LEGAL ETHICS IN THE EMPLOYMENT LAW CONTEXT: WHO IS THE CLIENT?[1]

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Abstract

The question is: Who is the client? Many ethical decisions attorneys must make emanate from this basic question. Thus, for those employment lawyers who represent, interact with, or sue unions or corporations, it is important to understand who the client is for different purposes such as representation, the attorney-client privilege, and ex parte communications. Because Kentucky recently adopted new rules of professional conduct, this paper uses Kentucky law as a microcosm through which to think about this larger question. Kentucky's prior rules were based on the prior version of the ABA Model Rules of Professional Conduct, still at least partially in effect in approximately twenty-two states. The current Kentucky rules mirror, almost identically in pertinent parts, the current model ABA rules known as Ethics 2000, on which approximately eighteen other states model the pertinent rules. This Article analyzes the recent change in Kentucky to permits scholars and attorneys in other states to benefit from the insights about Kentucky law.

Keywords:

ethical decisions, attorneys, professional conduct, etichcs

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[1] For those interested in reading more about the topic, *see generally* Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739 (1997) (exploring the same issue but without focus on the labor and employment context).

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I. Introduction

Assume that a union attorney represents the union in a grievance contesting a member's termination. At the hearing, can the opposing counsel demand that the member disclose the content of the member's conversations with the attorney?

Now assume that a plaintiff's attorney represents an employee in an employment dispute with an employer corporation. If the attorney without notice to the corporation interviews a prior low level manager for the company, has the attorney committed any ethical violation?

The question involved in these scenarios is: Who is the client? More specifically, when an attorney is representing an entity, who does the attorney represent? When the attorney's opposing counsel is representing an entity, with whom can the attorney communicate without opposing counsel's knowledge? Many of the ethical decisions an attorney must make emanate from these basic questions. Understanding the client's precise identity is essential to navigate the intricate ethical and evidentiary issues. [1]

This paper uses Kentucky law as a microcosm through which to think about these larger questions. Kentucky recently revised its rules of professional conduct. Kentucky's prior rules were based on the prior version of the ABA Model Rules of Professional Conduct. In approximately twenty-two states, all[2] or some[3] of the rules governing the issues discussed in this article are modeled on that version of the ABA Model Rules. And the current Kentucky rules mirror, almost identically in pertinent parts, the current ABA Model Rules, known as Ethics 2000.[4] Approximately nineteen other states have adopted rules

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[1].This paper focuses on the legal entities of corporations and unions. Government agencies are also involved in labor and employment litigation and governed by these rules. However, the particulars of the application to governmental entities are beyond the scope of this paper. *See, e.g.*, Ky. Bar Association on Ethics, Formal Op. KBA E-332 (1988) (regarding government counsel blanket vetoes on contact of government employees); Ky. Bar Ass'n on Ethics, Formal Op. KBA E-372 (1994) (regarding the relationship between Equal Employment Opportunity Commission and affected employee).

[2].ALA. RULES OF PROF'L CONDUCT; N.M. RULES OF PROF'L CONDUCT.

[3].ARIZ. RULES OF PROF'L CONDUCT; ARK. RULES OF PROF'L CONDUCT; CONN. RULES OF PROF'L CONDUCT; DEL. RULES OF PROF'L CONDUCT; FLA. RULES OF PROF'L CONDUCT; KAN. RULES OF PROF'L CONDUCT; ME. RULES OF PROF'L CONDUCT; MD. RULES OF PROF'L CONDUCT; MASS. RULES OF PROF'L CONDUCT; MISS. RULES OF PROF'L CONDUCT; MO. RULES OF PROF'L CONDUCT; MONT. RULES OF PROF'L CONDUCT; NEB. RULES OF PROF'L CONDUCT; N.J. RULES OF PROF'L CONDUCT; N.Y. RULES OF PROF'L CONDUCT; PA. RULES OF PROF'L CONDUCT; R.I. RULES OF PROF'L CONDUCT; S.D. RULES OF PROF'L CONDUCT; VA. RULES OF PROF'L CONDUCT; WYO. RULES OF PROF'L CONDUCT.

[4].*See* A.B.A. Ethics 2000 Commission, Report on the Model Rules of Professional Conduct, *available at* http://www.abanet.org/cpr/e2k/e2k-report_home.html.

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governing the issues discussed in this article that are modeled on the Ethics 2000 rules.[1]

In particular, this Article focuses on the ethics rules defining who an entity attorney represents, the duty of confidentiality, the attorney-client privilege, and ex parte contacts. Part I analyzes the law governing both a corporate employer and a union attorney's relationship to the client. Part II describes the duty of confidentiality and its relationship to the attorney-client privilege. Part III considers how far down the chain of corporate or union command the attorney-client privilege extends and addresses relevant rules of evidence and fiduciary exceptions to asserting the privilege. Part IV addresses other doctrines related to the attorney-client privilege implicated in the union context. Finally, Part V discusses the law governing ex parte communications with employees of a represented employer. Throughout, this Article raises unanswered questions and poses foreseeable factual scenarios to help the reader understand the scope of the relevant Kentucky law.

II. Who can claim to be represented?

The applicable Kentucky ethics rules and other authority illustrate the principle that an entity attorney represents the entity, rather than any particular constituent.[2]

A. Governing Rule

Kentucky Rules of Professional Conduct Rule 3.130(1.13)(a)[3] states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[4] The Kentucky Supreme Court Commentary,[5] Comment 1, defines the constituents of a corporation to be "[o]fficers, directors, employees and shareholders."[6] Kentucky Rule 1.13

1.Alaska Rules of Prof'l Conduct; Colo. Rules of Prof'l Conduct; Idaho Rules of Prof'l Conduct; Ill. Rules of Prof'l Conduct; Ind. Rules of Prof'l Conduct; La. Rules of Prof'l Conduct; Minn. Rules of Prof'l Conduct; Nev. Rules of Prof'l Conduct; N.H. Rules of Prof'l Conduct; N.C. Rules of Prof'l Conduct; N.D. Rules of Prof'l Conduct; Ohio Rules of Prof'l Conduct; Okla. Rules of Prof'l Conduct; Or. Rules of Prof'l Conduct; S.C. Rules of Prof'l Conduct; Utah Rules of Prof'l Conduct; Vt. Rules of Prof'l Conduct; Wash. Rules of Prof'l Conduct; Wis. Rules of Prof'l Conduct.

2.*E.g.,* Ky. Rules of Prof'l Conduct R. 1.13(a) (2009).

3.The Kentucky Rules of Professional Conduct Rule X will be referred to by the shorthand "Kentucky Rule" with the particular rule number throughout this paper. *E.g.*, Kentucky Rule 1.13(a).

4.*Id.* (analogous to Model Rules of Prof'l Conduct R. 1.13(a) (2002)).

5.The Kentucky Supreme Court Commentary will be referred to as "the Commentary."

6.KY. RULES OF PROF'L CONDUCT R. 1.13(a) cmt. 1 (2009) (previously this comment was numbered 2).

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indicates that the constituents of an unincorporated association include those persons in "positions equivalent to officers, directors, employees and shareholders."[1]

The Commentary further explains that "[w]hen one of the constituents . .. communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6,"[2] which requires maintaining communications in confidence.[3] According to the Commentary, "[t]his does not mean, however, that constituents of an organizational client are the clients of the lawyer."[4] It further provides: "The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation . . . ."[5]

B. Authority that Entity Lawyer Represents Corporation, Not Its Constituents

"The law is generally settled that an attorney for a corporation does not automatically represent the corporation's constituents in their individual capacities, even on the same matters."[6] In *Innes v. Howell Corp.*, the Sixth Circuit applied Kentucky law and held that an attorney for a corporation did not represent the president of the corporation.[7] The corporate attorney had investigated the president of the corporation and discovered that the president had received payments from an independent contractor, alleged to be kickbacks.[8] The corporate attorney informed the parent corporation of the payments.[9] The president was terminated.[10]

The corporation sued the president for breach of fiduciary duty, and the president sued the corporation for wrongful discharge.[11] The president also filed suit against the corporate attorney for legal malpractice.[12] The jury found there was no malpractice because the corporate attorney did not represent the president.[13] The Sixth Circuit affirmed the verdict.[14]

1.*Id.*
2.KY. RULES OF PROF'L CONDUCT R. 1.13(a) cmt. 2 (2009) (previously comment 3).
3.*See* KY. RULES OF PROF'L CONDUCT R. 1.6 (2009).
4.*See* KY. RULES OF PROF'L CONDUCT R. 1.13(a) cmt. 2 (2009).
5.*Id.*
6.Innes v. Howell Corp., 76 F.3d 702, 712 (6th Cir. 1996).
7.*Id.*
8.*Id.* at 706.
9.*Id.*
10.*Id.*
11.*Id.* at 705.
12.*Innes*, 76 F.3d at 706.
13.*Id.* at 707.
14.*Id.* at 712.

