CHAPTER 6

THE DUTY OF FAIR REPRESENTATION

I. FAIR REPRESENTATION AND THE ATTORNEY-CLIENT RELATIONSHIP IN LABOR ARBITRATION: DILEMMAS FOR UNION COUNSEL

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Introduction[2]

Over many years as union counsel, labor arbitrators have often appeared perplexed by my relationship with the grievant. The confusion may begin when, in response to the arbitrator's request that I confer with my "client" (the grievant), I insist that I do not represent the grievant. In other cases, the issue may arise when the grievant asks the arbitrator to order representation by counsel of the grievant's choosing, rather than by union counsel, because the interests of the grievant and the union purportedly are not aligned.

This paper reviews the case law addressing the often complex relationship of union counsel, the union, and the grievant in labor arbitration. It attempts to answer several related questions: What are a union attorney's duties when representing union members in arbitration? Is the client the union, is it the grievant, or is it both? What are union counsel's duties when a conflict arises between the union and a grievant?

The answers to these questions are vitally important for labor attorneys. Ethics rules dictate that an attorney must behave very differently if the client is the grievant, or the union, or both of them. Depending on how the questions above are answered, missteps by legal counsel may lead to discipline for ethics violations.

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They can also form the basis for malpractice actions against the attorney and lawsuits or unfair labor practice charges against the union.

The good news (for union attorneys, anyway) is that the courts now uniformly hold, at least in traditional labor arbitration,[3] that the union, not the grievant, is the client. As a result, union counsel ordinarily are subject to the minimal ethical duties governing representation of the constituents of a client-organization, rather than the more stringent conflict-of-interest rules governing representation of clients. Disgruntled union members therefore cannot easily sue union attorneys, report them for ethics violations, seek their disqualification in related litigation, or file unfair labor practice charges against the unions they represent. This paper lays out the somewhat tangled legal basis for these results.

To begin the discussion, Part I briefly reviews the sources of the ethics rules governing union counsel in arbitration. Part II discusses the very different rules governing conflicts of interest between clients, and between a client-organization and its constituents.

Against this backdrop, Part III focuses on union counsels' ethical obligations in traditional labor arbitration in light of the constraints of federal labor law in addition to duties imposed by the ethics rules. Part III also reviews circumstances in which counsel's misconduct may constitute a breach of the union's duty of fair representation.

The last two sections of this paper address problems that can vex union counsel after grievance proceedings have concluded. Part IV focuses on the potential disqualification of union counsel from defending fair representation suits or labor board charges brought by grievants who were unsuccessfully represented by the

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[3]The result may be different for arbitrations brought under *14 Penn Plaza v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). In *Pyett*, a sharply divided Supreme Court ruled that a union can effectively waive an employee's right to bring a statutory claim in court by agreeing that such claims must be arbitrated under the labor contract. It is possible that union attorneys have heightened ethical responsibilities when asserting an individual employee's statutory claims in arbitration under a collective bargaining agreement. As discussed in this paper, union counsel in labor arbitration performs a collective bargaining function that may be performed by a non-lawyer. In contrast, an attorney bringing statutory claims is performing a task that is purely legal. It is unclear whether union counsel's representation of a *Pyett* grievant creates an attorney-client relationship between them. It is also unclear whether, as discussed below with respect to traditional labor arbitration, a union attorney in a *Pyett* arbitration can claim immunity from malpractice under Section 301(b) of the Labor-Management Relations Act (LMRA) for professional negligence in presenting the statutory claim.

Thankfully, these conundrums are beyond the scope of this paper: *Pyett* is the subject of a separate panel presentation.

same counsel in arbitration. Part V reviews claims involving union counsel's alleged unauthorized use or disclosure of union members' confidences and secrets.

It is my hope that this paper will help arbitrators to understand that grievants are not clients, at least unless the union's attorney inadvertently has made them so.

I. Rules Governing Professional Conduct

The rules regulating attorney conduct vary by jurisdiction. Forty-nine states have adopted all or parts of the American Bar Association (ABA) Model Rules of Professional Conduct, which were amended most recently in August 2009. Most federal courts also follow the Model Rules.

California is now the only state that has not adopted some variant of the Model Rules. It has enacted its own disciplinary rules, the Rules of Professional Conduct (California Rules or Cal. Rules), which differ markedly from the Model Rules. The California Rules are disciplinary in nature; unlike the ABA Model Rules, they are not meant merely to provide ethical guidance. Willful violations are punishable, including by disbarment.[4] State and federal courts in California follow the California Rules rather than the Model Rules.

The Model Rules and the California Rules exist within a larger legal context guiding the practice of law.[5] Court decisions, statutes, and rules create ethical duties and impose penalties that sometimes make reliance on corresponding ethics rules a moot point. Attorney disqualification and Rule 11 of the Federal Rules of Civil Procedure are two examples. Courts sometimes invoke ethics rules as the basis for these punishments.[6]

Supposedly, ethics rules are not meant to create a basis for civil liability or to be invoked as procedural weapons in litigation.[7] In

[4]Cal. Rule 1-100(A); *see also* Cal. Bus. & Prof. Code §6078.

[5]*See ABA Annotated Model Rules of Professional Conduct*, p. 3 (6th ed. 2007) ("Annotated Rules").

[6]*Annotated Rules*, pp. 9–10.

[7]*Annotated Rules*, pp. 4, 5; Cal. Rule 1-100(A). Courts are divided on whether Rule 11 sanctions should be based on a violation of an ethics rule. *Compare Golden Eagle Distributing Corp. v. Burroughs Corp.,* 801 F.2d 1531, 1542 (9th Cir. 1986) (no sanctions for nationwide law firm's failure to cite controlling, adverse precedent in violation of Model Rule 3.3(a)), *with Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082 (7th Cir. 1987) (sanctions appropriate when undisclosed but controlling, adverse precedent made attorney's argument frivolous). *See also Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (sanctions upheld for counsel's distortion of legal opinions by omitting significant portions of quotations and for failure to disclose that

reality, ethics violations are often enforced through procedural motions instead of or in addition to disciplinary proceedings.[8]

II. Rules Governing Conflicts and Conflict Waivers

Conflicts of interest can result in attorney discipline, disqualification in later litigation, and malpractice judgments. For union counsel, whether these unpleasant consequences can result depends on whether the union and grievant are both clients, or the union instead is the sole client and the grievant is merely a "constituent."

If both are clients, the stringent conflict-of-interest rules set forth in Model Rule 1.7 and Cal. Rule 3-310 are applicable. If, in contrast, the attorney represents only the union as client, the more relaxed requirements of Model Rule 1.13 and Cal. Rule 3-600 will apply. All four rules permit simultaneous representation if there is no adversity between the client organization and the organization's member (whether the member is also a client or merely a constituent).

This section reviews the very different ethics rules applicable to simultaneous representation of two or more clients, and simultaneous representation of a client organization and its members.

A. Rules Governing Simultaneous Representation of Two Clients, or a Client Organization and its Constituent

The ABA's and California's conflict-of-interest rules presuppose the existence of an attorney-client relationship. While the rules do not tell us when an attorney-client relationship has been formed, many state courts have ruled that it can be created by conduct as well as by contract.

For example, in California, an attorney-client relationship can be formed by an individual's reasonable belief or expectation that an attorney is undertaking representation. More commonly, an

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she, not the court in the quotations, supplied emphasis). Rather than relying on Rule 11, federal courts look to ethics rules to determine whether counsel should be disqualified for a claimed conflict of interest.

