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**ETHICAL ISSUES IN REPRESENTING
MULTIPLE PLAINTIFFS OR DEFENDANTS:**

SPECIAL ISSUES FOR UNION COUNSEL

**Nora L. Macey
MACEY SWANSON & ALLMAN
INDIANAPOLIS, INDIANA**

I. INTRODUCTION

Attorneys representing labor unions face issues in representing multiple parties both from the plaintiff and defense sides. From the plaintiffs' perspective, Union attorneys regularly pursue litigation representing unions, individual union members or retired members in contractual claims under Section 301 of the LMRA or under federal statutes including the WARN Act, ERISA, the FLSA, the ADEA and Title VII. In many cases, these lawsuits are initiated by the union to obtain benefits for or to enforce the contractual or statutory rights of union-represented employees or retired members.

From the defendants' perspective, union counsel regularly defend unions in duty of fair representation suits under the LMRA, in suits for violation of union membership rights under the LMRDA and in claims under various employment discrimination statutes including Title VII, the ADEA and ADA.¹ In some cases, plaintiffs name individual union officers or members as defendants in these lawsuits. While there is no individual liability for union officers or members in duty of fair representation or Title VII suits, there may be individual liability under other statutes, including the LMRDA and Section 1981 of the Civil Rights Act of 1866, and there may be valid related state law claims against individuals which are not preempted.

Finally, union counsel often act on behalf of individual union officers and members in the collective bargaining context and in unrelated legal matters. Union counsel are retained to try arbitration cases by the union in discipline cases where the union attorney is advocating on behalf of an individual grievant who has been suspended or terminated. If the grievant later decides to sue the union for unfair representation or discrimination, union counsel may be required to defend a motion for disqualification based on "representation" of the employee in arbitration. The same type of motion can occur in cases where union counsel provided advice to a union member on another issue, such as worker's compensation or benefit rights, or where union counsel actually engaged to represent an individual member in an unrelated legal proceeding. If the member later sues the union, union counsel's ability to defend the union client may be challenged.

¹This paper does not address ethical issues involving representation of individual union officers or members in criminal matters. Criminal defense implicates both ethical rules and substantive law. Section 501 of the LMRDA prohibits expenditure of union funds to defend union officers accused of wrongdoing which, if proven, would be seriously detrimental to the union. One court found a conflict of interest where union counsel advised union officials in connection with grand jury proceedings alleging embezzlement and record destruction even though the officials were witnesses and not targets of the investigation. *In re Gopman*, 531 F.2d 262 (5th Cir. 1976). Union counsel may undertake to represent union officers or members in criminal proceedings by agreement with the individuals, but such representation can present problems with representation of the union itself if the alleged misconduct of the officers or members becomes the subject of a civil lawsuit against the union. *See, e.g., United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002).

This paper will look at the ABA Model Rules of Professional Conduct as they apply to three situations commonly faced by union counsel: (1) representation of individual union members as plaintiffs, either jointly with the union or in a suit financed by the union; (2) joint representation of the union and union officers or members in defense cases; and (3) defense of union clients in suits brought by union members where a conflict is alleged by the union member plaintiff based on prior “representation” by union counsel. The focus is on union counsel’s decision whether to undertake representation of multiple parties and on case law which may inform that decision or assist counsel in defending it.

II. MODEL RULES APPLICABLE TO REPRESENTATION OF UNIONS AND THEIR OFFICERS AND MEMBERS²

The starting point for union counsel is Rule 1.13 of the Model Rules of Professional Conduct, Organization as Client. Rule 1.13 provides in relevant part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Conflict of Interest: Current Clients] . If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.³

Because the union attorney is employed by an organization, legal representation initiated by the union for the benefit of constituents of the organization does not necessarily create an attorney/client relationship with the individuals. The Model Rules, by adopting the entity theory for lawyers who

²This paper relies on the ABA Model Rules of Professional Conduct which have been widely, but not universally, adopted by the states. Attorneys are cautioned to always consult their state disciplinary rules and the judicial codes of conduct applicable to their jurisdiction.

³Rule 1.13 includes provisions governing duties to inform the organization of misconduct by officers or other constituents of the organization and related issues of confidentiality. See Rule 1.13 (b)-(e).

represent organizations like labor unions, assures that legal conflicts of interest do not arise through ordinary dealings with the various constituents of the organization as long as the attorney remains loyal to his/her only client, the union as an entity.⁴ Under Rule 1.13 (f) the union attorney's only duty in this context is to inform the constituent that the union is the client in situations where the interest of the union and the interest of the constituent are adverse.⁵

However, when the union attorney positively engages to represent both the union and its officers or members, Rule 1.13 (g) imposes additional ethical obligations, requiring union counsel to comply with the conflict of interest rules for current clients set out in Model Rule 1.7. Under Model Rule 1.7 (a) a conflict of interest exists in this situation if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The union attorney can represent both parties in spite of the existence of the conflict of interest described in Model Rule 1.7 (a) if the attorney obtains the informed consent of both parties, confirmed in writing, and satisfies the additional requirements of Model Rule 1.7 (b) as follows:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation [or other proceeding].

Under Rule 1.7 (b) consent by the parties to representation is not enough to allow the representation in spite of the conflict of interest where the circumstances do not support a reasonable belief that the attorney can competently and diligently represent both parties.⁶

⁴See G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, Perspective: Entity Clients*, 1987 Supp., at 233.

