EXTENDING A QUALIFIED EVIDENTIARY PRIVILEGE TO CONFIDENTIAL COMMUNICATIONS BETWEEN EMPLOYEES AND THEIR UNION REPRESENTATIVES

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I. INTRODUCTION

Evidentiary privileges enable parties and potential witnesses[1] to refuse to disclose relevant and material evidence,[2] both at trial[3] and during the course of pretrial discovery.[4] Because these privileges contravene the public's right to every person's evidence,[5] as well as the corresponding obligation of every citi-

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[1] *See* Farley v. Farley, 952 F. Supp. 1232, 1238 (M.D. Tenn. 1997) (noting that a privilege may be asserted by "a person who is not a party to the proceeding in which the privilege is involved") (quoting 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 72.1, 101 (John W. Strong et al. eds., 4th ed. 1992); Rhode Island v. Almonte, 644 A.2d 295, 298 (R.I. 1994) ("[T]he holder of a privilege may not be an adverse party to the litigation but may well be a person who is entirely a stranger to the litigation, excepting insofar as he or she might be a witness or might have an interest in the material to be disclosed.").

[2] *See* United States v. Gillock, 587 F.2d 284, 296 (6th Cir. 1978) (Weick, J., dissenting) (noting that an evidentiary privilege permits its holder "to withhold or to suppress relevant and material evidence"); Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999) ("A privilege . . . vests the holder with a right to refuse to produce otherwise relevant evidence.").

[3] *See* United States v. Benford, 457 F. Supp. 589, 597 (E.D. Mich. 1978) ("[T]estimonial privileges, by their very nature, keep relevant and probative evidence from the jury."); Granite Constr. Co., 330 N.L.R.B. 205, 211 n.1 (1999) ("[A]ll privileges . . . deprive the parties of the right to introduce otherwise relevant evidence at trial."); Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1052 (1992) (noting that "a privilege has the effect of withholding relevant information from the factfinder").

[4] *See* Real v. Cont'l Group, Inc., 116 F.R.D. 211, 213 (N.D. Cal. 1986) ("[E]ven relevant evidence is not discoverable if such evidence is privileged."). *See generally* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (observing that "the same rules of privilege govern the scope of discovery as generally govern the admissibility of evidence at trial").

[5] *See* United States v. Dube, 820 F.2d 886, 889 (7th Cir. 1987) (citing Trammel v. United States, 445 U.S. 40, 50 (1980)). The "long-standing common law precept" that the public has a right to every person's evidence has been described as "one of the fundamental maxims of the law." Davis Enters. v. U.S. Envtl. Prot. Agency, 877 F.2d 1181, 1189 (3d Cir. 1989) (Weis, J., dissenting); *see also* Brownson v. United States, 32 F.2d 844, 847 (8th Cir. 1929) ("For more than 300 years it has been a maxim that the public has a right to every man's evidence. Privileges . . . are exceptions to the rule.").

zen to testify when called upon to do so,[6] they have traditionally been looked upon with disfavor by the courts and other tribunals.[7]

As the Second Circuit has observed, "the duty to disclose in a court all pertinent information within one's control, testimonially or by the production of documents, is usually paramount over any private interest which may be affected."[8] Nevertheless, by protecting the confidentiality of certain private communications,[9] privileges may foster important personal and professional relationships,[10] and serve other valuable nonevidentiary societal interests.[11]

Because they are both important[12] and often highly controversial,[13]

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[6] *See* Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973) (discussing "the basic proposition that the public 'has a right to every man's evidence'" and "the correlative duty to testify") (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192, at 70 (John T. McNaughton rev. ed. 1961)); Arizona v. Superior Court, 609 P.2d 1070, 1072 (Ariz. Ct. App. 1980) ("The duty to testify has been recognized as a basic obligation of every citizen since the public has the right to every man's evidence.").

[7] *See* Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) ("[B]ecause evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored . . . ."); Parvarandeh v. Goins, 124 F.R.D. 169, 171 (E.D. Tenn. 1988) ("Courts do not favor creating new privileges because privileges contravene the fundamental principle that the public has a right to every man's evidence.") (internal quotation marks and citations omitted).

[8] McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937); *see also In re* Dinnan, 661 F.2d 426, 430 (5th Cir. 1981) (asserting that "truth-seeking considerations" are "normally dominant" over any policy considerations intended to be served by an evidentiary privilege).

[9] *See, e.g.*, Giffin v. Summerlin, 78 F.3d 1227, 1240 n.4 (7th Cir. 1996) (referring to "the evidentiary privilege protecting private communications between a physician and a patient"); United States v. Wood, 924 F.2d 399, 401 (1st Cir. 1991) (noting that "the common law marital communications privilege . . . protects the confidentiality of private communications made between spouses during their marriage").

[10] *See* Fritsch v. Chula Vista, 187 F.R.D. 614, 631 (S.D. Cal. 1999) ("By creating an evidentiary privilege, society has made a judgment that fostering certain ideals or relationships is worth the potential sacrifice involved in terms of the loss of relevant evidence."); Montone v. Radio Shack, 698 F. Supp. 92, 94-95 (E.D. Pa. 1988) ("[A]n important defining aspect of a 'privilege,' both historically and common-sensically, is that the privilege directs itself to particular *relationships*. Thus, each of the traditionally recognized privileges . . . can be traced to an interest in fostering and protecting a relationship of high social importance.").

[11] *See In re* Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982) ("Each of the recognized privileges protects a substantial individual interest or a relationship in which society has an interest, at the expense of the public interest in the search for truth."); D'Aurizio v. Palisades Park, 899 F. Supp. 1352, 1360 (D.N.J. 1995) ("Common law privileges exist to foster underlying societal values."); Diaz v. Dist. Court, 993 P.2d 50, 57 (Nev. 2000) (observing that privileges "are not designed or intended to assist the fact-finding process or to uphold its integrity," but instead "are justified by the public's interest in encouraging socially useful communications and by certain notions of legitimate privacy expectations").

[12] *See generally* NL Indus., Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 233 n.11 (D. N.J. 1992) (observing that "privileges serve an important part in the preservation of the law and the administration of justice"); New Jersey v. Baluch, 775 A.2d 127, 151 (N.J. Super. Ct. App. Div. 2001) ("Privileges serve an important purpose, grounded in critical public policy concerns . . . .").

[13] *See, e.g.*, Spencer Sav. Bank v. Excell Mortgage Corp., 960 F. Supp. 835, 842 (D. N.J. 1997) (discussing "the controversy surrounding recognition of the self-critical analysis privilege"). *See generally* Gale v. Wyoming, 792 P.2d 570, 624 n.25 (Wyo. 1990) (Urbigkit, J., dissenting) (noting that "[f]ew, if any, areas of evidence law raise such fundamental dilemmas and result in such controversial outcomes" as "the law of privilege") (quoting *Developments in the Law – Privileged Communications*, 98 HARV. L. REV. 1665, 1665-66 (1985)).

evidentiary privileges have been the subject of considerable litigation.[14] However, despite the fact that unions stand in a fiduciary relationship to the employees they represent,[15] and evidentiary privileges reflect a recognition of the duty of loyalty fiduciaries owe to their principals,[16] there is surprisingly little case law discussing the possible existence of a union representation privilege.[17] There has likewise been very little academic discussion of this potential privilege to date.[18]

This article is an attempt to fill the latter void.[19] The article begins with a discussion of cases that have considered the possible recognition of a union representation privilege.[20] Using a test for the recognition of new evidentiary

[14] *See, e.g.*, May v. Collins, 122 F.R.D. 535, 539 (S.D. Ind. 1988) (observing that "[t]he newsgatherer's privilege has been often litigated"); State v. Miller, 709 P.2d 225, 237 (Or. 1985) ("The issue of when and to what extent communications made to agents and assistants of professional persons are protected by the evidentiary privileges is one with which many courts have wrestled."). *See generally* Kenneth S. Broun, *Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 780 (2002) ("Questions concerning evidentiary privileges have been frequently litigated since the enactment of Rule 501 [of the Federal Rules of Evidence].").

[15] *See* Int'l Bhd. of Elec. Workers, 309 N.L.R.B. 856, 857 (1992) ("It is well settled that a union owes a fiduciary duty to employees it represents as the exclusive collective-bargaining representative . . . ."); Int'l Bhd. of Firemen & Oilers, 302 N.L.R.B. 1008, 1009 (1991) ("A union owes a duty of fair representation to those unit employees it represents and . . . this duty is akin to the duty owed by other fiduciaries to their beneficiaries.") (internal quotation marks and citation omitted).

[16] *See* Kelly v. Ford Motor Co., 110 F.3d 954, 962 (3rd Cir. 1997) ("Privilege doctrine assumes that protecting . . . loyalty and trust . . . can only be accomplished if privileged material is never disclosed . . . ."); Carson v. Fine, 867 P.2d 610, 618 (Wash. 1994) (asserting that the recognition of a testimonial privilege "is simply the legal acknowledgment of . . . fiduciary duties"); Broun, *supra* note 14, at 796 ("[One] nonutilitarian rationale for privilege is that it gives recognition to the duty of loyalty owed by the recipient of information to the person confiding in her.").

[17] One commentator has described the union representation privilege as a "newly emerging" evidentiary privilege, "recently recognized in the labor arena." Leeann R. Gruwell Anderson, *Turning the Key: Ensuring Evidentiary Privileges as Labor Counsel*, 45 DRAKE L. REV. 492, 492 (1997); *cf.* EEOC v. Peoples Gas, Light & Coke Co., 92 Lab. Cas. (CCH) ¶ 34,070, 44,076 (N.D. Ill. 1981) (asserting that "a general federal policy . . . protecting the absolute sanctity of [communications concerning] labor negotiations" is "as yet unarticulated in case law").

