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# Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law, The Symposium: The Lawyer's Duties and Liabilities to Third Parties

Russell Pearce
*Fordham University School of Law*, RPEARCE@law.fordham.edu

# THE UNION LAWYER'S OBLIGATIONS TO BARGAINING UNIT MEMBERS: A CASE STUDY OF THE INTERDEPENDENCE OF LEGAL ETHICS AND SUBSTANTIVE LAW

RUSSELL G. PEARCE*



* Associate Professor of Law, Fordham University School of Law; B.A. 1978, J.D. 1981 Yale University. I am grateful for the comments and suggestions of participants at the South Texas College of Law Symposium, as well as at a Fordham Faculty Reading Group where I presented versions of this article. In addition, I have benefited from the comments of Dave Douglas, John Feerick, Bruce Feldacker, Mike Okun, and Jim Pope. Special thanks to Jim Coppess and Mike Lanzarone for their close attention to early drafts. I would also like to thank my research assistant, Emily Drucker, for her invaluable assistance.

## I. INTRODUCTION

One of the largest groups of purported nonclients to whom lawyers might have obligations are members of bargaining units represented by unions.[1] Despite the much publicized decline of labor unions, they have almost 16.4 million members.[2] In addition, many workers are members of bargaining units represented by labor unions, but are not union members.[3] The relationship of union lawyers to

1. James Pope has noted that "[u]nion lawyers alone rival corporate lawyers in their impact on client constituents. Although shareholders outnumber union members, the latter are far more dependent on their organizations." James G. Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1, 3 (1989).

2. *Id.* at 3 n.8 ("Union membership totalled 16,975,000 in 1986.") (citing STATISTICAL ABSTRACT OF THE UNITED STATES 402 (1988)); C.D. GIFFORD, DIRECTORY OF LABOR ORGANIZATIONS 5 (1996).

3. The provisions determining whether bargaining unit members are union members vary according to the provisions of collective bargaining agreements and relevant law. Section 8(a)(3) of the National Labor Relations Act (NLRA) permits a union and an employer to negotiate a contract requiring union membership as a condition of employment. These provisions are commonly referred to as union security clauses and fall into three general categories: (1) a union shop which requires that an employee become a union member usually after 30 days of employment; (2) an agency shop under which employees do not have to join the union but instead pay service fees; and (3) maintenance of membership where each employee who is a union member on the effective date of the contract must remain a member, but the initial decision to join is voluntary. BRUCE FELDACKER, LABOR GUIDE TO LABOR LAW 302, 303 (3d ed. 1990). Although these types of union security clauses refer to "union membership," the Supreme Court has held that an employee cannot actually be required to become a union member. Only a "financial core" membership, under which an employee pays the union's initiation fees and dues without actually becoming a member, can be required under a union security clause. *Id.* If a financial core member objects to paying the full initiation fees and dues, the employee can be required to pay only that portion of fees and dues used for collective bargaining functions. *Id.* at 323. These financial core members are still covered by the collective bargaining agreement and have full contractual rights, but are not entitled to participate in the union.

these millions of bargaining unit members, whether members of the union or not, is unclear.

An examination of how this relationship influences and is influenced by labor law offers a fascinating case study of the synergy between the substantive law and the law and ethics of lawyering.[4] The substantive labor law, which has legitimized representation of a union as an entity, both promotes collective action on the part of unions and protects the individual rights of bargaining unit members. The union's duty of fair representation calibrates these sometimes conflicting obligations.

These conflicting obligations owed to the organizational client and to the individual bargaining unit member complicate the law and ethics of union representation. In the context of grievances arising under collective bargaining agreements,[5] courts and commentators have employed three different and inconsistent paradigms to describe the relationship.[6] They have variously described the union lawyer's client as: the union; both the union and the bargaining unit member; and the union as the primary client with the bargaining unit member as a derivative client.[7]

Examination of the interplay between substantive labor law and legal ethics suggests that at least in this context the substantive law and legal ethics are intertwined. Just as labor law's conception of the role of the union and rights of the bargaining unit member influences the determination of the appropriate legal ethics model, legal ethics' construction of the lawyer's obligation to the union and bargaining unit member influences how we characterize the role of the union and the rights of the bargaining unit member.

This case study suggests re-examination of the current practice of analyzing substantive law and legal ethics as separate and unconnected fields. The current practice is to view substantive law and legal

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For example, only full union members can vote on the ratification of collective bargaining agreements. *Id.* at 302. In addition, federal law permits states to limit or prohibit union security provisions. II THE DEVELOPING LABOR LAW 1495 (Patrick Hardin et al. eds., 3d ed. 1992). A number of state statutes, called "right-to-work" laws, prohibit the payment of union dues or fees as a condition of employment, including even an agency shop arrangement. *Id.* at 1531. In these jurisdictions, a bargaining unit member need have no union affiliation. As a result of this panoply of potential contractual and legal provisions, bargaining units represented by unions will often include employees who are not union members or who are financial core members, and thus, members in name only.

4. I will sometimes refer to the law and ethics of lawyering using the shorthand expressions of "legal ethics" or "the law of lawyering."

5. *See infra* notes 22–25 and accompanying text.

6. *See infra* Part III.

7. *See id.*

ethics as intersecting circles, and to accept grudgingly that in the narrow area of intersection the substantive law and the law of lawyering are the same. A model more consistent with this case study would view substantive law and legal ethics as "warp and woof," as interlaced threads that together weave a whole tapestry.

Parts II and III of this Article discuss the relationship between lawyers and bargaining unit members in the framework of intersecting circles. After describing the role of unions and their obligations to bargaining unit members, Part II applies this analysis to the relationship between union lawyers and bargaining unit members. Next, Part III considers how the law of lawyering applies to representation of groups, group members, and nonclients, and applies this analysis to the relationship between union lawyers and bargaining unit members. Part IV then explains how the issues raised here are better analyzed as part of interlaced threads in a tapestry as opposed to intersecting circles.

## II. THE SUBSTANTIVE LAW CONTEXT: UNIONS, THE DUTY OF FAIR REPRESENTATION, GRIEVANCES, AND LAWYERS

This Part outlines the substantive law context of representation of unions with regard to contract grievances. Labor law empowers employees to form unions to promote their collective interests. It also imposes upon unions a duty of fair representation to all bargaining unit members, whether or not they are union members. In the processing of grievances, the duty permits unions broad discretion but requires them to act in good faith, not arbitrarily, and without discrimination. The duty does not require that the union provide a lawyer, or permit a private lawyer, to advocate with regard to a particular grievance.

### *A. Unions as Collectives*

The legal recognition of labor unions as exclusive bargaining agents for groups of employees is a relatively recent phenomenon. In the early nineteenth century, many jurisdictions deemed the organization of unions to be illegal.[8] Later in the nineteenth century, when courts found the organization of unions lawful, they deemed unions to be collections of individuals "lack[ing] legal personality" and the sta-

8. Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Unions in America*, 100 HARV. L. REV. 672, 675 (1987) (reviewing CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985)).

tus to "sue [ ]or be sued."[9] Even courts that found unions lawful refused to enforce trade agreements between unions and employers on the ground that they "were not consonant with the common law of contracts."[10]

As Professor Craig Becker has observed, "[b]y the turn of the twentieth century, the profound disparity between the legal privileges accorded the private business corporation and those extended to the trade union increasingly determined the balance of power between labor and capital in the workplace."[11] While the union lacked legal personality, corporations "enjoyed virtually unrestricted freedom in the marketplace."[12]

As the twentieth century progressed, changes in the status of unions emerged. Early in the century, courts began to "grant unions de facto legal personality" as a means of addressing labor unrest.[13] The New Deal subsumed these piecemeal developments into extensive federal regulation of labor-management relations.[14] Federal legislation assured unions legal personality and "vested [them] with the right to negotiate and administer collective bargains."[15] The grounds for providing unions with this role were "reducing industrial strife, restoring mass purchasing power [during the Depression], promoting a fairer distribution of economic resources, and furthering self-government by employees."[16] Although later legislation sought to provide greater protection for employee choice, it "retained [labor law's] commitment to collective action as an essential means to [these] multiple ends."[17]

Under this statutory framework, unions and employers enter into collective bargaining agreements. In collective bargaining, individual employees obtain the benefit of the greater power of collective representation,[18] but must relinquish "their contractual freedom to negotiate their own job conditions."[19] The union's task is to "accommodate the overlapping and competing demands of varied interest groups,

9. *Id.* at 676.
10. *Id.*
11. *Id.* at 674.
12. *Id.*
13. *Id.* at 676.
14. *Id.* at 677.
15. *Id.*; *see* 29 U.S.C. §§ 157, 185.
16. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 950 (1996).
17. *Id.* at 959.
18. *Id.* at 949–952.
19. *Id.* at 952 (footnote omitted).

surrendering or compromising some demands to achieve others."[20] Similarly, collective bargaining requires employers to relinquish their right to negotiate individually with employees and instead "to bargain in good faith with [a] collectively constituted entity."[21]

### *B. Grievances*

When grievances (or disputes) arise as to the interpretation and enforcement of collective bargaining agreements, "[n]inety-nine percent of collective bargaining agreements provide for arbitration."[22] Most agreements also provide for formal or informal procedures prior to "the final step of . . . arbitration,"[23] including attempts to resolve grievances at the shop level.