[8] *See, e.g.*, *Jenkins by Agyei v. State of Missouri*, 931 F.2d 470, 486 (8th Cir. 1991) (finding no abuse of discretion in district court decision disqualifying counsel for representing adverse interests in violation of Missouri's version of Model Rule 1.7 because "'we encourage the district courts to strictly enforce the Code of Professional Responsibility'" (citation omitted)).

attorney-client relationship may arise from a preliminary consultation by a prospective client seeking and receiving legal advice, although engagement does not result.[9]

In Illinois, by contrast, the attorney-client relationship is contractual and ordinarily can be formed only by a retainer agreement or payment of fees.[10]A retainer agreement, however, can be oral or implied.[11] The key is that the client must "manifest her authorization that the attorney act on her behalf, and the attorney must indicate his acceptance of power to act on the client's behalf."[12]

Even if no attorney-client relationship is formed, the Model Rules protect a prospective client from the disclosure and misuse of confidential information "that could be significantly harmful to that person."[13]

The ABA and California rules expressly permit an attorney to simultaneously represent an organization and its members as clients, subject to special conflict of interest rules. Model Rule 1.13(g) provides:

> 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. 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.

Cal. Rule 3-600(E), on which Rule 1.13(g) appears to have been based, provides:

> A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Model Rule 1.7, which governs if both the union and a grievant are clients, forbids simultaneous representation where a current

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[9] *Beery v. State Bar of California*, 43 Cal. 3d 802, 811–12, 239 Cal. Rptr. 121, 739 P.2d 1289 (1987).

[10] *People v. Simms*, 736 N.E.2d 1092, 1117 (Ill. 2000); *Zych v. Jones*, 406 N.E.2d 70, 74 (1st Dist. 1980).

[11] *Zych*, 406 N.E.2d at 74.

[12] *Simms*, 736 N.E.2d at 1117.

[13] Model Rule 1.18(c); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358 (1990).

conflict of interest exists among clients unless "each affected client gives informed consent, confirmed in writing":

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (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.[14]
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (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 before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing.

Comments 14 and 15 to Model Rule 1.7 provide an objective standard for determining whether it is proper for a lawyer to obtain a client's consent to otherwise impermissible multiple representation:

> [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. . . .

[14]From the perspective of a union attorney, Model Rule 1.7(a)(2) is an improvement over DR 5-105 of the ABA Model Code of Professional Conduct, which was superseded by the Model Rules. DR 5-105(B) provides that a lawyer cannot "continue multiple representation 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." More than one court interpreted "likely to be adversely affected" as warranting disqualification of union counsel in class litigation on behalf of employees because of the purely theoretical possibility that plaintiffs' counsel might act contrary to the interests of the plaintiffs if such actions might benefit the union. *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185 (E.D. Va. 1991), *rev'd. sub nom Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992); *Directors Guild of America v. Warner Bros.*, 1985 U.S. Dist. LEXIS 16325 at *22 (C.D. Cal. 1985); *Molina v. Mallah Organization, Inc.*, 804 F. Supp. 504 (S.D.N.Y. 1992).

> [15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. ...[15]

Cal. Rule 3-310(C) and (E) is similar, forbidding joint representation where the parties' interests potentially or actually conflict unless the attorney first obtains "the informed written consent of each client":

> (C) A member shall not, without the informed written consent of each client:
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> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
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> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
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> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
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> ...
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> (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

"Written consent" is defined as "written agreement to the representation following written disclosure." Cal. Rule 3-310(A)(2). An attorney must withdraw from representation whenever a conflict of interest arises in the course of representation and client consent to continued representation is not obtained. Cal. Rule 3-310(C).

The more relaxed requirements of Model Rule 1.13 and Cal. Rule 3-600 govern where the union is the client and the grievant is not, and a conflict is claimed to exist between the attorney's duties to the union and to the grievant. Model Rule 1.13 provides, in pertinent part:

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

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[15] *Annotated Rules*, p. 116.

> …
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> (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. 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.

Similarly, Cal. Rule 3-600 provides, in pertinent part:

> (A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.
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> …
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> (D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Comment 34 to Model Rule 1.7 highlights a key difference between simultaneous representation of a union and grievant, in contrast to representation of a union in which the grievant is a member:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). *Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter,* unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.[16]

Thus, a union lawyer ordinarily need not obtain the consent of a grievant who is merely a constituent to represent a labor union in an action by or against the grievant.

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[16] *Annotated Rules,* p. 121 (emphasis added).

The Model Rules' commentators nonetheless caution that a lawyer should withdraw from representing a member of an organization in favor of "independent representation" if adversity develops between them:

> [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
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> [11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

B. Effectiveness of Prospective Conflict Waivers

The ABA and California rules do not directly address the enforceability of advance waivers of conflicts. The California Rules require, however, that a lawyer obtain informed, written consent even where a conflict is only potential. The California Rules also can be read as requiring a second informed consent if the lawyer is to continue joint representation once a potential conflict has become actual.[17]

Rule 3-310(C)(1) notwithstanding, state and federal courts have enforced prospective waivers of fully disclosed, potential conflicts after the potential conflict has become real, without requiring a second waiver. *Concat LP v. Unilever, PLC*[18] suggests that the following factors should be considered in determining whether a waiver was sufficiently specific: (1) the waiver's breadth; (2) its temporal scope (i.e., whether it waived only current conflicts or applied to all conflicts in the future); (3) the quality of the conflict discussion between attorney and client; (4) the specificity of the waiver; (5) the nature of the actual conflict (e.g., whether the attorney sought to represent both clients in the same dispute or

[17] Cal. Rule 3-310(C)(1).
[18] 350 F. Supp. 796, 820 (N.D. Cal. 2004).

in unrelated matters); (6) the sophistication of the client; and (7) the interests of justice.

In *Visa, U.S.A., Inc. v. First Data Corp.*,[19] the district court, relying on cases interpreting Model Rule 1.7(b)(4), in addition to Cal. Rule 3-310, upheld the advance conflict waiver between First Data, the client, and Heller, its law firm:

> An advance waiver of potential future conflicts, such as the one executed by First Data and Heller, is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict. . . . The only inquiry that need be made is whether the waiver was fully informed. . . . In some circumstances, a second waiver will be warranted, but only if the attorney believes that the first waiver was insufficiently informed. There is no case law requiring a second disclosure in all circumstances for an advance waiver to be valid.[20]

A second waiver, the court held, is not required if the client gave full and knowing consent to waive conflicts as to future litigation in the first consent.

The court also found that First Data was a "sophisticated user of legal services,"[21] and had validly waived in advance the right to disqualify Heller in the event of future litigation with Visa:

> The [conflict waiver] letter identifies the adverse client, Visa, and discloses as fully as possible the nature of any potential conflict that could arise between the two parties. The letter also clearly states that the waiver contemplates Heller's representation of Visa against First Data in matters "including litigation." First Data was given ample information concerning the conflict in question that it was asked to waive, reviewed this information, and then agreed to the waiver. First Data has failed to demonstrate that it was not fully and reasonably informed when it signed the waiver letter.[22]

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[19] 241 F. Supp. 2d 1100 (N.D. Cal. 2003).

[20] *Id.* at 1105.

[21] *Id.* at 1109.