[18] The only previously published article that appears to have been devoted exclusively to the topic is Mitchell H. Rubinstein, *A New York Court Recognizes a Labor Union Evidentiary Privilege*, 9 LAB. LAW. 595 (1993). *But see* Loomis Armored Inc., 94 Lab. Arb. Rep. (BNA) 1097, 1101 (1990) ("In one commentary the authors identified the 'Grievant-Union' [privilege] as a *developed* 'privilege'. . . .") (emphasis added) (citing JAY E. GRENIG & WAYNE ESTES, LABOR ARBITRATION ADVOCACY: EFFECTIVE TACTICS AND TECHNIQUES § 7.51, 89 (1989).

[19] In addition to the authorities cited in note 18, the issue is discussed in Scott A. Brown, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 64 GEO. WASH. L. REV. 1322 (1996), and also, briefly, in MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 164 (2d ed. 1987); John G. Adams, *Privileges Under the NLRA: Attorney-Client, Work-Product, Collective Bargaining and Strike Strategy, and Mediator*, 48 LAB. L.J. 570, 573-75 (1997); and Gruwell Anderson, *supra* note 17, at 518-25.

[20] This potential privilege, generally described here as a "union representation privilege," has also been denominated an "employee-union representative" privilege, *United States Dep't of Justice v. FLRA*, 39 F.3d 361, 368-69 (D.C. Cir. 1994); a "labor relations" privi-

privileges first articulated by Professor John Wigmore[21] and subsequently embraced by a number of state and federal courts,[22] the article then analyzes the competing policy interests underlying the potential adoption of the privilege.[23]

The article ultimately concludes that courts and other tribunals should recognize a qualified form of this important privilege,[24] despite the absence of any significant prior legislative support,[25] and the fact that the only federal courts that have specifically considered the issue refused to adopt such a privilege.[26]

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lege, *Seelig v. Shepard*, 578 N.Y.S.2d 965, 968 (Sup. Ct. 1991); a "labor official" privilege, Gruwell Anderson, *supra* note 17, at 492; and a "labor union" privilege, Rubinstein, *supra* note 18, at 595. The differing nomenclature undoubtedly reflects the new and "emerging" nature of the privilege. Gruwell Anderson, *supra* note 17, at 492.

[21] Professor Wigmore is a "long acknowledged preeminent authority on the law of evidence in this country." Ohio v. Sims, 369 N.E.2d 24, 39 (Ohio Ct. C.P. Cuyahoga County 1977); *see also* EEOC v. Univ. of Notre Dame, 551 F. Supp. 737, 741 (N.D. Ind. 1982) (referring to Wigmore as "a leading commentator on the law of evidence"), *rev'd on other grounds*, 715 F.2d 331 (7th Cir. 1983). For a recent academic discussion of Professor Wigmore's approach to evidentiary privileges, see Edward J. Imwinkelreid, *The New Wigmore; An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315 (2003).

[22] *See, e.g.*, Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 167 (E.D.N.Y. 1988) (noting that "Professor Wigmore's four-part test . . . for determining whether novel privileges deserve judicial recognition" has been "endorsed by the Second Circuit"). *See generally* Douglas v. Superior Court, 597 A.2d 774, 777 (Vt. 1991) ("Most courts have created a testimonial privilege only when the conditions meet the four-part test for recognition set forth in Dean Wigmore's treatise."); *In re* Contempt of Wright, 700 P.2d 40, 48 (Idaho 1985) (Bistline, J., concurring) ("Many courts and commentators have accepted Wigmore's test as the proper method for determining if a proposed privilege ought to be recognized.").

[23] *See generally In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 382 (3d Cir. 1976) ("The granting or withholding of an evidentiary privilege requires a balancing of competing policies."); Smith v. Smith, 154 F.R.D. 661, 673 (N.D. Tex. 1994) ("In order for a new privilege to be adopted, the relevant competing interests must be appropriately considered and balanced.").

[24] *See* Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1053 (1992) (describing the union representation privilege as "a limited privilege"); Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 149 (Ct. App. 2003) (discussing the contention that "there is a qualified privilege for confidential communications between a union representative and union members concerning investigations into union matters and grievances"); *cf.* Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist. No. 28, 547 N.E.2d 182, 187 (Ill. 1989) ("The privilege . . . is at least a qualified one."). Judicial recognition of this privilege would be a "significant development in labor law." Rubinstein, *supra* note 18, at 595.

[25] In *In re Grand Jury Subpoenas dated Jan. 20, 1998*, 995 F. Supp. 332 (E.D.N.Y. 1998), the court noted that a bill passed by the New York state legislature that would have created a new testimonial privilege for confidential communications between employees and their union representatives was vetoed by the governor of that state. *See id.* at 335-36. The court also noted that the parties in that case had been unable to identify "any legislation in other states relating to a general union privilege." *Id.* at 336 n.2; *see also* Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036, 1041 (Ariz. 1980) ("[T]here is no statutory privilege to protect the confidentiality of communications between an employee and his [union] representative."); *Am. Airlines*, 8 Cal. Rptr. 3d at 152-53 ("[T]here simply is no indication . . . that the [California] Legislature intended to [create] an evidentiary communication privilege between union members and their representatives.").

[26] *See* McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 386 (C.D. Cal. 2002) (finding "no merit" to an argument that discussions between employees and their union representatives were privileged); *Grand Jury Subpoenas*, 995 F. Supp. at 334 ("[T]he court declines to recognize a common law privilege shielding conversations between union officials and

Given the evolutionary nature of the law of evidentiary privileges,[27] courts should not regard this absence of statutory or judicial support for a union representation privilege as weighing heavily against its recognition.[28]

II. Existing Case Law Recognizing the Privilege

A. City of Newburgh v. Newman

In the view of some observers,[29] the prospect of a union representation privilege was initially suggested by an intermediate New York state appellate court in *City of Newburgh v. Newman*,[30] although implicit support for the privilege can be found in at least one earlier federal administrative agency decision.[31] In *City of Newburgh*, a police officer facing disciplinary charges sought and obtained the advice and assistance of a union official.[32] A deputy police commissioner subsequently ordered the union official, who was also an officer in the department,[33] to answer questions about his conversations with the officer facing discipline.[34] The union official then filed an improper practice

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members on matters of union concern."); Walker v. Huie, 142 F.R.D. 497, 501 (D. Utah 1992) ("[T]he court does not find that it is justified in creating [such] a new evidentiary privilege."); *cf.* EEOC v. Peoples Gas, Light & Coke Co., 92 Lab. Cas. (CCH) ¶ 34,070, at 44,076 (N.D. Ill. 1981) ("No [labor negotiations] privilege exists either at common law or by statute.").

[27] *See* SEC v. Lavin, 111 F.3d 921, 925 (D.C. Cir. 1997) (referring to "the evolutionary development of testimonial privileges"); D'Aurizio v. Palisades Park, 899 F. Supp. 1352, 1355 (D. N.J. 1995) (noting "the evolution of a federal common law of privileges") (quoting 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 172, at 226 (2d ed. 1994).

[28] *See* Mullen v. United States, 263 F.2d 275, 278 (D.C. Cir. 1958) ("[R]ecognition of [a] privilege in federal courts does not depend upon finding that it has either existed uniformly at common law or has been approved in terms by act of Congress."); *In re* Agosto, 553 F. Supp. 1298, 1317 (D. Nev. 1983) (rejecting the proposition that "the lack of precedent for the recognition of a . . . privilege [is] a sufficient bar to a further inquiry into the propriety of considering such a privilege"); Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, 667 N.E.2d 458, 467 (Ohio Ct. App. 1995) ("The absence of a legislative enactment or previous judicial ruling creating . . . a privilege . . . does not itself foreclose [the] formulation and application of such a privilege if justice so requires.").

[29] *See, e.g.*, Gruwell Anderson, *supra* note 17, at 519 ("The first inklings of a labor official privilege appeared in *City of Newburgh v. Newman* . . . ."); *cf.* Rubinstein, *supra* note 18, at 595, 602 (describing *Seelig v. Shepard*, 578 N.Y.S.2d 965 (Sup. Ct. 1991), as "a case of first impression . . . recogniz[ing] a labor union privilege," but acknowledging that "*Seelig* is a logical extension of the *Newman* decision").

[30] 421 N.Y.S.2d 673 (App. Div. 1979).

[31] *See* Berbiglia, Inc., 233 N.L.R.B. 1476, 1495-96 (1977) (discussed *infra* notes 254-70 and accompanying text).

[32] *See City of Newburgh*, 421 N.Y.S.2d at 674.

[33] *See id.* Union officials frequently serve in the dual role of employee and union representative. *See* NLRB v. S. Cent. Bell Tel. Co., 688 F.2d 345, 357 n.13 (5th Cir. 1982) (referring to the "dual status" of "a worker who is also a union officer"); Zamudio v. California, 73 Cal. Rptr. 2d 79, 83 (Ct. App. 1998) (discussing the "situation where an individual wears two hats – that of employee and that of union representative"); Materials Research Corp., 262 N.L.R.B. 1010, 1015 (1982) ("[W]here employees are represented, the union official . . . is usually a steward employed at that same plant.").