The subject of the grievance proceeding may be the employer's treatment of the bargaining unit as a whole, such as the failure to comply with provisions regarding wages and hours, or the treatment of an individual or group of individuals, as in the case of discipline or discharge.[24] In either case, because grievances generally arise under collective bargaining agreements between union and employer which provide the union with control of grievances, the union (and not the individual) is generally the formal party initiating, pursuing, and resolving the grievance.[25]

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20. Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 257 (1977); *see also* Humphrey v. Moore, 375 U.S. 335, 349–50 (1964) (observing that "[c]onflict between employees represented by the same union is a recurring fact").

21. Brudney, *supra* note 16, at 952.

22. LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 15 (1994). A "grievance" is an allegation that a collective bargaining agreement has been improperly interpreted or applied. ROBERT E. DOHERTY, INDUSTRIAL AND LABOR RELATIONS TERMS: A GLOSSARY 16 (5th ed. 1989). The term "grievance arbitration" refers to arbitration of grievances arising under the terms of an existing collective bargaining agreement. BRUCE FELDACKER, LABOR GUIDE TO LABOR LAW 287 (3d ed. 1990). Grievance arbitration is distinct from "interest arbitration," which refers to arbitration of unresolved bargaining issues on a new or amended agreement. *Id.* While grievance arbitration is common, outside of the public sector, interest arbitration is a relatively rare phenomenon in the United States. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 134 (2d ed. 1986).

23. GOULD, *supra* note 22, at 5. Most collective bargaining agreements establish procedures for the handling of grievances. The first step usually occurs at the shop level; if an agreement is not reached at this initial phase, the grievance may be appealed in successive steps. The number and types of these steps vary among contracts. Most grievance procedures call for arbitration of grievances as a final step. ROBERT E. DOHERTY, INDUSTRIAL AND LABOR RELATION TERMS: A GLOSSARY 16 (5th ed. 1989).

24. COOPER & NOLAN, *supra* note 22, at 86–138, 181–200.

25. *See, e.g.*, Archibald Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 627–30 (1956) (describing the collective bargaining practice); Summers, *supra* note 20, at

Union control of the grievance sometimes leads to conflict between the union and the employee or employees who are complaining that the employer has violated their rights. As Judge Cudahy has noted, the union may very well have "a somewhat different perspective than the individual employee it represents in a grievance matter."[26] In grievances, "[t]he union represents the majority of employees, even while it is representing a single employee in a grievance process. Thus even during an individual grievance procedure, the union's own credibility, its integrity as a bargaining agent and the interests of all its members may be at stake."[27] Professors Michael C. Harper and Ira C. Lupu have observed that the limited bargaining leverage and financial resources require "union leaders to make difficult distributional judgments" throughout the process of resolving problems arising from contract administration.[28]

### C. *The Duty of Fair Representation*

In contract administration, as well as in contract negotiation, the union's duty of fair representation regulates its relationship to bargaining unit members. The Supreme Court and the National Labor Relations Board developed the duty as a corollary[29] to a union's "exclusive . . . statutory authority to represent all members of a designated unit."[30] As the Supreme Court has observed, this exclusive authority "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its

256 (stating that "unions assert under most collective agreements the exclusive power to process and settle grievances and to carry cases to arbitration"). While acknowledging union control over grievances, Summers challenges the commonly accepted notion that the union "own[s] the grievance" on the ground that the union has a duty of fair representation. Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1093 (1984). For a discussion of the duty of fair representation, see *infra* Part II.C.

26. Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995).

27. *Id.*

28. Michael C. Harper & Ira C. Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211, 1212–13 (1985).

29. II THE DEVELOPING LABOR LAW, *supra* note 3, at 1410. The first case enunciating this doctrine was Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944) (holding that black employees had a right to challenge racially discriminatory collective bargaining provisions). The Court applied the duty to the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) and Syres v. Oil, Chemical & Atomic Workers Local 23, 350 U.S. 892 (1955). II THE DEVELOPING LABOR LAW, *supra* note 3, at 1411–1412. In 1962, the National Labor Relations Board found "that a breach of the duty of fair representation amounted to an unfair labor practice." II THE DEVELOPING LABOR LAW, *supra* note 3, at 1412.

30. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 76 (1991).

discretion with complete good faith and honesty, and to avoid arbitrary conduct."[31] This duty, which applies to all employees in the bargaining unit, whether members of the union or not,[32] has been recently described by the Court as being "akin to the duty owed by other fiduciaries to their beneficiaries."[33] The union's breach of the duty often proves quite costly with remedies including awards of backpay, future losses, compensatory damages, and attorneys' fees,[34] as well as equitable relief.[35]

The duty of fair representation attempts to balance the union's prerogatives with the rights of the bargaining unit member. While placing some limits on the union's conduct, the doctrine does not provide a bargaining unit member with "an absolute right to have his grievance taken to arbitration."[36] The courts recognize that "[t]he collective bargaining system . . . of necessity subordinates the interests of an individual employee to the collective interests of all employees."[37] So long as the union is acting in good faith, without discrimination, and is not arbitrary, the union may compromise the grievances of some workers in the interests of the union as a whole,[38] or may refuse to pursue grievances it deems to lack merit.[39]

The duty of fair representation has become the focus of debate regarding the role of unions and the relationship between unions and bargaining unit members under labor relations law. At one end of the spectrum, commentators oppose the duty of fair representation. They describe the union's role as representing the interests of the majority of its members, and criticize the duty for "fracturing the collective entitlement of a body of labor into the aggregated rights of individual

31. *Id.*

32. II THE DEVELOPING LABOR LAW, *supra* note 3, at 1444; *see also* Deboles v. Trans World Airlines, Inc., 552 F.2d 1005, 1016 (3d Cir.) (stating that discrimination against nonmember employees is unlawful), *cert. denied*, 434 U.S. 837 (1977); Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945) (holding that company cannot discriminate against employees who belong to another union or no union).

33. Air Line Pilots Ass'n v. O'Neill, 499 U.S. at 74.

34. II THE DEVELOPING LABOR LAW, *supra* note 3, at 1477 (footnotes omitted). Individuals covered by the National Labor Relations Act can sue for relief in court or pursue an unfair labor practice before the National Labor Relations Board. *Id.* at 1423. The employee will often join the claim of breach of duty of fair representation with a claim that the employer breached the collective bargaining agreement or has colluded with the union. *Id.* at 1418, 1472.

35. II THE DEVELOPING LABOR LAW, *supra* note 3, at 1473.

36. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

37. *Id.* at 182.

38. *See, e.g.*, Griffin v. Air Line Pilots Ass'n Int'l, 32 F.3d 1079, 1083 (7th Cir. 1994).

39. *Sipes*, 386 U.S. at 191.

employees to be fairly represented."[40] They argue both that the duty is inconsistent with labor law's emphasis on collective action,[41] and that it unduly directs the limited resources of the union to the interests of individuals at the expense of the majority.[42]

At the other end of the spectrum, commentators describe the role of unions in enforcing collective bargaining agreements as a collection of individual interests, rather than as an organization having its own interest. While acknowledging the need for union flexibility in negotiating agreements, Clyde Summers argues that collective bargaining agreements "create[ ] rights in the individual employee. . . . [However], [t]he effect of the contractual provision giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf."[43] As a result, the union serves as the trustee of the individual's contract right, and "assumes an obligation to act on behalf of the individual."[44]

In the middle are those commentators who, like the courts, have rejected both polar approaches. They seek standards which protect both the union's authority to act on behalf of the organized group of workers and the individual's right to be free from exploitation by the majority.[45] While viewing grievances as vindicating the rights of the union, these commentators also describe grievances as implicating important rights of individual bargaining unit members.[46]

### D. *The Duty of Fair Representation and the Relationship of Union Lawyers to Bargaining Unit Members*

In many, but certainly far from all, grievance matters, unions use in-house lawyers or outside counsel as their representatives or advisors for part or all of the process.[47] In the context of the duty of fair representation, questions have arisen regarding whether a union must provide a lawyer, whether a bargaining unit member may retain a pri-

40. Becker, *supra* note 8, at 680; *see also* Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 204–05 (1980); Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 465–66 (1983).