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The Sixth Circuit reasoned that unless there is clear consent, express or implied, to represent a constituent, the corporate attorney represents only the corporation.[1] Despite the president being named in an environmental action that the corporate attorney had defended, the corporate attorney had not represented the president in his individual capacity.[2] The court reasoned that "[s]imply the fact that . . . [the president] might have been subject to personal liability in the . . . litigation does not establish any legal relationship – [the corporate attorney] would have needed to take action on [the president's] personal behalf, not just action for the general good of the corporation."[3]

Whether the president was named in the environmental action in his individual capacity or only in his official capacity is unclear.[4] If it was as an individual and the corporate attorney filed an answer, does the fact that the interests of the president and corporation were not then adverse mean that the corporate counsel did so only as the attorney for the corporation?

C. Authority that Entity Lawyer Represents Union, Not Constituents or Members

There is no Kentucky or Sixth Circuit authority specifically addressing whether a union attorney represents the entity or its constituents. There is likewise no authority on whether a union member is a constituent or third-party. But, by analogy to *Innes*, a union attorney would represent only the entity under Rule 1.13.[5]

Most cases from other jurisdictions support this interpretation. In innumerable cases courts have held that union attorneys cannot be sued by members for breach of confidentiality or malpractice and, in fact, are immune from damage claims.[6] Likewise, the majority of cases has not disqualified a

1.*Id.*
2.*Id.*
3.*Id.*
4.*See Innes*, 76 F.3d at 706.
5.KY. RULES OF PROF'L CONDUCT R. 1.13 (2009).
6.*See, e.g.*, Carino v. Stefan, 376 F.3d 156, 162 (3d Cir. 2004) (holding outside counsel retained by union to represent grievant is immune from malpractice claim based on deceiving grievant into withdrawing her grievance); Waterman v. Transp. Workers' Union Local 100, 176 F.3d 150, 150 (2d Cir. 1999) (noting "a union's attorneys may not be sued by an individual union member for actions taken pursuant to a collective bargaining agreement"); Arnold v. Air Midwest, Inc., 100 F.3d 857, 862-63 (10th Cir. 1996) (holding that union attorney hired and paid by union to aid grievant represents union and that union attorney is immune from suit); Breda v. Scott, 1 F.3d 908, 909 (9th Cir. 1993) (holding that a grievant cannot sue outside union counsel for malpractice in handling grievance as part of the collective bargaining process); Montplaisir v. Leighton, 875 F.2d 1, 7-8 (1st Cir. 1989) (holding that outside counsel engaged by and working for the union is immune, under Civil Service Reform Act, from suit for legal malpractice); Peterson v. Kennedy, 771 F.2d 1244, 1258-59 (9th Cir. 1985) (holding that in-house attorney handling grievance on behalf of union does not represent grievant and grievant cannot bring

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union attorney in the run-of-the mill breach of duty of fair representation ("DFR") case where a conflict of interest is asserted because of the attorney's representation of the union in the grievance process.[1]

To avoid creating an attorney-client relationship with a union constituent (or member), the attorney should remind the constituent (or

malpractice claim); Best v. Rome, 858 F. Supp. 271, 276-78 (D. Mass. 1994) (holding that attorneys are not liable for action taken on behalf of outside counsel), *aff'd*, 47 F.3d 1156 (1st Cir. 1995); Leeann R. Gruwell Anderson, Note, *Turning the Key: Ensuring Evidentiary Privilege as Labor Counsel*, 45 DRAKE L. REV. 491, 495-506 (1997); Jeremiah A. Collins & Seymour Waldman, Confidential Attorney-Client Communications in the Representation of Unions and Union Members 13 (May 13, 1999) (unpublished manuscript on file with author). Other cases, from federal district courts and state courts so holding include the following: Garland v. U.S. Airways, Inc., No. 05-140, 2006 U.S. Dist. LEXIS 89714 (W.D. Pa. Dec. 12, 2006); Link v. Rhodes, No. C 06-0386 MHP, 2006 U.S. Dist. LEXIS 30346 (N.D. Cal. May 17, 2006); United Steelworkers v. IVACO, Inc., 29 Empl. Benefits Cas. (BNA) 2897 (N.D. Ga. 2003); Gwin v. Nat'l Marine Eng'rs Beneficial Ass'n, 966 F. Supp. 4, 7-8 (D.D.C. 1997); Weiner v. Beatty, 116 P.3d 829 (Nev. 2005); Brown v. Me. State Employers Ass'n., 155 L.R.R.M. (BNA) 2124 (Me. 1997); Nelson v. Haus, Roman & Banks LLP, 724 N.W.2d 273 (Wis. Ct. App. 2006); Kertis v. Butler, No. 50260-3-I, 2003 Wash. App. LEXIS 2286 (Wash. Ct. App. Oct. 6, 2003); Mamorella v. Derkasch, 276 A.D.2d 152 (N.Y. App. Div. 2000); Frontier Pilots Litig. Steering Comm., Inc. v. Cohen, Weiss & Simon, 227 A.D.2d 130 (N.Y. App. Div. 1996); Sellers v. Doe, 650 N.E.2d 485 (Ohio Ct. App. 1994); Collins v. Lefkowitz, 584 N.E.2d 64 (Ohio Ct. App. 1990); Aragon v. Pappy, Kaplon, Vogel & Phillips, 262 Cal. Rptr. 646, 654 (Cal. Ct. App. 1989); Niezbecki v. Eisner & Hubbard, P.C., 717 N.Y.S.2d 815 (N.Y. Civ. Ct. 1999). *But see* Piper v. Yamaha Corp., No. 4:90-CV-69, 1992 U.S. Dist. LEXIS 1002, at *20-21 (W.D. Mich. Jan. 13, 1992) (holding that material issues of fact remained as to the existence of an attorney-client relationship with the grievant when outside counsel represented a union in federal court to appeal for enforcement of arbitration decision).

[1].Hayes v. Bakery Workers Int'l Union, No. 89-6349, 1990 U.S. App. LEXIS 16048, at *8 (6th Cir. Sept. 11, 1990) (holding that union counsel does not represent each member of the union for purposes of a conflict analysis); Hague v. United Paperworkers Int'l Union, 949 F. Supp. 979, 987 (N.D.N.Y. 1996) (holding that union attorney representing a union at arbitration hearing does not automatically have a conflict of interest with respect to grievant); Adamo v. Hotel Workers' Union, 655 F. Supp. 1129, 1129-30 (E.D. Mich. 1987) (holding that union attorney not disqualified because he represented union, not grievant, in arbitration); Griesemer v. Retail Store Employees Union, Local 1393, 482 F. Supp. 312, 314-15 (E.D. Pa. 1980) (holding that when grievant admits the union attorney represented the local union no confidential relationship developed); Evans v. Ass'n of Norwalk Sch. Adm'rs, No. CV94 0538581 S, 1995 WL 384629, at *1, *4 (Conn. Super. Ct. June 20, 1995) (denying motion to disqualify union attorney in DFR suit based, in part, on his representation during negotiations with employer over elimination of grievant's position); Anderson, *supra* note 31, at 506. *But see* Stone v. City of Philadelphia, No. 86-1877, 1986 WL 13483, at *4-7 (E.D. Pa. Nov. 25, 1986) (disqualifying union attorney who had met with plaintiffs on one occasion and advised that their claim lacked merit and the union would not pursue it); De Cherro v. Civil Serv. Employees Ass'n, 404 N.Y.S.2d 255, 257-58 (N.Y. App. Div. 1978) (holding that where union member reasonably believed attorney who provided advice on whether he had a claim for reinstatement was his counsel, and not only union's as an entity, attorney is disqualified in DFR suit); N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Op. 362 (1977) (assuming that union attorney represented both union and grievant in arbitration).

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member) that the attorney is the union's attorney whenever the constituent seems to refer to the attorney as the constituent's own attorney. The attorney could also consider providing a grievant a writing at the outset that clearly states that the attorney is the union's attorney. [1]

D. Rules on Entity Lawyer's Interactions with Constituents and Unrepresented Persons

The Kentucky ethics rules illustrate that, although an entity attorney represents the entity, the attorney does owe some limited duties to entity constituents and others, specifically those with whom the attorney may interact on behalf of the entity and whom are not represented. Kentucky Rule 1.13(f) states: "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."[2] Additionally, Kentucky Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.[3]

One scholar notes that the distinction between the "entity lawyer's duty to communicate turns on the existence of adverse interests, whereas the lawyer's duty in other cases turns on the non-client's apparent misunderstanding."[4]

1.If the union attorney has created an individual client relationship with a grievant or other member, then the rules governing conflict of interest between multiple clients will govern. That topic is beyond the scope of this paper. A starting point for researching conflicts between clients is MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

2.KY. RULES OF PROF'L CONDUCT R. 1.13(f) (2009) (previously Rule 1.13(d)).