⁵Even though no attorney-client relationship exists with respect to the individual member, disclosures of confidential information by union constituents may be protected from disclosure to third parties under Model Rule 1.6 Confidentiality of Information.

⁶Comment 1.7[5] to the Model Rules provides:

A client may consent to representation notwithstanding a conflict.
However ... when a disinterested lawyer would conclude that the

Where a conflict is alleged based on counsel's representation of a union and counsel's former representation of a union officer or member, Model Rule 1.9 applies. Model Rule 1.9 (a) permits representation against a former client as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Under Rule 1.9 (b) the same informed consent is required for representation by another lawyer in the conflicted lawyer's firm if the representation is adverse to the former client and the conflicted lawyer has acquired confidential information "material to the matter."

Model Rule 1.8 Conflict of Interest: Current Clients: Specific Rules contains provisions of particular application to union counsel who represent individual members in plaintiff-side class actions or other multiple party litigation instigated or financed by the union. Rule 1.8 (f) governs union-financed litigation as follows:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent:

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6 [Confidentiality of Information]

Representation of union officers or members in multiple-party litigation is also subject to ethical rules governing settlements set out in Model Rule 1.8 (g) as follows:

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

Finally, Model Rule 3.7 Lawyer as Witness governs the ability of union counsel, who may have participated in advice, negotiations, grievance proceedings or arbitration related to a member's claim against the union, to appear as an advocate for the union in litigation over the same issues. Model Rule 3.7 provides:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest: Current Clients] or Rule 1.9 [Conflict of Interest: Former Clients].

Courts have generally not precluded union counsel from appearing in litigation on behalf of the union when their potential testimony is limited to what they did or said as union counsel in collective bargaining proceedings. (See Section V, *infra*)

III. JOINT REPRESENTATION OF UNIONS AND UNION MEMBERS IN PLAINTIFF-SIDE LITIGATION ⁷

Union counsel occasionally face motions to disqualify them from representing union members or retired members in plaintiff-side litigation. The motions typically contend that the attorney's loyalty to the union client will compromise the ability to give full loyalty to the union

⁷ In preparing this paper, the author consulted the following materials: *Ethical Traps for the Unwary Employment Lawyer: A View From a Union Lawyer's Perspective*, William Lurye (2005), 2005 Midwinter Meeting of the EEO Committee of the ABA Labor and Employment Law Section; *Selected Ethical Issues Impacting Union Attorneys in the Employment Discrimination Context*, Carl. S. Yaller (2000), 2000 Midwinter Meeting of the EEO Committee of the ABA Labor and Employment Law Section. These papers are available on the ABA Labor and Employment Law Section website. The author also reviewed numerous papers on joint representation issues presented at the annual AFL-CIO Lawyers Conferences, which are available on the LCC website. The author is grateful for the research assistance of Robert Hicks, Associate, Macey Swanson and Allman.

members, usually asserting that the union’s interest and the plaintiffs’ are not aligned or that the union itself committed some act of acquiescence or complicity in the employer’s alleged wrongdoing that makes the union a potential defendant in the lawsuit.

In *Shaffer v. Farm Fresh, Inc.*,⁸ 125 present and former employees brought an FLSA action to obtain class relief for violations of FLSA overtime rules, including requiring “off the clock” work, failure to pay overtime, requiring work through breaks and altering time records. The costs of the lawsuit (but not fees of plaintiffs’ counsel) were financed by the UFCW, which was engaged in an organizing campaign at the employer’s facility and the UFCW’s counsel represented the employees in their FLSA action. The employer contended that plaintiffs’ counsel were “likely” to subvert the interests of the plaintiffs in the litigation in deference to the organizing objectives of their union client. The Fourth Circuit reversed a district court decision disqualifying union counsel on that basis. The Court found to be speculative the chain of events relied on by the district court to create a conflict of interest (including rejection of what defendants characterized as a “favorable” settlement under what defendants claimed was union influence). The Court applied Virginia Disciplinary Rule 5-105(B)⁹ which provides that

a lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client
...¹⁰

The Court held that the requirement that the adverse effect must be certain or “likely” requires the party seeking disqualification to show some strong “objective indicator” that the lawyer’s duty to the individual employees is likely to be compromised and that no such objective support was present in the record.¹¹

In *Trull v. Dayco Products, LLC*,¹² retired union-represented employees brought suit under Section 301 of the LMRA and ERISA to enforce the terms of collectively bargained benefit plans.

⁸ 966 F.2d 142 (4th Cir. 1992), *cert. denied*, 506 U.S. 1021.

⁹ See ABA Model Disciplinary Rule 5-105.

¹⁰ *Id.*, at 145.

¹¹ See also *Ganobsek v. Performing Arts Ctr. Auth.*, 163 LRRM 3018, 2000 U.S. Dist. LEXIS 6807(S.D. Fla. 2000)(denying motion to disqualify plaintiffs’ counsel in FLSA action where counsel also represented union in contract negotiations, finding insufficient evidence that counsel was allowing the union to control the lawsuit to the detriment of the individual plaintiffs); *Barton v. Albertson’s, Inc.*, 1997 U.S. Dist. LEXIS 22577 (D. Idaho 1997)(rejecting motion to disqualify union counsel from representing a plaintiff class in FLSA action).

