserted because of the attorney’s representation of the union in the grievance process. Hayes v. Bakery Workers Int’l Union, 1990 U.S. App. LEXIS 16048, at \*8 (6th Cir. Sept. 11, 1990) (union counsel do not represent each member of the union for purposes of a conflict analysis); Hague v. United Paperworkers Int’l Union, 949 F. Supp. 979, 987 (N.D.N.Y. 1996) (union attorney representing a union at arbitration hearing does not have a conflict of interest with respect to grievant); Adamo v. Hotel Workers’ Union, 655 F. Supp. 1129, 1129-30 (E.D. Mich. 1987) (union attorney not disqualified because he represented union, not grievant, in arbitration); Griesemer v. Retail Store Employees Union, Local 1393, 482 F. Supp. 312, 314-15 (E.D. Pa. 1980) (union attorney who specifically stated to grievant that he represented only the union was strictly counsel for union); Evans v. Ass’n of Norwalk Sch. Adm’rs, 14 Con. L. Rptr. 413, 1995 WL 384629 (Conn. Super. Ct. 1995) (denying motion to disqualify union attorney in DFR suit based, in part, on his representation during negotiations with employer over elimination of grievant’s position); Anderson, supra, at 506; but see Stone v. Philadelphia, 1986 WL 13483 (E.D. Pa. Nov. 25, 1986) (disqualifying union attorney who had met with plaintiffs on one occasion and advised that their claim lacked merit and the union would not pursue it); De Cherro v. Civil Serv. Employees Ass’n, 404 N.Y.S.2d 255, 257 (N.Y. App. Div. 1978) (where union member reasonably believed attorney who provided advice on whether she had a claim for reinstatement was her counsel, and not only union’s as an entity, attorney is disqualified in DFR suit); N.J. Eth. Op. 362, 100 N.J.L.J. 1, 1977 WL 23877 (Jan. 6, 1977) (assuming that union attorney represented both union and grievant in arbitration).

Tip: To avoid creating an attorney-client relationship with a union constituent (or member), you should remind the constituent (or member) that you are the union’s attorney whenever she seems to refer to you as her attorney. You could also consider providing a grievant a writing at the outset that states you are the union’s attorney.

Caveat: If the union attorney has created an individual client relationship with a grievant or other member, then the rules governing conflict of interest between multiple clients will govern.<sup>15</sup> That topic is beyond the scope of this paper.

### **III. Attorney-Client Privilege**

#### **A. The Governing Federal Rule**

Federal Rule of Evidence 501 merely provides for the implementation of common law privileges.<sup>16</sup>

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<sup>15</sup> A starting point for researching conflicts between clients is ABA Rule 1.7.

One of the well-established common-law privileges is the attorney-client privilege.

**B. How Far Down the Chain of Command Can a Corporation Assert the Attorney-Client Privilege?**

What if the employer is defending a wage and hour claim, and its attorney gathered information from low-level employees about times that a manager had the employees clock-out but continue to work? Or what if the employer is defending a sexual harassment suit, and the attorney gathered information from low-level employees about statements made by other employees? Can the company assert the attorney-client privilege?

**C. Upjohn – the Seminal Case Defining the Attorney-Client Privilege for Entities**

The seminal case defining the attorney-client privilege for entities is UpJohn. UpJohn Co. v. United States, 449 U.S. 383 (1981). In Upjohn, the Court rejected a narrow approach to defining the client as only the top managers for purposes of the attorney-client privilege. Id. at 396. Instead, the Court adopted a case-specific approach for determining when the attorney-client privilege applies to corporate communications. Id.

In UpJohn, the general counsel of the company learned that company employees might be involved in bribing foreign officials. Id. at 386. He consulted with outside counsel and the chairman of the board and then commenced an investigation. Id. As part of the investigation, the chairman sent a questionnaire, prepared by the attorneys, to all the foreign and area general managers. Id. The cover letter indicated that the questionnaire was part of the general counsel’s investigation and asked that the process be kept highly confidential. Id. at 387. Additionally, the general counsel conducted interviews of those who received the questionnaire and many other employees. Id.

The Internal Revenue Service filed a summons to obtain the questionnaires and the general counsel’s investigation files. Id. at 387-88. The company declined to produce the questionnaires. Id. at 388. One basis for doing so was attorney-client privilege. Id. The Court held that Federal Rule of Evidence 501 “protects the giving of information to [a] lawyer to enable him to give sound and informed advice.” Id. at 390. The Court relied on the ABA Code of Professional Responsibility 4-1 requiring the lawyer to learn the facts of the case. Id. at 391.

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<sup>16</sup> Rule 501 states in pertinent part, “the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.”

Applying a case specific inquiry, the Court held that a number of factors indicated that the questionnaires and records of the investigation were attorney-client privileged. *Id.* at 395. “The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.” *Id.* at 394. Moreover, the matters addressed by the employees were within their corporate duties, the employees were aware the communications were for the purpose of obtaining legal advice, and the instructions indicated that the communications were highly confidential. *Id.* at 394-95.

#### **D. Kentucky Rule of Evidence 503 Defines the Attorney-Client Privilege**

Kentucky Rules of Evidence Rule 503 defines the “lawyer-client privilege.”

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.<sup>17</sup>

For purposes of the privilege, a client includes a “corporation, association, or other organization or entity.” Ky. R. Evid. 503(a)(1).

The protected communications can be between the client, the client’s representative, the client’s lawyer, and the lawyer’s representative or any subset of those parties.<sup>18</sup> Ky. R. Evid. 503(b).

As succinctly summarized, “A client has a privilege to refuse to disclose and prevent any other person from disclosing: (1) confidential; (2) communications; (3) between or among the client, or prospective client, or the client’s representatives; and (4) an attorney, or her agents; (5) made for the purpose of obtaining legal services or advice.” Richard A. Bales & Richard O. Hamilton, Jr., Workplace Investigations in Kentucky, 27 N. Ky. L. Rev. 201, 274 (2000).

A representative of the client includes: 1) “a person having authority to obtain professional legal services,” 2) a person having authority to act on the advice so obtained, and 3) “an employee or representative who makes or receives a confidential communication” in the course of employment, concerning the subject of the employment, and to “effectuate legal representation for the client.” Ky. R. Evid. 503(a)(2).