41. Becker, *supra* note 8, at 680–81.

42. Seymour M. Waldman, *A Union Advocate's View*, *in* THE CHANGING LAW OF FAIR REPRESENTATION 109, 112 (Jean T. McKelvey ed. 1985).

43. Summers, *supra* note 20, at 256.

44. Summers, *supra* note 25, at 1094.

45. *See, e.g.*, Cox, *supra* note 25, at 630–34; Harper & Lupu, *supra* note 28, at 1215–16.

46. *See supra* note 45.

47. In many instances, unions will instead use nonlawyer staff. *See, e.g.*, FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 241–42 (4th ed. 1985).

vate union lawyer, and whether the union is liable for the union lawyer's misconduct.

Where the collective bargaining agreement provides for union control of grievances, the union has the authority to determine whether to retain an attorney to process a grievance. Employees have unsuccessfully argued that they had a right to choose their representative and also, their right to an attorney in complex grievances.[48] As one commentator notes, "[c]ourts have rejected claims that the duty of fair representation requires a union to furnish a lawyer to represent a grievant in arbitration."[49]

The rationale for the union's authority to retain counsel derives both from the existence of collective right in the union and the absence of a countervailing right for the individual. Control of the grievance process includes determining the advocate with regard to the grievance, as well as which arguments and concessions are made.[50] At the same time, the member only has the right to representation which is not arbitrary, discriminatory, or in bad faith, but not to representation at the level of the skills of a trained professional.[51] For this reason, even where the union retains a lawyer, the lawyer's failure to satisfy professional standards does not breach the union's duty of fair representation.[52]

What does constitute a violation of the duty of fair representation is using a discriminatory process for determining whether to retain a lawyer. Some unions, for example, have taken the position that they will only provide attorneys to represent grievances on behalf of union members and not for nonmembers. They argue that such policies are not impermissible discrimination. Rather, it is "an extra service, rep-

48. MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 389 (1988); *see also* Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985).

49. MALIN, *supra* note 48, at 389.

50. *See, e.g.*, Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985) ("Decisions in other circuits hold that it is for the union to decide the circumstances under which an attorney will be supplied to a grievant"); Johnson v. United Steelworkers, Dist. 7, Local Union No. 2378-B, 843 F. Supp. 944, 947 (M.D. Pa. 1994) (stating that "[f]ederal law provides that unions are to be the exclusive bargaining representatives for workers in union shops . . . .").

51. *See, e.g.*, Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 920 (7th Cir. 1989) ("We have no doubt that certain acts or omissions by a union official representing a grievant, while actionable if done by an attorney, would not constitute a breach of the union duty of fair representation."); MALIN, *supra* note 48, at 389 (stating "arbitration is not the same as litigation and . . . reliance on representation by nonlawyer union officials, standing alone, cannot, as a matter of law, be a breach of duty").

52. *See, e.g.*, Curtis v. United Transp. Union, 700 F.2d 457, 458 (8th Cir. 1983) (agreeing with the argument that the union should not be held to the reasonable attorney standard for determining breach of the duty of fair representation).

resentation over and above the level of adequacy, a benefit, and an incentive to membership."[53] Rejecting this argument, courts have found these policies to constitute unlawful discrimination.[54]

Another issue related to union control and collective bargaining is the question of whether the employee may retain his or her own counsel to process the grievance. Where the collective bargaining agreement gives the union exclusive control of the grievance, just as the union can decide not to use an attorney, it can decide to forbid the employee from using her own attorney.[55] The Ninth Circuit has noted that "no court has adopted the rule that employees are entitled to independently retained counsel in arbitration proceedings, or that the exclusion of such attorneys from arbitration violates the duty of fair representation."[56]

At the same time, the union does not have unlimited power to control the employee's access to a lawyer. In *Seymour v. Olin Corp.*,[57] the employee alleged that the union refused to process his grievance unless he agreed not to consult with an outside attorney he had retained.[58] The Fifth Circuit held that this allegation, if proven, would constitute a breach of the duty of fair representation.[59] It found little collective interest in prohibiting consultation with counsel. The court noted that "[a] union's interest in acting as exclusive spokesman . . . [and its] ability to represent all its employees is not compromised by the mere fact that an employee is consulting with an attorney regarding matters related to his discharge."[60] The court found that the individual employee has a legitimate interest in consulting counsel,

53. National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d 1402, 1406 (D.C. Cir. 1983) (quoting Brief for Petitioner, at 13) (internal quotes omitted).

54. MALIN, *supra* note 48, at 390. *Compare* National Treasury Employees Union v. Federal Labor Relations Auth., 721 F.2d at 1407 (stating that "as exclusive bargaining agent, the Union may not provide [attorney representation] exclusively for Union members") *with* National Treasury Employees Union v. Federal Labor Relations Auth., 800 F.2d 1165, 1170–71 (D.C. Cir. 1986) (finding it permissible to deny attorney representation in situations where "the individual retains the right to protect himself in the employment relationship").

55. MALIN, *supra* note 48, at 390; *see also Garcia*, 58 F.3d at 1179 ("Unions are given considerable discretion in handling grievance procedures. This discretion includes the right to limit the role of outside attorneys in the grievance process.")

56. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985). Even where a union permits an employee to retain her own lawyer, the employer has no obligation to arbitrate with the employee or the lawyer. *See* General Drivers Local 984 v. Malone & Hyde, Inc., 23 F.3d 1039, 1043 (6th Cir. 1994).

57. 666 F.2d 202 (5th Cir. Unit B 1982).

58. *Id.* at 207.

59. *Id.* at 210.

60. *Id.* at 209.

especially where the interests of the union might deviate from those of an individual employee.[61]

Courts and the NLRB have also held that employees have a right to retain their own counsel as a remedy for breach of the duty of fair representation. Where the NLRB has found that the union has breached its duty of fair representation in failing to pursue the employee's rights, it has sometimes ordered the union to pay for the employee to hire independent counsel to pursue those rights.[62] Similarly, courts have awarded attorneys fees to the prevailing plaintiff in fair representation cases.[63] While some courts have employed a "private attorney general" theory to justify such an award,[64] others have found them a principal element of plaintiff's damages, incurred to do what the "union was obliged but failed to do on his behalf."[65]

## III. THE LAW AND ETHICS OF LAWYERING: THE UNION LAWYER'S OBLIGATIONS TO BARGAINING UNIT MEMBERS

### *A. The Legal Ethics Complexity*

Legal ethics does not provide an easy formula for analyzing the union lawyer's relationship to bargaining unit members. The union's status as a client, the potential clienthood of the bargaining unit member, and the application of the derivative client doctrine, make this analysis complex. As a result, courts and commentators have employed three different perspectives: the union as the client, both union and bargaining unit member as clients, and the bargaining unit member as a derivative client.[66]

One level of complexity arises from the lawyer's representation of the union as an organization. On their face, the legal ethics rules do provide a simple set of rules for representation of an organization,

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61. *Id.*

62. *See, e.g.*, NLRB v. International Bhd. of Teamsters, 509 F.2d 1075, 1078–79 (9th Cir.) (finding that the order that the union pay counsel fees was within the power granted to the NLRB), *cert. denied*, 421 U.S. 976 (1975); United Steelworkers Local 15063 (Shanks), 281 N.L.R.B. 1275, 1275 (1986) (requiring union to pay for the employee's representation); Glass Bottle Blowers Ass'n Local 106 (Owens-Illinois, Inc.), 240 N.L.R.B. 324, 1979 WL 8704, at *3 (1979) (ordering payment of fees for employee's counsel).