¹² 214 F.R.D. 394, 2003 U.S. Dist. LEXIS 7647 (W.D.N.C. 2003).

In class certification proceedings, the defendants challenged the ability of counsel to represent the class of retired employees because counsel's law firm had also represented the retired employees' union. The defendants argued that the deposition testimony of class members showed a possibility that the retired members had an action against the union for breach of its duty of fair representation. The court rejected the challenge to union counsel based on the fact that any duty of fair representation suit was long-since time-barred.

In *Marquis v. Tecumseh Products Co.*,¹³ union-represented employees filed a class action against their employer under Title VII for hostile environment, sex discrimination and retaliation and under Michigan's Elliott-Larsen Civil Rights Act. They were represented by the attorney for the International Union. The lawsuit did not include any claims against the International or its affiliated local union. On the motion for class certification, the employer challenged union counsel's ability to represent the plaintiff class and cited in support of its claim of conflict of interest the failure to bring any claims against the local union. While the court denied the motion for class certification on other grounds, it found that plaintiffs' counsel, who represented the International but not the local union, was not an inadequate representative under Rule 23 (a).¹⁴

Defendants sometimes attempt to defeat the ability of the union to serve as class representative or the union's attorney to serve as class counsel by asserting a counterclaim against the union, especially in Title VII litigation. In *International Woodworkers of America, AFL-CIO v. Chesapeake Bay Plywood Corp.*,¹⁵ the Fourth Circuit held that assertion of such a counterclaim does not automatically prevent the union from serving as a class representative. In that case the union and three of its officers individually filed a class action under Title VII for race and sex discrimination claiming widespread discriminatory practices by the employer in hiring, initial assignment, promotions, discipline and general work conditions. The company asserted in its counterclaim that the union breached its contractual duty to submit claims of discrimination to the grievance and arbitration procedure and requested that the union be jointly liable for any damages in the case. The court found that the counterclaim did not assert any basis for such liability. The court also found no evidence that the union's assertion of claims on behalf of black and female employees had precipitated intraunion conflict and refused to assume that such a conflict existed based on mere

¹³ 206 F.R.D. 132 (E.D.Mich. 2002).

¹⁴ See also *Shores v. Publix Super Markets*, 1996 U.S. Dist. LEXIS 3381 (M.D.Fla. 1996), *vacated on other grounds*, 1997 U.S. Dist. LEXIS 16778 (M.D.Fla. 1997)(plaintiffs' relationship with union does not create conflict which would make plaintiffs inadequate class representatives). Compare *Molina v. Mallah Org, Inc.*, 804 F. Supp. 504 (S.D.N.Y. 1992)(class counsel considered adequate counsel for plaintiff class under Rule 23 even though counsel also represented union, but court disqualifies counsel from also representing union and union trustees in the class action).

¹⁵ 659 F.2d 1259 (4th Cir. 1981),

speculation.¹⁶ In *Directors Guild of America, Inc. v. Warner Bros., Inc.*,¹⁷ the district court reached a contrary result, finding the union to be an inadequate class representative in a race and sex discrimination suit on behalf of its members where the defendants' counterclaim raised a triable issue of union responsibility for creating and perpetuating the alleged discriminatory system and where contemporaneous suits against the union by its members for both race discrimination and reverse discrimination demonstrated the conflicting interests of union members.¹⁸

The courts will refuse to permit union counsel to represent a class if the conflict between representation of the union and the members is concrete and demonstrable, rather than speculative. In *Lewis v. National Football League*,¹⁹ the court refused to certify a class represented by a union attorney. The class was composed of approximately 250 NFL players who were subject to first refusal/compensation restrictions. The class was represented by attorneys for the NFL Players Association. The same law firm was involved in litigation on behalf of the NFLPA for breach of contract against certain NFL players including approximately 20 members of the plaintiff class. The court held that this conflict of interest precluded representation of the plaintiff class and deferred certification of the class until the named plaintiffs could obtain substitute counsel. The court expressly rejected counsel's suggestion that the class could be redefined to exclude the 20 players who were defendants in the NFLPA action, finding this suggestion evidence that counsel's loyalty was to its union clients and not to the class as a whole.

Defendants also sometimes object to the competence of union counsel to represent plaintiffs and plaintiff classes because the union is financing the litigation. In *Trull v. Dayco Products, LLC*,²⁰ defendants asserted that the union law firm had a conflict of interest due to the union undertaking to finance a retiree insurance class action on behalf of a class of retired union-represented employees. Defendants argued that union counsel had not shown compliance with the provisions of Rule 1.8

¹⁶ Although the union cleared the hurdle of class certification as class representative in *Woodworkers v. Chesapeake Bay Plywood*, its attorney was nevertheless disqualified on the grounds that he was a witness in the case. See Model Rule 3.7. Counsel may have walked into the disqualification trap by appearing at a deposition on behalf of his union client and stating:

We examined the notice of deposition and concluded that I was the only one that could give any kind of reasonable answers to these questions. I am the only one that knows anything about most of these things.

659 F.2d at 1272.

¹⁷ 1985 U.S. Dist. LEXIS 16325 (C.D. Cal. 1985).

¹⁸ See also *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 1973 U.S. Dist. LEXIS 10490 (S.D.N.Y. 1973) (discussed *infra*).