3.KY. RULES OF PROF'L CONDUCT R. 4.3 (2009). The rule currently contains additional language: "The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel." The current ABA Rule 4.3 adds: "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002).

4.Edward C. Brewer, III, *The Ethics of Internal Investigations in Kentucky and Ohio*, 27 N. KY. L. REV. 721, 788 (2000).

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III. The Duty of Confidentiality

The Kentucky ethics rules codify the duty of confidentiality that an attorney owes to a client. Until July 15, 2009, Rule 3.1301.6(a) stated in relevant part: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."[1] The Kentucky Supreme Court Commentary, Comment 20, previously stated: "If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable."[2]

Effective July 15, 2009, Kentucky Rule 1.6(a) states, in relevant part: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[3] The Commentary effective July 15, 2009, Comment 11, states: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege . . . ."[4]

1.Ky. Rules of Prof'l Conduct R. 1.6(a) (2008).

2.KY. RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 20 (2008).

3.KY. RULES OF PROF'L CONDUCT R. 1.6(a) (2009). The new Kentucky Rule 1.6(a) is analogous to the current ABA Rule 1.6(a). MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

4.KY. RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 11 (2009). The professional requirement of confidentiality is broader in scope than the attorney-client evidentiary privilege and includes information learned from third parties about the client, but only the privilege allows the attorney to refuse to testify. GEOFFREY C. HAZARD JR. ET AL., THE LAW AND ETHICS OF LAWYERING 342 (Robert C. Clark et al. eds., 4th ed. 2005). *See also* Banner v. City of Flint, 99 F. App'x 29, 36 (6th Cir. 2004) (Even if a client had waived the attorney-client privilege, the attorney could not disclose confidential information unless he had complied with Michigan Rule 1.6. The attorney had not complied with Rule 1.6 because he had not advised the client of the advantages and disadvantages of disclosing the confidences.). The current Commentary, Comment 3, explicitly states:

[t]he rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

KY. RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 3 (2009).

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IV. Attorney-Client Privilege

One issue often faced by entity attorneys is how far down the chain of command an entity may assert the attorney-client privilege. Federal Rule of Evidence 501 merely provides for the implementation of common law privileges.[1] One of the well-established common-law privileges is the attorney-client privilege.[2]

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

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

The seminal case defining the attorney-client privilege for entities is *Upjohn*.[3] In *Upjohn*, the Court rejected a narrow approach to defining the client as only the top managers for purposes of the attorney-client privilege.[4] Instead, the Court adopted a case-specific approach for determining when the attorney-client privilege applies to corporate communications.[5]

In *Upjohn*, the general counsel of the company learned that company employees might be involved in bribing foreign officials.[6] He consulted with outside counsel and the chairman of the board and then commenced an investigation.[7] As part of the investigation, the chairman sent a questionnaire, prepared by the attorneys, to all the foreign and area general managers.[8] The cover letter indicated that the questionnaire was part of the general counsel's investigation and asked that the process be kept highly confidential.[9] Additionally, the general counsel conducted interviews of those who received the questionnaire and many other employees.[10]

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1. FED. R. EVID. 501 (stating in pertinent part, "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").
2. FED. R. EVID. 501 cmt.
3. Upjohn Co. v. United States, 449 U.S. 383 (1981).
4. *Id.* at 396-97.
5. *Id.*
6. *Id.* at 386.
7. *Id.*
8. *Id.*
9. *Upjohn*, 449 U.S. at 387.
10. *Id.*

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The Internal Revenue Service filed a summons to obtain the questionnaires and the general counsel's investigation files.[1] The company declined to produce the questionnaires on attorney-client privilege and other grounds.[2] The Court held that Federal Rule of Evidence 501 protects the "giving of information to [a] lawyer to enable him to give sound and informed advice."[3] The Court relied on the ABA Code of Professional Responsibility, Ethical Consideration 4-1 requiring the lawyer to learn the facts of the case.[4]

Applying a case specific inquiry, the Court held that a number of factors ndicated that the questionnaires and records of the investigation were attorney-client privileged.[5] "The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel."[6] Moreover, the matters addressed by the employees were within their corporate duties, the employees were aware the communications were for the purpose of obtaining legal advice, and the instructions indicated that the communications were highly confidential.[7]

B. Kentucky Rule of Evidence 503 and Authority

Kentucky Rules of Evidence Rule 503 defines the "lawyer-client privilege" as giving "[a] client . . . the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."[8] For purposes of the privilege, a client includes a "corporation, association, or other organization or entity."[9] The protected communications can be between the client, the client's representative, the client's lawyer, and the lawyer's representative or any subset of those parties.[10] As other scholars have succinctly summarized, "[a] client has a privilege to refuse to disclose and prevent any other person from disclosing: (1) confidential; (2) communications;

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1. *Id.* at 387-88.
2. *Id.*
3. *Id.* at 390.
4. *Id.* at 391.
5. *Upjohn*, 449 U.S. at 395.
6. *Id.* at 394.
7. *Id.* at 394-95.
8. KY. R. EVID. 503(b). There are five listed exceptions: 1) "[f]urtherance of crime or fraud," 2) "[c]laimants through same deceased client," 3) "[b]reach of duty by a lawyer or client," 4) "[d]ocument attested by a lawyer," and 5) "[j]oint clients." KY. R. EVID. 503(d).
9. KY. R. EVID. 503(a)(1).
10. KY. R. EVID. 503(b). It can also be between those parties and another party concerning a matter of public interest or between lawyers representing the same client. For a discussion of the common interest privilege in the federal setting, *see* Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 220 (W.D. Ky. 2006).

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(3) between or among the client, or prospective client, or the client's representatives; . . . (4) an attorney, or her agents; [and] (5) made for the purpose of obtaining legal services or advice."[1]

A "client's representatives" include: (1) "a person having authority to obtain professional legal services," (2) a person having authority to act on the advice so obtained, and (3) "an employee or representative who makes or receives a confidential communication" in the course of employment, concerning the subject of the employment, and to "effectuate legal representation for the client."2 "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[3] Additionally, "[t]he burden of establishing the privilege, both substantively and procedurally, is on the organization seeking the protection of the privilege."[4]

1. Authority Regarding Employers Asserting the Attorney-Client Privilege

Kentucky cases have applied these definitions. For example, in *Hahn v. Univ. of Louisville*, a research technologist sued the University of Louisville for alleged mistreatment that she had suffered from the University's Department of Psychology. [5] At issue were four e-mails from an associate university counsel to the department's business manager.[6] One e-mail had been carbon copied to the chair of the department.[7] The e-mails concerned "possible claims arising out of pending litigation" and other anticipated litigation.[8] The e-mails disclosed the counsel's legal opinion.[9] Counsel did not discuss the e-mails with anyone other than the recipients and the archivist responsible for handling the type of document discovery involved.[10]

The business manager had received the e-mails in the course of her duties and did not discuss the documents with anyone other than counsel and possibly the department chair.[11] The department chair did not remember

1.Richard A. Bales & Richard O. Hamilton, Jr., *Workplace Investigations in Kentucky*, 27 N. KY. L. REV. 201, 274 (2000).
2.KY. R. EVID. 503(a)(2).
3.KY. R. EVID. 503(a)(5).
4.Brewer, *supra* note 36, at 765.
5.Hahn v. Univ. of Louisville, 80 S.W.3d 771, 772 (Ky. Ct. App. 2001).
6.*Id.* at 772.
7.*Id.* at 773.
8.*Id.*
9.*Id.*
10.*Id.* The documents were requested under the Open Records Act. *Id.* at 772.
11.*Hahn*, 80 S.W.3d at 773.