[22] *Id.* at 1107. Under both the ABA and California rules, some conflicts are considered so serious that client consent will be deemed insufficient to permit continued joint representation. Under the California Rules, written consent will always suffice under the disciplinary rules, but may be insufficient for non-disciplinary purposes:

> Though an informed consent be obtained, no case we have been able to find sanctions dual representation of conflicting interests if that representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another. (Citations omitted.) As a matter of law, *a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed.* Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

Klemm v. Superior Court, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509 (1977) (emphasis added). Under Model Rule 1.7(b)(3), the representation may "not involve the assertion of

The *Visa U.S.A.* decision notes that the ABA Committee on Ethics and Professional Responsibility has opined that a lawyer may ethically obtain a client's advance waiver allowing the lawyer to represent unidentified future clients with interests potentially adverse to the existing client's interests.[23]

The ABA opinion requires the lawyer to give the client enough information to make an intelligent decision and the lawyer must reasonably believe that the new representation will not adversely affect the original client's representation. The opinion questions whether a client can truly appreciate the consequences of a prospective waiver that does not identify the subject matter of the likely conflict and the identity of the potential new client or, at minimum, the class of potentially conflicting clients.[24]

III. Union Counsels' Ethical Obligations in Traditional Labor Arbitration

The courts now uniformly accept that a union lawyer's representation in traditional labor arbitration or collective bargaining does not create an attorney-client relationship with the affected union members. "As a matter of black letter legal ethics, the union lawyer's client is the union."[25] Because the client is not the union member (see Part III.B below), the union attorney's ethical responsibilities are limited to the minimal professional responsibilities governing representation of members of organizations under Model Rule 1.13 and Cal. Rule 3-600 (discussed in Part II above and Part III.C below).

One important consequence is that a union attorney's misconduct in a traditional labor arbitration cannot form the basis of a malpractice action by the member, although the union (not the member) may be able to sue the attorney for professional negligence (see Part III.A below). In addition, the attorney's

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a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." According to the district court in *Visa U.S.A.*, these kinds of conflicts were not present.

[23]ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-372 (1993).

[24]*See Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (law firm disqualified from representing new tort client in case directly adverse to existing tax client, notwithstanding existing client's execution five years earlier of a prospective waiver of conflicts in standing retainer agreement, since consent was insufficiently explicit to waive so far in advance a matter as serious as litigation against an existing client); *see also* N. M. Crystal, *Enforceability of General Advance Waivers of Conflicts of Interest*, 38 St. Mary's L.J. 859 (2007) (discussing waivers under the Model Rules).

[25]R. G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex L. Rev. 1095, 1109 (1996).

malpractice may be imputed to the union and be actionable against it as a breach of the duty of fair representation.

A. Union Counsel's Immunity From Personal Liability in Traditional Labor Arbitration

It is now well-settled that union attorneys are not personally liable to union members for professional negligence in private sector grievance arbitration or collective bargaining.[26]

Peterson v. Kennedy and the other cases cited in footnote 26 establish that a dissatisfied union member can sue the union, but not the union's attorney, for breach of the duty of fair representation based on the attorney's mistakes or misconduct. As shown below, the courts apply the traditional deferential standard of care applicable to fair representation violations to determine whether an attorney has breached it, not standards of care ordinarily applicable to professionals. Union liability exists only if the attorney has mishandled a grievance arbitration or compromised negotiations through conduct which is arbitrary, discriminatory, or in bad faith, not for the kinds of errors of judgment that might otherwise create liability for malpractice.[27]

These principles derive from Section 301(b) of the Labor Management Relations Act, 1947 (LMRA),[28] which provides in part:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

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[26] *Peterson v. Kennedy*, 771 F.2d 1244, 1259 (9th Cir. 1985); *Montplaisir v. Leighton*, 875 F.2d 1 (1st Cir. 1989); *Arnold v. Air Midwest, Inc.*, 100 F.3d 857 (10th Cir. 1996); *Waterman v. Transport Workers' Union Local 100*, 176 F.3d 150 (2d Cir. 1999); *Carino v. Stefan*, 376 F.3d 156 (3d Cir. 2004). The same analysis has been adopted by courts applying state law. *See, e.g., Leal v. Woodley & McGillivary*, 2009 WL 1704311, at *6 (S.D. Tex. June 17, 2009); *Nelson v. Haus, Roman & Banks LLP*, 296 Wis. 2d 934, 724 N.W.2d 273, at *2 (2006) (unreported); *Weiner v. Beatty*, 121 Nev. 243, 247, 116 P.3d 829 (2005); *Stafford v. Meek*, 762 So. 2d 925, 2000 Fla. App. LEXIS 4300 (2000); *Mamorella v. Derkasch*, 716 N.Y.S.2d 211, 2000 N.Y. App. Div. LEXIS 11401 (2000); *Niezbecki v. Eisner & Hubbard, P.C.*, 186 Misc. 2d 191, 717 N.Y.S.2d 815 (2000); *Brown v. Maine State Employees Ass'n*, 1997 ME 24, 690 A.2d 956, 1997 Me. LEXIS 25, 155 L.R.R.M. (BNA) 2124 (1997); *Frontier Pilots Litig. Steering Committee, Inc. v. Cohen, Weiss & Simon*, 227 A.D.2d 130, 641 N.Y.S.2d 639, 639 (1996); *Sellers v. Doe*, 99 Ohio App. 3d 249, 650 N.E.2d 485, 1994 Ohio App. LEXIS 5542 (1994); *Collins v. Lefkowitz*, 66 Ohio App. 3d 378, 584 N.E.2d 64, 65 (1990); *De Grio v. American Federation of Government Employees*, 484 So. 2d 1, 1986 Fla. LEXIS 1568, 121 L.R.R.M. (BNA) 2712 (1986).

[27] *Peterson*, 771 F.2d at 1259.

[28] 29 U.S.C. §185(b).

The Supreme Court long ago ruled in *Atkinson v. Sinclair Refining Co.*[29] that under Section 301(b) "union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process" or for actions taken "on behalf of the union."[30]

The Supreme Court extended the *Atkinson* rule in *Complete Auto Transit, Inc. v. Reis,*[31] holding that a damage claim may not be maintained against a union officer acting as an individual, even if the officer's conduct (engaging in a wildcat strike) was unauthorized by the union and was in violation of an existing collective bargaining agreement.

One consequence of the *Atkinson* rule is that union attorneys engaged in the grievance arbitration process or labor negotiations are entitled to the same protections as union officers and personnel. In handling grievances, an attorney "performs a function in the collective bargaining process that would otherwise be assumed by the union's business agents or representatives."[32] As such, the union attorney has the same *Atkinson* immunity from personal liability as any other union representative.[33]

Section 301(b) also protects union attorneys from malpractice liability for acts performed at union expense in the collective bargaining process, including grievance arbitration.[34]

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[29]370 U.S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 462 (1962), *overruled in part on other grounds by Boys Market, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235, 241, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970).

[30]*Peterson,* 771 F.2d at 1256; *Arnold,* 100 F.3d at 862; *Waterman,* 176 F.3d at 150; *Carino,* 376 F.3d at 159–60.

[31]451 U.S. 401, 402, 101 S. Ct. 1836, 68 L. Ed. 2d 248 (1981).

[32]*Peterson*, 771 F.2d at 1258.

[33]Immunity from individual liability also applies when a union lawyer is involved in contract negotiations. In *Montplaisir,* union attorneys involved in the PATCO strike were found not personally liable for allegedly encouraging an unlawful strike and negligently "advising union members... that they ran no significant risk of losing their jobs by participating in the walkout." *Montplaisir.*, 875 F.2d at 1–2. Relying on *Peterson,* the court concluded that "[t]he appropriate test for *Atkinson* immunity ought not to be the actor's identity, occupation or formal position, but rather the role that he played." *Id.*, 875 F.2d at 6.