A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of

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<sup>17</sup> There are five listed exceptions, 1) “furtherance of crime or fraud,” 2) “claimants through same deceased client,” 3) “breach of duty by lawyer or client,” 4) “document attested by lawyer,” and 4) “joint clients.”

<sup>18</sup> It can also be between those parties and another party concerning a matter of public interest or between lawyers representing the same client. For a discussion of the common interest privilege in the federal setting see Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 220 (W.D. Ky. 2006).

professional legal services to the client or those reasonably necessary for the transmission of the communication. Ky. R. Evid. 503(a)(5).

“The burden of establishing the privilege, both substantively and procedurally, is on the organization seeking the protection of the privilege.” Brewer, supra, at 765.

### **E. Kentucky Authority Regarding Employers Asserting the Attorney-Client Privilege**

A representative includes a management employee who receives a confidential communication from an entity attorney regarding ongoing and anticipated litigation against the employer. Hahn v. Univ. of Louisville, 80 S.W.3d 771, 776 (Ky. Ct. App. 2002). In Hahn, a research technologist sued the University of Louisville for alleged mistreatment that she had suffered from the University’s Department of Psychology. Id. at 772. The University anticipated additional litigation. Id.

One issue was whether certain communications were attorney-client privileged. Id. at 775. At issue were four e-mails from an associate university counsel to the department’s business manager. Id. at 772. One e-mail had been carbon copied to the chair of the department. Id. The e-mails concerned “possible claims arising out of pending litigation.” Id. at 773. The e-mails disclosed the counsel’s legal opinion. Id. Counsel did not discuss the e-mails with anyone other than the recipients and the archivist responsible for handling the type of document discovery involved.<sup>19</sup> Id.

The business manager had received the e-mails in the course of her duties and did not discuss the documents with anyone other than counsel and possibly the department chair. Id. The department chair did not remember receiving the one e-mail carbon copied to him. Id. He did not recall discussing it with anyone or printing it. Id. But if he had printed it, he would have directed his secretary to place it in a confidential file. Id.

The court held that the chair and business manager were representatives of the client, and that the e-mails were protected by the attorney-client privilege. Id. at 776. The court reasoned that the “communications were made for the purpose of providing legal services to the University.” Id. The court further reasoned that proper precautions were taken to maintain the confidentiality of the documents. Id. Further, the chair and business manager were clearly employees, and the court must have reasoned that they received the messages in the course of their employment. See id.

The Kentucky Supreme Court has provided more detail regarding the “course of employment” and “effectual legal services” requirements of the rule. Lexington Pub. Library v. Clark, 90 S.W.3d 53, 60 (Ky. 2002). Only duties specifically within the employee’s scope of responsibilities will satisfy the requirement of receiving statements in the course of employment. Id. at 60. Additionally, the communication must be for legal, and not business, purposes. And the employee must know at the time that the

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<sup>19</sup> The documents were requested under the Open Records Act. Id. at 772.

purpose of the communication is to obtain legal advice. Id. at 60, 61. Moreover, a target of an investigation cannot make communications “to effectuate legal representation for the client.” Id. at 61.

In Lexington Public Library, an employee sued her former employer, the Lexington Public Library, for unlawful retaliation and constructive discharge. Id. at 56. The employee claimed her supervisor had retaliated against her for filing a complaint against him. Id. The employee learned that the supervisor was thereafter terminated and sought discovery of documents related to that termination. Id. The library asserted that twelve such documents were attorney-client privileged.<sup>20</sup> Id. at 56. The trial court, after in camera review, found that the documents were not privileged because they were generated for business and not legal purposes. Id.

The library sought a writ of prohibition preventing disclosure of the documents. Id. The documents were not available to the Court. Id. Instead, the Court relied only on an affidavit from the library’s assistant director for training and human resources. Id. She had contacted one of the library’s attorneys before preparation of the documents about her “‘increasing concern surrounding [the supervisor’s] behavior and performance.’” Id. at 57. She was concerned because he was over forty and experiencing health problems. Id. The attorney suggested that she and another employee solicit comments and concerns about the supervisor from his co-workers. Id.

The Court held that it did not have sufficient evidence to determine whether the communications between the assistant director and her subordinates were for a business or legal purpose. Id. at 63. The Court reasoned that, while they were solicited by the assistant director in order to obtain advice from the library’s attorney, such advice could be for either a legal or a business purpose. Id.

The Court also held that it did not have sufficient evidence to determine whether those communications were made within the corporate duties of the employees. Id. The Court reasoned that “there is a difference between a duty to report and a duty to observe and evaluate.” Id. at 60. While the communications were generated because of the assistant director’s direction of her subordinates, the communications were about the employees’ past observations of the supervisor. Id. The employees’ duties, insofar as the record disclosed, did not encompass observing and evaluating the supervisor. Id.

The Court also held that the record was “silent” as to whether any of the persons other than the assistant director and one other “knew at the time the communications were made that they were being made for the purpose of obtaining legal advice as opposed to, e.g., furnishing information . . . to be used in determining whether to terminate [the supervisor’s] employment.” Id. at 61.

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<sup>20</sup> There were originally fourteen at issue but only twelve remained at issue by time the case reached the Kentucky Court of Appeals. Id. at 56.

Finally, the Court held that a memorandum to the supervisor about his job performance and his response were not privileged. Id. The Court reasoned that the supervisor was not a representative of the library. Id. He was the target of the investigation and a potential adverse litigant. Thus, he was in no position to make any communication to “effectuate legal representation for the client.”<sup>21</sup> Id.; cf. Greenwell v. Unified Foodservice Purchasing Coop., 22 IER Cases 1092 (Ky. Ct. App. 2005) (depublished and not for use in Kentucky courts) (holding that communications between an employee and the corporate attorney investigating another employee’s discrimination suit were privileged when employee thereafter sued the corporate employer for retaliation based on testimony during the other employee’s unemployment hearing).

The Court also clarified that privileged communications do not have to be made to the entity attorney. Id. at 59. Instead, communications between employees that are forwarded to the attorney, and otherwise satisfy the rule, are also protected. Id.

Query: Under the court’s logic regarding potential adverse litigants, are communications between a company and a potential grievant unprotected?