[34] *See City of Newburgh*, 421 N.Y.S.2d at 674-75.

charge against the department[35] under a New York state law regulating labor relations between public employers and employees commonly known as the Taylor Law.[36]

The New York Public Employment Relations Board ("PERB"),[37] which has jurisdiction over such charges,[38] held that the employer had engaged in a statutorily prohibited practice.[39] Because the Taylor Law gives public employees the right to organize and bargain collectively through representatives of their own choosing,[40] and an aspect of that right "is the privilege of consulting with appropriate union officials as to matters affecting them as employees,"[41] the PERB found that the department's questioning of the union official interfered with the employees' statutorily protected organizational rights.[42]

Significantly, the PERB also ordered the department to cease and desist from any future questioning of union officials "about information obtained by them in the course of assisting unit employees who may be involved in disciplinary or grievance procedures."[43] The board explained its decision to award this broad prospective relief[44] on the following basis:

> Such consultations are in the nature of internal communications and, like other internal union affairs, they may be deemed confidential by the union and the employees. To invade that confidentiality tends to inhibit employees from seeking the advice of

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[35] *See id.* at 674. The filing of an improper practice charge is the means by which New York public employees, or their union, may challenge an employer's alleged violation of their state statutory rights to organize and bargain collectively. *See, e.g.*, Kennedy v. Metro. Bus Auth., 102 L.R.R.M. (BNA) 2088, 2091 (E.D.N.Y. 1979).

[36] The "Taylor Law" is the popular name for the Public Employees Fair Employment Act of 1967. N.Y. CIV. SERV. LAW §§ 200-14 (1997). Broadly speaking, the act "deals with rights and relationships involved in public employment, such as organizing, collective bargaining, [and] the prohibition of strikes by public employees." *In re* Bd. of Educ. of Watertown City Sch. Dist., 710 N.E.2d 1064, 1067 (N.Y. 1999).

[37] The New York Court of Appeals has noted that "[w]ith the enactment of the Taylor Law, the Legislature created PERB, an independent board empowered to resolve employment disputes between public employers and the collective bargaining representatives of public employees." Patrolmen's Benevolent Ass'n of N.Y. v. New York, 767 N.E.2d 116, 118 (N.Y. 2001) (citing N.Y. CIV. SERV. LAW § 205).

[38] *See* Palumbo v. Bd. of Educ. of City of N.Y., 400 N.Y.S.2d 857, 859 (App. Div. 1978); DeMilia v. McGuire, 420 N.Y.S.2d 960, 962 (Sup. Ct. 1979).

[39] *See City of Newburgh*, 421 N.Y.S.2d at 674.

[40] *See id.* at 675 (quoting N.Y. CIV. SERV. LAW §§ 202, 203); *see also* Kennedy v. Metro. Suburban Bus. Auth., 102 L.R.R.M. (BNA) 2088, 2091 (E.D.N.Y. 1979) ("[T]he Taylor law[ ] makes it an improper practice for a public employer . . . to interfere, restrain or coerce public employees in the exercise of their organizational rights and [their right] to choose their collective bargaining representative.").

[41] *City of Newburgh*, 421 N.Y.S.2d at 675; *see also* Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers, 648 N.Y.S.2d 152, 153 (App. Div. 1996) (discussing "the rights of union members to organize and to consult with union officials on matters affecting them as employees").

[42] *See City of Newburgh*, 421 N.Y.S.2d at 675.

[43] *Id.* at 674.

[44] The PERB has the express statutory authority to direct an employer to "cease and desist from any improper practice," and also to take "affirmative" steps to remedy such a practice. Saratoga Springs City Sch. Dist. v. N.Y. State Pub. Employment Relations Bd., 416 N.Y.S.2d 415, 420 (App. Div. 1979) (quoting N.Y. CIV. SERV. LAW § 205.5(d) (1997)).

> their union representatives as to matters affecting their interest and similarly to deter the representatives from proffering advice, if sought.[45]

The Appellate Division of the New York Supreme Court affirmed the PERB's determination.[46] In particular, the court agreed with the PERB's conclusion that an employer's "[q]uestioning of a union official as to his observations and communications with a union member facing disciplinary proceedings, if permitted, would tend to deter members of the union from seeking advice and representation with regard to pending charges, thereby seriously impeding their participation in an employee organization."[47] The court thus found that assuring the confidentiality of such consultations is necessary to protect the right of employees "to fully participate in an employee organization, with the full benefits thereof."[48]

However, the court maintained that it was not adopting a common law evidentiary privilege analogous to the attorney-client privilege.[49] The court apparently concluded that the protection available to an employee who has communicated with a union representative in confidence should be more limited than that provided by traditional evidentiary privileges:

> Any privilege established by the decision of the board is strictly limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty.[50]

B. Cook Paint & Varnish Co.

1. Factual Background

Approximately two years after *City of Newburgh*, the National Labor Relations Board ("NLRB" or the "Board")[51] reached the same result,[52] without

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[45] *City of Newburgh*, 421 N.Y.S.2d at 675.

[46] *See id.* at 676. As the state agency "charged with implementing the fundamental policies of the Taylor Law," the PERB "is presumed to have developed an expertise and judgment that requires [courts] to accept its construction [of the law] if not unreasonable." Lynbrook v. N.Y. State Pub. Employment Relations Bd., 399 N.E.2d 55, 58 (N.Y. 1979) (citations omitted).

[47] *City of Newburgh*, 421 N.Y.S.2d at 675-76.

[48] *Id.* at 676.

[49] *See id.*; *see also* Seelig v. Shepard, 578 N.Y.S.2d 965, 967 (Sup. Ct. 1991) ("[A union official] does not have . . . a broad common-law privilege, an analogue to the attorney-client privilege.").

[50] *City of Newburgh*, 421 N.Y.S.2d at 676.

[51] The NLRB is the federal agency with responsibility for administering the National Labor Relations Act. *See* 29 U.S.C. §§ 153-56, 159-61, 164(c) (1994); Rochester Joint Bd. v. NLRB, 896 F.2d 24, 28 (2d Cir. 1990); ITT Lamp Div. v. Minter, 435 F.2d 989, 992 (1st Cir. 1970). It is essentially a federal counterpart to the PERB, with somewhat broader jurisdiction over unfair labor practices arising in the private sector. *See In re* Town of Wallkell Unit of the Orange County Chapter, Civil Serv. Employees Ass'n, 382 N.Y.S.2d 224, 225 (Sup. Ct. 1975) ("In effect PERB sits as the National Labor Relations Board, but in a limited fashion.").

[52] Even though it merely "establish[ed] the labor official privilege in the administrative setting," the analysis in *City of Newburgh* "also provide[s] support for common law recognition of the privilege." Gruwell Anderson, *supra* note 17, at 525; *see also* Levitt v. Bd. of Collective Bargaining of City of N.Y., 531 N.Y.S.2d 703, 705-06 (Sup. Ct. 1988) (noting

discussing *Newburgh*,[53] in *Cook Paint & Varnish Co.*[54] In *Cook Paint*, a union steward advised a bargaining unit employee in connection with an employment dispute,[55] and subsequently represented the employee in grievance proceedings initiated by the union when the employee was ultimately discharged as a result of the disputed incident.[56] When the matter was not resolved satisfactorily in the grievance process,[57] the union invoked binding arbitration under the terms of the applicable collective bargaining agreement.[58]

In preparing for the arbitration, the employer's attorney attempted to question the union steward about his knowledge of the matter,[59] and to obtain contemporaneous notes he had prepared in connection with the proceeding.[60] When the steward objected to being interviewed or producing his notes,[61] he

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that "the Taylor Law and its model, the National Labor Relations Act . . . have, in many essential respects, been interpreted in the same way," and that "[a]gencies and courts have often borrowed from each other evolving notions of the sensible application of these [acts]") (parentheses omitted).

[53] The NLRB may be "guided by Federal precedents" in considering privilege issues. Patrick Cudahy, Inc., 288 N.L.R.B. 968, 970 n.11 (1988). However, the Board "has long held that it is not bound by State court decisions," United Steelworkers of Am., 137 N.L.R.B. 95, 96 (1962), and it ultimately "bring[s] to bear [its] own reason and experience in determining how to apply [a] privilege in the context of unfair labor practice proceedings." *Patrick Cudahy*, 288 N.L.R.B. at 970 n.11 (internal quotation marks omitted).

[54] 258 N.L.R.B. 1230 (1981).

[55] *See id.* at 1230. A steward is a "union official who represents other union employees in grievances with management and who oversees the carrying out of the union contract." Cahoon v. Int'l Bhd. of Elec. Workers, 175 F. Supp. 2d 220, 227 (D. Conn. 2001) (quoting BLACK'S LAW DICTIONARY 1414 (6th ed. 1990)); *see also* Salierno v. Micro Stamping Co., 345 A.2d 342, 344 (N.J. Super. Ct. 1975) (noting that the function of a union steward is "to deal with the employer on a day-to-day basis in solving employee problems and grievances").

[56] *See Cook Paint*, 258 N.L.R.B. at 1230-31. The Board has observed that "[o]nce a disciplinary decision has been made by the employer, the proper forum for the discussion and evaluation of that disciplinary action shifts to the grievance procedure." Baton Rouge Water Works Co., 256 N.L.R.B. 995, 997 n.6 (1979).