¹⁹ 146 F.R.D. 5, 1992 U.S. Dist. LEXIS 16892 (D.D.C. 1992).

²⁰ 214 F.R.D. 394, 2003 U.S. Dist. LEXIS 7647 (W.D.N.C. 2003).

governing third-party financing of litigation, especially with respect to confidentiality guarantees, and that the class representatives in their deposition testimony did not show a clear understanding of the nature of the suit and the manner in which it was being directed. The court rejected the defendants' objections to class counsel, finding their arguments unsupported by the record and speculative. The court noted that union financing of the litigation was permitted with the informed consent of the class representatives and that their testimony indicated that they knew the class attorneys were the union's attorneys and approved of that connection. Named plaintiffs also testified that they had agreed to be named plaintiffs because the defendants' actions were affecting class members at large; these statements indicate an implied understanding that some information may be provided to the Union, which is permitted under Rule 1.8 (g) and Rule 1.6 (a).

In cases where the court finds that the union is not a proper plaintiff class representative, that ruling often precludes union counsel from representing the individual class representatives. In *Lynch v. Sperry Rand Corp.*,²¹ male employees and retirees and their union representatives filed a class action under Title VII claiming that the negotiated pension plan discriminated against them in favor of female employees. Class representatives included both individual employees and retirees and their union representatives. In class certification proceedings the court held that the unions were not proper class representatives because of potential conflicts based on their negotiation of the pension plans, their potential liability under the employer's counter-claim for indemnification and their representation of both the male plaintiffs and the female employees who allegedly received more favorable treatment under the pension plans. At the same time, the court ruled that the individual plaintiffs were proper class representatives even though several had served as union officers and all had been recruited as class representatives by the unions. The court then considered whether the attorneys who represented the class, both individual class representatives and union class representatives, could continue to represent the class. Class counsel had been selected by the unions, had represented the unions in prior matters including contract negotiations and was being paid by the unions. Under these circumstances, the court ruled that class counsel was disqualified from representing the class for the same reasons the union was disqualified from serving as class representative.²²

²¹ 62 F.R.D. 78, 1973 U.S. Dist. LEXIS 10490 (S.D.N.Y. 1973).

²² It is well-settled that unions can sue as "persons aggrieved" under Title VII. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir, 1969). See e.g. *International Union, UAW v. LTV Aerospace and Defense Co.*, 136 F.R.D. 113, 55 FEP 1078 (N.D. Tex. 1991). However, cases reach different results on whether a union in a particular case can serve as a class representative challenging an employer's discriminatory actions under a negotiated collective bargaining agreement. Compare *AFSCME v. Nassau County*, 664 F. Supp. 64 (E.D.N.Y. 1987), *rev'd on other grounds*, 96 F.3d 644 (2d Cir. 1996), and *AFSCME v. State of Washington*, 578 F.Supp. 846, 852-53 (W.D.Wash. 1983), *rev'd on other grounds*, 770 F.2d 1401 (9th Cir. 1985) (finding union class representatives represented by union attorney adequate and rejecting conflict of interest challenge) with *Johnson v. Vancouver Plywood Co.*, 16 FEP 1537, 1976 U.S. Dist. LEXIS 16534 (W.D.La. 1976) (serious question regarding union liability for discrimination under union-

Difficult issues may arise for union counsel in settling a class action whether or not the union is a class representative. The union attorney has a duty to class members which is different from the duty of fair representation which a union has toward union members in resolving disputes under a collective bargaining agreement. In *Air Line Stewards v. American Airlines, Inc.*,²³ the union served as class representative and the union attorney as class counsel in a Title VII suit challenging the airline's policy on termination of pregnant flight attendants. The class included both former flight attendants who had become pregnant and current flight attendants who might become pregnant in the future. After the suit was filed, the airline ended its policy. Union counsel subsequently negotiated a settlement that provided for preferential hiring of former flight attendants who had been terminated under the old policy, but without back pay and without full accrual of seniority.

While the union argued that the compromise of claims was consistent with its duty of fair representation, the court held that duty inapplicable to the role of class representative. The court found that, once the discriminatory policy had been eliminated, the interests of former employees (reinstatement with full seniority and back pay) and current employees (protecting their seniority position against reinstated former employees) were in conflict and that the union and union attorney could not represent both interests. The court ordered the district court on remand to permit named plaintiffs or other members of the plaintiff class from each group to replace the union as class representatives and for the case to proceed, unless a settlement was reached which was agreed to by all appropriate parties.²⁴

negotiated collective bargaining agreement bars union from serving as plaintiff class representative). See *Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 947 (9th Cir. 1979)(whether union will adequately represent a class of persons is a question of fact).

²³ 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

²⁴ Compare *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979)(court refused to disqualify union general counsel from representing defendant class of male physical education teachers in declaratory judgment action by Board of Education to clarify conflicting administrative rulings on lawfulness of maintaining separate seniority lists for male and female physical education teachers; concurring judge relies on duty of fair representation cases recognizing union's right to take a positions on seniority issues that benefit some members at the expense of others as long as union acts reasonably, in good faith and without hostility or arbitrary discrimination).