63. II THE DEVELOPING LABOR LAW, *supra* note 3, at 1479.

64. *Id.*, *supra* note 3, at 1480–81. The private attorney general theory justifies an exception to the "American Rule" barring the award of attorney's fees on the ground that such awards provide lawyers with a needed incentive to enforce rights under law.

65. Scott v. Local 377 International Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977); *see* II THE DEVELOPING LABOR LAW, *supra* note 3, at 1481 (analyzing the *Scott* decision).

66. *See infra* Part III.B.

such as a union. The client is the union.[67] The bargaining unit members are not clients and are not entitled to any client-like rights.

But while the rules of organizational representation may appear simple, implementation is another matter. Organizations as entities exist only in the abstract. In practice, organizations can only act through human representatives. As Rule 1.13 of the Model Rules of Professional Conduct recognizes, the entity provides the lawyer with instructions "through its duly authorized constituents."[68]

The task of determining the lawyer's relationship to the various constituents of the organization is complex.[69] In different circumstances, different constituents will have the authority to provide instructions to the lawyer. Some decisions may be made at the highest level of the organization and some at lower levels. Some authorities have also found that under some circumstances, such as a derivative suit against a corporation, the corporation's lawyer properly represents only the corporation, as an abstract entity, and should not follow instructions from any constituent.[70]

Accordingly, Professor Geoffrey C. Hazard, Jr. has observed that the efforts of courts and scholars to apply legal ethics to corporate representation have been "baffled and baffling."[71] Making the union lawyer's obligations even more baffling is the inclusion in the bargaining unit of both union members, who are constituents of the union, and nonunion members, whose grievances the union must also process, as well as financial core members whose status as members or nonmembers is unclear.[72]

The second factor is what Professor Ted Schneyer terms "clienthood."[73] He notes that "[t]he brute fact that establishes the

67. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995).

68. *Id.*

69. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 747–48 (2d ed. 1994).

70. *Id.* at 765–69.

71. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 30 (1987). As Professor John Leubsdorf has observed, "[t]he lawyer-client relationship traditionally has been conceived as one between individuals." John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 825 (1992). For a more detailed discussion of the individualism inherent in legal ethics, see Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1274–79 (1994).

72. *See supra* note 3. This Part will refer generally to union members and nonmembers. It does not determine whether financial core members are properly members or nonmembers, but rather, identifies how this issue further complicates the analysis.

73. Theodore Schneyer, Clienthood (1995) (unpublished manuscript, on file with the author).

existence of most lawyer-client relationships is a contract in which lawyer L agrees to provide legal services in return for compensation from C."[74] In that case, the union would be the union lawyer's client. Sometimes, however, as a matter of expectations or of policy, the law of lawyering determines that the contractual relationship does not dictate who is a client. For example, in the insurance defense context, even though both the insurer and the insured have a relationship with the lawyer, "some courts and commentators have taken the view that the lawyer represents the insured alone."[75] Their rationale is to structure the lawyer's incentives to protect the relatively vulnerable insured.[76] One could argue based on a similar policy, or based on expectations,[77] that despite the union's retention of the lawyer, the bargaining unit member is a client.

The third factor is the concept of the derivative client. The lawyer's duties to a derivative client are higher than to other nonclients. Professors Geoffrey C. Hazard, Jr. and W. William Hodes have explained that where "the lawyer is hired to represent the fiduciary, and the fiduciary is legally required to serve the beneficiary, the lawyer should be deemed employed to further that service."[78] The derivative client doctrine has implications for the lawyer's duties of loyalty, competence, and confidentiality.[79] Under the duty of fair representation, the union has a fiduciary obligation to the bargaining unit member,[80] who may therefore be a derivative client.

### *B. The Union Lawyer's Obligations to the Bargaining Unit Member*

The ethics codes, courts and commentators, variously and inconsistently, rely on these three factors to characterize the relationship between the union lawyer and the bargaining unit member. The three alternative models employed are: the union as the sole client, the

74. *Id.* at 11.

75. *Id.*; *see also* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 257, 273–80 (1995) (discussing professional responsibility in the insurance field). As a general matter, a lawyer should not permit an insurance company or other third party who pays for a client's representation to influence the lawyer's conduct. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(c) (proposing that in some circumstances both the insurance company and the insured should be considered clients).

76. Schneyer, *supra* note 73, at 11.

77. *See supra* Part II.C. and *infra* part III.B.2.a.

78. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.3:108 (2d ed. Supp. 1996).

79. *See infra* notes 121–127 and accompanying text.

80. *See supra* notes 32–33 and accompanying text.

union and member both as clients, and the member as a derivative client.

### 1. *The Union as Entity Client and Bargaining Unit Member as Nonclient*

As a matter of black letter legal ethics, the union lawyer's client is the union. The union's lawyer in a grievance matter must follow directions from authorized union officials, even on those occasions where the "utility or prudence [of those directions] is doubtful."[81]

Similarly, the lawyer's duties of confidentiality, loyalty, and competence run to the union and not the bargaining unit member. The lawyer must protect the union's confidences, even from union members, and the union itself is the holder of the attorney-client privilege.[82] The lawyer owes no independent duty of confidentiality to the bargaining unit member and indeed must reveal the member's confidences, if relevant, to the union leadership.[83] On the other hand, if the union chooses to protect the confidentiality of the bargaining unit member's communications, they may be protected as the union's confidential communication.[84]

The conflict rules apply in a corresponding way. The lawyer's only duty of loyalty is to the union, its sole client. Any differences between the union and bargaining unit member, even if a union member, are irrelevant to the duty of loyalty and therefore fail to implicate Rules 1.7 or 1.9. Accordingly, in duty of fair representation cases, attempts to disqualify union lawyers on the ground that they previously handled the employee's grievance have generally been unsuccessful.[85]

Under entity representation, the lawyer's duty of competence and exposure to malpractice liability runs to the union. In the leading case

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81. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 3 (1995).

82. *See id.*; *see also* HAZARD ET AL., *supra* note 69, at 236 (stating that "current management of a corporation controls the privilege on behalf of the corporation").

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 & cmt. (1995).

84. Most jurisdictions permit corporations to protect the employee's communications with the corporation's attorney as privileged. *Id.* at 236 n.34. *See* Upjohn v. United States, 449 U.S. 383, 386 (1981) (holding that corporations may choose to protect as privileged communications from low level employees to the corporation's lawyers). Some jurisdictions, however, only permit corporations to protect the communications of the "control group"—those high level employees who control the corporation. HAZARD ET AL., *supra* note 69, at 236 n.34. *See* Consolidated Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 252 (Ill. 1982) (rejecting the *Upjohn* approach).

85. *See* Adamo v. Hotel Workers' Union, 655 F. Supp. 1129, 1129–30 (E.D. Mich. 1987); Griesemer v. Retail Store Employees Union, Local 1393, 482 F. Supp. 312, 314–15 (E.D. Pa. 1980).

of *Peterson v. Kennedy*,[86] a union member argued that a union staff attorney had committed malpractice in handling the member's grievance.[87] The court held that the immunity of union officials from individual liability in an action against the union[88] applied to attorneys for unions, whether in-house or outside counsel.[89] Of course, the union could sue the lawyer for malpractice with regard to the grievance, and the bargaining unit member could sue if the lawyer was representing the member in addition to the union.[90] Moreover, the bargaining unit member could recover against the union if the lawyer's conduct was not just negligent, but sufficiently egregious to make the union liable for breach of the duty of fair representation.

One complication to entity representation occurs where the authorized representatives of the union engage in unlawful conduct posing threat of "substantial injury" to the union. In these circumstances, the lawyer may ask the union leadership to review such conduct, and may resign if the leadership refuses to prevent it.[91] In a related situation, similar to a shareholder derivative suit where union members file an action alleging that union officers have breached their fiduciary duty to the union, the court may require representation for the union independent of its duly authorized constituents.[92]

A second complication relates to the composition of the bargaining unit. The legal ethics rules sometimes distinguish the union lawyer's obligations to bargaining unit members depending on whether or not they are union members. In contrast, the duty of fair representation forbids discrimination between union and nonunion bargaining unit members.

As noted above, neither member nor nonmember is entitled to the lawyer's loyalty, competence, or confidentiality. What the union

86. 771 F.2d 1244 (9th Cir. 1985).

87. *Id.* at 1251.