[57] The Supreme Court has noted that in most collective bargaining relationships, "an attempt is usually made to keep the number of arbitrated grievances to a minimum." Vaca v. Sipes, 386 U.S. 171, 192 n.15 (1967). As a result, "[t]he vast majority of all grievances are resolved short of arbitration." Serv. Employees Int'l Union, Local No. 579, 229 N.L.R.B. 692, 696 n.11 (1977).

[58] *See Cook Paint*, 258 N.L.R.B. at 1231. Grievance and arbitration provisions are "a standard feature of almost all collective bargaining agreements." Antol v. Esposto, 100 F.3d 1111, 1121 (3d Cir. 1996).

[59] *See Cook Paint*, 258 N.L.R.B. at 1231. The employer presumably anticipated obtaining useful information from the steward based on the fact that a "union official handling [a] grievance will typically meet with the grievant, discuss the grievant's petition, suggest possible arguments, and perhaps conduct an investigation of the underlying facts." Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 919 (7th Cir. 1989).

[60] *See Cook Paint*, 258 N.L.R.B. at 1231.

[61] In this respect, the fact pattern in *Cook Paint* is not unique. *See, e.g.*, Colgate-Palmolive Co., 257 N.L.R.B. 130, 133 n.6 (1981) (describing another union steward "who refused to answer questions, when called in for an interview as to [an] incident, on the grounds that right, wrong, or indifferent he did not want to become involved in any interview which could result in disciplinary action against a fellow union member").

was threatened with discipline unless he disclosed the substance of his communications with the employee he represented.[62]

After the steward ultimately submitted to the interview under protest[63] (and provided his notes directly to the arbitrator, rather than the employer),[64] the union filed an unfair labor practice charge with the Board.[65] The union asserted that the employer had violated section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act")[66] by threatening employees with discipline for engaging in concerted activity.[67]

2. *The Board's Initial Decision*

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with its employees' exercise of their rights under Section 7 of the Act.[68] Section 7 in turn gives employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[69] In its landmark ruling in *NLRB v. J. Weingarten, Inc.*,[70] the Supreme Court held that the section 7 right of an employee to engage in concerted activity includes the right to the presence of a union representative at an investigatory interview the employee reasonably believes may result in disciplinary action.[71] In several subsequent cases,[72] the Board has held that the right to union representation recognized in *Weingarten* encompasses the right to confer with the union representative prior to the interview itself.[73]

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[62] *See Cook Paint*, 258 N.L.R.B. at 1231.

[63] *See id.* The steward's decision to submit to the interview undoubtedly reflected his understanding of "the time-honored principle of industrial relations that – with few exceptions – an employee must 'obey now and grieve later.'" Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1242 (7th Cir. 1997). However, one of the widely-recognized exceptions to this principle applies where, as implicitly alleged in *Cook Paint*, an employee "has a right to union representation which would be denied by obedience to the order." AT&T Communications, 94 Lab. Arb. Rep. (BNA) 1229, 1232 (1990) (Kaufman, Arb.) (quoting FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 199-200 (4th ed. 1985).

[64] *See Cook Paint*, 258 N.L.R.B. at 1231.

[65] *See* Cook Paint & Varnish Co., 246 N.L.R.B. 646, 649 (1979), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981). Unfair labor practice charges may be filed by "any person," 29 C.F.R. § 102.9 (2002), which in this context includes "individuals or labor organizations." Aguinaga v. John Morrell & Co., 713 F. Supp. 368, 371-72 (D. Kan. 1988) (citing 29 U.S.C. § 152(1) (1994) and 29 C.F.R. § 102.1 (2000)).

[66] 29 U.S.C. § 158(a)(1) (1994).

[67] *See* Cook Paint & Varnish Co. v. NLRB, 648 F.2d 712, 714 (D.C. Cir. 1981).

[68] *See* Linn v. United Plant Guard Workers of Am., 383 U.S. 53, 59 n.3 (1966).

[69] 29 U.S.C. § 157 (1994).

[70] 420 U.S. 251 (1975).

[71] *See id.* at 262 ("[Section] 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres . . . .").

[72] *See generally* PPG Indus., Inc., 251 N.L.R.B. 1146, 1165 (1980) ("The parameters of employee rights under *Weingarten* have been set forth in numerous Board cases . . . ."); Ohio Masonic Home, 251 N.L.R.B. 606, 606 (1980) (referring to the Board's "pronouncements interpreting the *Weingarten* principle").

[73] *See* System 99, 289 N.L.R.B. 723, 727 (1988); Pac. Tel. & Tel. Co., 262 N.L.R.B. 1048, 1048-49 (1982), *enforced in part and enforcement denied in part*, 711 F.2d 134 (9th Cir.

The union in *Cook Paint* relied on these principles in arguing, through the Board's General Counsel,[74] that the employer's coercive interview of the union steward unlawfully interfered with the section 7 right of the steward and the employee he represented to engage in protected concerted activity.[75] In its initial decision,[76] the Board declined to consider the impact of *Weingarten* on the confidentiality of communications between an employee and a union representative.[77] It instead held that the employer violated section 8(a)(1) by seeking to compel the steward to answer *any questions* concerning the disputed matter.[78]

The Board premised this holding on its conclusion that once disciplinary action has been taken and the dispute is to be submitted to arbitration, the employer's motive for interrogating any employee has necessarily moved beyond its legitimate interest in maintaining the orderly operation of its business,[79] and "into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position."[80] The Board held that this latter interest, while also perhaps a legitimate one,[81] must nevertheless give way to the greater right of employees "to make common cause with their fellow

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1983); U.S. Postal Serv., 254 N.L.R.B. 703, 707 (1981); Climax Molybdenum Co., 227 N.L.R.B. 1189, 1189-90 (1977), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978).

[74] Under section 3(d) of the NLRA, the Board's General Counsel is authorized to investigate unfair labor practice charges and issue complaints based on those charges, and to prosecute those complaints on behalf of the charging parties in proceedings before the Board. *See* 29 U.S.C. § 153(d) (1994).

[75] *See* Cook Paint & Varnish Co., 246 N.L.R.B. 646, 650 (1979), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981):

> The starting point of the . . . argument is the well-established principle that an employee's participation in grievance and arbitration proceedings constitutes protected concerted activity which may not be interfered with either by his employer or by his union. The . . . basic proposition is that [the employer's] threat of discipline if [the steward] . . . refused to be interviewed in the course of [its] preparation for arbitration was an unlawful interference with the employees' participation or refusal to participate in protected concerted activity.

(Citations omitted.)

[76] *Cook Paint*, 246 N.L.R.B. 646 (1979), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981).

[77] *See id.* at 646 nn.2 & 4. The court in *City of Newburgh v. Newman*, 421 N.Y.S.2d 673 (App. Div. 1979) also did not rely on *Weingarten*, presumably because *Weingarten* is "not controlling" in cases arising under the Taylor Law. Sperling v. Helsby, 400 N.Y.S.2d 821, 822 (App. Div. 1977). For a criticism of the New York courts' failure to extend *Weingarten* to public sector employment, see Anthony R. Baldwin, Weingarten *and the Taylor Law – A Claimed Difference Without a Distinction*, 7 HOFSTRA LAB. L.J. 123 (1990).

[78] *See Cook Paint*, 246 N.L.R.B. at 646.

[79] *See id.* The Board has long recognized that "an employer has the right to establish legitimate rules to govern the conduct of its employees and to investigate violations of those rules." United Techs. Corp., 260 N.L.R.B. 1430, 1442 (1982); *see also* Gen. Elec. Co., 253 N.L.R.B. 1189, 1191 (1981) (Penello, concurring in part and dissenting in part) ("[T]he Board has upheld an employer's right to investigate violations of work rules and other improper activities. An employer may also question its employees during such an investigation, and insist that they cooperate.").

[80] *Cook Paint*, 246 N.L.R.B. at 646. Indeed, a concurring member of the Board noted that the employer had admitted that "one of the reasons it wished to talk to the [steward] was to learn the Union's case." *Id.* at 647 (Truesdale, concurring).

[81] *Cf.* Bill Scott Oldsmobile, 282 N.L.R.B. 1073, 1077 (1987) (Dotson, Chairman, dissenting in part) ("[I]nterviews in preparation for trial are one of the rare kinds of interrogations in which the Board has long recognized that the employer has a legitimate interest.").

employees."[82] The administrative law judge,[83] whose decision the Board was affirming,[84] articulated the basic reasoning underlying the Board's initial holding:

> There obviously is a world of difference between an employer's trying to obtain factual information helpful in determining whether an employee should be disciplined, on the one hand, and, on the other hand, his attempting to obtain information to justify discipline already imposed. In the former case, the employer is legitimately concerned about maintaining order in the operation of his business; in the latter case, he is concerned only with vindicating action he has already taken. In the former case, an employee's statutory right to make common cause with his fellow employees may well have to yield to the more urgent need of orderly conduct of the business, a necessity to management and labor alike; in the latter case, however, there is no apparent reason why an employer's vindication of action he has already taken should be allowed to override the employees' concern for solidarity.[85]

3. *The Federal Appellate Court's Decision*

The Court of Appeals for the District of Columbia Circuit refused to enforce the Board's initial decision in *Cook Paint*.[86] In particular, the court rejected the Board's apparent "*per se* rule" that an employer may never threaten discipline in order to compel an employee to respond to questions relating to a matter scheduled for arbitration,[87] holding that the Board lacked the statutory authority to adopt such a rule.[88]

However, the court acknowledged that there are limits to the employer's right to conduct pre-arbitration interviews of its employees.[89] In particular, the employer may not use such interviews to discover the union's arbitration strategy[90] or otherwise "pry into protected union activities."[91] Because the interrogation of an employee's *Weingarten* representative may implicate protected

[82] *Cook Paint*, 246 N.L.R.B. at 646.