IV. JOINT REPRESENTATION OF UNIONS AND THEIR OFFICERS OR MEMBERS IN DEFENSE CASES

Issues of concurrent representation of unions and their officers in defense cases are governed both by the ethical rules on conflict of interest and by substantive law under the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §501(a). Section 501(a) imposes fiduciary duties on union officers. Courts have interpreted this provision to bar unions from using union funds to defend union officers charged with wrongdoing which, if the charges were true, would be “seriously detrimental to the union.”²⁵ While this rule is generally invoked in derivative suits challenging mismanagement of union funds, it is not limited to those situations. In *Urichuck v. Clark*,²⁶ the Third Circuit held that the rule could also apply in certain circumstances to LMRDA Title I cases for violation of union member rights. Citing cases governing union liability for the actions of union officers,²⁷ the court held:

If [the actions of union officers] fall within the scope of their authority, they are acting for the union and whatever liability flows from their actions flows to the union also. However, if their illegal actions fall without the scope of their authority, they must bear the consequences alone.

Providing union counsel to jointly represent the union and officers accused of wrongdoing seriously detrimental to the union has been treated as an impermissible union expenditure under this statute.²⁸

In most cases, union counsel can ethically represent named union officers in duty of fair representation or employment discrimination defense cases without creating a conflict of interest with the union. Model Rule 1.13 (g) permits such representation as long as there is no violation of Conflict of Interest rules. Under Model Rule 1.7 (a) such a conflict arises where the union’s and union officer’s interests are “directly adverse” or where representation of one of the clients will “materially limit” counsel’s responsibilities to the other. In routine defense cases, the union officer’s alleged wrongdoing is the same as the union’s. Typically, the union representative is alleged to have dropped a grievance, failed to keep the grievant informed or lied about the status or resolution of the grievance. These allegations are directed at the union officer’s acts within the scope of his responsibility as the union’s agent. In effect, the officer’s acts are the union’s acts. In these cases,

²⁵*Milone v. English*, 306 F.2d 814, 817 (D.C. Cir. 1972); *Tucker v. Shaw*, 378 F.2d 304 (2d Cir. 1967).

²⁶ 689 F.2d 40, 43 (3rd Cir. 1982). *See also Mulligan v. Parker*, 805 F. Supp. 592 (N.D.Ill. 1992).

²⁷*See e.g. Shimman v. Frank*, 625 F.2d 80 (6th cir. 1980).

²⁸ *See Holdeman v. Sheldon*, 204 F.Supp. 890 (S.D.N.Y. 1962).

the defense of the officer and the union are essentially the same. The existence of separate procedural defenses for each defendant does not create an adverse situation or limit the lawyer's ability to diligently represent both defendants.²⁹

Conflict issues become more difficult when the allegations against the union officer relate to conduct that is outside the scope of his or her authority, such as sexual or racial harassment, slander or assault. Although union officers do not like to be told that they must obtain their own attorney, this alternative should be considered whenever union counsel anticipates a possible defense which would shift blame to the individual and away from the union. As a matter of policy, many unions do not want to be in the position of condoning actions which are detrimental to their membership, particularly sexual or racial harassment, and, for this reason, will focus their defense on the adequacy of the union's response to the allegations rather than challenging the veracity of the plaintiff's story. This plan of defense serves the union's interest but does not satisfy the individual's legal and emotional interest in vindication through proving the allegations to be false.

Another important consideration in deciding whether to undertake joint defense in cases of this kind is the extent to which the particular facts of the case implicate a need to protect against disclosure of truly confidential information. In cases of joint representation, disclosures among counsel and joint defendants are protected from disclosure to third parties under the common interest theory but there is no attorney client privilege protecting disclosures made to either party from the other if a subsequent controversy arises.³⁰ One way to evaluate whether this presents a problem with joint representation of the union and its officers or members is to consider how often counsel will feel required to have private conversations with one party without the other present. If this will be a frequent occurrence, counsel should consider separate representation of the individuals.

The District of Columbia Bar Legal Ethics Committee³¹ established a checklist for determining whether joint representation is appropriate, which is useful in evaluating issues of joint representation in union defense cases, as follows:

1. The Co-parties agree to a single comprehensive statement of facts describing the occurrence.

²⁹Once the lawyer has decided that no conflict exists with respect to representation of the union and its officer, it is nevertheless good practice to advise the officer of any risk of personal liability in the lawsuit and to suggest that he/she consult with an individual attorney to confirm the assessment of union counsel. It is also advisable to discuss confidentiality issues with respect to disclosures to the "union," the company and third parties. While no written consent to joint representation is required in these circumstances, some written confirmation of the discussion is still a good idea.

³⁰ See *Boswell v. IBEW Local 164*, 106 LRRM 2713 (D.N.J. 1981).

³¹ Opinion No. 140 (July 7, 1984).

2. The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against the other.
3. The attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other.
4. The attorney advises each party as to the possible theories of recovery or defense which it may be foregoing through this joint representation based on the disclosed facts.
5. Each party agrees to forego any claim or defense against the other based on the facts known by each at that time.
6. Each party agrees that the attorney is free to disclose to the other party, at the attorney's discretion, all facts obtained by the attorney.
7. The attorney outlines potential pitfalls in multiple representation, and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advises that no separate consideration is desired.
8. Each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which, if they do not compromise these differences, may require the attorney to withdraw from the representation of both without injuring either.
9. Each party agrees that the attorney may represent both in the litigation.