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receiving the one e-mail carbon copied to him.[1] He did not recall discussing it with anyone or printing it.[2] But "if he had printed it, he would have directed his secretary to place it in a confidential file."[3]

The court held that the chair and business manager were representatives of the client, and that the e-mails were protected by the attorney-client privilege.[4] The court reasoned that the "communications were made for the purpose of providing legal services to the University."[5] The court further reasoned that proper precautions were taken to maintain the confidentiality of the documents.[6] Further, the chair and business manager were clearly employees, and the court must have reasoned that they received the messages in the course of their employment.[7]

The Kentucky Supreme Court has provided more detail regarding the "course of employment" and "effectual legal services" requirements of the rule.[8] Only duties specifically within the employee's scope of responsibilities will satisfy the requirement of receiving statements in the course of employment.[9] Additionally, the communication must be for legal, and not business, purposes.[10] And the employee must know at the time that the purpose of the communication is to obtain legal advice.[11] Moreover, a target of an investigation cannot make communications "to effectuate legal representation for the client."[12]

In *Lexington Public Library*, an employee sued her former employer, the Lexington Public Library, for unlawful retaliation and constructive discharge.[13] The employee claimed her supervisor had retaliated against her for filing a complaint against him.[14] The employee learned that the supervisor was thereafter terminated and sought discovery of documents related to that termination.[15] The library asserted that twelve such documents were attorney-client privileged.[16] The trial court, after *in camera* review, found that the

1.*Id.*
2.*Id.*
3.*Id.* at 773.
4.*Id.* at 775-76.
5.*Id.* at 776.
6.*Hahn*, 80 S.W.3d at 776.
7.*See id.*
8.Lexington Pub. Library v. Clark, 90 S.W.3d 53, 58 (Ky. 2002).
9.*Id.*
10.*Id.* at 61.
11.*Id.*
12.*Id.* (citing KY. R. EVID. 503(a)(2)(B)(iii)).
13.*Id.* at 56.
14.*Lexington Pub. Library*, 90 S.W.3d at 56.
15.*Id.*
16.*Id.* There were originally fourteen at issue, but only twelve remained at issue by time the case reached the Kentucky Court of Appeals. *Id.*

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documents were not privileged because they were generated for business, and not legal, purposes.[1]

The library sought a writ of prohibition preventing disclosure of the documents.[2] Because the writ petition was a separate civil action, not an interlocutory appeal from the underlying action, the documents were not available to the court.[3] Instead, the court relied only on an affidavit from the library's assistant director for training and human resources about the underlying proceeding.[4] She had contacted one of the library's attorneys before preparation of the documents about her "'increasing concern surrounding . . . [the supervisor's] behavior and performance.'"[5] She was concerned because he was over forty and experiencing health problems.[6] The attorney suggested that she and another employee solicit comments and concerns about the supervisor from his co-workers.[7]

The court held that it did not have sufficient evidence to determine whether the communications between the assistant director and her subordinates were for a business or legal purpose.[8] The court reasoned that, while they were solicited by the assistant director in order to obtain advice from the library's attorney, such advice could be for either a legal or a business purpose.[9] The court also held that it did not have sufficient evidence to determine whether those communications were made within the corporate duties of the employees.[10] The court reasoned that "[a] duty to report . . . is different from a duty to observe and evaluate."[11] While the communications were generated because of the assistant director's direction of her subordinates, the communications were about the employees' past observations of the supervisor.[12] The employees' duties, insofar as the record disclosed, did not encompass observing and evaluating the supervisor.[13] The court stated that the record was "silent" as to whether any of the persons other than the assistant director and one other "knew at the time the communications were made that they were being made for the purpose of obtaining legal advice as opposed to,

1.*Id.*
2.*Id.*
3.*Id.*
4.*Lexington Pub. Library*, 90 S.W.3d at 56.
5.*Id.* at 57.
6.*Id.*
7.*Id.*
8.*Id.* at 63.
9.*Id.*
10.*Lexington Pub. Library*, 90 S.W.3d at 63.
11.*Id.* at 60.
12.*Id.*
13.*Id.*

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e.g., furnishing information . . . to be used in determining whether to terminate . . . [the supervisor's] employment."[1]

Finally, the court held that a memorandum to the supervisor about his job performance and his response were not privileged.[2] The court reasoned that the supervisor was not a representative of the library,[3] but rather was "the target of the investigation and [a] potential adverse litigant."[4] Thus, "he was not in a position to make any communication to 'effectuate legal representation for the client.'"[5] The court's logic could be construed to mean that communications between a company and any potential grievant are unprotected, but it cannot yet be known whether certain circumstances might limit the holding. The court also clarified that privileged communications do not have to be made to the entity attorney.[6] Instead, communications between employees that are forwarded to the attorney, and otherwise satisfy the rule, are also protected.[7]

Lexington Public Library takes *Upjohn* further such that Kentucky entity attorneys overseeing internal investigations should be sure to make a written record informing the constituent of the attorney's involvement and indicating the legal implications of the investigation. Additionally, Kentucky cases do not resolve what exactly constitutes a legal purpose – as opposed to a business purpose. One commentator who has surveyed cases outside of Kentucky provides the following worthwhile tips to maintain privilege status:

(1) Have human resource personnel initiate, without the involvement of an attorney, an immediate investigation of any allegations of sexual harassment. [8]

1.*Id.* at 61.

2.*Id.*

3.*Lexington Pub. Library*, 90 S.W.3d at 61.

4.*Id.*

5.*Id.* (citing KY. R. EVID. 503(a)(2)(B)(iii)). Couldn't every manager in *Upjohn* who made payments, which were alleged to be bribes, be a "target" of the investigation? Why can't a target have information necessary to obtain effective legal representation? *Cf.* Greenwell v. Unified Foodservice Purchasing Coop., 22 IER Cases 1092 (Ky. Ct. App. 2005) (depublished and not for use in Kentucky courts) (holding that communications between an employee and the corporate attorney investigating another employee's discrimination suit were privileged when employee thereafter sued the corporate employer for retaliation based on testimony during the other employee's unemployment hearing).

6.*Lexington Pub. Library*, 90 S.W.3d at 59.

7.*Id.*

8.Merrily S. Archer, *Attorney-Client Privilege and Work Product Protections in an Internal Sexual Harassment Investigation*, COLO. LAW., Oct. 2001, at 141, 141; *see also* Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146 (S.D.N.Y. 1999) (holding investigation by outside counsel retained to investigate allegations of racial harassment was for a legal purpose); Brownell v. Roadway Package Sys., Inc., 185 F.R.D. 19, 24-25 (N.D.N.Y. 1999) (holding employees' statements to employer's attorney were "for the purpose of obtaining his legal assistance and not for the purpose of committing a tort or a crime"); Scurto v. Commonwealth Edison Co., No. 97 C 7508, 1999 WL 35311, at *4 (N.D. Ill. Jan. 11, 1999) (holding investigation of racial

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(2) When an in-house counsel is involved in an investigation, "carefully designate that investigative documents were prepared or reviewed in the attorney's capacity as a legal advisor."[1]

(3) Be sure corporate sexual harassment policies underscore the legal nature of the investigation if the process involves an investigation by counsel.[2]

2. Federal Cases Regarding Corporations Asserting the Attorney-Client Privilege [3]

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

Professor Sherman L. Cohn has classified the tests used by the federal courts, and one of those tests, which has been used within Kentucky, is the "subject-matter test."[4] The Western District of Kentucky is one of the courts that uses the subject-matter approach.[5] The court states the test as follows:

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discrimination by an attorney under a policy that states staff counsel is responsible for legal aspects of the policy is for legal and not business purposes); Worthington v. Endee, 177 F.R.D. 113, 117 n.4 (N.D.N.Y. 1998) (questioning whether a sexual harassment investigation constitutes a confidential communication from the employees to the attorney); Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 821, 824 (D. Vt. 1997) (upholding magistrate's determination that notes taken by human resource director during investigation of plaintiff's allegations of sexual harassment, in anticipation of litigation, and conveyed to counsel were privileged); Harding v. Dana Transp., Inc., 914 F. Supp. 1084 (D.N.J. 1996) (holding that outside counsel's sexual harassment investigation of facts to determine which are legally relevant "falls squarely within the ambit of the attorney-client privilege"); Hardy v. N.Y. News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (holding that an attorney with the title of Director of Employee or Labor Relations was not acting as a legal advisor when he participated in investigations of allegations of racial discrimination); Payton v. N.J. Tpk. Auth., 691 A.2d 321, 334 (N.J. 1997) (stating that if the purpose of a sexual harassment investigation is to enforce an anti-harassment policy or comply with legal duties to investigate, it is not privileged because the purpose is not to provide legal advice or to prepare for litigation).

[1].Archer, *supra* note 108, at 143.

[2].Archer, *supra* note 108, at 143.

[3].Even more so than the federal courts, the state courts use different tests for when the attorney-client privilege applies to a communication with a constituent. Cohn, *supra* note 1, at 756. In fact, Illinois continues to use the control-group test rejected by *Upjohn*. Cohn, *supra* note 1, at 757. Thus, researching the law of the particular jurisdiction at issue is very important.

[4].Cohn, *supra* note 1, at 755. For an example of the functional approach, see *Admiral Ins. Co. v. U.S. District Court*, 881 F.2d 1486, 1492 (9th Cir. 1988).

[5].Broessel v. Triad Guar. Ins. Corp., 238 F.R.D. 215, 218 (W.D. Ky. 2006). The Sixth Circuit has stated in an unpublished opinion that documents prepared for corporate executives by

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

One scholar provides samples of letters that corporate counsel can use in investigations to help ensure communications remain attorney-client privileged.[2] These could also be adapted to the union context. Finally, it should be noted that in some jurisdictions, former employees' communications with an entity's counsel are covered by the attorney-client privilege if they have a continuing legal obligation to furnish information to the entity's lawyer, but there is no Kentucky authority on point.[3]

3. For Which Communications Can a Union Assert the Attorney-Client Privilege?

What if a union is defending a *Beck*[4] case and the attorney has spoken to a volunteer union officer about dues notices? Or what if the union is defending a duty of fair representation case, and the attorney has spoken with other members about the complained about assignment of employees? Can the union assert the attorney-client privilege?