Tip: Be sure to make a written record informing the constituent of the entity attorney’s involvement and indicating the legal implications of the investigation. Lexington Public Library distinguishes Upjohn on these grounds.

Query: Can an employer prevent a low-level employee from disclosing conversations with the corporate attorney to opposing counsel? How as a practical matter? If the employee’s conduct could be imputed to the company can the company disqualify the opposing attorney and suppress any record of the communication? If not, can the company enter into a confidentiality agreement with the employee or seek a protective order for attorney-client privileged information? This relates to the discussion of ex parte communications discussed below.

## **F. Open Issue Regarding What Constitutes a Legal Purpose**

Post Lexington Public Library it remains to be resolved which types of employment investigations are for legal purposes and which are for business purposes. Ms. Merrily Archer has discussed this issue, and the courts varying positions, in the context of sexual harassment investigations. Merrily S. Archer, Attorney-Client Privilege and Work Product Protections in an Internal Sexual Harassment Investigation, Colo. Law., Oct. 30, 2001, at 141, 141.

She cites Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1091 (D.N.J. 1996), as a case holding that outside counsel’s sexual harassment investigation “falls squarely within the ambit of attorney-client privilege” because ascertaining the facts and

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<sup>21</sup> Query: Couldn’t every manager in Upjohn who made payments, which were alleged to be bribes, be a “target” of the investigation? Why can’t a target have information necessary to obtain effective legal representation?

determining which are legally relevant is the first step to resolving a legal problem. Id.; see also Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146 (S.D.N.Y. 1999) (investigation by outside counsel retained to investigate allegations of racial harassment was for a legal purpose); Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 24-25 (N.D.N.Y. 1999) (employees' statements to employer's attorney were "for the purpose of obtaining his legal assistance and not for the purpose of committing a tort or a crime"); Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 821, 824 (D. Vt. 1997) (upholding magistrate's determination that notes taken by human resource director during investigation of plaintiff's allegations of sexual harassment, in anticipation of litigation, and conveyed to counsel were privileged); see also Scurto v. Commonwealth Edison Co., 1999 WL 35311 (N.D. Ill. Jan. 11, 1999) (investigation of racial discrimination by an attorney under a policy that states staff counsel is responsible for legal aspects of the policy is for legal and not business purposes).

On the other hand, Archer states that several courts have "seriously questioned' or dismissed outright the argument that attorneys act in a 'legal capacity' when conducting internal sexual harassment investigations." Archer, supra, at 141 nn. 6 & 7; Worthington v. Endee, 177 F.R.D. 113, 117 n.4 (N.D.N.Y. 1998) (questioning whether a sexual harassment investigation constitutes a confidential communication from the employees to the attorney); Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (holding that an attorney holding the title of Director of Employee or Labor Relations was not acting as a legal advisor when he participated in investigations of allegations of racial discrimination); Payton v. N.J. Turnpike Auth., 691 A.2d 321, 334 (N.J. 1997) (stating that if the purpose of a sexual harassment investigation is to enforce an anti-harassment policy or comply with legal duties to investigate it is not privileged because the purpose is not to provide legal advice or prepare for litigation).

Archer recommends the following tips:

1. Have human resource personnel initiate without the involvement of an attorney an immediate investigation of any allegations of sexual harassment.
2. When an in-house counsel is involved in an investigation, "carefully designate that investigative documents were prepared or reviewed in the attorney's capacity as a legal advisor."
3. Be sure corporate sexual harassment policies underscore the legal nature of the investigation if the process involves an investigation by counsel.

Archer, supra, at 143.

## G. Federal Cases Regarding Corporations Asserting the Attorney-Client Privilege<sup>22</sup>

It appears that twenty-seven years after UpJohn the particular test used to determine when a corporation can assert the attorney-client privilege as to communications with an employee still varies from court to court. Various commentators have developed different classifications for the tests being used, but it is important to research the law of the particular circuit in which you will be appearing.

Professor Cohn has classified the tests used by the federal courts into two categories: the functional approach, deciding each case on a case-by-case basis, and the subject-matter test. Sherman L. Cohn, The Organizational Client: Attorney-Client Privilege and the No-Contact Rule, 10 Geo. J. Legal Ethics 739, 755 (1997). For an example of the functional approach see Admiral Ins. Co. v. U.S. Dist. Court, 881 F.2d 1486 (9th Cir. 1988). Id. An example of a case using the subject-matter test is Indep. Petrochemical Corp. v. Aetna Cas. and Sur. Co., 672 F. Supp. 1 (D.D.C. 1986). Id. A subject-matter test uses criteria similar to the following:

the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Cohn, supra, at 753; Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) aff'd en banc, 572 F.2d 606 (8th Cir. 1978).

The Western District of Kentucky is one of the courts that uses the subject-matter approach.<sup>23</sup> Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 218 (W.D. Ky. 2006). The court states the test as follows:

The attorney-client privilege also extends to communications made by noncontrol group employees (1) at the direction of their superiors, (2) in order to secure legal advice for the corporation, (3) about matters within the scope of the employee's corporate duties; and (4) while the employees

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<sup>22</sup> Even more so than the federal courts, the state courts use different tests for when the attorney-client privilege applies to a communication with a constituent. Cohn, supra, at 756. In fact, Illinois continues to use the control-group test rejected by UpJohn. Cohn, supra, at 757. Thus, it is very important to research the law of the particular jurisdiction at issue.

<sup>23</sup> The Sixth Circuit has stated in an unpublished opinion that documents prepared for corporate executives by corporate lawyers performing legal functions are "within the reach of the privilege." Crabb v. KFC Nat. Mgmt. Co., 952 F.2d 403, 1992 WL 1321, at \*3 (6th Cir. 1992).

were aware that they were being questioned in order that the corporation could obtain legal advice.

Id.

Brewer provides samples of letters that corporate counsel can use in investigations to help insure communications remain attorney-client privileged. Brewer, *supra*, at 769-70. These could also be adapted to the union context.

## **H. Asserting Privilege over Entity Attorney’s Conversations with Former Employees**

In some jurisdictions, former employees’ communications with an entity’s counsel are covered by the attorney-client privilege if they have a continuing legal obligation to furnish information to the entity’s lawyer. Restatement (Third) Of Law Governing Law § 73, cmt. e (2000).