While some cases and commentators suggest that the issue with respect to joint representation depends on counsel's own assessment of the culpability of the individual defendant, this approach can cause problems in a union context. The individual officer accused of misconduct is likely to resent any implication that union counsel or other union leaders believe the accusation. On the other hand, turning a blind eye to evidence of culpability can compromise the union's defense. The best course is to base the decision with respect to joint representation on the nature of the non-frivolous allegations in the complaint, which is a more objective standard. If the non-frivolous allegations of the complaint, if true, would create a conflict of interest for union counsel, the best course is separate representation from the start. With respect to costs of separate representation, the union's payment of defense costs for union officers may implicate the prohibitions under Section 501(a) of the LMRDA. The individual officers or members can proceed with separate representation, with potential reimbursement of their costs to be considered in the event they prevail.

The most difficult issues arise when a union attorney attempts to represent individual union officials in cases brought by union members alleging fraud or mismanagement in the handling of union funds or records. In these cases, counsel risks being disqualified from representing the officers, the members, the union or everyone involved. Union counsel should make the decision about representation in these cases with a clear focus on his or her responsibility to the union as an entity. Moreover, although the cases generally give counsel some time to determine whether a conflict is present, the best practice is to make the decision about representation as soon as possible.

The series of cases involving allegations of corruption in the Mine Workers Union illustrate some of the issues and pitfalls for union counsel. In *Yablonski v. United Mine Workers (Yablonski I)*,³² union members sued the union and three named officers under Section 501 of the LMRDA requesting an accounting of union funds disbursed by the officers and for restitution of funds alleged to be misappropriated or misspent. The plaintiffs moved to disqualify the defense counsel chosen to represent both the union and the officers on conflict of interest grounds. The law firm then withdrew from representing the individual officers but continued to represent the union. The issue on appeal was whether counsel could continue to represent the union in these circumstances. The court ruled that counsel could not.

In its ruling, the court noted that a lawyer can properly represent all defendants if a suit appears groundless and that separate counsel is required only where there is a potential conflict between the interests of the union and its officers. The court further found generally counsel is permitted an initial period of joint representation after the lawsuit is filed to determine the exact nature of the lawsuit and to protect the interest of all defendants. However, the court found that union counsel's continued representation of the union officers in other litigation required disqualification of counsel based on the conflicting loyalties inherent in concurrent representation of the very union officers accused of misconduct. Thus, the court concluded:

Where union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by independent counsel unencumbered by potentially conflicting obligations to any defendant officer.

In disqualifying the union counsel, the court distinguished the facts of *Teamsters v. Hoffa*,³³ where the court permitted the union to be represented by a regularly retained attorney in a Section 501 suit as long as the union attorney did not represent the officers in the same proceeding. The court noted that the Mine Workers' counsel in the *Yablonski* case was engaged in representation of an individual officer in pending and related matters which could impair the independence of his judgment in representing the union in a "derivative" suit brought on behalf of its own members.

³² 448 F.2d 1175 (D.C. Cir. 1971).

³³ 242 F. Supp. 246, 256 (D.D.C. 1965).

In a subsequent decision, the same court disqualified in-house counsel for the same union, finding that their connections and representation of the accused officers precluded their satisfying the requirement of “unquestionably independent new counsel” ordered in the prior decision.³⁴ Finally, in *Weaver v. United Mine Workers*,³⁵ the court considered the impact of a change in union leadership which removed from office the union officials whose conduct was challenged in the Section 501 action. The union requested to be realigned in the lawsuit on the side of plaintiffs and against the former officers. It also retained as counsel an attorney who had formally represented some of the plaintiffs in the lawsuit. The court granted the motions, holding that the current attorneys did not have a conflict of interest.

[U]nlike the officer clients of the counsel we earlier disqualified, [clients of the new counsel] have never been accused of misconduct in union matters. Consequently, the risk of conflict which existed in the earlier cases – where counsel may have been duty bound to shield the officers to the detriment of the UMWA whose interests they were also obligated to protect – simply does not exist in the circumstances presented here.

Id., at 585.

Similarly, in *Milone v. English*,³⁶ the court refused to disqualify counsel who jointly represented the union and its officers in a derivative suit charging the officers with mismanagement of union funds. In that case plaintiffs filed their motion to disqualify union counsel four years after the lawsuit was commenced and after successful implementation of a court approved consent decree allowing the officers to remain in office under a monitorship to oversee management of the union until a new convention was held. The court also denied a motion to require the repayment to the union of the costs of the officers’ defense, at least at that stage in the proceeding.

Generally union counsel can represent both an international union and its affiliated local union in defense cases, subject to conflict of interest rules on informed consent, unless there is an objective divergence of interests which could impair counsel’s ability to diligently represent each entity. See Model Rules 1.13 and 1.7. However, union counsel may not be able to represent either the international or its affiliated local union if their interests become adverse and union counsel represents or has represented both entities in the past. In *International Longshoremen’s Ass’n, Local 1332 v. International Lonshoremen’s Ass’n*,³⁷ the International Union revoked the charter of the

³⁴ *Yablonski v. United Mine Workers (Yablonski II)*, 454 F.2d 1036, (D.C. Cir. 1971).

³⁵ 492 F.2d 580 (D.C. Cir. 1973).