As to officers and other employees, *Upjohn* applies in a relatively straight-forward manner.[5] Attorney-client privilege can be asserted against union members seeking to obtain attorney communications with union officers.[6] Some authority supports the proposition that communications with volunteer officers also should be protected by the attorney-client privilege. "The *Upjohn* principle may extend to non-employees of the business organization where the non-employee agent has 'a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of legal

corporate lawyers performing legal functions are "within the reach of the privilege." Crabb v. KFC Nat. Mgmt. Co., No. 91-5474, 1992 WL 1321, at *3 (6th Cir. Jan. 6, 1992).

1.*Broessel*, 238 F.R.D. at 218.

2.Brewer, *supra* note 36, at 807-11.

3.RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 73 cmt. e (2000).

4.Commc'ns Workers v. Beck, 487 U.S. 735 (1988). In these types of cases, nonmembers bring suit alleging union improprieties such as inadequate notice of the right to become a nonmember and to object to paying full dues. *E.g.,* Larry G. Hutchinson, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779, 833 (2009).

5.Collins & Waldman, *supra* note 31, at 5.

6.Howard S. Simonoff, A Beautiful Bind: Some Ethical Considerations in Representing an Imaginary "Person" in A World of Real People 8 (Apr. 29, 2002) (unpublished manuscript on file with author).

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services.'"[1] Indeed, Rule 503 supports such an outcome by defining a representative as "[a] person having authority to . . . act on advice thereby rendered on behalf of the client."[2] Some authority also supports the proposition that communications with members should be protected by the attorney-client privilege.[3]

One scholar recommends, however, that lawyers assume "that an attorney's communications with a non-employee agent may well not be protected by the attorney-client privilege . . . ."[4] Likewise, "it cannot be assumed that attorney communications with members necessarily are privileged against disclosure to employers or others."[5] Consistent with these recommendations, if a member is present for a communication between an officer and the union attorney, that communication would not be attorney-client privileged.

4. Who May Claim the Privilege

"The privilege may be claimed by the client . . . or the successor, trustee, or similar representative of a corporation, association, or other organization . .."[6] Exactly who, in the form of a particular person, will decide whether the corporation or union claims or waives the privilege? "Corporate law generally provides that the board of directors or a person authorized by the board to act may act for the corporation, if approval of shareholders on the particular matter is not required."[7] Generally, when management is replaced, the successor controls the privilege.[8] One authority holds that a union's board, but not a single board member, may waive a union's attorney-client privilege.[9]

1.Brewer, *supra* note 36, at 763-64 (quoting John Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 487 (1982)).
2.KY. R. EVID. 503(a)(2)(A) (2009).
3.*See* Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 104-05, 109-10 (D.N.J. 1994) (holding attorney-client privilege applies to investigation by union attorney who interviewed various union members "to provide a basis for responding to the client's queries"); *see also* United States v. Fisher, 692 F. Supp. 488, 491 (E.D. Pa. 1988) (suggesting in dicta that the attorney-client relationship might exist for purposes of attorney-client privilege between union attorney and each of its members). Consistent with the theory that the union attorney represents only the union and not individual members, no joint attorney-client privilege will arise in the typical case. *See* Anderson, *supra* note 31, at 496-98 (discussing Bachner v. Air Line Pilots Ass'n, 113 F.R.D. 644, 647 (D. Alaska 1987)).
4.Brewer, *supra* note 36, at 764.
5.Simonoff, *supra* note 119, at 8.
6.KY. R. EVID. 503(c) (2009).
7.HAZARD, *supra* note 40, at 533.
8.*See* HAZARD, *supra* note 40, at 534.
9.Diemer v. Fraternal Order of Police, Chicago Lodge 7, 242 F.R.D. 452, 458 (N.D. Ill. 2007).

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There is a split over whether inadvertent disclosure automatically destroys the privilege regardless of the circumstances.[1] A full discussion of this issue is beyond the scope of this Article, but the Sixth Circuit has stated in an unpublished opinion that "the mere fact that a breach in the chain of control has occurred is not sufficient to automatically render a document devoid of any privileged status."[2]

5. Fiduciary Duty Exceptions

In some circumstances, unions may be unable to assert the attorney-client privilege because of fiduciary duty exceptions. One exception to the attorney-client privilege that has been somewhat widely adopted in the corporate setting is the ability of shareholders in derivative suits to obtain otherwise attorney-client privileged communications.[3] Applicability of the exception turns on a balancing of several factors, referred to as the "*Garner* factors," and the harm to the party claiming the privilege.[4]

The *Garner* factors are as follows:

(1) "the number of shareholders . . . and the percentage of stock they represent;"

(2) "the bona fides of the shareholders;"

(3) "the nature of the shareholders' claim and whether it is obviously colorable;"

(4) "the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;"

(5) "whether . . . the shareholders' claim is of wrongful action by the corporation" and what type of wrongful action;

(6) "whether the communication[s] relate[] to past or to prospective actions;"

(7) whether the communication was about the litigation;

(8) "the extent to which the [particular] communication is identified . . . [or] the shareholders are blindly 'fishing;'" and

(9) "the risk [of] revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons."[5]

Union members have attempted to rely on *Garner* to obtain otherwise privileged documents.[6] Several courts have held that the doctrine applies to

1.Bales & Hamilton, *supra* note 61, at 275 n.507.
2.Crabb v. KFC Nat. Mgmt. Co., No. 91-5474, 1992 WL 1321, at *2 (6th Cir. Jan. 6, 1992).
3.Garner v. Wolfinbarger, 430 F.2d 1093, 1097 (5th Cir. 1970); Anderson, *supra* note 31, at 507.
4.Anderson, *supra* note 31, at 514.
5.Anderson, *supra* note 31, at 511-12 (quoting *Garner*, 430 F.2d at 1104).
6.Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 679 (D. Kan. 1986).

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unions because of their fiduciary relationship with members.[1] And some courts have found that the plaintiffs proved good cause.[2] Several courts, however, have not actually ordered the release of privileged information because weighing the *Garner* factors, modified for the union setting, has indicated no reason to do so.[3] Whether there is a *Garner* fiduciary exception in Kentucky is unclear.[4] The Kentucky Supreme Court has referenced *Garner*, but has not addressed the issue.[5]

In contrast to the *Garner* fiduciary exception, the furtherance of crime or fraud exception clearly extends to include some situations where an attorney's conduct furthers a breach of fiduciary duty.[6] In *Steelvest, Inc. v. Scansteel Service Center, Inc.*, the Kentucky Supreme Court held that "as a matter of law, . . . a breach of a fiduciary duty is equivalent to fraud."[7] In *Steelvest*, the plaintiff company sued the prior president and director for breach of fiduciary duty.[8] The president had formulated a plan to incorporate and had incorporated a rival

1.Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97, 107 (D.N.J. 1994) ("The circuit courts have uniformly upheld the view that the union's duty of fair representation is a fiduciary responsibility."); Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68, 71 (E.D. Va. 1992) (reasoning that a union's duty of fair representation is a fiduciary duty); Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 680 (D. Kan. 1986) (noting that "courts have repeatedly characterized the general nature of a union's duty toward its members as fiduciary"); Anderson, *supra* note 31, at 510.

2.Wessel v. City of Albuquerque, No. 00-00532 (ESH/AK), 2000 U.S. Dist. LEXIS 17494, at *19, *22 (D.D.C. Nov. 30, 2000) (applying exception where plaintiffs proposed to represent class of all non-members affected by allegedly deficient notice and advice concerned correction to notice, not defense against plaintiffs' suit); *Nellis*, 144 F.R.D. at 72 (applying exception particularly where there is a lack of alternative source for information); *Aguinaga*, 112 F.R.D. at 68 (applying exception where, among other things, a high number of union members were adversely affected and the plaintiffs had high degree of need for the information); Boswell v. Int'l Bhd. of Elec. Workers, 106 L.R.R.M. (BNA) 2713 (D.N.J. 1981) (applying *Garner* to compel disclosure of opinions from union counsel relating to legality of union's conduct toward plaintiff under Labor Management Disclosure Act); Anderson, *supra* note 31, at 513-14.

3.Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1415 (11th Cir. 1994) (assuming that exception could apply to suit against union, good cause not shown where only tiny percentage of members were plaintiffs and where plaintiffs were adverse to other union members) *modified*, 30 F.3d 1347 (11th Cir. 1994); Mui v. Union of Needletrades, No. 97 CIV. 7270 HB KNF, 1998 WL 915901, at *3 (S.D.N.Y. Dec. 30, 1998) (holding no good cause where plaintiffs few in number and possibility exists information may be discovered from other sources); *Arcuri*, 154 F.R.D. at 108-09 (holding no good cause particularly where suit would not benefit all members and number of plaintiffs was minuscule compared to number affected); Anderson, *supra* note 31, at 511.