## **I. Cases Regarding Unions Asserting the Attorney-Client Privilege**

### **1. For Which Communications Can a Union Assert the Attorney-Client Privilege?**

What if a union is defending a Beck<sup>24</sup> case and the attorney has spoken to a volunteer union officer about dues notices? Or what if the union is defending a DFR case and the attorney has spoken with other members about the complained about assignment of employees? Can the union assert the attorney-client privilege?

### **2. Applicability of UpJohn**

As to officers and other employees, UpJohn applies in a relatively straight-forward manner. Collins, *supra*, at 5. Attorney-client privilege can be asserted against union members seeking to obtain attorney communications with union officers. Howard S. Simonoff, A Beautiful Bind: Some Ethical Considerations in Representing an Imaginary “Person” in A World of Real People 8 (Apr. 29, 2002) (unpublished manuscript).

Some authority supports the proposition that communications with volunteer officers should be protected by the attorney-client privilege. “The Upjohn principle may extend to non-employees of the business organization where the non-employee agent has ‘a significant relationship to the corporation and the corporation’s involvement in the transaction that is the subject of legal services.’” Brewer, *supra*, at 763-64 (quoting John Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57

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<sup>24</sup> Communication Workers v. Beck, 487 U.S. 735 (1988). In these types of cases, nonmembers bring suit alleging union improprieties such as inadequate notice of the right to become a nonmember and to object to paying full dues.

N.Y.U. L. Rev. 443, 487 (1982)). Indeed, Rule 503 supports such an outcome by defining a representative as “a person having authority to act on the advice so obtained.”

Some authority also supports the proposition that communications with members should be protected by the attorney-client privilege.<sup>25</sup> See Arcuri v. Trump Taj Mahal Assoc., 154 F.R.D. 97, 104-05 (1994) (holding attorney-client privilege applies to investigation by union attorney who interviewed various union members “in order to provide a basis for responding to the client’s queries”); see also, United States v. Fisher, 692 F. Supp. 488, 491 (E.D. Pa. 1988) (suggesting in dicta that attorney-client relationship might exist for purposes of attorney-client privilege between union attorney and each of its members).

Brewer recommends, however, that lawyers assume “that an attorney’s communications with a non-employee agent may well not be protected by the attorney-client privilege. . . .” Brewer, *supra*, at 764. Likewise, “it cannot be assumed that attorney communications with members necessarily are privileged against disclosure to employers or others.” Simonoff, *supra*, at 8.

Caveat: Consistent with these recommendations, if a member is present for a communication between an officer and the union attorney, that communication would not be attorney-client privileged.

## **J. Who May Claim the Privilege**

“The privilege may be claimed by the client . . . or the successor, trustee, or similar representative of a corporation, association, or other organization.” Ky. R. Evid. 503(c).

Query: Exactly who, in the form of a particular person, will decide whether the corporation or union claims or waives the privilege?

“Corporate law generally provides that the board of directors or a person authorized by the board to act may act for the corporation, if approval of shareholders on the particular matter is not required.” Geoffrey C. Hazard, Jr., et al., The Law and Ethics of Lawyering 533 (4th ed. 2005).

Generally, when management is replaced, the successor controls the privilege. See Hazard, *supra*, at 534.

One authority holds that a union’s board but not a single board member may waive a union’s attorney-client privilege. Diemer v. Fraternal Order of Police, Chicago Lodge 7, 242 F.R.D. 452, 458 (N.D. Ill. 2007).

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<sup>25</sup> Consistent with the theory that the union attorney represents only the union and not individual members, no joint attorney-client privilege will arise in the typical case. See Leeann R. Gruwell Anderson, Note, Turning the Key: Ensuring Evidentiary Privilege as Labor Counsel, 45 Drake L. Rev. 491 (1997) (discussing Bachner v. Air Line Pilots Ass’n, 113 F.R.D. 644, 647 (D. Alaska 1987)).

There is a split over whether inadvertent disclosure automatically destroys the privilege regardless of the circumstances. Bales, supra, at 275 n.507. A full discussion of this issue is beyond the scope of this paper. But the Sixth Circuit has stated in an unpublished opinion that “the mere fact that a breach in the chain of control has occurred is not sufficient to automatically render a document devoid of any privileged status.” Crabb v. KFC Nat. Mgmt. Co., 952 F.2d 403, 1992 WL 1321, at \*2 (6th Cir. Jan. 6, 1992).

## **K. Fiduciary Duty Exceptions**

### **1. Garner Good Cause Exception Applied to Union**

One exception to the attorney-client privilege that has been somewhat widely adopted in the corporate setting is the ability of shareholders in derivative suits to obtain otherwise attorney-client privileged communications. Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970); Leeann R. Gruwell Anderson, Note, Turning the Key: Ensuring Evidentiary Privilege as Labor Counsel, 45 Drake L. Rev. 491, 507 (1997). Applicability of the exception turns on a balancing of several factors including the harm to the party claiming the privilege. Anderson, supra, at 514.

The Garner factors include the following:

- (1) the number of shareholders and the percentage of stock they represent;
- (2) the bona fides of the shareholders;
- (3) the nature of the shareholders’ claim and whether it is obviously colorable;
- (4) the apparent necessity or desirability of the shareholders having the information;
- (5) the availability of the information from other sources;
- (6) whether the shareholders’ claim is of wrongful action by the corporation and what type of wrongful action;
- (7) whether the communication was about the litigation;
- (8) the extent to which the particular communication is identified or the shareholders are “fishing”; and
- (9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Anderson, supra, at 511-12 (quoting Garner, 430 F.2d at 1104).

Union members have attempted to rely on Garner to obtain otherwise privileged documents. Several courts have held that the doctrine applies to unions because of their fiduciary relationship with members. Arcuri v. Trump Taj Mahal Assoc., 154 F.R.D. 97, 107 (D.N.J. 1994) (“The circuit courts have uniformly upheld the view that the union’s duty of fair representation is a fiduciary responsibility.”); Nellis v. Air Line Pilots Ass’n, 144 F.R.D. 68, 71 (E.D. Va. 1992) (reasoning that a union’s duty of fair representation is a fiduciary duty); Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 680 (D. Kan. 1986)

(“courts have repeatedly characterized the general nature of a union’s duty toward its members as fiduciary”); Anderson, supra, at 510.