³⁶ 306 F.2d 814 (D.C. Cir. 1962).

³⁷ 909 F. Supp. 287 (E.D. Pa. 1995).

Local Union and the Local Union sued to have the charter reinstated. The court disqualified union counsel from representation of the International Union based on evidence that counsel's partner formerly represented the Local Union's president and that the Local Union was currently represented in another case by the International Union's co-counsel. Finding these interests directly adverse, and absent the local's consent, the court held that the conflict could not be cured by withdrawal from the current conflicting litigation on behalf of the Local Union and instead ordered that counsel for the International Union be disqualified.

V. MOTIONS TO DISQUALIFY UNION COUNSEL FROM DEFENDING UNIONS IN CASES BROUGHT BY UNION MEMBERS

Union attorneys occasionally face motions to disqualify them from representation of the union client when a union officer or member whom they assisted in their capacity as union counsel later takes a legal position adverse to the union. Although motions to disqualify are generally disfavored,³⁸ they are nonetheless costly to defend and often accompanied by complaints to the disciplinary commission. Rather than simply withdraw from the case in the face of such a motion, union counsel often resist disqualification because of a longstanding relationship with the union client and the desire of the client to receive representation by its chosen attorney.

In considering motions to disqualify, courts generally look to see if the party seeking disqualification was actually represented by the challenged attorney, if the subject matter of the previous litigation is substantially related to the one before the court, and if the party seeking disqualification could have reasonably communicated secrets or confidences to the challenged attorney in the course of prior representation.³⁹ Courts generally hold that no attorney-client relationship can be formed unless both the attorney and the client agree to such a relationship, but some have found a relationship implied by the conduct of the parties. However, courts have repeatedly rejected attempts to imply an attorney-client relationship based on conduct of union

³⁸As the Seventh Circuit held in *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982):

[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.

See also, Panduit Corp. v. All States Plastic Manufacturing Co., 744 F.2d 1564, 1576-77 (Fed. Cir. 1984)(referring to motions to disqualify as a "vexatious tactic.")

³⁹ *See Freeman v. Chicago Musical Instrument Co.*, 689 F.2d at 721-22; *INA Underwriters Ins. v. Nalibotsky*, 594 F.Supp.1199, 1206 (E.D. Pa. 1984); *Black v. State of Missouri*, 492 F.Supp. 848, 864 (W.D.Mo. 1980).

counsel acting as union counsel in administration of the collective bargaining agreement.⁴⁰

In *Griesemer v. Retail Store Employees Union, Local 1393*,⁴¹ counsel for the Local Union represented the plaintiff's interest in the grievance procedure and negotiated the settlement of her grievance. However, the court held that the union counsel was not disqualified from continuing to represent the union when the grievant later sued to set aside the grievance settlement. As the court observed:

[A]t no time did Katz formally represent or hold himself out to be plaintiff's attorney. In fact, plaintiff admitt[ed] that Katz did not represent her ... Rather, as plaintiff confessed, Katz represented the local union in processing plaintiff's grievance.⁴²

Moreover, while union counsel was acting in support of her grievance, the union member retained her own attorney. Under these circumstances, the court concluded that no confidential relationship developed which would warrant disqualification of union counsel in subsequent proceedings by the plaintiff against the union.

In *Adamo v. Hotel, Motel, Bartenders, Cooks and Restaurant Workers Union*,⁴³ a union member moved to disqualify union counsel from defending the union in his duty of fair representation case because the union counsel's firm had handled the arbitration of his grievance on behalf of the union. The court denied the motion to disqualify finding that the union was the sole client of union counsel during the arbitration and that the record did not support a finding that the union member looked to the members of union counsel's law firm as his lawyers. The court also concluded that no attorney would be required to testify in the lawsuit on other than formal matters⁴⁴

⁴⁰ *Carino v. Stefan*, 376 F.3d 156 (3d Cir. 2004); *Waterman v. Transport Workers Union Local 100*, 176 F.3d 150 (2d Cir. 1999); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 862 (10th Cir. 1996); *Breda v. Scott*, 1 F.3d 908 (9th Cir. 1993). A minority view that grievance representation can create an attorney-client relationship based on the unsophisticated union member's subjective understanding and sharing of information with the union lawyer is represented by the state court decision in *DeCherco v. Civil Service Employees Ass'n*, 404 N.Y.S.2d 255, 257 (NY Sup. Ct. 1978).

⁴¹ 482 F.Supp. 312 (E.D.Pa. 1980).

⁴² 482 F.Supp. at 314-315.

⁴³ 655 F.Supp. 1129 (E.D.Mich. 1987).

⁴⁴ See Model Rule 3.7 Lawyer as Witness, Section II, *supra*, which sets out instances where a lawyer may appear as a witness in a proceeding without disqualification.

In *Hague v. United Paperworkers Int'l Union*,⁴⁵ the court applied similar reasoning to reject a challenge to the union attorney's representation of the union in a duty of fair representation suit brought by an individual employee who had been represented in arbitration by the union attorney. The court held that outside counsel was acting on behalf of the union and in the union's place in the grievance and arbitration procedure and that no conflict arose based on the relationship between the union or its counsel and the plaintiff as grievant. See also *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985)(union attorney may not be held liable for malpractice to an individual union member for acts performed as the union's agent in the collective bargaining process). Accord *Gwin v. National Marine Eng'rs Ben. Ass'n*, 966 F. Supp. 4 (D.D.C. 1997).