4.Brewer, *supra* note 36, at 773 (citing Shobe v. EPI Corp., 815 S.W.2d 395, 397-98 (Ky. 1991)).

5.Brewer, *supra* note 36, at 773 (citing Shobe v. EPI Corp., 815 S.W.2d 395, 397-98 (Ky. 1991)).

6.Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 487 (Ky. 1991).

7.*Id.*

8.*Id.* at 479.

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business during the last eleven months of his employment with the company.[1] The president's attorney had advised him in these efforts.[2]

The company sought to obtain certain communications between the president and his attorney, which would otherwise be protected by the attorney-client privilege, under the crime or fraud exception.[3] The court held that the attorney-client privilege could not be used to protect the communications.[4] The court reasoned that the attorney presumably knew that the president's activities "possibly constituted a breach of fiduciary duties."[5] Because the attorney, nevertheless, assisted the president in his efforts, the crime or fraud exception applied.[6]

The United States District Court for the Western District of Kentucky has further explained this exception. In *Invesco Institutional, Inc. v. Paas*,[7] an employer sued four senior employees who had left the company to work for a competitor.[8] The employer asserted a claim for breach of fiduciary duty, alleging that the employees had disclosed confidential information and assisted the competitor to hire away key personnel.[9] The employer attempted to discover, among other documents, otherwise attorney-client protected information from the firms of the attorney who had represented the employees in obtaining the new employment.[10] The firms attempted to quash the subpoenas.[11]

The employer produced enough evidence "to support a reasonable belief that *in camera* review might yield evidence that establishes the applicability of the asserted exception to the privilege."[12] And the court conducted an *in camera* review of the documents.[13] The court held, however, that not a "single document . . . appears connected to a breach of fiduciary duty."[14] The court admonished that "[i]t must be remembered that only those communications that further the alleged breach of fiduciary duty are subject to production under the exception."[15] The court reasoned that seeking to obtain other employment did

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1.*Id.*
2.*Id.*
3.*Id.* at 487.
4.*Steelvest*, 807 S.W.2d at 488.
5.*Id.*
6.*Id.*; *Steelvest* was decided under KRS § 421.210(4) (1991) which has been superseded by KY. RULES OF PROF'L CONDUCT R. 1.6 (2009).
7.Invesco Institutional (N.A.), Inc. v. Paas, 244 F.R.D. 374 (W.D. Ky. 2007).
8.*Id.* at 375-76.
9.*Id.* at 376.
10.*Id.*
11.*Id.*
12.*Id.* at 384.
13.*Invesco*, 244 F.R.D. at 387.
14.*Id.* at 391.
15.*Id.*

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not breach any fiduciary duty.[1] Because the documents dealt with obtaining other employment but not with disclosure of confidential information, they were not "made in furtherance of the alleged breaches of fiduciary duty."[2]

6. Related Privileges for Communications with Union Members

In addition to the attorney-client privilege, unions may assert a negotiations or union representative privilege. First, some jurisdictions recognize the negotiation privilege, which protects as privileged statements regarding labor negotiation strategy.[3] Additionally, disclosure of authorization cards to employers is generally prohibited, and one court has extended that privilege to include a union's documents relating to an organizing campaign.[4]

Second, the National Labor Relations Board, the Federal Labor Relations Authority ("FLRA"), and the New York state courts recognize that employer conduct that seeks to obtain confidential communications between union members and representatives, acting as such, is an unfair labor practice.[5] The FLRA considers this protection an evidentiary privilege.[6] Some arbitrators

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1.Id.

2.Id.

3.Harvey's Wagon Wheel, Inc. v. N.L.R.B., 550 F.2d 1139, 1143 (9th Cir. 1976) (stating that statements of union representatives are normally privileged because disclosure might expose "crucial material regarding pending union negotiations"); Berbiglia Inc., 233 N.L.R.B. 1476, 1495 (1977) (revoking subpoena which would require union to open its files regarding meetings and correspondence concerning negotiations and whether to strike); Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist., 547 N.E.2d 182, 185-86 (Ill. 1989) (holding employer board's closed negotiations meetings privileged); Michael D. Moberly, Extending a Qualified Evidentiary Privilege to Confidential Communications between Employees and their Union Representatives, 5 NEV. L.J. 508, 511 n.26, 540, 543-44 (2004); Collins & Waldman, supra note 31, at 10-11. But see EEOC v. Peoples Gas, Light & Coke Co., No. 80 C 1824, 92 Lab. Cas. (CCH) P34,070, 1981 WL 2332, at *8 (N.D. Ill. Aug. 19, 1981) (holding no privilege protects communications during labor negotiations from discovery by EEOC); Taylor Lumber & Treating, Inc., 326 N.L.R.B. 1298, 1300 n.11 (1998) (adopting ALJ decision that criticized Berbiglia and found employer's negotiations discussions were not privileged).

4.Int'l Union v. Garner, 102 F.R.D 108, 113, 116-17 (M.D. Tenn. 1984). But cf. Patterson v. Heartland Indus. Partners, 225 F.R.D. 204, 206-07 (N.D. Ohio 2004) (holding that a First Amendment associational privilege does not apply when the names of the employees are redacted from organizing documents and that no NLRA privilege covers organizing documents).

5.Moberly, supra note 160, at 522-26 (discussing City of Newburgh v. Newman, 70 A.D.2d 362 (N.Y. App. Div. 1979); Cook Paint & Varnish Co., 258 N.L.R.B. 1230 (1981); U.S. Dep't of Treasury, Customs Serv., 38 F.L.R.A. 1300 (1991)).

6.Moberly, supra note 160, at 520-21. The D.C. Circuit has clarified that the privilege is available only against management. See U.S. Dep't of Justice v. FLRA, 39 F.3d 361, 370 (D.C.C. 1994). See generally, Mitchell H. Rubinstein, Is a Full Labor Relations Evidentiary Privilege Developing?, 29 BERKELEY J. EMP. & LAB. L. 221 (2008).

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may also recognize this privilege.[1] Other jurisdictions have expressly declined to find a privilege for communications between union members and their representatives, particularly when asserted against a non-employer party.[2]

V. Ex parte communications

With whom may an attorney speak when the opposing counsel represents an entity? If a union is investigating a grievance, may the union attorney speak, without the consent of the employer's attorney, to low-level employees who are union members, with low-level employees who are not union members, or with low-level management? If an employee's attorney is investigating a potential sexual harassment suit, can the employee's attorney speak with these employees without such consent? What if an employer or employee is suing a union? Can their attorneys speak with the union members? With union representatives who are employees but not officers?

A. Rules Regarding Ex Parte Communications

The Kentucky ethics rules are illustrative of the principles governing ex parte communications with entity constituents. Kentucky Rule 4.2 previously provided that, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[3]

The Commentary, Comment 2, previously stated:

- In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the

1.Moberly, *supra* note 160, at 542 (discussing *In re* Hughes Aircraft Co., 86 Lab. Arb. Rep. (BNA) 1112 (1986) (Richman, Arb.)).

2.*In re* Grand Jury Subpoenas, 995 F. Supp. 332, 336-37 (E.D.N.Y. 1998) (holding grand jury subpoenas not barred because no union privilege); Walker v. Huie, 142 F.R.D. 497, 500-01 (D. Utah 1992) (finding no privilege protects police officer's communications with union representative from discovery in suit by civilian against officer); Moberly, *supra* note 160, at 534, 511 n.26, 559 (citing McCoy v. Sw. Airlines Co., 211 F.R.D. 381, 386 (C.D. Cal. 2002)).

3.KY. RULES OF PROF'L CONDUCT R. 4.2 (2008). The current Kentucky Rule 4.2 is analogous to ABA Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or by a court order."