88. *Id.* at 1256–57. The union member was not without any remedy—he could in certain circumstances seek relief from the union. *Id.* at 1259. However, former employees are precluded from bringing action against lawyers who acted as their union representative. *Id.*

89. *Id.* at 1258; *see also* Breda v. Scott, 1 F.3d 908 (9th Cir. 1993) (raising the issue in the context of outside counsel). For a discussion of the policies supporting immunity, see Schneyer, *supra* note 73, at 28–32.

90. *Peterson*, 771 F.2d at 1259.

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1995).

92. Yablonski v. United Mine Workers, 448 F.2d 1175, 1182 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

lawyer does owe them is a duty to avoid intentional wrongs.[93] The emerging trend, however, is for jurisdictions to go further and provide nonclients with a right to sue a lawyer under "doctrines [such] as third party beneficiary, negligent representation, gratuitous undertaking, and the 'balance of factors' test."[94] While analogous arguments could be made on behalf of bargaining unit members where a lawyer has negligently handled a grievance, federal law provides the lawyer with immunity from such a suit.[95] As a practical matter, whatever the lawyer's potential liability, if the employees' interests coincide with those of the union, the lawyer will have a duty to the union to zealously and competently represent the employees' interests.

In other areas, differences appear.[96] If nonmembers do not have their own lawyer, the union lawyer may speak with them, but must make clear that the lawyer does not represent them.[97] In contrast, Rule 1.13 only requires the lawyer to provide such a warning to a union member when it is apparent that the organization's interests are adverse to those of the union member.[98] At that point, though, in addition to suggesting that the member consider obtaining independent representation as with the nonmember, the union lawyer must also explain that the conversation may not be privileged[99]—a requirement which does not generally exist under Rule 4.3 for nonclients such as the nonmember.[100] Under Rule 4.3, a lawyer would only have such an obligation where she actually knows that the nonmember mistakenly believes the conversation to be privileged.[101]

Other differences present potentially significant problems in processing a grievance on behalf of a nonmember. The union lawyer should not give the nonmember legal or other advice other than to seek counsel.[102] The union lawyer may give the union member, as a

93. Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 659 (1994).

94. *Id.* at 660.

95. *See supra* notes 89–91 and accompanying text.

96. Whether a financial core member is a member or nonmember for these purposes is not clear. Their lack of internal voting rights suggests they are nonmembers while their technical membership supports viewing them as members. *See supra* note 3.

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 cmt. (1995).

98. *Id.* at Rule 1.13(d).

99. *Id.* at Rule 1.13 cmt. 7.

100. *Id.* at Rule 4.3 & cmt.

101. *Id.*

102. *Id.* If the union lawyer is aware that either the member or nonmember is represented by counsel with regard to the grievance, the union lawyer may not communicate with the employee without counsel's consent. *Id.* at Rule 4.2.

constituent, legal advice related to the lawyer's representation of the union. Similarly, while the union may protect the confidentiality and privileged nature of communications with the union member as a constituent of the union, no protection exists for communications with the nonmember.[103]

The legal ethics rules restricting advice and confidentiality to a nonmember interfere with the representation of a grievance involving them. The absence of the privilege would make the nonmember's communications to the lawyer subject to disclosure. Either the disclosure of this information or the chilling of discussions with the lawyer would make it more difficult for the union to advocate for the grievance or decide whether to resolve it. The ethical restriction on the lawyer's offering advice to the nonmember has a similar effect.

In addition, the union lawyer's differential treatment of the nonmember poses problems under the duty of fair representation. The duty generally proscribes discriminatory treatment of nonmembers. The application of the legal ethics rules would sometimes result in the nonmember receiving lower quality representation simply because they are a nonmember.

To avoid this dilemma, unions could argue that the applicable entity is the bargaining unit and not the union. The union has the authority by virtue of its role as representative of the bargaining unit, not by virtue of its own status as an entity. If the union lawyer's client were the bargaining unit represented by the union, both union member and nonmember would be similarly situated as bargaining unit members and the legal ethics distinctions between them disappear.

While the argument is quite reasonable, it appears to be a novel one and its success is unclear. On one hand, one could analogize the union to the board of directors of a corporation. Just as shareholders elect the board to manage the corporation, the bargaining unit members select the union to serve as its exclusive bargaining agent. On the other hand, the perception of unions and lawyers may be quite different. It may very well be that the lawyer and the union understand the union, and not the bargaining unit, to be the client.

### 2. *Both the Union and Bargaining Unit Member as Clients*

Although the majority of courts have found the union to be the lawyer's client, some authorities argue for recognizing both the union and member as separate clients.

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103. *See supra* notes 82–84 and accompanying text.

a. The Grounds for Finding the Member a Client

One line of authority suggests a general rule that a bargaining unit member is a separate client of the union's lawyer. The rationale for this view is that the union attorney is indeed acting on behalf of the member and not solely on behalf of the union.[104] As one commentator has argued, "in pursuing a member's [grievance], a union attorney is representing the member, though the union's interests may also be served."[105] At least one court has applied a similar rationale. It held that the union member was a client because the attorney's representation of the member in the grievance proceeding was an intended benefit of union membership. The court rejected the union's claim of representation "as a separate entity, independent from its members."[106]

A second line of authority looks to the facts of a particular situation to determine whether a union's attorney also represents a union member.[107] This line of authority, in turn, divides into two competing approaches. One approach weighs against finding a lawyer-client relationship. Under it, courts start from an understanding that a union member "views the union attorney as an arm of his union rather than as an individual he has chosen as his lawyer."[108] The union member has the burden of demonstrating that particular circumstances indicate the existence of a lawyer-client relationship. These circumstances include the lawyer's express representations, the member's express indication to the lawyer that she understands the lawyer to be representing her, or other indicia that the relationship was a confidential one.[109]

104. Tim Adams, Comment, *Labor Law Preemption: The Ninth Circuit Grants Malpractice Immunity to Union Attorneys:* Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), 61 WASH. L. REV. 1503, 1514–15 (1986).

105. *Id.*

106. Stone v. City of Philadelphia, Civ.A. No. 86-1877, 1986 WL 13483, at *6 (E.D. Pa. Nov. 25, 1986).

107. Of course, in the rare situation where the union member and the attorney enter into a retainer agreement, their relationship is clear. *See, e.g., Peterson*, 771 F.2d at 1259. Without further explanation, the *Peterson* court also suggests that attorneys are liable to the client where the attorney provides personal services "wholly unrelated to the collective bargaining process; e.g., drafting a will, handling a divorce or litigating a personal injury suit." *Id.* Whether this liability to the employee would be premised on the implied relationship, the intention to benefit the union member, or solely the absence of collective bargaining concerns, is unclear.

108. *Id.* at 1258.

109. Adamo v. Hotel Workers's Union, 655 F. Supp. 1129, 1129–30 (E.D. Mich. 1987). The requirements of the latter element are unclear. The *Adamo* court refers to whether "any confidences were exchanged." Presumably, this means information understood to be confidential from the union, but the phrase is unclear. *Id.* at 1129–30; *see also Griesemer*, 482 F. Supp. at 314–15.

Not surprisingly, courts applying this test have found that union members have failed to meet their burden.[110]

A second approach weighs in favor of finding a relationship. This approach presumes that the union lawyer represents the member absent express notification to the contrary. As one court observed, "the [union] member is not legally sophisticated enough to understand" that the union lawyer represents the union, and not the member, in a grievance proceeding.[111] Accordingly, that court found that the union member's subjective understanding and sharing of information with the lawyer were sufficient to create a lawyer-client relationship.[112] Even though these cases deal with union members, their rationales would apply with equal force to nonunion members of bargaining units.

b. The Implications of the Member's Status as Client

If the bargaining unit member, as well as the union, is a client of the lawyer, the duties of confidentiality, loyalty, and competence become more complex. The union lawyer might have to share relevant union confidences, such as the union's internal appraisal of the grievance, with the member in jurisdictions where joint representation is understood to waive confidentiality among joint clients.[113] Even where confidentiality is not waived, the privilege is waived. Therefore, if the member were later to sue the union for breach of the duty of fair representation in its advocacy of the grievance, the lawyer would have to testify as to confidential communications with the union, as well as with the member.[114]

These confidentiality issues pose only one set of the conflicts problems. In every grievance proceeding the possibility exists that the employee will not be satisfied with the outcome and will sue the union for breach of the duty of fair representation. Therefore, whatever the particular facts of a grievance, a potential conflict exists. Exacerbating this potential conflict is the possible harm to both clients of the loss of privilege in a duty of fair representation action. While such potential conflict would certainly require the lawyer to make disclosures, obtain consents, and objectively determine that the representa-

110. *Adamo*, 665 F. Supp. at 1130; *Griesemer*, 482 F. Supp. at 315.