Even where union counsel undertakes to represent a union member in a proceeding where a true attorney-client relationship exists, the courts will disqualify union counsel from subsequent representation of the union in a matter adverse to the member only where the court finds a "substantial relationship" between the subject matter of the prior and the present representations. In *Tisby v. Buffalo General Hospital*,⁴⁶ union counsel represented a member of a union-represented unit of nurses in an administrative disciplinary action brought by the State Education Department charging her with unsafe nursing practices. The nurse retained the union's lawyer precisely because he was union counsel and she believed he was the logical choice to represent her in the administrative proceeding. Although that proceeding was eventually withdrawn, the nurse's employment was terminated a few months later. The nurse met with union counsel and union officials at the time of her termination to discuss her grievance. When the union subsequently decided to withdraw the grievance prior to arbitration, the nurse filed suit against her employer for unlawful termination and against the union for breach of its duty of fair representation. She also moved to disqualify union counsel from representing the union in defense of her claims. The court denied the motion finding that union counsel's individual representation of plaintiff in her administrative proceedings was not substantially related to her duty of fair representation claim even though the disciplinary incident that led to the administrative proceeding was part of the hospital's grounds for her later termination. According to the court, a court should grant a motion to disqualify only where "the relationship between issues in the prior and present cases is 'patently clear,' ... 'identical' or 'essentially the same.'"⁴⁷

⁴⁵ 949 F. Supp. 979 (N. D.N.Y. 1996).

⁴⁶ 157 F.R.D. 157 (W. D.N.Y. 1994).

⁴⁷ Even if the court had found proof of a "substantial relationship," such a finding, by itself, is not enough to disqualify counsel without first finding evidence that the plaintiff enjoyed a confidential attorney-client relationship. As the Second Circuit observed in a related contest in *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1972),

[B]efore the substantial relationship test is even implicated, it must be shown that the attorney was in a position where he *could* have received information which his former client might reasonably have assumed the attorney would withhold from his present client.

When union counsel is not barred by conflict of interest rules from defending the union in a suit brought by a union member, counsel must nevertheless observe confidentiality rules with respect to confidential information which the attorney obtained in the course of prior representation of the union member even if the representation was in the role of union counsel. In *Gwin v. National Marine Eng'rs Ben Ass'n*,⁴⁸ the plaintiff, as part of his duty of fair representation suit, claimed that the union's duty was breached when its counsel used a tape of conversations with a manager which the member provided to union counsel during grievance-arbitration proceedings in subsequent labor negotiations with the company. Without specifically addressing ethical issues for the union attorney, the court held that the disclosure and use of the tape by the union was not a breach of confidentiality because the plaintiff was aware when he provided the tape to union counsel that counsel was acting on behalf of the union.

However, some courts have held that union counsel cannot ethically represent one union member against another where the representation would involve use of confidential information gained in representing a member as union counsel to the disadvantage of that member. In *Debiasi v. Charter County of Wayne*,⁴⁹ the court held that Rule 1.6 of the Michigan Rules of Professional Conduct⁵⁰ prohibited union counsel from acting as private counsel for a union member who was bringing a suit for reverse discrimination against his employer, the County Sheriff, claiming that the County discriminated against him by promoting a black female Lieutenant to the position of Commander in preference to the white male plaintiff. Both the plaintiff and the successful applicant for the position were union members and the County defendants asserted that union counsel was in possession of confidential employment information about the successful applicant by virtue of his role as union counsel which could be used against her interests in the reverse discrimination lawsuit. Union counsel sought ethical guidance from the State Bar, which issued an advisory letter stating:

Even though the labor union [and not individual member Pamela McClain] is and was your client, it is possible that you could have received some confidential communication from an agent of your [union] client ... during your representation as general counsel [for the union] during labor negotiations.

⁴⁸ 966 F.Supp. 4 (D.D.C. 1997).

⁴⁹ 284 F. Supp. 2d 760 (E.D. Mich. 2003).

⁵⁰ See Model Rule 1.6 Confidentiality of Information.

The court deferred to the Michigan State Bar advisory letter and disqualified the union's attorney from representing the plaintiff, concluding:

Indeed as a member of the Union, it can hardly be disputed that Ms. McClain would expect that information exchanged during a meeting with her superior with Union representation present would be considered confidential by her Union when the Union discussed the matter with its attorney. Moreover, to allow [union counsel] to use information that he acquired as the Union's attorney to the advantage of one member against another member would have a chilling effect on Union members and destroy their confidence in Union representation.

284 F.Supp.2d at 769-770.

V. CONCLUSION

For union counsel, the issues surrounding representation of multiple parties are important ones. Unions have broad authority to protect the interests of their members, to speak for them, to resolve disputes for them and to negotiate the terms of their employment. As union counsel, we exercise on the union's behalf the powers and responsibilities that arise from our clients' status as exclusive bargaining representative. However, when, at our union client's request, we undertake to represent the officers or members of the union individually, we assume all the responsibilities of attorneys toward the individual clients. Before agreeing to the joint representation, union counsel should assure that their duties as the individual's attorney and their duties as a union representative can be discharged with diligence, loyalty and confidentiality in the harmonious interests of all parties.