[34]*Peterson,* 771 F.2d at 1256; *Montplaisir,* 875 F.2d at 4; *Arnold,* 100 F.3d at 862; *Waterman,* 176 F.3d at 150; *Carino,* 376 F.3d at 159; *accord Aragon v. Pappy, Kaplon, Vogel & Phillips,* 214 Cal. App. 3d 451, 463, 262 Cal. Rptr. 646 (1989); *Best v. Rome,* 858 F. Supp. 271, 276 (D. Mass. 1994), *aff'd,* 47 F.3d 1156 (1st Cir. 1995) (applying Massachusetts law); *Nelson v. Haus, Roman & Banks LLP,* 296 Wis. 2d 934, 724 N.W.2d 273, at *2 (2006) (unreported) ("federal law bars a member of a union from bringing a legal malpractice claim against an attorney retained by a union"); *Frontier Pilots Litig. Steering Committee, Inc. v. Cohen, Weiss & Simon,* 227 A.D.2d 130, 641 N.Y.S.2d 639, 639 (1996) ("plaintiffs' legal malpractice claims are preempted by Federal labor law, since they arise out of defendants' representation of the union, as its agent, during the course of collective bargaining"); *Mamorella v. Derkasch,* 276 A.D.2d 152, 155, 716 N.Y.S.2d 211 (2000) ("it is well established that plaintiff's legal malpractice claim is preempted by federal labor law, and that attorneys who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services performed constitute part of the collective bargaining process"); *Weiner*

The courts have held that retained union counsel are entitled to the same protections as staff attorneys employed by unions:

> Counsel, whether "outside" or "inside," should be protected by the *Atkinson* rule so long as they perform work for the union within the collective bargaining context.[35]

B. No Attorney-Client Relationship Exists Between Union Counsel and a Union Member in Labor Arbitration

Another consequence of applying the protections of Section 301(b) to union counsel is that ordinarily[36] no attorney-client relationship is formed with the grievant or the union member:

> [The attorney's] principal client is the union; it is the union that has retained him, is paying for his services, and is frequently the party to the arbitration. . . . The union member looks to the union to save his job, gives it credit when a dispute is resolved in his favor, and holds it responsible when his discharge is upheld or he loses other important rights. He views the union attorney as an arm of his union rather than as an individual he has chosen as his lawyer. In fact, it is not uncommon for the union member to be completely unaware, at least prior to the arbitration hearing, of who on the union's staff is actually handling his grievance.[37]

To hold union attorneys responsible for negligence "would give rise to an anomalous result: certain agents or employees of the union would be held to a far higher standard of care than the union itself."[38] Members also would be able to sue attorneys for malpractice after the expiration of the six-month statute of limitations for a fair representation action provided in Section 10(b) of the LMRA.[39]

> Thus, the union attorney would often be the only defendant against whom a disappointed grievant could proceed. He would become the

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v. Beatty, 116 P.3d 829, 121 Nev. 243, 250 (2005); *Nosie v. Association of Flight Attendants*, 722 F. Supp. 2d 1181, 1199 (D. Haw. 2010); *Garland v. U.S. Airways, Inc.*, 2006 WL 3692591, at *6 (W.D. Pa. Dec. 12, 2006) (unreported).

[35] *Montplaisir*, 875 F.2d at 7 n.7; *see also Peterson*, 771 F.2d at 1258; *Breda v. Scott*, 1 F.3d 908, 909 (9th Cir. 1993) ("In-house counsel immunity creates the same public policy concern as outside counsel immunity. We find no reason to treat the two differently.").

[36] See note 42 below.

[37] *Peterson*, 771 F.2d at 1258–59; *see also Best*, 858 F. Supp. at 276 (applying Massachusetts law).

[38] *Peterson*, 771 F.2d at 1259; *accord Montplaisir*, 875 F.2d at 6–7.

[39] 29 U.S.C. §160(b); *Peterson*, 771 F.2d at 1259; *accord Montplaisir*, 875 F.2d at 6–7; *see also Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).

natural, and only, target in large numbers of what would normally be breach of the duty of fair representation suits.[40]

Peterson v. Kennedy concludes that if a union's attorney commits malpractice in an arbitration proceeding, only the union can sue for negligence or breach of contract.[41] If successful, the union may then choose to "compensate a union member out of the recovery for any damages he may have suffered."[42]

C. Union Counsel's Duties to Union Members Under the Ethics Rules

Although no attorney-client relationship exists between a union attorney and represented employees in labor arbitration or contract negotiations, the attorney must nonetheless comply with ethics rules governing representation of organizations.

As discussed in Part II above, simultaneous representation of an organization and its members is permissible under Model Rule 1.13(g) and Cal. Rule 3-600. Both sets of rules recognize, however, that a potential conflict of interest arises when a represented organization's interests become adverse to a member's individual interests. In such an instance, the attorney's duties are minimal, particularly as compared with duties when a conflict arises between two clients. Model Rule 1.13(f) provides:

> (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 or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Thus, a union attorney need not disclose to a grievant that the union, not the member, is the client, unless the attorney knows or should know "that the organization's interests are adverse" to the member.

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[40] *Peterson*, 771 F.2d at 1259–60.

[41] *Id.* at 1259.

[42] *Id.* In contrast, a dissatisfied union member can sue counsel referred by a union but retained by the individual to process a grievance or handle an NLRB claim. *See, e.g., Weitzel v. Oil Chemical & Atomic Workers*, 667 F.2d 785, 786–87 (9th Cir. 1982).

In addition, a member may sue union counsel "where the legal services provided are wholly unrelated to the collective bargaining process; *e.g.*, drafting a will, handling a divorce or litigating a personal injury suit." *Peterson*, 771 F.2d at 1259; *see also Canez v. Hinkle*, 210 F.3d 381, 2000 U.S. App. LEXIS 1391 (9th Cir. Jan. 28, 2000) (unreported and not for citation) (malpractice suit permitted where union attorney allegedly advised union officer that undocumented personal loan from labor union without executive board or membership approval was legal).

California's Rules of Professional Conduct impose a slightly greater burden on counsel. As is also discussed in Part II above, an organization's attorney must disclose that the organization, not the member, is the client when it becomes "apparent that the organization's interests are *or may become adverse*" to the member. Cal. Rule 3-600(D); emphasis added.

Some variants of the ABA rules require more. Rule 1.13(f) of the Nevada Rules of Professional Conduct, for example, imposes an affirmative duty on counsel

> to explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent.

In contrast to the Model Rules and Cal. Rules, this duty exists even if there is no potential or actual adversity between the interests of the client organization and its constituent.

The rules warn that when adversity does exist, the attorney should caution a "constituent individual" that his or her communications are not privileged. Comment 10 to Model Rule 1.13 cautions:

> [T]he lawyer should advise any constituent [of an organization], whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer and the individual may not be privileged.[43]

Similarly, Cal. Rule 3-600(D) suggests that if a potential or actual conflict becomes apparent, the attorney must not lull a member into believing that the member's confidences will not be disclosed to the organization or used against him:

> The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.[44]

[43] *Annotated Rules* at 202.

[44] In some circumstances, the failure of an organization's attorney's to "clarify the nature of his or her role in representing the organization ... may give rise to a lawyer-client relationship between the lawyer and the constituent." *Annotated Rules* at 211. This result should not apply to union attorneys in light of federal case law holding that they do not perform a legal function when they appear in a labor arbitration. *See* Part III.A above.