And some courts have found that the plaintiffs proved good cause. Wessel v. City of Albuquerque, 2000 U.S. Dist. LEXIS 17494 (D.D.C. Nov. 30, 2000) (exception applies where plaintiffs proposed to represent class of all non-members affected by allegedly deficient notice and advice concerned correction to notice, not defense against plaintiffs’ suit); Nellis, 144 F.R.D. at 72 (exception applies particularly where there is a lack of alternative source for information); Aguinaga, 112 F.R.D. at 681 (exception applies where, among other things, a high number of union members were adversely affected and the plaintiffs had high degree of need for the information); Boswell v. Int’l Bhd. of Elec. Workers Local 164, 106 L.R.R.M. (BNA) 2713, 1981 WL 27188 (D.N.J. 1981) (order applying Garner to compel disclosure of opinions from union counsel relating to legality of union’s conduct toward plaintiff under Labor Management Disclosure Act); Anderson, supra, at 513-14.

Several courts, however, have not actually ordered the release of privileged information because a weighing of the Garner factors, modified for the union setting, has indicated no reason to do so. Cox v. Adm’r U.S. Steel & Carnegie, 17 F.3d 1386, 1415 (11th Cir. 1994) (assuming that exception could apply to suit against union, good cause not shown where only tiny percentage of members were plaintiffs and where plaintiffs were adverse to other union members) modified, 30 F.3d 1347 (11th Cir. 1994); Arcuri, 154 F.R.D. at 108-09 (no good cause particularly where suit would not benefit all members and number of plaintiffs was minuscule compared to number affected); Mui v. Union of Needletrades, 1998 WL 915901 (S.D.N.Y. Dec. 30, 1998) (no good cause where plaintiffs few in number and possibility exists information may be discovered from other sources); Anderson, supra, at 511.

## **2. Kentucky Extension of Crime-Fraud Exception**

It is unclear whether there is a Garner fiduciary exception in Kentucky. The Kentucky Supreme Court has referenced Garner, but has not addressed the issue. Brewer, supra, at 773 (citing Shobe v. EPI Corp., 815 S.W.2d 395, 397, 398 (Ky. 1991)).

There is clearly, however, an extension of the furtherance of crime or fraud exception to include some situations where an attorney’s conduct furthers a breach of fiduciary duty. In Steelvest, Inc. v. Scansteel Serv. Center, Inc., 807 S.W.2d 476 (Ky. 1991), the Kentucky Supreme Court held that “as a matter of law . . . a breach of a fiduciary duty is equivalent to fraud.” Id. at 487.

In Steelvest, the plaintiff company sued the prior president and director for breach of fiduciary duty. Id. at 479. The president had formulated a plan to incorporate and had incorporated a rival business during the last eleven months of his employment with the company. Id. The president’s attorney had advised him in these efforts. Id.

The company sought to obtain certain communications between the president and his attorney, which would otherwise be protected by the attorney-client privilege, under the crime or fraud exception. Id. at 487. The Court held that the attorney-client privilege could not be used to protect the communications. Id. at 488. The Court reasoned that the attorney presumably knew that the president’s activities “possibly constituted a breach of fiduciary duties.” Id. Because the attorney, nevertheless, assisted the president in his efforts, the crime or fraud exception applied.<sup>26</sup> Id.

The United States District Court for the Western District of Kentucky has further explained this exception. In Invesco Institutional, Inc. v. Paas, 244 F.R.D. 374 (W.D. Ky. 2007), an employer sued four senior employees who had left the company to work for a competitor. Id. at 375. The employer asserted a claim for breach of fiduciary duty, alleging that the employees had disclosed confidential information and assisted the competitor to hire away key personnel. Id. at 376. The employer attempted to discover, among other documents, otherwise attorney-client protected information from the firms of the attorney who had represented the employees in obtaining the new employment. Id. The firms attempted to quash the subpoenas. Id.

The employer produced enough evidence “to support a reasonable belief that in camera review might yield evidence that establishes the applicability of the asserted exception to the privilege.” Id. at 384. And the court conducted an in camera review of the documents. Id. at 387. The court held, however, that not a “single document” appears “connected to a breach of fiduciary duty.” Id. at 391. The court admonished that “[i]t must be remembered that only those communications that further the alleged breach of fiduciary duty are subject to production under the exception.” Id. The court reasoned that seeking to obtain other employment did not breach any fiduciary duty. Id. Because the documents dealt with obtaining other employment but not with disclosure of confidential information, they were not “made in furtherance of the alleged breaches of fiduciary duty.” Id.

#### **IV. Related Privileges for Communications with Union Members**

##### **A. Negotiations Privilege**

In some jurisdictions, statements regarding labor negotiation strategy are privileged. Harvey’s Wagon Wheel, Inc. v. N.L.R.B., 550 F.2d 1139 (9th Cir. 1976) (stating that statements of union representatives are normally privileged because disclosure might expose “crucial material regarding pending union negotiations”); Berbiglia Inc., 233 N.L.R.B. 1476, 1495 (1977) (revoking subpoena which would require union to open its files regarding meetings and correspondence concerning negotiations and whether to strike); Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist., 547 N.E.2d 182 (Ill. 1989) (holding employer board’s closed negotiations meetings privileged); Michael D. Moberly, Extending a Qualified Evidentiary Privilege to Confidential

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<sup>26</sup> Steelvest was decided under KRS 421.210(4) which has been superseded by Rule 1.6.

Communications Between Employees and Their Union Representatives, 5 Nev. L.J. 508, 540, 543-44 (2004-2005); Collins, *supra*, at 10-11; but see EEOC v. Peoples Gas, Light & Coke Co., 92 Lab. Cas. (CCH) P34,070, 1981 WL 2332 (N.D. Ill. Aug. 19, 1981) (no privilege protects communications during labor negotiations from discovery by EEOC); Taylor Lumber, 326 N.L.R.B. 1298, 1300 n.11 (1998) (Board adopts ALJ decision that criticized Berbiglia and found employer's negotiations discussions were not privileged); Moberly, *supra*, 511 n.26.