[83] Unfair labor practice hearings under the NLRA are held before administrative law judges, whose decisions are then subject to Board review. *See* 29 C.F.R. §§ 102.15-.16, 102.34 & 102.45(a) (2001).

[84] *See Cook Paint*, 246 N.L.R.B. at 646.

[85] *Id.* at 651 (footnote omitted).

[86] *See* Cook Paint & Varnish Co. v NLRB, 648 F.2d 712, 713 (D.C. Cir. 1981). The Board itself "has no independent enforcement authority." NLRB v. Hub Plastics, Inc., 52 F.3d 608, 613 (6th Cir. 1995). The NLRA instead authorizes the Board to petition the federal appellate courts for enforcement of its decisions. *See* 29 U.S.C. § 160(e) (1994); United States v. Palumbo Bros., Inc., 145 F.3d 850, 870 (7th Cir. 1998).

[87] *Cook Paint*, 648 F.2d at 719-20.

[88] *See id.* at 725 n.25. The court explained that "pre-arbitration interviews are part of the grievance-arbitration process," which in turn is "a matter of contract." *Id.* Because the Supreme Court has made it clear that "contractual matters are to be resolved without interference from the Board," the court in *Cook Paint* concluded that "whether an opposing witness may be interviewed prior to arbitration is a matter to be decided by the parties, and not by Board rule." *Id.* (citing NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967)); *cf.* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 155 n.4 (Ct. App. 2003) (finding it unnecessary to decide whether "the creation of a union representative-union member evidentiary privilege is a matter that should be left for negotiation and included in the parties' collective bargaining agreement").

[89] *See Cook Paint*, 648 F.2d at 722.

[90] *See id.*

[91] *Id.* at 723.

union activity,[92] the court concluded that "very different considerations may be relevant in considering the legality of an interview of a union steward that are not present in the case of employees generally."[93]

The court nevertheless rejected a "blanket rule" that would have prohibited an employer from ever questioning a union steward[94] in favor of one that merely prevents inquiries that would seriously infringe on its employees' statutorily protected activity.[95] Because the Board had not addressed the impact of the employer's interview on such activity,[96] the court remanded the case to the Board[97] to consider the extent to which the steward "was entitled to special protection due to his status as a union steward."[98]

4. *The Board's Supplemental Decision*

On remand,[99] the Board acquiesced in the Court of Appeals' conclusion that the employer was contractually entitled to conduct legitimate investigatory interviews in preparation for the parties' pending arbitration.[100] The Board nevertheless concluded that the employer's interview of the steward exceeded permissible bounds and impinged on protected union activity[101] to the extent the "facts sought were the substance of conversations between an employee and his steward, as well as the notes kept by the steward, in the course of fulfilling his representational function."[102]

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[92] *See id.* at 724-25 ("[A] steward may be acting pursuant to his position as a representative of the employees, responsible for processing the grievance at issue. To require collective bargaining *representatives* to submit to compulsory interviews might seriously infringe on protected activity.").

[93] *Id.* at 725.

[94] *Id.* The court stated: "For example, a union steward who has no representational responsibilities in a particular case, or one who may be directly involved in illegal acts of misconduct, may not be entitled to any special protection." *Id.*

[95] *See id.*

[96] *See id.* at 725 n.25 (noting that "the Board . . . advanced no reasoning or analysis . . . other than that all pre-arbitration interviews are unlawful"). The administrative law judge, by contrast, did address this issue, and concluded that even if, as a general proposition, "an employee may be compelled to cooperate in his employer's preparation for arbitration," requiring such cooperation from a union steward who acted as the grievant's union representative would effectively deprive the grievant of "the union representation to which he [is] entitled" under *Weingarten*. *Cook Paint*, 246 N.L.R.B. at 654.

[97] *See Cook Paint*, 648 F.2d at 725.

[98] *Id.* at 726.

[99] On remand, the Board was "bound by the court's opinion as the law of the case." Int'l Longshoremen's Ass'n, 323 N.L.R.B. 1029, 1029 (1997). However, the Board has never repudiated its original decision in *Cook Paint*, and that decision arguably "remains binding on the Board's administrative law judges" in other cases. Beverly Health & Rehab. Servs., Inc., 332 N.L.R.B. 347, 356 n.21 (2000), *enforced*, 297 F.3d 468 (6th Cir. 2002). In this regard, administrative law judges are generally "required to follow Board cases where they are inconsistent with those of various circuit courts." Aqua-Chem, Inc., 288 N.L.R.B. 1108, 1120 n.2 (1988).

[100] *See Cook Paint*, 258 N.L.R.B. at 1231 (quoting *Cook Paint*, 648 F.2d at 723).

[101] *See id.* at 1231, 1232.

[102] *Id.* at 1232.

Focusing on the steward's role in the underlying incident,[103] the Board noted that he had engaged in no alleged misconduct,[104] nor was he a witness to the incident that resulted in the termination of the employee he represented,[105] in which case the employer would have been within its rights in questioning him about those matters.[106] His involvement in the matter instead had arisen solely as the result of his status as the employee's union representative.[107]

The Board noted that permitting the employer to interrogate the steward concerning his consultation with the employee he represented would have a chilling effect on all of its employees and their union representatives.[108] The Board explained:

> Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow [an employer] to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. Such actions by [an employer] also inhibit stewards in obtaining needed information from employees, since the steward knows that, upon demand of [the employer], he will be required to reveal the substance of his discussions or face disciplinary action himself.[109]

Although the Board stopped short of characterizing its holding as the recognition of a new evidentiary privilege,[110] that arguably is the practical impact

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[103] *See id.* at 1231 ("[O]ur initial inquiry involves examination of the role played by [the steward] in the . . . incident.").

[104] *See id.* An employer has the right to question its employees about their own alleged misconduct. *See* Blanchard v. Simpson Plainwell Paper Co., 925 F. Supp. 510, 517 (W.D. Mich. 1995); Manville Forest Prods. Corp., 269 N.L.R.B. 390, 391 (1984).

[105] *See Cook Paint*, 258 N.L.R.B. at 1231. The Board has held that, at least prior to the imposition of discipline, an employer may "lawfully compel[ ] . . . employees to cooperate in its investigation of another employee's alleged misconduct." *Manville Forest Prods.*, 269 N.L.R.B. at 391.

[106] *See* Pension Benefit Guar. Corp., 52 F.L.R.A. 1390, 1406 (1997) ("Although union officials are entitled in some circumstances to protection against management-conducted interrogations, a union steward who is directly involved in alleged acts of misconduct is not relieved of the responsibility to cooperate fully in the employer's investigation of such misconduct."); U.S. Dep't of Treasury, Customs Serv., 38 F.L.R.A. 1300, 1306 (1991) ("[T]here will be times when the interrogation of a union steward may be appropriate, as, for example, when a steward acting in that capacity is a witness to employee misconduct or when a steward engages in flagrant misconduct.").

[107] *See Cook Paint*, 258 N.L.R.B. at 1231; *cf.* Ralphs Grocery Co., 101 Lab. Arb. Rep. (BNA) 634, 638 (1993) (Ross, Arb.) (noting the distinction "between actions of stewards on behalf of their union members and actions taken in their capacity as an employee").

[108] *See Cook Paint*, 258 N.L.R.B. at 1232.

[109] *Id.* (footnote omitted).

[110] *See* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 155 (Ct. App. 2003) ("*Cook Paint* limited its ruling to those situations in which the employer sought to interrogate a steward about the pre-arbitration assistance the steward gave to an employee about the upcoming arbitration, concluding such an interrogation would constitute an unfair labor practice under the NLRA."); *cf. In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 336 (E.D.N.Y. 1998) (characterizing *City of Newburgh* and, inferentially, *Cook Paint* as "cases that have [merely] held it to be an unfair labor practice for an employer to seek to question a union representative about statements made by an employee who the representative was assisting in an internal disciplinary proceeding"). In fact, the Board itself emphasized that its ruling did "not mean that all discussions between employees and stewards are confidential." *Cook Paint*, 258 N.L.R.B. at 1232.

of its decision.[111] Moreover, the Board's authority to recognize such privileges,[112] while viewed with skepticism by some courts,[113] has been alluded to in other Board cases.[114] In any event, the analysis in *Cook Paint* provided the principal support for the subsequent decision of the Federal Labor Relations Authority ("FLRA" or the "Authority") in *United States Department of Treasury, Customs Service*,[115] which is the first federal case explicitly recognizing a union representation privilege.[116]

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[111] The Board characterized the employer's interrogation of the union steward as an unfair labor practice violative of section 8(a)(1) of the NLRA. *See Cook Paint*, 258 N.L.R.B. at 1231, 1232. However, "[i]nterrogation of a union steward about an employee being represented by the steward is not [an unfair labor practice] *unless* the union steward is accorded a privilege or immunity." Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1051 (1992) (emphasis added). *But cf. Am. Airlines*, 8 Cal. Rptr. 3d at 155 (declining "to equate an employer's unfair labor practice under the NLRA with the creation of an evidentiary privilege").