Finally, the union's attorney is not required in every instance to withdraw when the union's interests conflict with those of the member, even if the connection with the member has ripened into an attorney-client relationship.[45] If a conflict occurs, the advance waiver of the conflict memorialized in writing should be sufficient to permit continued joint representation. Conflicts of interest and conflict waivers are discussed in general terms in Part II above.

D. Union Counsel's Misconduct as a Breach of the Union's Duty of Fair Representation

As discussed above, although a union attorney's misconduct in representing members in labor arbitration or collective bargaining is not actionable malpractice, it can constitute a breach of the union's duty of fair representation.

1. The Duty of Fair Representation: In General

A union breaches its duty of fair representation when its processing of a grievance or its handling of an arbitration is "arbitrary, discriminatory, or in bad faith."[46]

In both grievance processing and collective bargaining, simple negligence[47] or a mistake in judgment, no matter how egregious, ordinarily does not rise to unfair representation.[48] Nor do a union's actions breach the duty when it takes

> a good faith position which is contrary to the interests of some individuals whom it represents [or] support[s] the interests of one group of employees against that of another. … "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative

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[45]Model Rule 1.13(g) permits an organization's attorney to separately represent the organization's members in addition to the organization, subject to the conflict of interest rules of Model Rule 1.7.

[46]*Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967); *see also Breininger v. Sheet Metal Workers Int'l Ass'n, Local Union No. 6*, 493 U.S. 67, 110 S. Ct. 424, 107 L. Ed. 2d 388 (1989). In collective bargaining, a union will be liable for a breach if its conduct or the results of negotiations are so far outside the "wide range of reasonableness" accorded unions in collective bargaining as to be "wholly irrational" or "arbitrary" when evaluated in light of the facts and the legal climate that confronted the negotiators. *International Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991).

[47]But see note 54 below.

[48]*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976); *Peters v. Burlington Northern R.R.*, 931 F.2d 534, 539 (9th Cir. 1991).

in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[49]

2. *Fair Representation in Grievance Processing and Arbitration*

Most collective bargaining agreements contain a discretionary grievance arbitration procedure. In a discretionary procedure, the union at any stage can elect to advance a grievance to the next step of the grievance procedure or it can decline to proceed further. If the grievance procedure is discretionary, the union need not arbitrate a non-meritorious grievance.[50]

Not all breaches of the fair representation duty in the course of administering the grievance procedure are actionable; the breach must "seriously undermine the integrity of the arbitral process."[51] A union is not liable for "good faith, non-discriminatory errors of judgment made in the processing of grievances."[52] If the union makes a bad judgment call, "then the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith."[53] As noted above, the plaintiff must prove more than mere negligence; to prevail, the employee must show that the union acted in "egregious" disregard of the grievant's rights.[54]

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[49] *Humphrey v. Moore*, 375 U.S. 335, 381–82, 84 S. Ct. 363, 11 L. Ed. 2d 231 (1964), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953).

[50] *Wellman v. Writers Guild of America, West, Inc.*, 146 F.3d 666, 671 (9th Cir. 1998); *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir. 1994). A union's failure to take a meritorious grievance to arbitration is not necessarily a violation. *See Douglas v. International Ass'n of Machinists and Aerospace Workers, Dist. Lodge 141*, 2009 WL 3078497, at *4 (D. Colo. Aug. 17, 2009) (recognizing that "the failure to arbitrate even a meritorious grievance is not sufficient to state a claim that defendant violated the [duty of fair representation]") (alterations in original); *Dillard v. International Bhd. of Elec. Workers*, 2009 WL 1204362, at *2 (M.D. Ala. 2009) ("A labor union is not under an absolute duty to pursue a grievance through arbitration, even if the grievance is itself meritorious") (internal citations and quotation marks omitted).

[51] *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 61, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981), *quoting Hines*, 424 U.S. at 567 (*overruled on other grounds by Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)); *White v. Detroit Edison Co.*, 472 F.3d 420, 425–26 (6th Cir. 2006). In contrast, a union's failure to arbitrate a written warning on which the employer later relied to support the plaintiff's discharge constituted a breach of the duty of fair representation where the union's inaction stemmed from sex discrimination in violation of Title VII. *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 878 (9th Cir. 2007); *see also Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083 (9th Cir. 1991).

[52] *Peterson*, 771 F.2d at 1254. But reliance on advice of counsel is not a total shield against liability. "Such a rule would virtually eliminate a remedy for arbitrary, discriminatory, or bad faith union action, as long as an attorney recommended such action." *Gregg v. Chauffeurs, Teamsters and Helpers Union, Local 150*, 699 F.2d 1015, 1016–17 (9th Cir. 1983).

[53] *Wellman*, 146 F.3d at 670.

[54] *Id.*, 146 F.3d at 671 (*citing Stevens*, 18 F.3d at 1448); *see also Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir. 1982); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir. 1985). The Ninth Circuit is unique in holding that a purely ministerial error (e.g., a union's

Applying these principles, the courts have held that union members have no right to dictate who will arbitrate their grievances and how their grievances will be arbitrated. "A grievant has no right to a private attorney, or to require a union to utilize a lawyer, at an arbitration."[55] A union's refusal to provide representation by counsel of the grievant's own choosing, or even to assign representation to an attorney, is not actionable except perhaps in instances where the union has deviated from a well-established practice.[56] Just as a grievant is not entitled to representation by a trained attorney, the grievant is not entitled to representation at an equivalent skill level.[57]

3. Errors in Traditional Labor Arbitration Usually Are Not Unfair Representation

The kind of negligence that would be considered professional malpractice if committed in litigation does not necessarily breach

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failure to file a grievance within contractual time limits) may constitute an actionable breach of the duty in limited circumstances. "[I]f the [union's] conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith." *Wellman*, 146 F.3d at 670. According to another formulation, unintentional union conduct is actionable if it was "the solitary and indivisible cause of the complete extinguishment of an employee's grievance rights." *Eichelberger v. NLRB*, 765 F.2d 851, 855 (9th Cir. 1985); *see Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1399 n.5 (9th Cir. 1985); *Zuniga v. United Can Co.*, 812 F.2d 443, 451 (9th Cir. 1987).

In one case, for example, a union breached its fair representation duty by failing to file a timely grievance, through no fault of the grievant, after the union had determined that grievance was meritorious and should be arbitrated. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983) (decision questioned in *Eichelberger*, 765 F.2d at 855). In another case, a union violated the duty when it failed to notify the grievant's employer that the grievant was contractually exempt from layoff. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513–15 (9th Cir. 1986).

[55] *Lettis v. United States Postal Service*, 39 F. Supp. 2d 181, 198 (E.D.N.Y. 1998); *accord Brown v. Trans World Airlines, Inc.*, 746 F.2d 1354, 1359 (8th Cir. 1984); *Grovner v. Georgia-Pacific Corp.*, 625 F.2d 1289, 1290–91 (5th Cir. 1989).