Additionally, disclosure of authorization cards to employers is generally prohibited, and one court has extended that privilege to include a union's documents relating to an organizing campaign. UAW v. Garner, 102 F.R.D 108, 113, 116 (M.D. Tenn. 1984); but cf. Patterson v. Heartland Indus. Partners, L.L.P., 225 F.R.D. 204, 206, 207 (N.D. Ohio 2004) (holding that a First Amendment associational privilege does not apply when the names of the employees are redacted from organizing documents and that no NLRA privilege covers organizing documents).

## **B. Union Representative Privilege**

The National Labor Relations Board, the Federal Labor Relations Authority ("FLRA"), and the New York state courts recognize that employer conduct that seeks to obtain confidential communications between union members and representatives, acting as such, is an unfair labor practice. Moberly, *supra*, at 541 (discussing City of Newburgh v. Newman, 421 N.Y.S.2d 673 (N.Y. App. Div. 1979); Cook Paint & Varnish Co., 258 N.L.R.B. 1230 (1981); U.S. Dep't of Treasury, Customs Serv., 38 F.L.R.A. 1300 (1991)). The FLRA considers this protection an evidentiary privilege, Moberly, *supra*, at 521, but the D.C. Circuit has clarified that the privilege is available only against management, U.S. Dep't of Justice v. FLRA, 39 F.3d 361, 370 (D.C. Cir. 1994). Some arbitrators may also recognize this privilege. Moberly, *supra*, at 542 (discussing Hughes Aircraft Co., 86 Lab. Arb. Rep. (BNA) 1112 (1986) (Richman, Arb.)).

Other jurisdictions have expressly declined to find a privilege for communications between union members and their representatives, particularly when asserted against a non-employer party. Walker v. Huie, 142 F.R.D. 497, 501 (D. Utah 1992) (no privilege protects police officer's communications with union representative from discovery in suit by civilian against officer); In re Grand Jury Subpoenas, 995 F. Supp. 332, 336 (E.D.N.Y. 1998) (grand jury subpoenas not barred because no union privilege); Moberly, *supra*, at 534, 511 n.26, 559 (citing McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 386 (C.D. Cal. 2002)).

## **V. Ex Parte Communications**

### **A. With Whom Can Opposing Counsel Speak?**

If a union is investigating a grievance, can the union attorney speak, without the consent of the employer's attorney, to low-level employees who are union members, with

low-level employees who are not union members, with low-level management? If an employee's attorney is investigating a potential sexual harassment suit, can the employee's attorney speak with these employees without such consent?

What if an employer or employee is suing a union? Can their attorneys speak with the union members? With union representatives who are employees but not officers?

## **B. Kentucky Rule Regarding Ex Parte Communications**

Kentucky Rule 4.2 provides,

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.<sup>27</sup>

The Commentary, Comment 2, states,

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent of an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

The Commentary effective July 15, 2009, Comment 7, will state in pertinent part:

In the case of a represented organization, this Rule prohibits communications to a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the

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<sup>27</sup> Kentucky Rule 4.2 effective July 15, 2009 will be analogous to ABA Rule 4.2. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or by a court order."

matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.<sup>28</sup>

### **C. Kentucky Bar Association Ethics Opinion on Ex Parte Communication**

The KBA Opinion E-382 (July 1995) also advises that the prohibition on ex parte communications applies to 1) management employees, 2) non-management employees whose “act or omission in connection with the matter may be imputed to the organization,” and 3) “employees whose statement may constitute an admission of the organization.” Brewer, supra, at 802. The prohibition does not encompass other non-management employees. Id.; see also Shoney’s, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).

KBA Opinion E-382 provides that an employee whose conduct does not give rise to the claim is not an employee whose acts or omissions can be imputed to the organization. Additionally, an employee whose statements do not relate to the scope of the employee’s employment is not an employee whose statement will constitute an admission.

The opinion provides an example for guidance. A company has four employees, a president, two loaders, and a secretary. One of the loaders injures a third party who was delivering goods to the loading dock. Both the other employees observed the accident. The other loader was working on the dock at the time, and the secretary was taking a break on the dock. The third party sues the company.

The third party’s attorney may contact only the secretary. It is contemplated that the observing loader would be asked about the operation of the loading dock, a matter within the scope of his employment. On the other hand, the secretary would not be asked any matters within the scope of her employment.<sup>29</sup>

With the change to the Commentary, Comment 7, effective July 15, 2009, the opinion may no longer be accurate. The president would have to “supervise, direct, or regularly consult with the company’s attorney regarding the suit” for communication

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<sup>28</sup> The new language is analogous to ABA Comment 7. These changes were made, in part, because the ABA believed the “admissions” language had been interpreted overbroadly to include evidentiary admissions. Ellen J. Messign & James S. Weliky, Contacting Employees of an Adverse Corporate Party: A Plaintiff’s Attorney’s View, 19 Lab. Law. 353 (2004).

<sup>29</sup> KBA E-213 (March 1979), decided when the Disciplinary Rules were still in effect, concluded, “Therefore, if there is any question concerning the relationship of an employee to the corporation or governmental entity, it is necessary to contact the attorney of the corporation before taking any statements from the employee or from questioning any employee of the adversary corporation.” While the applicability of Rule 4.2 does not hinge on access to privileged information like the Disciplinary Rule did, it is an interesting question whether the advice to contact opposing counsel holds when an attorney is unsure about whether a non-management employee’s act can be imputed to the employer or whether the non-management employee’s statement will constitute an admission.

with the president to be barred. The loader who observed the incident would have to have authority to obligate the company in order for communication with the loader to be barred.

#### **D. Kentucky Authority Regarding Ex Parte Contacts with Current Employees**

A lawyer who has conversations about matters important to the case with management constituents of an entity that the lawyer knows is represented will be disqualified and any interview statements will be suppressed.<sup>30</sup> Shoney's Inc. v. Lewis, 875 S.W.2d 514, 515-17 (Ky. 1994). In Shoney's Inc., the plaintiff sued her employer for sexual harassment. Id. at 514. Prior to filing suit, the plaintiff's attorney contacted the employer's vice president of human resources. Id. The vice president informed the attorney that the employer would be represented by counsel and provided counsel's name. Id. Thereafter, the plaintiff's attorney spoke with the employer's counsel regarding pre-litigation settlement. Id. at 514-15. The employer's counsel sent a letter confirming the conversation. Id. at 515. After receipt of the letter, plaintiff's counsel met with and obtained statements from two of the employers' senior managers and numerous non-managerial employees without consent of the employer's counsel. Id. The plaintiff then filed suit, and the employer moved to disqualify plaintiff's attorney and his firm under Kentucky Rule 4.2. Id.