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part of the organization. Prior to communication with a nonmanagerial employee or agent or an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).[1]

The current Commentary, Comment 7, states in pertinent part:

- In the case of a represented organization, this Rule prohibits communications to a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[2]

B. Ethics Opinion on Ex Parte Communication

KBA Opinion E-382 (July 1995) also advises that under the prior rule the prohibition on ex parte communications "applie[d] to (i) management employees, (ii) non-managerial employees whose act or omission in connection with the matter may be imputed to the organization, and (iii) employees whose statement may constitute an admission of the organization."[3] The prohibition does not encompass other non-management employees[4] or an employee whose conduct does not give rise to the claim (whose acts or omissions cannot be imputed to the organization).[5] Additionally, an employee whose statements do not relate to the scope of the employee's employment is not an employee whose statement will constitute an admission.[6]

The opinion provides an example for guidance. A company has four employees, a president, two loaders, and a secretary.[7] One of the loaders injures a third party who was delivering goods to the loading dock.[8] The other loader

1.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 2 (2008).
2.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009). The new language is analogous to ABA Comment 7. These changes were made, in part, because the ABA believed the "admissions" language had been interpreted overbroadly to include evidentiary admissions. Ellen J. Messing & James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, 19 LAB. LAW. 353, 358 (2004).
3.Brewer, *supra* note 36, at 802; Ky. Bar Association on Ethics, Formal Op. KBA E-382 (1995).
4.Brewer, *supra* note 36, at 802; Ky. Bar Association on Ethics, Formal Op. KBA E-382 (1995); *see also* Shoney's, Inc. v. Lewis, 875 S.W.2d 514 (Ky. 1994).
5.Ky. Bar Association on Ethics, Formal Op. KBA E-382 (1995).
6.*Id.*
7.*Id.*
8.*Id.*

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was working on the dock at the time, and the secretary was taking a break on the dock.[1] The third party sues the company.[2]

Per the opinion, the third party's attorney may contact only the secretary.[3] It is contemplated that the observing loader would be asked about the operation of the loading dock, a matter within the scope of his employment.[4] On the other hand, the secretary would not be asked about any matters within the scope of her employment.[5]

With the change to the Commentary, Comment 7, effective July 15, 2009, the opinion may no longer be accurate. The president would have to "supervise[], direct[], or regularly consult[] with the organization's lawyer" regarding the suit for communication with the president to be barred.[6] The loader who observed the incident would have to have authority to obligate the company in order for communication with the loader to be barred.[7]

C. Authority Regarding Ex Parte Contacts with Current Employees

Under the prior rule, a lawyer who has conversations about matters important to the case with management constituents of an entity that the lawyer knows is represented will be disqualified, and any interview statements will be suppressed.[8] For example, in *Shoney's Inc. v. Lewis*, the plaintiff sued her employer for sexual harassment.[9] Prior to filing suit, the plaintiff's attorney contacted the employer's vice president of human resources.[10] The vice

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1.*Id.*

2.*Id.*

3.Ky. Bar Association on Ethics, Formal Op. KBA E-382 (1995).

4.*Id.*

5.*Id.* Ky. Bar Association on Ethics, Formal Op. KBA E-213 (1979), decided when the Disciplinary Rules were still in effect, concluded, "[t]herefore, if there is any question concerning the relationship of an employee to the corporation or governmental entity, it is necessary to contact the attorney of the corporation before taking any statements from the employee or from questioning any employee of the adversary corporation." While the applicability of Rule 4.2 does not hinge on access to privileged information like the Disciplinary Rule did, it is an interesting question whether the advice to contact opposing counsel holds when an attorney is unsure about whether a non-management employee's act can be imputed to the employer or whether the non-management employee's statement will constitute an admission.

6.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).

7.*Id.*

8.Shoney's Inc. v. Lewis, 875 S.W.2d 514, 515-17 (Ky. 1994); *see also* Callis v. KBA, 143 S.W.3d 603 (Ky. 2004) (reprimanding attorney for ex parte contacts); Babbs v. Minton, No. 2004-CA-000332-OA, 2004 WL 1367621 (Ky. Ct. App. June 18, 2004) (unpublished and not to be cited in Kentucky courts) (holding that plaintiff's attorney who hired an agent to contact opposing employer's president, who was represented, must be disqualified and the record of the president's important admissions suppressed).

9.*Shoney's*, 875 S.W.2d at 514.

10.*Id.*

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president informed the attorney that the employer would be represented by counsel and provided counsel's name.[1] Thereafter, the plaintiff's attorney spoke with the employer's counsel regarding pre-litigation settlement.[2] The employer's counsel sent a letter confirming the conversation.[3] After receipt of the letter, plaintiff's counsel met with and obtained statements from two of the employer's senior managers without consent of the employer's counsel.[4] The plaintiff then filed suit, and the employer moved to disqualify plaintiff's attorney and his firm under Kentucky Rule 4.2.[5]

The Kentucky Supreme Court held that the managers of senior rank were "precisely within the group of persons provided for in the comment"[6] and that Kentucky Rule 4.2 applies "both before and after formal proceedings have begun."[7] The court also held, in reliance on the authority of other jurisdictions, that the appropriate remedies were disqualification of plaintiff's counsel and suppression of the statements wrongfully obtained.[8] The court reasoned that, if not suppressed, the statements might "acquire an independent significance, such that irreparable prejudice may result."[9] Without any reasoning in support, the court also ordered the trial court to order the plaintiff's attorney to disclose to the employer's counsel the identity of all persons from whom statements were taken and to "refrain from any further disclosure of the substance of the statements in question."[10]

In contrast, when an attorney is unaware that an entity is represented, communications with entity constituents are not cause for disqualification.[11] In

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1.*Id.*
2.*Id.* at 514-15.
3.*Id.* at 515.
4.*Id.*
5.*Shoney's*, 875 S.W.2d at 515.
6.*Id.* Currently, communications with a specified group of management are prohibited.
7.*Id.* at 515-16.
8.*Id.* at 516.
9.*Id.*
10.*Id.* at 517. Does the court refer to only the disclosure of the management employees' statements or all of the statements taken? Does the court's order imply that taking statements of any employee was inappropriate? If it was not inappropriate, why should counsel be directed not to disclose the statements in question? Can he give them to the new plaintiff's attorney? Or is the order to disclose the identities to the employer to enable the employer to move to suppress any of those statements which were obtained by improper ex parte contacts? The dissent argued disqualification and suppression were inappropriate remedies for the attorney's ethical failure. *Id.* at 517 (Leibson, J., dissenting). The dissent reasoned that suppression of the statements was unauthorized by the Kentucky Rules of Civil Procedure and Evidence. *Id.* The Kentucky Supreme Court also has held that when an ex parte discussion with a constituent is not prejudicial, a writ of mandamus will not issue. Univ. of Louisville v. Shake, 5 S.W.3d 107, 110 (Ky. 1999).
11.Humco, Inc. v. Noble, 31 S.W.3d 916, 919 (Ky. 2000).

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Humco, the plaintiff sued her employer for racial discrimination.[1] Prior to filing suit, plaintiff's counsel wrote the employer's hospital administrator.[2] The administrator responded and carbon copied the employer's counsel.[3] The plaintiff's attorney, who did not know the employer was represented, then contacted five non-managerial employees regarding the matter.[4] After suit was filed, counsel (different than that named on the administrator's letter) entered an appearance on behalf of the employer.[5] Thereafter, plaintiff's new attorneys (who were in possession of the prior attorney's notes) interviewed ten former employees, some of whom were management.[6]

The employer moved to disqualify plaintiff's attorneys because of the interviews.[7] The employer also requested suppression of the statements obtained.[8] The court held that plaintiff's attorneys had not made any inappropriate ex parte communications.[9] As to the interviews of the current non-management employees, the court held that plaintiff's attorney did not know at the time of the interviews that the employer was represented.[10] The court reasoned that the employer did not advise plaintiff's counsel that it was represented.[11] It further reasoned that individuals often carbon copy an attorney on a letter, "but that fact alone does not establish that the attorney is representing the letter-writer."[12] Moreover, there were no other circumstances indicating that the employer was formally represented by the copied attorney or that the plaintiff's attorney knew of any such representation.[13]

Thus, any letter from an entity's lawyer to an opposing counsel "should state explicitly in its text that the organization is represented by an attorney and provide the attorney's name, address, and other contact information."[14]

1.*Id.* at 918.
2.*Id.*
3.*Id.*
4.*Id.*
5.*Id.*
6.*Humco*, 31 S.W.3d at 918.
7.*Id.*
8.*Id.*
9.*Id.* at 921.
10.*Id.* at 919.
11.*Id.*
12.*Humco*, 31 S.W.3d at 919.
13.*Id.*
14.Brewer, *supra* note 36, at 803.

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D. Authority Regarding Ex Parte Contacts with Former Employees

In many jurisdictions, an attorney may communicate with a former employee of an entity without opposing counsel's consent, although in some, consent is required.[1] KBA Opinion E-381 states that a lawyer may communicate with a former employee of an organization without consent or notification.[2] The *Humco* court also held that Kentucky Rule 4.2 only limits an attorney's right to contact current employees.[3] The court reasoned that the "purpose of Rule 4.2 is not to 'prevent the flow of information'" but rather to "preserve the position of the parties in an adversarial system."[4] The court explained that a former employee is not a "party" and is not adverse to the plaintiff.[5] The current Commentary to Kentucky Rule 4.2, Comment 7, is consistent. [6] In sum, an attorney making ex parte contacts with current or former constituents should be careful not to inquire into any privileged attorney-client communications.[7] As discussed above, the privilege belongs to the entity.[8] On the other hand, Opinion E-381 suggests that an organization can "enter into confidentiality agreements or seek protective orders against communications by former employees who have privileged information."[9] The opinion states that "[i]t is incumbent on the party who knows that its former employees possess privileged information to utilize confidentiality agreements and/or seek protective orders."[10] One scholar cautions that "it may be illegal to ask a witness not to talk voluntarily with a prosecutor or law enforcement official."[11]

E. Open Issue and Concluding Advice on Ex Parte Contacts

First, Kentucky courts have not addressed the issue of who has managerial responsibility under the prior rules. It might encompass supervisors or may be limited to the control group.[12] An example of an employment case where a court held that managerial means "officers, directors, and managing

1.*Id.* at 801.
2.Ky. Bar Association on Ethics, Formal Op. KBA E-381 (1995).
3.*Humco*, 31 S.W.3d at 920.
4.*Id.*
5.*Id.*
6.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).
7.Garrett Hodes, *Ex Parte Contacts with Organizational Employees in Missouri*, 54 J. MO. B. 83, 86 (1998).
8. *Id.*
9.Brewer, *supra* note 36, at 804; Ky. Bar Association on Ethics, Formal Op. KBA E-381 (1995).
10.Ky. Bar Association on Ethics, Formal Op. KBA E-381 (1995).
11.Brewer, *supra* note 36, at 805.
12.Cohn, *supra* note 1, at 771-72.