[56] *Castelli*, 752 F.2d at 1483–84; *Garcia v. Zenith Electric Corp.*, 58 F.3d 1171, 1179–80 (7th Cir. 1995); *Baxter v. United Paperworkers Int'l Union, Local 7370*, 140 F.3d 745, 747–48 (8th Cir. 1998); *Del Casal v. Eastern Airlines, Inc.*, 465 F. Supp. 1254, 1257 (S.D. Fla. 1979), *aff'd*, 634 F.2d 295 (5th Cir. 1981); *cf. Seymour v. Olin Corp.*, 666 F.2d 202, 209–10 n.5 (1982) (union's failure to pursue grievance unless grievant discharged private attorney was unfair representation; declining to rule on whether union "may prohibit the mere *presence* of private counsel" (emphasis in original)); *see also Balistreri v. Western Carloading*, 530 F. Supp. 825 (N.D. Cal. 1980) (change of union's attorneys on day of arbitration against grievant's wishes was not a breach).

[57] *Thomas v. United Parcel Service, 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"); *Curtis v. United Transportation Union*, 700 F.2d 457, 458 (8th Cir. 1983).

the duty of fair representation. Union officials "should not be held to a standard akin to legal malpractice."[58]

Thus, a union representative (or an attorney acting in the same capacity) is required to conduct only "some minimal investigation" of a grievance, "the thoroughness of which depends on the given case."[59]

In one reported decision, an investigation was found sufficient where the union representative merely read and considered the grievant's letter before reaching the conclusion that the grievance was not meritorious.[60] Similarly, the duty of fair representation was not violated where the union representative "spent no more than one and a half hours in investigation and preparation for the arbitration."[61]

In another case, no breach was found where the union, before deciding not to arbitrate, failed to interview the grievant and the chief company witness, and reviewed only the written grievance, the collective bargaining agreement, the grievant's membership files, and the grievant's letters to another employee.[62] In general, a union does not act arbitrarily if it deliberates about the merits of an argument advanced by the grievant and can provide an explanation for its decision not to pursue the grievance.[63]

In contrast, a breach of the duty was found where the union, departing from its established practice of interviewing all discharged employees, refused to permit the grievants to explain the events leading to their terminations before declining to arbitrate.[64] In another case, the duty of fair representation was violated when the union failed to disclose that it had decided not to submit

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[58] *Smith v. Drug, Chemical, Cosmetic, Plastics Employees, Local 815*, 943 F. Supp. 224, 241 (E.D.N.Y. 1996).

[59] *Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985); *see also Stevens*, 18 F.3d 416, 420–21 (1st Cir. 2005) ("The duty of fair representation mandates that a union conduct at least a 'minimal investigation' into an employee's grievance. But under this standard, only an 'egregious disregard for union members' rights constitutes a breach of the union's duty' to investigate") (citations omitted); *Labuga v. Darling Int'l, Inc.*, 2010 WL 364330 at *7–10 (E.D. Cal. Jan. 22, 2010); *Ajifu v. International Ass'n of Machinists and Aerospace Workers*, 205 Fed. Appx. 488, 490 (9th Cir. 2006) (union member's claims that defendant union failed both to follow her instructions to appeal her case in a timely manner and to submit her grievance to arbitration despite its merit amounted at most to negligence on the part of the union and not unfair representation); *Stevens*, 18 F.3d at 1446–47; *Wellman*, 146 F.3d at 671; *Emmanuel v. Teamsters, Local Union No. 25*, 426 F.3d 416, 426 (1st Cir. 2005).

[60] *Eichelberger*, 765 F.2d at 857 n.10.

[61] *Castelli*, 752 F.2d at 1482.

[62] *Evangelista*, 777 F.2d at 1395.

[63] *Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221–22 (9th Cir. 2000); *Stevens*, 18 F.3d at 1447.

[64] *Tenorio*, 680 F.2d at 602.

the grievant's claims to arbitration while the grievant was deciding whether to accept a settlement offer from her employer.[65]

A union's failure to interview witnesses or call them to testify is generally not a violation of the duty. At worst, these transgressions are excused as poor judgment or trial tactics rather than conduct that is arbitrary, discriminatory, or in bad faith.[66]

For example, in *Barrington v. Lockheed Martin*,[67] the union did not breach its fair representation obligation by refusing to permit a grievant to testify or call her own witnesses at the arbitration hearing challenging her discharge, where, *inter alia*, the union did not want the member to testify because her employer had not met its burden to establish cause for her termination, her testimony would open the door to other issues, and she was allowed to present testimony and witnesses at the re-opening of proceedings.

Similarly, a union's failure or refusal to present evidence or to make arguments or objections requested by the grievant is ordinarily not a breach of the duty of fair representation.[68]

A union's failure to order a court reporter's transcript of the arbitration hearing or to provide the grievant with copies of the post-hearing briefs or exhibits is also not a violation.[69]

Finally, unions are free to negotiate settlements over grievants' objections. "When employees make their union the sole bargaining representative with the employer, they relinquish the right to control the settlement of their grievances. Unions are free to negotiate and accept settlements even without the grievants' approval."[70]

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[65] *Tenorio*, 680 F.2d at 602.

[66] *Moore v. Potter*, 275 Fed. Appx. 405, 409 (5th Cir. 2008) (unreported); *Patterson v. Teamsters, Local 959*, 121 F.3d 1345 (9th Cir. 1997); *Galindo*, 793 F.2d at 1515; *Findley v. Jones Motor Freight, Inc.*, 639 F.2d 953, 958–59 (3d Cir. 1981); *Hardee v. North Carolina Allstate Services, Inc.*, 537 F.2d 1255, 1258 (4th Cir. 1976); *McKelvin v. E. J. Brach Corp.*, 124 F. 3d 864, 867–69 (7th Cir. 1997); *Taylor v. Belger Cartage Service, Inc.*, 762 F.2d 665, 668 (8th Cir. 1985); *Pacific Maritime Ass'n (International Longshoremen and Warehousemen's Union, Local 8)*, 321 NLRB 822, 823 (1996).

[67] 257 Fed. Appx. 153 (11th Cir. 2007) (unreported).

[68] *Slevira*, 200 F.3d at 1221; *Castelli*, 752 F.2d at 1483; *Franklin v. Southern Pacific Transportation Co.*, 593 F.2d 899, 901 (9th Cir. 1979); *Cannon v. Consolidated Freightways Corp.*, 524 F.2d 290, 294 (7th Cir. 1975); *Capobianco v. Brink's, Inc.*, 543 F. Supp. 971 (E.D.N.Y 1982), *aff'd*, 722 F.2d 727 (2d Cir. 1983); *Johnson v. Jos. Schlitz Brewing Co.*, 581 F. Supp. 338, 344–45 (M.D.N.C. 1984), *aff'd*, 765 F.2d 1235 (4th Cir. 1985); *Mosley v. Roadway Express Inc.*, 2009 U.S. Dist. LEXIS 32850 (S.D. Tex. Apr. 17, 2009).

[69] *Grovner*, 625 F.2d at 1290–91; *Blasic v. United Parcel Service, Inc.*, 1999 U.S. Dist. LEXIS 17521, 162 L.R.R.M. (BNA) 2886 (D.D.C. 1999).

[70] *Shane v. Greyhound Bus Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989); *accord Otero v. International Union of Elec., Radio and Machine Workers*, 474 F.2d 3, 4 (9th Cir. 1973); *Brewery Workers (Miller Brewing Co.)*, 195 NLRB 772, 780 (1972).

In sum, a union's procedural and substantive decisions regarding a grievance arising under a collective bargaining agreement rarely breach the duty of fair representation, even when made over the grievant's objections.