The Court held that the managers, of senior rank, were "precisely within the group of persons provided for in the comment."<sup>31</sup> Id. It further held that Kentucky Rule 4.2 applies "both before and after formal proceedings have begun." Id. The Court also held, in reliance on the authority of other jurisdictions, that the appropriate remedy was disqualification of plaintiff's counsel. Id. at 516. Finally, the Court held that "with respect to the statements wrongfully obtained the only satisfactory remedy is suppression." Id. The Court reasoned that if not suppressed, the statements might "acquire an independent significance, such that irreparable prejudice may result." Id. Without any reasoning in support, the Court also ordered the trial court to order the plaintiff's attorney to disclose to the employer's counsel the identity of all persons from whom statements were taken and to "refrain from any further disclosure of the substance of the statements in question." Id. at 517.<sup>32</sup>

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<sup>30</sup> See also, Callis v. KBA, 143 S.W.3d 603 (Ky. 2004) (publicly reprimanding attorney for ex parte contacts); Babbs v. Minton, 2004 WL 1367621 (Ky. Ct. App. 2004) (unpublished and not to be cited in Kentucky courts) (holding that plaintiff's attorney who hired agent to contact represented opposing employer's president must be disqualified and the record of the president's important admissions suppressed).

<sup>31</sup> Effective July 15, 2009, communications with a specified group of management will be prohibited.

<sup>32</sup> Query: Does the court refer to only the disclosure of the management employees' statements or all of the statements taken? Does the court's order imply that taking statements of any employee was inappropriate? If it was not inappropriate, why should counsel be directed not to disclose the statements in question? Can he give them to the new plaintiff's attorney? Or is the order to disclose the identities to the employer to enable the employer to move to suppress any of those statements which were obtained by improper ex parte contacts?

The dissent argued disqualification and suppression were an inappropriate remedy. Id. at 517 (Leibson, J., dissenting). The dissent reasoned that the violation was simply ethical. Id. at 517. The dissent further reasoned that suppression of the statements was unauthorized by the Kentucky Rules of Civil Procedure and Evidence. Id. at 517.

When an ex parte discussion with a constituent is not prejudicial, a writ of mandamus will not issue. Univ. of Louisville v. Shake, 5 S.W.3d 107, 110 (Ky. 1999). In Shake, the Court decided the issue based on the standard for issuance of a writ of mandamus. Id. at 109-10. Plaintiff, a secretary, sued the University of Louisville for sexual and religious harassment. Id. at 108. The University notified the secretary's counsel that it was denying permission to interview or contact any present or past employee outside the presence of the university attorney. Id. A few weeks before the scheduled trial, plaintiff's counsel spoke briefly with a former chair of the University of Louisville's Board of Trustees. Id. They spoke about a deposition of another employee who had testified that the former chair had asked questions about the case. Id. at 109. The University sought to disqualify the attorney based on the conversation, and the trial court denied the motion. Id. The court of appeals also denied the motion. Id.

The Supreme Court upheld the denial on the grounds that the University had failed to meet the requirement for an issuance of a writ of great injustice or irreparable injury. Id. at 110. The Court reasoned that the brief conversation pertained to collateral issues, and no confidential or privileged information was revealed. Id. The Court further reasoned that plaintiff had agreed not to use the information obtained at trial. Id. Moreover, the Court distinguished Shoney's on the ground that the information at issue there was highly prejudicial whereas here the Court could "perceive no likely resultant prejudice." Id.

### **E. Knowledge of Representation**

When, however, an attorney is unaware that an entity is represented, communications with entity constituents is not cause for disqualification. Humco, Inc. v. Noble, 31 S.W.3d 916, 919 (Ky. 2000). In Humco, the plaintiff sued her employer for racial discrimination. Id. at 918. Prior to filing suit, plaintiff's counsel wrote the employer's hospital administrator. Id. The administrator responded and carbon copied the employer's counsel. Id. The plaintiff's attorney, who did not know the employer was represented, then contacted five non-managerial employees regarding the matter. Id. After suit was filed, counsel (different than that named on the administrator's letter) entered an appearance on behalf of the employer. Id. Thereafter, plaintiff's new attorneys (who were in possession of the prior attorney's notes) interviewed ten former employees, some of whom were management. Id.

The employer moved to disqualify plaintiff's attorneys because of the interviews. Id. The employer also requested suppression of the statements obtained. Id. The Court

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held that plaintiff's attorneys had not made any inappropriate ex parte communications. Id. at 921. As to the interviews of the current non-management employees, the Court held that plaintiff's attorney did not know at the time of the interviews that the employer was represented. Id. at 919. The Court reasoned that the employer did not advise plaintiff's counsel that it was represented. Id. It further reasoned that individuals often carbon copy an attorney on a letter "but that fact alone does not establish that the attorney is representing the letter-writer." Id. Moreover, there were no other circumstances indicating that the employer was formally represented by the copied attorney or that the plaintiff's attorney knew of any such representation. Id.

Tip: Any letter from an entity's lawyer to an opposing counsel should "explicitly state in its text that the organization is represented by an attorney and provide the attorney's name, address, and other contact information." Brewer, supra, at 803.

#### **F. Kentucky Authority Regarding Ex Parte Contacts with Former Employees**

KBA Opinion E-381 (July 1995) states that "a lawyer may communicate with a former employee of an organization without consent or notification." Brewer, supra, at 802.

The Court, in Humco, also held that Kentucky Rule 4.2 only limits an attorney's right to contact current employees. Id. at 920. The Court reasoned that the purpose of Rule 4.2 is not to prevent the flow of information but rather to "preserve the position of the parties in an adversarial system." Id. The Court explained that a former employee is not a "party" and is not adverse to the plaintiff. Id.