[112] As discussed in more detail in Section III.A *infra*, the Federal Rules of Evidence generally charge the federal courts with responsibility for "formulating new privileges by resorting to the principles of common law." *In re* Grand Jury Subpoena dated Nov. 14, 1989, 728 F. Supp. 368, 370 (W.D. Pa. 1990) (citing FED. R. EVID. 501). However, in resolving unfair labor practice claims, the Board acts "in a quasi judicial capacity," NLRB v. S. Materials Co., 345 F.2d 240, 244 (4th Cir. 1965), and "through case-by-case treatment has [long] been developing an administrative common law concerning 'unfair' practices of employers and unions alike." NLRB v. Boeing Co., 412 U.S. 67, 83 (1973). In addition, the Board is statutorily bound, "so far as practicable," to follow the Federal Rules of Evidence, including the provision authorizing the common law development of evidentiary privileges. Patrick Cudahy, Inc., 288 N.L.R.B. 968, 970 n.11 (1988) (quoting 29 U.S.C. § 160(b) (1994)). Thus, like "regular courts," the Board arguably "has authority under the Federal Rules of Evidence to participate in the development of the 'common law' rules of privilege." Inslaw, Inc., 89-3 B.C.A. (CCH) ¶ 22,121, at 111, 252-53 (1989) (construing the authority of a similar board); *cf.* St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n/Mich. Educ. Ass'n, 581 N.W.2d 707, 718 (Mich. 1998) (indicating that the "common law" may be developed by "federal administrative *and* judicial precedent") (emphasis added).

[113] *See, e.g.*, Montebello Rose Co. v. Agric. Labor Relations Bd., 173 Cal. Rptr. 856, 876 (Ct. App. 1981) (asserting that "any attempt by the NLRB to create a new privilege . . . has been rejected") (citing Gen. Eng'g, Inc. v. NLRB, 341 F.2d 367, 374-75 (9th Cir. 1965); *cf.* Dean v. Veterans Admin., 151 F.R.D. 83, 86 (N.D. Ohio 1993) ("Courts have not uniformly disregarded agency regulations restricting disclosure of documents and testimony, but rather have reiterated that the decision whether a particular agency's privilege will apply must rest with the court.").

[114] *See, e.g.*, Granite Constr. Co., 330 N.L.R.B. 205, 211 n.1 (1999) ("If a party seeks to create a new evidentiary privilege in Board proceedings, the party must first convince the Board."); Filene's Basement Store, 299 N.L.R.B. 183, 204 (1990) (referring to the existence of privileges "previously recognized at law, or in Board precedent"); G.W. Galloway Co., 281 N.L.R.B. 262, 262 n.1 (1986) ("The Board has explicitly recognized [a] limited evidentiary privilege which protects the informal investigatorial and trial preparatory processes of regulatory agencies such as the NLRB.") (internal quotation marks and citations omitted).

[115] 38 F.L.R.A. 1300 (1991).

[116] *See* United States v. FLRA, 39 F.3d 361, 368-69 & n.11 (D.C. Cir. 1994) (noting that "[t]he Authority relied on *Cook Paint*" when "the employee-union representative privilege [was] established in . . . *Customs Service*") (internal quotation marks omitted); Brown, *supra* note 19, at 1326 (asserting that "the Authority established the employee-union representative privilege in . . . *Customs Service*").

C. *Customs Service*

The *Customs Service* case arose under the Federal Service Labor-Management Relations Statute ("FSLMRS" or the "Statute"),[117] a federal labor relations act patterned after the NLRA[118] that codifies the collective bargaining rights of most federal employees,[119] and generally governs "the investigation and prosecution of unfair labor practices in the federal sector."[120] As in *Cook Paint* and *City of Newburgh*, the specific issue addressed in *Customs Service* was whether an employer commits an unfair labor practice[121] by questioning an employee's union representative about statements the employee made to the representative during the course of the employer's disciplinary investigation.[122]

The FLRA, which has exclusive jurisdiction over unfair labor practice claims arising under the FSLMRS[123] and thus functions much like the NLRB does in the private sector,[124] characterized the issue as one of first impression

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[117] 5 U.S.C. § 7101-35 (1994). The FSLMRS is also occasionally referred to as the Federal Labor-Management Relations Act, or "FLMRA." *See* FLRA v. U.S. Dep't of Justice, 137 F.3d 683, 685 & n.1 (2d Cir. 1997).

[118] *See* Rizzitelli v. FLRA, 212 F.3d 710, 712 n.1 (2d Cir. 2000) ("Congress intended the FSLMRS to be the public-sector counterpart to the NLRA and structured the respective [provisions] similarly."); Dep't of Justice v. FLRA, 991 F.2d 285, 289 (5th Cir. 1993) ("The FSLMRS is modeled after the National Labor Relations Act . . . .").

[119] *See* U.S. Dep't of Energy v. FLRA, 880 F.2d 1163, 1166 (10th Cir. 1989); *see also* Library of Congress v. FLRA, 699 F.2d 1280, 1283 (D.C. Cir. 1983) ("Congress intended the . . . statutory scheme to serve the twin goals of protecting the right of public employees to organize and bargain collectively, while simultaneously strengthening the authority of federal management to hire and fire employees in the interest of a more effective public service.").

[120] United States v. Prof'l Air Traffic Controllers Org., 504 F. Supp. 432, 434 (N.D. Ill. 1980), *rev'd*, 653 F.2d 1134 (7th Cir. 1981); *see also* Yates v. U.S. Soldiers' & Airmen's Home, 533 F. Supp. 461, 463 (D.D.C. 1982) (noting that the FSLMRS "establishes a code of unfair labor practices" and "empowers the FLRA to take action to prevent unfair labor practices").

[121] The FSLMRS makes it an unfair labor practice for a covered federal employer "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right" under the act. 5 U.S.C. § 7116(a)(1). Among the rights secured by the Act is the right to the presence of a union representative during "any examination of [the] employee . . . in connection with [a disciplinary] investigation." *Id.* § 7114(a)(2)(B).

[122] *See Customs Serv.*, 38 F.L.R.A. at 1319 (stating that the issue in the case was "whether the designated union representative of an employee in an actual or potential disciplinary action can be examined by management concerning statements made by the employee to his, or her, representative").

[123] *See* 5 U.S.C. § 7105(a)(2)(G); Steadman v. Governor, U.S. Soldiers' and Airmen's Home, 918 F.2d 963, 966 (D.C. Cir. 1990); *cf. Yates*, 533 F. Supp. at 465 (concluding that "the FLRA's unfair labor practice jurisdiction . . . preempts that of state and federal courts").

[124] *See* Am. Fed'n of Gov't Employees v. FLRA, 785 F.2d 333, 336 (D.C. Cir. 1986); *Library of Congress*, 699 F.2d at 1283. However, the FSLMRS "is not a carbon copy of the NLRA," and the FLRA's authority is therefore not precisely "the same as that of the NLRB." Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 534 (1989). For example, "[i]n some respects Congress granted the FLRA broader remedial authority than is possessed by the NLRB." Prof'l Air Traffic Controllers Org. v. FLRA, 685 F.2d 547, 584 n.79 (D.C. Cir. 1982).

under the FSLMRS.[125] However, the FLRA recognized that the NLRB decided a similar issue in *Cook Paint*,[126] and therefore looked to that case for guidance in determining whether a union representation privilege should be recognized in FSLMRS cases.[127]

In *Customs Service*, an employee accused of misconduct asked the local union president to represent him in connection with the employer's disciplinary proceedings.[128] When it became apparent that the employee's recollection of the underlying events had been refreshed after his meetings with the union president,[129] the employer instructed its investigator to interview the union president.[130]

At the outset of the union president's interview, he was informed that the focus of the interview would be on what the accused employee told him about the events under investigation.[131] The union president was also advised that he was required to disclose any information he possessed pertaining to that matter, and cautioned that he would be subject to disciplinary action if he refused to answer the investigator's questions.[132]

Both the union president and his own union representative protested the employer's attempt to interview the union president.[133] After the union president ultimately submitted to the interview,[134] the union filed an unfair labor practice charge against the employer under the FSLMRS.[135] The union argued that the existence of an evidentiary privilege "is an integral part of an employee's statutory right to representation and the [union's] statutory right and duty to provide representation,"[136] because those rights would be meaning-

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[125] *See Customs Serv.*, 38 F.L.R.A. at 1308. The potential recognition of the privilege had previously been discussed, but not resolved, in *Dep't of Justice, Immigration & Naturalization Serv.*, 36 F.L.R.A. 41, 65-66 & n.6 (1990).

[126] *See Customs Serv.*, 38 F.L.R.A. at 1303, 1324 (characterizing *Cook Paint* as a "similar case").

[127] *See id.* at 1308-09 & n.1. The FLRA has elsewhere indicated that in the "absence of Authority precedent concerning [an] issue, it is both useful and appropriate to examine [Board] precedent." Fed. Trade Comm'n, 35 F.L.R.A. 576, 584 (1990); *see also Am. Fed'n of Gov't Employees*, 785 F.2d at 336 ("It is . . . appropriate [to] consider the decisions of the NLRB in [FLRA] cases.").

[128] *See Customs Serv.*, 38 F.L.R.A. at 1301, 1316.

[129] At the time of his initial interview, the employee "claimed that he was an alcoholic subject to functional blackouts and was unable to recall anything pertinent" to the matter. *Id.* at 1301. However, after meeting with the union president, the employee "remembered some of the events . . . and described them in some detail." *Id.* at 1316.

[130] *Id.* at 1302, 1317.

[131] *Id.* at 1302, 1318.

[132] *Id.* at 1302.