IV. Potential Conflicts when Union Counsel Defends a Fair Representation Suit by a Grievant, or Sues a Grievant on Behalf of a Union

Unfavorable outcomes in grievance proceedings can lead to lawsuits by dissatisfied grievants. In contrast, union counsel sometimes are asked by a union to sue a former grievant. In both instances, the grievant is likely to move for the attorney's disqualification from representing the union in the litigation. As shown below, such a disqualification motion, whether based on conflict-of-interest grounds or on a claim that the union lawyer will testify at trial, is likely to be unsuccessful.

A. Motions to Disqualify Union Counsel Based on a Conflict of Interest

As discussed above, the ABA and California ethics rules forbid joint representation where the parties' interests potentially or actually conflict unless the attorney has disclosed the conflict and obtained the client's consent.

Based on case law establishing that a union attorney does not represent a grievant in arbitration, there should be no ethical conflict if a union attorney defends a member's fair representation suit, even in circumstances in which the union attorney participated in the conduct alleged to have constituted the breach. Unfortunately, few reported cases have addressed conflicts of this kind between union members and attorneys, and fewer still have applied the principles established in cases like *Peterson v. Kennedy* to resolve the disqualification issue. Nonetheless, the few reported cases suggest that union counsel will not be disqualified on ethics grounds from defending a union against its member's fair representation claims.

In *Evans v. Association of Norwalk School Administrators*,[71] for example, the plaintiff filed suit against a school district for eliminating her position and against the union for unfair representa-

[71] 1995 Conn. Super. LEXIS 1874 (June 20, 1995).

tion in failing to pursue her claim against the district. When the union attorney who had participated in her grievance proceedings appeared on behalf of the union in the fair representation action, the plaintiff moved to disqualify him pursuant to Model Rule 1.9, governing conflicts between current and former clients.

With little analysis of the requirements of the Model Rules, the court ruled that "it would be unreasonable to permit the plaintiff here to rely on a claim of disappointed expectations of loyalty to disqualify this lawyer."[72] The attorney's relationship with the union "antedated the facts and circumstances that form the basis of the plaintiff's complaint" and the plaintiff was aware of the attorney's representation of the union at all times. In these circumstances, the attorney did not owe loyalty to the plaintiff when a dispute arose as to the quality of the union's representation.[73]

In *Griesemer v. Retail Store Employees Union, Local 1393*,[74] the union's attorney negotiated a non-monetary settlement that the grievant claimed was unfair. The district court denied the union member's motion to disqualify the attorney, ruling that the union, not the grievant, was the client.[75]

In an unpublished opinion, the Sixth Circuit reached a conclusion similar to *Griesemer*. In *Hayes v. Bakery, Confectionery and Tobacco Workers Int'l Union of America, Local 213*,[76] Hayes, a shop steward, filed a grievance following a physical altercation with the union's business manager, who was also an employee. On the advice of union counsel, the union decided not to pursue the grievance based on its conclusion that Hayes had initiated the fight. Hayes sued the union and attempted to disqualify union counsel on conflict-of-interest grounds, arguing that counsel should be disqualified because his prior representation on Hayes's behalf allegedly conflicted with his representation of the union against Hayes. The Court of Appeals upheld the district court's denial of Hayes's disqualification motion based on a finding that "counsel for a union are excepted from [the] general rule" that "counsel to an

[72] *Id.* at *10.
[73] *Id.* at *11.
[74] 482 F. Supp. 312 (E.D. Pa. 1980).
[75] *Id.*, 482 F. Supp. at 314–15; *accord Adamo v. Hotel, Motel, Bartenders, Cooks and Restaurant Workers' Union*, 655 F. Supp. 1129, 1129–30 (E.D. Mich. 1987) (attorney who represented union in unsuccessful discharge arbitration can defend terminated employee's fair representation action since attorney was union's, not grievant's, lawyer).
[76] 914 F.2d 256, 1990 WL 130488 (6th Cir. 1990).

unincorporated association represents each member individually for purposes of a conflict analysis."[77]

In an NLRB Advice Memorandum, the General Counsel concluded that a union did not breach its duty of fair representation by using the same law firm to represent the grievants in a discharge arbitration that had previously sued the grievants, who were former union officers, to obtain union records and property.[78]

Another court has ruled that a union's and its attorney's alleged conflicts of interest did not constitute unfair representation where the plaintiff could not show that the breach contributed to an unfavorable arbitration award.[79] The court dismissed the discharged grievant's fair representation claim under Rule 12(b)(6) because the plaintiff could not establish that the arbitrator's award was tainted by the union's and counsel's alleged undisclosed ownership of a business supplying temporary, non-union employees to the employer.

B. Disqualification Based on the Union Attorney as Witness at Trial

Model Rule 3.7(a) prohibits an attorney from appearing as an advocate at trial unless the testimony relates to an "uncontested issue" or to the "nature and value of legal services rendered in the case," or unless disqualification "would work substantial hardship on the client." Model Rule 3.7(b) forbids a lawyer from acting as an advocate at "a trial in which another lawyer in the lawyer's firm is likely to be called as a witness."

California's disciplinary rule is more generous to lawyers and firms. Although it requires an attorney to withdraw as counsel if the attorney may be called as a witness on behalf of a client, the prohibition applies only to jury trials, and permits attorney testimony in a jury trial if the client has given "informed, written consent." Cal. Rule 5-210.

Further, in California potential lawyer testimony in a jury trial is not grounds to disqualify other attorneys from representing the client in the same proceeding; the limitation on attorney testimony "is not intended to apply to circumstances in which a lawyer

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[77] *Id.*, 1990 WL 130488 at *3.

[78] *United Brotherhood of Carpenters (Keller Kitchen Cabinets Southern)*, 12-CB-2034, 101 L.R.R.M. (BNA) 1170 (Mar. 22, 1979).

[79] *Williams v. Romano Bros. Beverage Co.*, 939 F.2d 505, 508–09 (7th Cir. 1991).

in an advocate's firm will be a witness."[80] Like the Model Rules, California also permits, without client consent, testimony by an attorney before a jury that "relates to an uncontested matter" or "relates to the nature and value of legal services rendered in the case."

Only one reported case has granted a disgruntled grievant's motion to disqualify union counsel in an unfair representation action. In *Corona v. Hotel & Allied Services Union Local 758*,[81] a group of union members sued their union and employer, alleging that the union breached its duty of fair representation by failing to advance their grievance to arbitration. The grievants claimed Farelli, the union's attorney, after taking their statements, recommended that the union immediately file a grievance against the hotel and demand an emergency arbitration hearing. It was undisputed that the attorney advised the union in a memorandum that the union should "request … an emergency hearing."[82]

The court granted the union members' motion to disqualify both union counsel and his firm from representing the union in the fair representation proceedings:

> While Farelli, an associate of a law firm which frequently represents the Union, is perhaps not one's *beau ideal* of the non-party, disinterested witness, he comes closer to fulfilling that role than anyone else, and as an attorney and officer of the Court, one may presumably rely upon him to give a truthful account to the factfinders. Moreover, … Farelli is the only witness to these events who is an attorney, and consequently uniquely qualified to paint that legal landscape which lies at the heart of the plaintiffs' case against the Union.[83]

Other cases have rejected similar arguments. For example, in *Palladino v. CNY Centro, Inc.*,[84] an employee moved to disqualify the law firm representing the union on the ground that the employee intended to call a partner of the law firm as a witness. According to the plaintiff, the partner misrepresented himself as the plaintiff's attorney to two potential witnesses and collected evidence against the plaintiff for the defendant's benefit. In a short opinion, the appellate court held that the lower court had erred in granting the motion to disqualify.[85] It reasoned that the plaintiff failed to demonstrate that the partner was a necessary witness