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agents" is *Shealy v. Laidlaw Bros.*[1] One employment case in the Western District of Michigan, *Massa v. Eaton*, has addressed the issue of who has managerial responsibility and held that ex parte interviews with any managerial level employee, not only those in the control group, are forbidden.[2]

Under the current Commentary to Kentucky Rule 4.2, Comment 7, the issue will be who "supervises, directs or regularly consults with the organization's lawyer concerning the matter."[3] While the supreme court's intent likely was to narrow the class of persons with whom communication is prohibited, the language is not clear as to whether "supervise" and "direct" are modified by the phrase "concerning the matter."[4]

KBA Opinion E-382 implies that anyone speaking about matters within the scope of employment makes statements that may constitute an admission.[5] This is consistent with the meaning of an evidentiary admission, which can be contradicted or impeached.[6] An evidentiary admission generally refers to a statement made by a party. Often an opposing party introduces such a statement as adverse evidence against the party. The party, however, can introduce other evidence to undermine the admission.

Consistent with the evidentiary interpretation of admissions, some courts in other jurisdictions hold that an attorney may communicate ex parte with a constituent who is not a manager and whose conduct will not be imputed to the employer.[7] But the attorney cannot use the statements gathered as admissions.[8] These courts reason that lawyers must choose between communicating with employees ex parte or using gathered statements as admissions.[9]

Some courts interpret admission differently to mean only a binding admission, in the sense that it takes the issue "out of the case."[10] The current Commentary to Kentucky Rule 4.2, Comment 7, clarifies that only contact with a person who can make a binding admission will be prohibited.[11]

One professor has identified seven different tests, one of which is the prior ABA Model Rule upon which Kentucky's prior Rule 4.2 was based, in use

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1.Shealy v. Laidlaw Bros., 34 Fair Empl. Prac. Cas. (BNA) 1223, 1225 (D.S.C. 1984).
2.Massa v. Eaton Corp., 109 F.R.D. 312, 314-15 (W.D. Mich. 1985).
3.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).
4.*Id.*
5.Ky. Bar Association on Ethics, Formal Op. KBA E-382 (1995).
6.Cohn, *supra* note 1, at 778.
7.Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723, 730 (N.D. Ill. 1996).
8.*Id.*
9.Sally E. Barker, Application of ABA Model Rules 4.2 and 4.3 to Union and Plaintiff's Employment Law Counsel's Communications with Adverse Parties 8 (Feb. 19, 2002)(unpublished manuscript on file with author); *see, e.g.*, *Orlowski*, 937 F. Supp. at 730.
10.Cohn, *supra* note 1, at 778; *see, e.g.,* Niesig v. Team I, 558 N.E.2d 1030, 1035 (N.Y. 1990).
11.KY. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).

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in different jurisdictions.[1] This means it is imperative to research the law in the jurisdiction at issue before making any ex parte contacts. These tests are:

(1) While it is not likely, some jurisdictions, including some federal district courts, do impose a complete ban on communications with an entity's employees.[2]

(2) Other jurisdictions, including some federal district courts, ban either communications with the control group or with "officers, directors, and managing agents." [3]

(3) Some jurisdictions, including some federal district courts, support "a ban on ex parte communications with all current employees about matters within the scope of their employment."[4]

(4) Some jurisdictions, including some federal district courts, use a case-by-case balancing approach.[5] An employment case where this approach was used is Mompoint v. Lotus Development Corp.[6]

(5) Some jurisdictions use a "managing-speaking agent test."[7] Under this test, ex parte communications are only prohibited with those parties who have "the legal authority to 'bind' the corporation in a legal evidentiary sense."[8]

(6) Some jurisdictions use the test established by the version of Model Rule 4.2 previously in effect in Kentucky.[9] See the issues discussed above in sub-sections G & H for potential differences between jurisdictions using this rule.

(7) Finally, some jurisdictions use a test similar to the following: ex parte contacts are prohibited with "'employees whose acts or omissions in the matter under inquiry are binding on the corporation . . . or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.'"[10]

1.Ernest F. Lidge III, The Ethics of Communicating with an Organization's Employees: An Analysis of the Unworkable "Hybrid" or "Multifactor" Managing-Speaking Agent, ABA, and Niesig Tests and a Proposal for a "Supervisor" Standard, 45 ARK. L. REV. 801 (1993).

2.Id. at 810-14.

3.Id. at 814-16.

4.Id. at 816.

5.Id. at 816-18.

6.Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414, 418 (D. Mass. 1986) (permitting ex parte interviews by counsel for terminated alleged harasser of allegedly harassed women). But see Morrison v. Brandeis Univ., 125 F.R.D. 14, 18, 18 n.1 (D. Mass. 1989) (stating that Mompoint was decided under exception for court authorization of ex parte contacts with represented party).

7.Lidge, supra note 233, at 834.

8.Lidge, supra note 233, at 834 (quoting Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984)).

9.KY. RULES OF PROF'L CONDUCT R. 4.2 (2008). Some other jurisdictions have already adopted the more recent changes to ABA Model Rule 4.2 that are currently in effect in Kentucky.

10.Lidge, supra note 233, at 855 (quoting Niesig v. Team I, 558 N.E.2d 1030, 1035 (N.Y. 1990)).

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Finally, the following useful tips concerning ex parte contacts, which were previously proposed by another scholar, are offered for entity lawyers:

(1) Disclose your identity, that you are counsel for the organization's adversary, and the purpose of the interview.[1]

(2) Be clear that the interview is voluntary and that the interviewee may seek counsel, whether individual or the entity's counsel.[2]

(3) Make sure the employee is not individually represented already.[3]

(4) Refrain from asking about communications with the entity's counsel.[4]

(5) Conclude the interview if it becomes apparent that the employee is one with whom ex parte contact is prohibited.[5]

(6) If substantial uncertainty exists as to whether the employee is a party for purposes of ex parte contacts, attempt to resolve the issue with opposing counsel or seek court approval for the contact.[6]

VI. Conclusion

An attorney who understands who the client is when representing an entity will be less likely to breach confidentiality or commit malpractice. An attorney who understands who the opposing counsel's client is will be more likely to obtain useful information and to avoid disqualification. Thus, when an attorney thinks about who the client is, it enhances the attorney's ability to serve the client and ensures that attorneys act responsibly and ethically.

1.Felicia Ruth Reid, Comment, *Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees*, 24 U.C. DAVIS L. REV. 1243, 1305 (1991).
2.*Id.* at 1305-06.
3.*Id.* at 1306.
4.*Id.*
5.*Id.*
6.*Id.* at 1307.

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S.D. RULES OF PROF'L CONDUCT;
VA. RULES OF PROF'L CONDUCT;
WYO. RULES OF PROF'L CONDUCT;
ALASKA RULES OF PROF'L CONDUCT;
COLO. RULES OF PROF'L CONDUCT;
IDAHO RULES OF PROF'L CONDUCT;
ILL. RULES OF PROF'L CONDUCT;
IND. RULES OF PROF'L CONDUCT;
LA. RULES OF PROF'L CONDUCT;
MINN. RULES OF PROF'L CONDUCT;
NEV. RULES OF PROF'L CONDUCT;
N.H. RULES OF PROF'L CONDUCT;

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N.C. RULES OF PROF'L CONDUCT;
N.D. RULES OF PROF'L CONDUCT;
OHIO RULES OF PROF'L CONDUCT;
OKLA. RULES OF PROF'L CONDUCT;
OR. RULES OF PROF'L CONDUCT;
S.C. RULES OF PROF'L CONDUCT;
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Aragon v. Pappy, Kaplon, Vogel & Phillips, 262 Cal. Rptr. 646, 654 (Cal. Ct. App. 1989);
Niezbecki v. Eisner & Hubbard, P.C., 717 N.Y.S.2d 815 (N.Y. Civ. Ct. 1999).

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