[133] *Id.* The right to union representation at investigatory interviews applies even where the individuals being interviewed are "themselves union agents and would normally be the representatives of the union if [another] employee were to seek representation." Keystone Steel & Wire Co., 217 N.L.R.B. 995, 997 (1975); *see also* Pac. Gas & Elec. Co., 253 N.L.R.B. 1143, 1151 (1981) (noting that a union steward has "no less of a statutory right to have union representation than any other employee"); Commercial Nat'l Bank, 67 Lab. Arb. Rep. (BNA) 163, 165-66 (1976) (Lubow, Arb.) ("[A] request . . . for representation should be honored even if the [employee] is a Union officer.").

[134] *See Customs Serv.*, 38 F.L.R.A. at 1318-19.

[135] *See id.* at 1314.

[136] *Id.* at 1307.

less unless employees could communicate with their representatives without fear that those communications might subsequently be divulged to the employer.[137] The FLRA's General Counsel subsequently issued a complaint based on the union's charge,[138] asserting that "the union's statutory right to represent an employee facing disciplinary action must include the right to speak confidentially with [the] employee."[139]

The administrative law judge[140] relied upon the Seventh Circuit's analysis in *Memorial Hospital v. Shadur*[141] in deciding whether the claimed privilege should be recognized.[142] While acknowledging the court's indication that evidentiary privileges are disfavored and "not to be granted lightly,"[143] the administrative law found that the court's analysis compelled him to consider "the importance of the relationship or policy sought to be fostered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship."[144]

In considering those issues, the administrative law judge recognized that in many cases the union official representing an employee at an investigatory interview is unlikely to be an attorney.[145] The judge also acknowledged that "there can be no attorney-client privilege unless the party to whom the communication was made is an attorney."[146] The judge nevertheless viewed the union

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[137] *See id.* at 1306-07.

[138] *See id.* at 1300, 1314. The FLRA's General Counsel is authorized to handle unfair labor practice charges in essentially the same manner as the NLRB's General Counsel. *See* Clark v. Mark, 590 F. Supp. 1, 6 & n.9 (N.D.N.Y. 1980). Thus, the FLRA's General Counsel "has the power to investigate and act on charges of unfair labor practices." Nat'l Fed'n of Fed. Employees v. Commandant, Def. Language Inst., 493 F. Supp. 675, 680 (N.D. Cal. 1980). This power includes the exclusive authority to "issue and prosecute unfair labor practice complaints before the Authority." Turgeon v. FLRA, 677 F.2d 937, 938 n.4 (D.C. Cir. 1982).

[139] *Customs Serv.*, 38 F.L.R.A. at 1306. The year before *Customs Service* was decided, the FLRA had expressly adopted the NLRB's view that "in order for the representation to be effective, the employee and the union representative are entitled to consult before [an investigatory] interview." Fed. Aviation Admin., 35 F.L.R.A. 645, 652 (1990) (citing Pac. Tel. & Tel. Co., 262 N.L.R.B. 1048 (1982), *enforced in part and enforcement denied in part*, 711 F.2d 134 (9th Cir. 1983)).

[140] The FSLMRS authorizes the FLRA to delegate to an administrative law judge its authority to determine whether an employer has committed an unfair labor practice. *See* 5 U.S.C. § 7105(e)(2) (1994); Am. Fed'n of Gov't Employees v. FLRA, 944 F.2d 922, 924 n.12 (D.C. Cir. 1991).

[141] 664 F.2d 1058 (7th Cir. 1981).

[142] *See Customs Serv.*, 38 F.L.R.A. at 1320. The court in *Memorial Hospital* noted that in federal court litigation, "Rule 501 of the Federal Rules of Evidence provides the framework for determining whether material . . . is privileged," and discussed "several principles to be used in making the determination required under Rule 501." *Id.* at 1061. The application of Rule 501 is discussed in more detail in Section III.A *infra*.

[143] *Customs Serv.*, 38 F.L.R.A. at 1319.

[144] *Id.* at 1320 (quoting *Mem'l Hosp.*, 664 F.2d at 1061-62).

[145] S*ee id.* at 1323 (discussing the "advice and . . . defense" typically provided by an employee's union representative "[e]ven though the representative is not an attorney"). *See generally* Thomas v. Bakery, Confectionary & Tobacco Workers Union, 826 F.2d 755, 763 n.3 (8th Cir. 1987) ("A union representative need not be a lawyer and should not be held to a lawyer's standard of care.").

[146] *Customs Serv.*, 38 F.L.R.A. at 1319 (citing Baird v. Koerner, 279 F.2d 623, 627 (9th Cir. 1960)); *see also In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 340

representative's role in employer disciplinary investigations to be analogous to that of an attorney.[147]

In particular, the judge found that, as in the attorney-client relationship,[148] an employee must feel "free to make full and frank disclosures to his, or her, representative in order that the employee have adequate advice and a proper defense."[149] He therefore concluded that confidential communications between employees and their union representatives, like those between clients and their attorneys,[150] should be protected by an evidentiary privilege.[151]

The FLRA affirmed the administrative law judge's ruling and, with slight modifications, adopted his decision.[152] In particular, the FLRA agreed with the judge's determination that an employer violates the FSLMRS by requiring a union official to reveal, under threat of discipline, the substance of statements made to him by an employee in the course of his representation of the employee.[153] In language strikingly similar to that of the Board in *Cook*

(E.D.N.Y. 1998) ("[T]he attorney-client privilege does not extend to shield an [employee's] communications with union representatives."); Rawlings v. Police Dep't of Jersey City, N.J., 627 A.2d 602, 609 (N.J. 1993) (holding that an employee's conversation with his union representative was not privileged because "the union representative was not a lawyer").

147 The judge indicated that "[w]hat this case involves, and all that it involves" is a determination of "whether the relationship between a union representative and an employee is analogous to the attorney-client privilege [sic]." *Customs Serv.*, 38 F.L.R.A. at 1319. The judge then effectively answered the query in the affirmative, relying in part upon the employee's explicit statutory right to be represented in employer disciplinary proceedings not only by a union representative, but alternatively by "an attorney or other representative, other than the [union] representative." *Id.* at 1323 (quoting 5 U.S.C. § 7114(a)(5) (2000); *see also* President v. Ill. Bell Tel. Co., 865 F. Supp. 1279, 1290 (N.D. Ill. 1994) ("In advancing grievances on behalf of a member, 'the union functions in a manner not wholly unlike that of an attorney representing a client in court[.]'") (quoting Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 919 (7th Cir. 1989)).

148 *See* United States v. Zolp, 659 F. Supp. 692, 715 (D. N.J. 1987) ("Communications between attorneys and their clients are protected from disclosure to foster the policy of promoting full and frank discussion between clients and their attorneys, thereby permitting litigants and their counsel to fully evaluate the merits of a particular case . . . ."); Mead Data Cent., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977) (discussing "the policy objective of the attorney-client privilege to encourage frank and full disclosure of the realities of a client's situation to his attorney").

149 *Customs Serv.*, 38 F.L.R.A. at 1323.

150 Courts considering the potential recognition of new evidentiary privileges frequently focus on whether the relationships at issue are "sufficiently analogous to the conventional attorney-client model to warrant the assertion of . . . privileges." *In re* LTV Sec. Litig., 89 F.R.D. 595, 614 (N.D. Tex. 1981).

151 *See Customs Serv.*, 38 F.L.R.A. at 1313-14 ("I conclude that statements by an employee to his, or her, designated union representative are privileged . . . ."); *cf.* Loomis Armored Inc., 94 Lab. Arb. Rep. (BNA) 1097, 1101 (1990) (Gentile, Arb.) ("Arbitrators have treated communications between a grievant and the union official advising the grievant with respect to a grievance in a manner similar to the attorney-client privilege.") (quoting GRENIG & ESTES, *supra* note 18, at 89).

152 *See Customs Serv.*, 38 F.L.R.A. at 1300-01.

153 *See id.* at 1308; *see also* Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1029 n.5 (1992) (noting that "the Authority [in *Customs Service*] issued [a] decision agreeing with the Judge that the [employer] in that case had committed the unfair labor practice alleged").

Paint,[154] the FLRA explained that the recognition of an evidentiary privilege shielding such communications from discovery by the employer is necessary to protect "basic employee rights under the Statute, the violation of which tends to have a chilling effect throughout the [bargaining] unit on both employees seeking union assistance and employees who serve in a representational capacity."[155]

The decision in *Customs Service* represents perhaps the broadest interpretation of the union representation privilege by any tribunal to date.[156] Not only did the FLRA characterize its holding as the recognition of an evidentiary privilege,[157] but the administrative law judge whose decision it adopted based his recognition of the privilege on a perceived analogy to the attorney-client relationship that both the NLRB[158] and the courts (including the court in *City of Newburgh v. Newman*)[159] have generally found unconvincing.[160]

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[154] *See Cook Paint*, 258 N.L.R.B. at 1232 ("[An employer's] probe into [such] protected activities . . . cast[s] a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.").

[155] *Customs Serv.*, 38 F.L.R.A. at 1310; *see also id.* at 1306 ("[T]he chilling effect that results from an interrogation of a union steward will interfere with both the employee who seeks union assistance and the employees who represent the union . . . .").