111. DeCherro v. Civil Serv. Employees Ass'n, 404 N.Y.S.2d 255, 257 (App. Div. 1978).

112. *Id.* at 258.

113. Pearce, *supra* note 71, at 1262–63 n.48.

114. *See Griesemer*, 482 F. Supp. at 314–15.

tion of both clients will not be adversely affected,[115] it would also weigh heavily against joint representation. It would therefore appear that a lawyer would have difficulty representing both union and bargaining unit member unless the grievance was easily resolvable to their mutual satisfaction.

Even where joint representation would arise as a result of a mutual agreement or as a matter of law, conflicts might develop. At the time when the interests of the parties become adverse, such as if the union decided not to pursue the grievance or to resolve it against the member's wishes, the lawyer would probably have to withdraw. A similar result would occur where the representation of one client might be materially limited, such as where the union revealed a confidence the member would want to know. In these circumstances, moreover, the lawyer would probably have to withdraw from representing both clients because of the similarity of the matters and the adversity of the parties. At that point, the union would have to use a nonlawyer advocate not bound by the legal ethics rules to represent both union and bargaining unit member, or would have to provide two new lawyers, one for the union and an independent one for the member. In addition, were the union member to sue the union for breach of the duty of fair representation, the lawyer would not be able to represent either union or member without consent of the other.[116] The union would then have to find a lawyer unfamiliar with the grievance to defend it.

Under this model, a union would have strong reasons not to use lawyers in grievance proceedings. Any lawyer would be viewed as representing both union and bargaining unit member and would be unlikely to represent both. As noted above, the only way to avoid the myriad conflict problems and use a lawyer would be to provide a separate, independent lawyer for the bargaining unit member. Employing one nonlawyer who would not have to worry about the conflicts rules would be a far less expensive solution. It would also permit the union to use an advocate it could trust and control for both union and member. At the same time, it would deprive the union of legal expertise.

### *3. The Union as Client and the Member as Derivative Client*

Viewing the union member as a beneficiary of the union's fiduciary obligations creates yet another way of describing the union lawyer's relationship to the union member—the union is the primary

115. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1995).
116. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1995).

client and the union member is a derivative client.[117] Under this approach, the lawyer should follow the primary client's instructions unless they would wrongfully harm the beneficiary.[118] At that point, the lawyer has a duty to disobey them, for the fiduciary is not permitted to use a lawyer to that end.[119]

This approach has support in the context of union representation. The Supreme Court has analogized the union's duty of fair representation to the duty owed by other fiduciaries to their beneficiaries.[120] Accordingly, courts have applied the derivative client approach to afford union members access to privileged information in duty of fair representation suits. Employing a doctrine originated in corporate derivative suits,[121] these decisions provide that where union members sue a union "for behavior allegedly inimical [to] their interests,"[122] the members can obtain privileged information from the union upon a showing of good cause.[123] Some jurisdictions do not even require a showing of good cause in a beneficiary's suit against a fiduciary. They hold "that the fiduciary does not have a privilege to assert against the beneficiary."[124]

The derivative client approach has other potential implications for the union lawyer. The existence of a fiduciary duty to a nonclient union member could arguably provide the basis for a successful disqualification motion in a duty of fair representation suit. For example, in *Westinghouse v. Kerr-McGee Corporation*,[125] the Seventh Circuit disqualified the plaintiff's law firm because it had previously repre-

117. Hazard, *supra* note 71, at 31. *But see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94–380 (1994) which argues that:

> The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

*Id.*

118. *See* Hazard, *supra* note 71, at 32.

119. Hazard, *supra* note 71, at 32. *But see* ABA Comm. on Ethics and Professional Responsibility, *supra* note 117.

120. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 74 (1991).

121. *See* Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (1970), *cert. denied*, 401 U.S. 974 (1971).

122. Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68, 71 (E.D. Va. 1992).

123. Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 681 (D. Kan. 1986); Boswell v. International Bhd. of Elec. Workers Local 164, 1981 WL 27188 (D.N.J. 1981) (stating that "the availability of the attorney-client privilege should be subject to the right of the [beneficiary] to show cause why it should be invoked in the particular instance"); *see also Nellis*, 144 F.R.D. at 71.

124. HAZARD ET AL., *supra* note 69, at 808. This doctrine does not appear to have been applied in breach of duty of fair representation suits.

125. 580 F.2d 1311, 1321–22 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

sented an organization of which the defendant was a member in a related matter. Although the court found that the defendant's organizational membership did not create a lawyer-client relationship with the firm, it held that under the circumstances it did create a relationship of trust and reliance sufficient to implicate the law firm's obligation of loyalty to the defendant even as a nonclient.[126]

The derivative client approach could also provide grounds for lawyer liability, such as for negligently failing to prevent the union's breach of the duty of fair representation. In *Ficket v. Superior Court of Pima County*,[127] for example, the court permitted the conservator of an incompetent's estate to sue the lawyer for the former guardian for negligently permitting the former guardian to breach his fiduciary obligations to the beneficiary.

## IV. A PRELIMINARY INQUIRY INTO THE INTERDEPENDENCE OF LEGAL ETHICS AND SUBSTANTIVE LAW

### *A. Intersecting Circles or Interlaced Threads?*

Professor Susan Koniak has observed that the legal profession "takes for granted that the domain of professional ethics is separate from the domain of law."[128] This perception dominates the prevailing approach to analyzing legal ethics and substantive law. It treats them as separate circles which intersect in a small, contested area where one subject provides the rule for the other.

In the field of legal ethics, authorities and commentators often consider issues only with regard to legal ethics categories and without regard for the implications for substantive law.[129] Law schools follow a similar approach. Legal ethics is generally taught as an independent course which is largely confined to explication of legal ethics rules.[130] The organized bar's testing of legal ethics through the Multi-State Professional Responsibility Examination similarly focuses on legal ethics as a separate, self-referential subject.[131]

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126. *Id.*

127. 558 P.2d 988 (Ariz. 1976).

128. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1396 (1992).

129. *See* Schneyer, *supra* note 73, at 1 (criticizing this approach).

130. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40–41 (1992).

131. *Id.*

In a related manner, commentators and authorities analyze the substantive law with little attention to legal ethics.[132] The place of legal ethics in law schools illustrates how marginal it is to the study of the substantive law. Professor Deborah Rhode observes that "[i]n most institutions, required ethics courses meet for minimal time; in many others, they are treated as intellectual interlopers, staffed by a reluctant, rotating cadre of junior faculty and outside lecturers."[133] Not surprisingly, substantive law scholars find little value in considering the interaction between legal ethics and substantive law. A survey of casebooks found that the "median amount of coverage [of legal ethics] in each volume was 1.4% of the total pages."[134]

While commentators treat the circles of substantive law and legal ethics as separate, they also acknowledge the existence of limited areas of intersection. In these areas, the substantive law and the "law of lawyering" are the same. Generally, the substantive law provides the law of lawyering. Some examples of this intersection are the attorney-client privilege provided by the law of evidence,[135] Rule 11 of the Federal Rules of Civil Procedure,[136] and the tort of legal malpractice.[137] To preserve their professional autonomy, lawyers seek to minimize or eliminate these intersections, and instead place the law of lawyering solely within the control of the legal profession.[138]

But the model of overlapping circles was not always how legal authorities understood the relationship between substantive law and legal ethics. Judge George Sharswood, the father of our modern legal ethics codes, viewed substantive law and legal ethics as inextricably intertwined.[139] In his classic 1854 essay on professional ethics, he ex-

132. *Id.* at 41. Professor Rhode has challenged this approach and championed the teaching of ethics throughout the curriculum. *See id.* at 54–56.

133. *Id.* at 40.

134. *See, e.g., id.* at 41.

135. *See, e.g*, HAZARD ET AL., *supra* note 69, at 221 n.6 (discussing how Federal Rule of Evidence 501 allows determination of the attorney-client privilege to be pursuant to the principles of common law in the light of reason and experience).

136. *See, e.g.*, HAZARD ET AL., *supra* note 69, at 414–17 (discussing how the threat of sanctions for malicious prosecution of a frivolous claim protects the attorney-client privilege).