Effective July 15, 2009, the Commentary to Kentucky Rule 4.2, Comment 7, will state: "Consent of the organization's lawyer is not required for communication with a former constituent."

Opinion E-381 suggests that an organization can "enter into confidentiality agreements or seek protective orders against communications by former employees who have privileged information." Brewer, supra, at 804. The opinion states that, "[i]t is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective orders."

Caveat: Brewer suggests that "it may be illegal to ask a witness not to talk voluntarily with a prosecutor or law enforcement official." Brewer, supra, at 805.

Tip: An attorney making ex parte contacts with current or former constituents should be careful not to inquire into any privileged attorney-client communications. Garrett Hodes, Ex Parte Contacts with Organizational Employees in Missouri, 54 J. Mo. B. 83, 86 (1998). As discussed above, the privilege belongs to the entity.

### **G. Open Issue Regarding Who Is a Manager**

Kentucky courts have not addressed the issue of who has managerial responsibility. It might encompass supervisors or may be limited to the control group. Cohn, supra, at 771-72.

An example of an employment case where a court held that managerial means “officers, directors, and managing agents” is Shealy v. Laidlaw Bros., 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 (D.S.C. 1984).

Effective July 15, 2009, under the Commentary to Kentucky Rule 4.2, Comment 7, the issue will be who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter.” While the Supreme Court’s intent likely was to narrow the class of persons with whom communication is prohibited, the language is not clear as to whether supervise and direct are modified by the phrase “concerning the matter.”

### **H. Whose Statements May Constitute an Admission**

KBA Opinion E-382 implies that anyone speaking about matters within the scope of employment makes statements that may constitute an admission. This is consistent with the meaning of an evidentiary admission, which can be contradicted or impeached. Cohn, supra, at 778.

Consistent with the evidentiary interpretation of admissions, some courts hold that an attorney may communicate *ex parte* with a constituent who is not a manager and whose conduct will not be imputed to the employer. But the attorney cannot use the statements gathered as admissions. These courts reason that lawyers must choose between communicating with employees *ex parte* or using gathered statements as admissions. Sally E. Barker, Application of ABA Model Rules 4.2 and 4.3 to Union and Plaintiff’s Employment Law Counsel’s Communications with Adverse Parties 8 (unpublished manuscript); *see, e.g., Orłowski v. Dominick’s Finer Foods, Inc.*, 937 F. Supp. 723, 730 (N.D. Ill. 1996).

Some courts interpret admission differently, to mean only a binding admission, in the sense that it takes the issue “out of the case.” Cohn, supra, at 778; *see e.g., Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990).

The Commentary to Kentucky Rule 4.2, Comment 7, effective July 15, 2009, clarifies that only contact with a person who can make a binding admission will be prohibited.

### **I. Other Jurisdictions Authority on Ex Parte Communications**

Professor Lidge has identified seven different tests, one of which is the ABA Model Rule upon which Kentucky’s Rule 4.2 is based, in use in different jurisdictions. Ernst F. Lidge III, The Ethics of Communicating with an Organization’s Employees: An

Analysis of the Unworkable “Hybrid” or “Multifactor” Managing-Speaking Agent, ABA, and Niesig Tests and a Proposal for a “Supervisor” Standard, 45 Ark. L. Rev. 801 (1992). This means it is imperative that you research the law in the jurisdiction at issue before making any ex parte contacts.

1) While it is not likely, some jurisdictions, including some federal district courts, do impose a complete ban on communications with an entity’s employees. Lidge, supra, at 810-14.

2) Other jurisdictions, including some federal district courts, ban either communications with the control group or with “officers, directors, and managing agents.” Lidge, supra, at 814-16

3) Some jurisdictions, including some federal district courts, “support a ban on ex parte communications with all current employees about matters within the scope of their employment.” Lidge, supra, at 816.

4) Some courts, including some federal district courts, use a case-by-case balancing approach. Lidge, supra, at 816-18. An employment case where this approach was used is Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414, 418 (D. Mass. 1986) (permitting ex parte interviews by counsel for terminated alleged harasser of allegedly harassed women). But see Morrison v. Brandeis Univ., 125 F.R.D. 14, 18 n.1 (D. Mass. 1989) (stating that Mompoint was decided under exception for court authorization of ex parte contacts with represented party).

5) Some jurisdictions use a “managing-speaking agent test.” Under this test, ex parte communications are only prohibited with those parties who have the legal authority to bind the corporation. Lidge, supra, at 835.

6) Some jurisdictions use the test established by the version of Model Rule 4.2 currently in effect in Kentucky.<sup>33</sup> See the issues discussed above in sub-sections G & H for potential differences between jurisdictions using this rule.

7) Finally, some jurisdictions use a test similar to the following: ex parte contacts are prohibited with “employees whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.” Lidge, supra, at 855 (quoting Niesig, 558 N.E.2d at 1035).

## **J. Authority in the Sixth Circuit on Ex Parte Communications**

One employment case in the Western District of Michigan has addressed the issue of who has managerial responsibility. Felicia Ruth Reid, Comment, Ethical Limitations

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<sup>33</sup> Some other jurisdictions have already adopted the more recent changes to ABA Model Rule 4.2 that will be effective in Kentucky on July 15, 2009.

on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees, 24 U.C. Davis L. Rev. 1243, 1270-71 (1991). In Massa v. Eaton, the court held that ex parte interviews with any managerial level employee, not only those in the control group, is forbidden. Massa v. Eaton, 109 F.R.D. 312 (W.D. Mich. 1985).

**K. Tips for Attorneys Making Ex Parte Communications**

Reid offers the following tips.

1. Disclose your identity, that you are counsel for the organization's adversary, and the purpose of the interview.
2. Be clear that the interview is voluntary and that the interviewee may seek counsel, whether individual or the entity's counsel.
3. Make sure the employee is not individually represented already.
4. Refrain from asking about communications with the entity's counsel.
5. Conclude the interview if it becomes apparent that the employee is one with whom ex parte contact is precluded.
6. If substantial uncertainty exists as to whether the employee is a party for purposes of ex parte contacts, attempt to resolve the issue with opposing counsel or seek court approval for the contact.

Reid, supra, at 1305, 1306.