[80]Drafter's Notes, Rule 5-210 (1992).
[81]2005 WL 2086326, 2005 U.S. Dist. LEXIS 18545 (S.D.N.Y. Aug. 29, 2005).
[82]*Id.,* 2005 U.S. Dist. LEXIS, at *11.
[83]*Id.* at *23.
[84]74 A.D.3d 1909, 903 N.Y.S.2d 436 (2010).
[85]*Id.*, 74 A.D.3d at 1910.

and that his testimony would prejudice the union, and the law firm's continued representation of the union would not create an appearance of impropriety.[86]

In *Conn v. United States Steel Corp.*,[87] the plaintiff sought to disqualify the union's attorney on grounds that he was a necessary witness in the trial of her action against the employer and union, and that he had gained unfair access to confidential information through his interactions with the plaintiff. The court rejected both theories. The court concluded that the union attorney was not a necessary witness because the information the plaintiff would elicit through the lawyer's testimony could be obtained from other individuals.[88] The court also reasoned that the plaintiff had not identified any information that the union attorney learned during his interactions with her that the lawyer did not already know through his ongoing representation as the union's attorney.[89]

In *Evans*, the court refused to disqualify union counsel notwithstanding Model Rule 3.7. The court interpreted Rule 3.7 to permit another attorney from the same law firm to represent the union at trial if the first attorney is called as a witness.[90] The court recognized that the union attorney's credibility may be at issue in the trial,[91] but nonetheless ruled:

> The matter should be finally resolved by the trial judge and in part depends on a good faith representation by the plaintiff that she intends to call the lawyer to testify and a similar representation by the lawyer as to whether he intends to testify for the union. … As noted, however, the motion for disqualification is denied.[92]

In *Tisby*, the plaintiff relied on the Model Code[93] in seeking to disqualify the firm of the union attorney who had represented her in administrative disciplinary proceedings from defending her unfair representation action on the basis that the attorney would be called as a witness. Her former attorney was not trial counsel in the lawsuit. The court determined that the plaintiff had not made a sufficient showing that the attorney's testimony would "contra-

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[86] *Id.*

[87] 2009 WL 260955 at *4–7 (N.D. Ind. 2009).

[88] *Id.* at *7.

[89] *Id.* at *6.

[90] *Evans v. Association of Norwalk School Administrators,* 1995 Conn. Super LEXIS 1874 at *2–3 (June 20, 1995).

[91] *Id.* at *11.

[92] *Id.* at *11–12.

[93] The old Model Code mandated disqualification of the law firm if it should become "apparent that the [lawyer's] testimony is or may be prejudicial to the client." DR 5-102(B).

dict or undermine" the plaintiff's "factual assertions."[94] In fact, the attorney's testimony was not "significantly inconsistent" with the plaintiff's.[95] Accordingly, the law firm was not disqualified.

V. Union Counsel's Use or Disclosure of a Grievant's Confidences and Secrets

Model Rule 1.6(a) prohibits a lawyer from "reveal[ing] information relating to the representation of a client unless the client gives informed consent."[96] Based on Model Rule 1.13 (discussed above), a union attorney's duties of confidentiality, loyalty, and competence would appear to run to the union, as the client, not to the union 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. The lawyer owes no independent duty of confidentiality to the bargaining union member and indeed must reveal the member's confidences, if relevant, to the union leadership. 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.[97]

There are a handful of reported cases in which a union member has sought to disqualify a union attorney from defending a fair representation action on the grounds that the attorney would reveal confidences at trial or use them to the union's advantage.

In *Evans*, the union's attorney met twice with the plaintiff during a dispute with her employer, a school district, regarding the elimination of her position. The union attorney allegedly gave her specific legal advice. These meetings were authorized and paid for by the union, and union officials participated in them. In addition, the plaintiff sent a letter to the lawyer outlining her claims.

The court ruled that while some of the communications between the attorney and the plaintiff may have been privileged, the disclosure of possible confidential information was permissible under Model Rule 1.6(b)(5), which allows a lawyer to reveal confidential

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[94] *Tisby v. Buffalo General Hospital*, 157 F.R.D. 157, 167 (W.D.N.Y. 1994).

[95] *Id.* at 166.

[96] California regulates attorney disclosures of confidential client information by statute. "It is the duty of an attorney to ... maintain inviolate the confidence [*sic*], and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1).

[97] R. G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex L. Rev. 1095, 1109 (1996).

communications to establish a defense to a civil claim against the lawyer or "to respond to allegations in any proceeding concerning the lawyer's representation of the client."

Similarly, the court in *Griesemer* refused to disqualify the attorney, relying on the exception contained in the predecessor to Rule 1.6(b)(5), ABA Model Code of Professional Responsibility (Model Code) Disciplinary Rule (DR) 5-101(B)(3):[98]

> [The attorney's] testimony, if required at trial, simply would describe the steps taken by him as counsel to negotiate the settlement agreement and his communications with representatives of the local union and plaintiff concerning the terms and execution of the agreement. His remarks would relate solely to "the nature and value of legal services rendered in the case by the lawyer to his client," a situation expressly sanctioned by the Code of Professional Responsibility.[99]

Disqualification was also denied where the attorney, in addition to representing the union in a discharge arbitration, formed an independent attorney-client relationship with the grievant, who was a registered nurse.[100] The court rejected the plaintiff's claim that the attorney, in defending the union, would use confidences and secrets that he had acquired in the course of defending the plaintiff, as her private attorney, in disciplinary proceedings brought against her by the state licensing agency. The court found that there was no "substantial relationship between the subject matter of counsel's prior representation of the moving party and the issues in the present lawsuit."[101] The court concluded that "even if, *arguendo*, the issues are similar…, [the attorney] did not have access to relevant privileged information from Plaintiff."[102]

Conclusion

Labor arbitrators should keep in mind that the union, not the grievant, is the union attorney's client in a traditional labor arbi-

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[98]DR 5-101(B)(3) provides: "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify: … 3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client."

[99]*Griesemer v. Retail Store Employees Union, Local 1393*, 482 F. Supp. 312, 315 (E.D. Pa. 1980).

[100]*Tisby v. Buffalo General Hospital*, 157 F.R.D. 157 (W.D.N.Y. 1994).

[101]*Id.* at 164.

[102]*Id.*

tration.[103] There is no attorney-client relationship between the union's lawyer and the member, and the attorney-client privilege therefore does not apply to their communications.

Similarly, the ethics rules are clear that union counsel ordinarily owes only minimal duties to a grievant, provided that the attorney complies with the relatively relaxed disclosure obligations owed to constituents of client organizations.

The cases also establish that a union's attorney is not liable to a grievant for legal malpractice, although the attorney can be sued by the union for professional negligence committed in the course of a grievance arbitration. In some cases, however, the attorney's misconduct can be the basis of a fair representation action against the client union.

Finally, a union attorney ordinarily will not be disqualified from representing the union in an action for breach of the duty of fair representation brought by a grievant whom the attorney represented in an arbitration, or from representing the union as plaintiff in a lawsuit against the grievant. This is true even if the attorney will testify as a witness at trial or has knowledge of the confidences and secrets obtained in the course of representing the plaintiff in grievance arbitration proceedings.

[103]As noted at the outset of this paper (*see* note 3), this may not be true in *Pyett* arbitrations. There, the attorney is required to vindicate statutory claims rather than simply engage in a collective bargaining function. *Pyett* arbitrations are the subject of another paper.