137. *See, e.g.*, HAZARD ET AL., *supra* note 69, at 175–76 (describing briefly the history and development of the tort of legal malpractice).

138. *See generally* Koniak, *supra* note 128 (describing lawyers' resistance to outside regulation); *see also* David Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812–14 (1992) (discussing professional compliance and independent arguments).

139. *See generally* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992) (discussing Judge Sharswood's impact on modern legal ethics).

plained how the substantive goals of the legal system established the framework for understanding the lawyer's ethical obligations.[140]

A growing number of commentators are reviving a more complex understanding of the interaction between substantive law and legal ethics. Professor Deborah Rhode has championed the "pervasive" approach to legal ethics, which would make legal ethics an integral part of all substantive courses.[141] Professors Geoffrey C. Hazard, Jr., Susan P. Koniak, and Roger C. Cramton propose "the 'pervasive method' in reverse."[142] Their casebook seeks to place legal ethics in the context of relevant areas of substantive law.[143] Other commentators have made similar efforts. David Wilkins[144] and Ted Schneyer urge that the development of lawyer regulation should include "close attention to the specific legal and factual context at hand."[145] Charles Silver and Kent Syverud describe the interconnection of insurance law, procedure and legal ethics.[146] William Simon,[147] Robert Gordon,[148] and David Luban[149] contend that the substantive goal of justice under the law depends upon the law and ethics of lawyering.

These works suggest the emergence of a new model for examining the connection between legal ethics and substantive law. Rather than treat these areas as separate but intersecting circles, the new model would describe them as interlaced threads forming a larger tapestry. This model has two primary characteristics. First, the threads of legal ethics and substantive law connect in many places, not just in

140. *Id.* at 259. For example, the substantive goal of protecting property rights required the lawyer to "refuse to pursue legal goals that frustrate legitimate property rights, such as by helping a client use legal means to avoid the 'just demands of creditors.'" *Id.* at 266. Similarly, the substantive goal of protecting the individual from a potential abuse of state authority and implementing the constitutional right to a trial according to law, required the criminal defense lawyer to zealously defend the defendant even if the lawyer was convinced of the client's guilt. *See id.* at 265.

141. *See* Rhode, *supra* note 130, at 32; *see generally* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994) (providing a detailed discussion of the pervasive method).

142. HAZARD ET AL., *supra* note 69, at vi.

143. *Id.*

144. Wilkins, *supra* note 138, at 799.

145. Schneyer, *supra* note 73, at 63.

146. Silver & Syverud, *supra* note 75, at 255.

147. *See generally* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (proposing that lawyers exercise discretion and judgment in representing clients, rather than merely restricting their duties to black letter ethical rules).

148. *See generally* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990) (discussing legal ethics in the context of a corporate practice setting).

149. *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (comprehensive discussion of ethics in the law).

the limited area where one subject provides the rule for the other. Second, the relationship between the two subjects is reciprocal. They both have a significant influence on each other.

### *B. Comparing the Two Models: The Union Lawyer's Obligations to the Bargaining Unit Member*

This Article offers a case study to begin testing the two competing models of the relationship between substantive law and legal ethics. The case study suggests that the model of interlaced threads offers a far more comprehensive and nuanced method for analyzing the obligations of union lawyers than the model of intersecting circles.

Although less comprehensive, the concept of intersecting circles does provide some insight into the relationship between labor law and legal ethics. One area of intersection between these circles is the doctrine of immunity from liability for a union lawyer.[150] In this instance, the substantive law provides the law of lawyering in recognition that a union's relationship with its lawyers is significant to maintaining the substantive goals of labor law.

While consistent with the model of intersecting circles, explanation of the basis of this rule resembles broader connections underlying the model of interlaced threads. The doctrine of immunity for union officials was designed to prevent "the use of private lawsuits . . . as a 'union busting' device,"[151] and to protect the ability of unions to enlist qualified representatives.[152] When lawyers function in the same capacity as union officials, such as in processing grievances, they receive the same protections.[153] To do otherwise would undermine the purposes of the immunity doctrine.[154]

In addition, the availability of the negligence standard against a union representative would undermine the rationality and symmetry

150. *See* Schneyer, *supra* note 73, at 28–32 (discussing derivation of immunity doctrine in substantive concerns of labor law).

151. Montplaisir v. Leighton, 875 F.2d 1, 4 (1st Cir. 1989).

152. *Id.* at 7.

153. *Id.* at 6; Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

154. Ted Schneyer has a slightly different approach to analyzing immunity for union lawyers. Rather than begin the analysis with an understanding that the lawyer's obligation is to promote the entity's interests, he suggests that legal ethics should ordinarily weigh in favor of enhancing the lawyer's obligations to the individual member. However, in light of countervailing policy considerations, such as protecting the interests of other union members, he recognizes the benefits of the immunity doctrine. Schneyer, *supra* note 73, at 28–32.

of relations between the union and its members.[155] The duty of fair representation requires a member to demonstrate "arbitrary, discriminatory, or bad faith" actions by the union.[156] The Supreme Court has observed that negligence does not meet this standard.[157] Permitting nonclient suits against a union lawyer based on a negligence theory would therefore alter the relationship between union and member by permitting recovery against a union representative under a lower standard.

Although the rationale for the immunity doctrine fits within the intersecting circles approach, its application suggests the perspective of interlaced threads. In resolving whether the bargaining unit member is a union lawyer's client, courts have disagreed as to whether to place the burden on the member to demonstrate the existence of the relationship, or on the lawyer to disprove it.[158] Resolution of this issue determines whether the lawyer may take advantage of the doctrine of immunity. The union lawyer only has immunity from the member's suit if the lawyer is the union's lawyer and not the bargaining unit member's.[159]

Beyond the immunity doctrine are a number of aspects of labor law and legal ethics that diverge under the intersecting circle model, but appear to influence each other as the model of interlaced threads would predict. One set of these connections occurs where the substantive labor law shapes the applicable law of lawyering. For example, twentieth century labor law created legal personality for unions. The existence of legal personality favors representing the union as an entity. Absent legal personality, a union might very well receive representation as a collection of individuals rather than as an organization.[160]

A similar influence results from the description of the duty of fair representation as creating a fiduciary relationship between union and bargaining unit member. This description has led to a partial waiver

155. *Montplaiser*, 875 F.2d at 6–7; *Peterson*, 771 F.2d at 1259.

156. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

157. *Montplaisir*, 875 F.2d at 6–7; *Peterson*, 771 F.2d at 1259.

158. *See supra* Part III.B.2.(a).

159. *See* II THE DEVELOPING LABOR LAW *supra* note 3, at 1450.

160. Although representation as an entity is available even for unincorporated groups, *see generally* Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (discussing the conflict between individual autonomy and group participation in legal representation of groups), court determinations that unions were only collections of individuals would probably have determined the legal ethics characterization of union representation. *See supra* notes 8–10 and accompanying text.

of the attorney-client privilege in duty of fair representation suits against unions.[161] It also provides the basis for future arguments for disqualification of union attorneys.[162]

Perhaps the most pervasive and reciprocal connections of the interlaced threads of labor law and legal ethics relate to influence of the clienthood determination on labor law's construction of a union's function as a collectivity. Indeed, it influences the relationship between the union and bargaining unit member in ways that implicate the policies underlying the duty of fair representation, including the proper allocation of authority between individual and collectivity, as well as the union's discretion and effectiveness in relations with management. If the union lawyer represents only the union, and bargaining unit members have no significant claim on the lawyer, legal representation provides a valuable resource for union leadership and promotes the power of the union as a collective.

Any other alternative undermines these goals to some degree. Recognizing the bargaining unit member as a client limits the authority and flexibility of the union with regard to the relations with management, as well as with bargaining unit members. The law of lawyering would make the union employing a lawyer function in the area of contract administration as a collection of individuals—some of whom are not even union members—rather than as a collectivity. Viewing the bargaining unit member as a separate client deprives the union of the ability to control grievances unilaterally and reduces the union's ability to promote the interests of the majority in relations with management.[163] It also diminishes union resources by disqualifying lawyers who represent the union in a grievance from defending the union in a duty of fair representation suit, and perhaps requiring the union to pay for a separate lawyer for the bargaining member in conflict situations.[164] Of course, to avoid functioning as a collection of individuals, the union could use nonlawyers who are not bound by conflicts rules.[165] This solution would deprive unions of access to lawyers' expertise in the grievance process and would place them at a disadvantage compared to employers who face no such restriction.

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161. *See supra* notes 121–124 and accompanying text.

162. *See supra* notes 125–26 and accompanying text.

163. Pope, *supra* note 1, at 16 ("To win against the employer, the union must adopt a unified strategy. Much of the art of union leadership consists of maintaining solidarity in the face of potential division.")

164. *See supra* Part III.B.2.(b).

165. *See supra* Part III.B.2(b).

The derivative client approach has a lesser, but still substantial, influence on union relations with bargaining unit members and management. Unlike representation of the bargaining unit member as a separate client, the derivative client approach does not deprive the union of representation as an organization. At the same time, by strengthening the claims of the individual against the collectivity, it reduces the union's ability to use its legal resources to promote collective action.[166] In circumscribing the attorney-client privilege, the derivative approach chills the incentive of unions to confide in lawyers and therefore obtain the full benefit of legal advice. It also potentially diminishes resources by affording an argument for disqualification. In addition, it places the lawyer in the position of policing the client more than a lawyer otherwise would. This policing raises the danger of lawyers claiming authority properly belonging to union leaders.[167] Often enhancing this danger is a "professional and cultural" divide between union lawyers and union leaders.[168]

Consideration of the derivative approach also reveals that the fiduciary understanding of the duty of fair representation conflicts at least in part with the lawyer immunity doctrine. Based on the fiduciary understanding, the derivative approach could create liability for a union lawyer who assists, or fails to prevent, a union's breach of the duty of fair representation.[169] Although such liability contravenes lawyer immunity, it does not wholly contravene the rationales for lawyer immunity. One rationale is preventing liability under a negligence standard because such a standard is lower than the standard required for a breach of the duty of fair representation.[170] Lawyer liability for assisting or permitting breaches would not conflict with this rationale. However, it would conflict with the broader rationales that potential personal liability for any union official or agent chills union activity, and that potential personal liability—for lawyers in particular—discourages unions from employing lawyers and lawyers from representing unions.[171]

How to resolve the conflict between lawyer immunity and the fiduciary nature of the duty of fair representation, whether by preferring or compromising one of these doctrines, presents a difficult issue implicating both labor law and legal ethics considerations. But the

166. Pope, *supra* note 1, at 16.
167. *Id.* at 11–12, 29.
168. *Id.* at 29.
169. *See supra* note 127 and accompanying text.
170. *See supra* notes 155–57 and accompanying text.
171. *See supra* notes 151–54 and accompanying text.

purpose of identifying this issue is not to resolve it. Rather, it is to demonstrate the efficacy of the model of interlaced threads in exposing an issue which courts and commentators appear to have overlooked.

The model of interlaced threads further helps analyze two legal ethics questions which do not fit easily within the entity, separate client, or derivative approaches.[172] The first suggests a narrow area of potential lawyer liability beyond breaches of the duty of fair representation. Assuming the union has instructed the lawyer to advocate zealously on behalf of an individual grievance,[173] the lawyer commits malpractice, and the union refuses to sue for malpractice, why shouldn't the law permit the bargaining unit member to sue?[174] The availability of such a suit could provide a significant remedy to an individual who may have suffered an extremely serious harm, such as the loss of a secure, well-paying job.

On its face, such a suit would seem consistent with respecting the union's collective authority. After all, the union instructed the lawyer to advocate zealously. But the union's interests may be more complex. The union may have considered suing the lawyer and decided that its long term relationship with the union lawyer was more important to the collective than the individual grievance.[175] Accordingly, even consideration of this narrow area of lawyer liability implicates the range of questions regarding the proper distribution of authority between individual and collective under substantive labor law.

The second issue which does not clearly fall within the paradigms of group, individual, and derivative representation, but demonstrates the interconnection between legal ethics and substantive law, is the claim that union lawyers have an obligation to the good of the union as a whole separate from the instructions of union leadership.[176] One goal of labor law is the democratic governance of unions.[177] This sug-

172. This claim turns on a construction of a union's obligation to bargaining unit members which could fit within alternative or supplemental versions of the entity or derivative models.

173. This removes the issue of the union's authority to control the grievance. *See supra* Part II.B.

174. I would like to thank Ted Schneyer for bringing this question to my attention.

175. The union's reasons could also be less sympathetic, such as its own negligence or a cozy friendship between union leaders and the lawyer.

176. One could make this argument as an alternative or supplementary version of the entity or derivative models.

177. Pope, *supra* note 1, at 29. The law seeks to promote "full and active participation by the rank and file in the affairs of the union." American Fed'n of Musicians v. Wittstein, 379 U.S. 171, 182–83 (1964). *See* 29 U.S.C. §§ 411, 481 (1994).

gests an analogy to government lawyers where many have argued that the lawyer properly represents the electorate, or the "people," as opposed to government officials.[178] Professor James Gray Pope has made a similar claim with regard to union lawyers.[179] He argues that while a union lawyer should generally follow the instructions of union leaders in dealing with management, she should protect the democratic process of the union in internal union disputes.[180] In the event of "violations of or malfunctions in the union's democratic processes, . . . union lawyers should take action whenever the leadership is planning or engaging in activities that could, if members had access to all the facts, give rise to a legal challenge with a reasonable likelihood of success."[181]

Professor Pope does not fully analyze the implications of his approach for grievance arbitrations. He suggests that union leaders have "no structural conflict of interest" with members and "nothing to gain from . . . negligent grievance processing."[182] He would treat grievance processing as a democratic process violation only where "unfair treatment is politically motivated."[183] The determination of whether the treatment is unfair and politically motivated, and the authority to act in such circumstances raises some of the same difficulties for the distribution of authority between union and lawyer, and the power of the union as a collective, as derivative representation.[184] Therefore, in its

178. *See, e.g.*, William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are In Conflict?*, 29 HOWARD L.J. 539 (1986) (discussing competing approaches to government representation). In addition, some commentators have argued that all lawyers for large, powerful organizations, such as corporations, have a broad duty to the public good. *See, e.g.*, Gordon, *supra* note 148, at 256; William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

179. Pope, *supra* note 1, at 37–38. Pope relies more on commentators suggesting a general duty to the public interest, rather than on the analogy to the government lawyer, which his article does not explore in depth.

180. *Id.* at 54.

181. *Id.* Stephen Ellman makes a similar argument with regard to group representation generally. Ellman, *supra* note 160, at 1103.

182. Pope, *supra* note 1, at 47. However, as this Article suggests, the conflicts of interest may be structural and the union's motivations may be more complex. *See supra* notes 26–28 and accompanying text, as well as Part III.B.2.b.

183. Pope, *supra* note 1, at 48.

184. *See supra* notes 166–69 and accompanying text. These difficulties could be even greater under other applications of the analogy of government lawyering to union representation. Professor Pope's suggestion is narrow compared to a claim that in all circumstances the union lawyer has an obligation to represent what is right for the "people" or the bargaining unit, despite the instructions of union leaders. Such an approach would tilt the balance of authority even further toward the lawyer. Indeed, as William Josephson and I warned in an earlier article on the analogous context of government representation, the public representation approach poses the danger of "a government of lawyers, not of

effect, as well as in its derivation,[185] the democratic governance approach implicates the allocation of authority between the individual and collective.

Consideration of the democratic governance approach again illustrates how determination of the appropriate role of union lawyers is interconnected with the substantive law. As with the entity, separate client, and derivative models, or the narrow malpractice exception discussed above, the democratic governance model demonstrates that the law of lawyering and substantive labor law have many connections and influence each other reciprocally. All of these analyses indicate that contrary to the intersecting circles approach, any effort to determine the appropriate labor law or role for union lawyers must take both legal ethics and labor law into account.

## V. CONCLUSION

Examination of the union lawyer's duties to bargaining unit members demonstrates that labor law and legal ethics are better understood as interlaced threads, rather than intersecting circles. This case study supports Judge Sharswood's view that legal ethics define, and are defined by, the nature of our society.[186] If Sharswood's understanding proves to have general applicability, we may conclude that legal ethics and substantive law form a seamless web, such that knowledge of one is not complete without knowledge of the other.

laws." Josephson & Pearce, *supra* note 178, at 569. Here, the danger would be of bargaining unit representation by lawyers as opposed to their elected representatives.

185. *See supra* note 172 and accompanying text.

186. Pearce, *supra* note 139, at 282.