[156] An employee's right to union representation at an investigatory interview is not explicit in the NLRA, but instead was "quite belatedly" found by the NLRB to be *implicit* in the language of section 7 of the Act. *See Customs Serv.*, 38 F.L.R.A. at 1321 n.6 (citing J. Weingarten, Inc., 202 N.L.R.B. 446, *enforcement denied*, 485 F.2d 1135 (5th Cir. 1973), *rev'd*, 420 U.S. 251 (1975)). Because Congress specifically codified the right in the FSLMRS, *see* 5 U.S.C. § 7114(a)(2)(A)&(B), the parameters of the right – including the extent to which it encompasses an evidentiary privilege – may "evolve differently" under the two acts. Headquarters Nat'l Aeronautics & Space Admin., Wash., D.C., 50 F.L.R.A. 601, 608 n.5 (1995), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999).

[157] In particular, the FLRA "adopt[ed] the Judge's . . . conclusion[ ]" that "there is a privilege that protects communications between an employee and a union representative." *Customs Serv.*, 38 F.L.R.A. at 1301, 1304. Interestingly, even the employer had conceded that a "communication between a union representative and an employee is entitled to some level of privilege." *Id.* at 1304.

[158] *See, e.g.*, United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., 242 N.L.R.B. 1203, 1203 n.3 (1979) ("A union's duty to an employee is not analogous to that of an attorney to a client."); Serv. Employees Int'l Union, 229 N.L.R.B. 692, 692 n.2 (1977) ("[W]e do not adopt any implication that, in the informal, investigative, or bargaining stage of a grievance, a collective-bargaining representative's duty to an employee it represents is analogous to that owed by an attorney to a client."); Int'l Ladies' Garment Workers' Union, 122 N.L.R.B. 1390, 1401 (1959) ("[T]he rule of secrecy governing the conduct of attorneys has special significance for the legal profession . . . and is not a rule of general application to the relationship between a labor organization and its agent.").

[159] 421 N.Y.S.2d 673, 676 (App. Div. 1979) (describing as "without merit" the contention that the union representation privilege is "on a par with that of attorney-client").

[160] *See, e.g., In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 339 (E.D.N.Y. 1998) ("Membership in a union cannot be described as 'an institutionalized substitute' for the attorney-client relationship.") (quoting Kandel v. Tocher, 256 N.Y.S.2d 898, 902 (App. Div. 1965)). The Supreme Court has identified some of the reasons for this skepticism:

> The . . . analogy is inadequate in several respects . . . . Unlike employees represented by a union, a client controls the significant decisions concerning his representation [by an attorney]. Moreover, a client can fire his attorney if he is dissatisfied with his attorney's performance. This

Despite the broad potential ramifications of this analogy,[161] the FLRA's recognition of a union representation privilege (and, prior to that, the implicit recognition of such a privilege in *City of Newburgh* and *Cook Paint & Varnish*)[162] is persuasive,[163] at least as a matter of labor-management relations law.[164] One of the principal purposes of the right to union representation in an investigatory interview is "to eliminate the inequality of bargaining power between employees and employers"[165] by permitting the union representative "to provide assistance and counsel to the employee being interrogated."[166]

While the employee's apparent lack of candor at the outset of the employer's investigation[167] is not to be commended,[168] the facts in *Customs Service* illustrate one of the potential benefits of giving union representatives this advisory role in employer investigations.[169] In particular, an unrepresented

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option is not available to an individual employee who is unhappy with a union's representation, unless a majority of the members of the bargaining unit share his dissatisfaction.

Teamsters v. Terry, 494 U.S. 558, 568-69 (1990).

[161] The attorney-client privilege is "the oldest and most revered of the legally recognized privileges protecting confidential communications." United States v. Bauer, 132 F.3d 504, 512 (9th Cir. 1997). To the extent the union representation privilege is deemed analogous to the attorney-client privilege, the union representation privilege may be "virtually sacrosanct." McClary v. Walsh, 202 F.R.D. 286, 294 (N.D. Ala. 2000).

[162] In *Customs Service*, the FLRA specifically asserted that "the principle applied by the NLRB [in *Cook Paint*] is no different" than the evidentiary privilege it was recognizing. *Customs Serv.*, 38 F.L.R.A. at 1303.

[163] *See* United States Dep't of Justice v. FLRA, 39 F.3d 361, 369 & n.11 (D.C. Cir. 1994) ("We do not question [the] reasoning [of *Customs Service* and *Cook Paint*] insofar as it applies to management.").

[164] Labor-management relations has been described as a "unique and pervasively regulated area," Donovan v. Master Printers Ass'n, 532 F. Supp. 1140, 1148 (N.D. Ill. 1981), with "rules which are not necessarily applicable" in other areas of the law. Bd. of Educ. of County of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439, 445-56 (W. Va. 1977).

[165] NLRB v. Southwestern Bell Tel. Co., 730 F.2d 166, 172 (5th Cir. 1984) (internal punctuation and citation omitted); *see also* Morais v. Cent. Beverage Union Employees' Supplemental Retirement Plan, 167 F.3d 709, 714 (1st Cir. 1999) (observing that a union representative's "primary function is to equalize the mismatch between the employer and an individual employee").

[166] N.J. Bell Tel. Co., 308 N.L.R.B. 277, 279 (1992) (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262-63 (1975)); *see also* Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 920 (7th Cir. 1989) (observing that "the union official serves as advocate for and counselor to the grievant").

[167] *See Customs Serv.*, 38 F.L.R.A. at 1317 (referring to the employee's "apparent" recovery of memory); *cf.* Monroe Mfg., Inc., 323 N.L.R.B. 24, 35 (1997) (describing another individual who "feigned lack of memory . . . in order to avoid embarrassing questions"); *N.J. Bell Tel. Co.*, 308 N.L.R.B. at 300 (discussing an employee who "was being uncooperative at the interview, by failing to answer questions that he should have been able to respond to").

[168] *See generally* North Elec. Co., 176 N.L.R.B. 1, 1 (1969) (noting that "the Board does not condone [an employee's] lack of candor . . . with the [employer]"); St. Luke's Hosp., 93 Lab. Arb. Rep. (BNA) 1241, 1245 (1989) (Johnson, Arb.) ("The [employee] has a . . . duty to diligently present all pertinent information which may affect a disciplinary decision.").

[169] *See generally* Climax Molybdenum Co., 227 N.L.R.B. 1189, 1198 (1977) ("[O]ne of the objectives of *Weingarten* is to promote good-faith discussions at the investigatory level so that problems may be solved at this level, thus preventing needless hard feelings at a later stage."), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978).

employee accused of misconduct, fearful of the employer's intentions,[170] may decide to "'dummy up' in the face of . . . attempts by his employer to question him"[171] as appears to have occurred in *Customs Service.*[172] This tendency to "stonewall" the employer's investigation[173] may be less prevalent if a union representative is present during the employer's interrogation of the employee.[174] The Supreme Court itself alluded to this benefit when it recognized the right to such representation in *Weingarten*:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.[175]

Significantly, a union representative cannot function properly in this role without "an opportunity to consult beforehand with the employee to learn his

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[170] *See generally* Montgomery Ward & Co., 269 N.L.R.B. 904, 905 (1984) ("[T]he fear and confusion an employee subjected to an investigatory interview may experience is relevant in the *Weingarten* context . . . . Simply stated, employees are accorded representation, in large part, because they are frightened and confused.").

[171] System 99, 289 N.L.R.B. 723, 727 (1988); *see also* Gonzales Packing Co., 304 N.L.R.B. 805, 810 n.16 (1991) (describing an employee who "had decided . . . to dummy-up; that is, to pretend to an almost total lack of recollection as the best means of ensuring that he could not be blamed"); *cf.* Serv. Tech. Corp., 196 N.L.R.B. 845, 847 n.11 (1972) (describing employees who "would in all probability have refused to talk even if afforded union representation").

[172] The NLRB has indicated that an individual who asserts that he is "unable to recall" a particular incident, and then subsequently "reveal[s] that he [does] recall," initially may have been "withholding information through the stock answer, 'I don't remember.'" Grand Cent. Aircraft Co., 103 N.L.R.B. 1114, 1171 n.61 (1953); *cf.* ITT Continental Baking Co., 246 N.L.R.B. 1047, 1051 (1979) (finding that an employee's "belated recollection . . . was a contrivance").

[173] *See, e.g.*, Sea-Land Serv., 280 N.L.R.B. 720, 729 (1986) (describing an employee's "attempt to stonewall [the employer's] investigation to cover up his own wrongdoing"); *cf.* Pac. Tel & Tel. Co., 262 N.L.R.B. 1048, 1052 (1982) (Hunter, dissenting) (asserting that "an employer's wish to carry out his investigation without being unduly impeded is not . . . prejudicial to an honest employee"), *enforced in part and enforcement denied in part*, 711 F.2d 134 (9th Cir. 1983).

[174] *See, e.g.*, N.J. Bell Tel. Co., 308 N.L.R.B. 277, 293 (1992) (describing a union representative who advised employees that if they were interviewed in connection with an employer investigation, they should "request union representation, [and] cooperate in the investigation"). *But see* Manville Prods. Corp., 269 N.L.R.B. 390, 391 (1984) (referring to an employee who "in his role as union steward, advised others not to answer"); *Climax Molybdenum Co.*, 227 N.L.R.B. at 1193 (Penello and Walther, dissenting) (predicting that some union representatives will use the opportunity for a pre-interview consultation with the employee to "bring[ ] pressures to bear on [the] employee to withhold the facts").

[175] N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 262-63 (1975); *see also* U.S. Postal Serv., 241 N.L.R.B. 141, 151-52 (1979) ("[A]lthough during a *Weingarten* interview the union representative is present to assist the employee . . . the union representative can properly elicit facts favorable to the employer as well as to the employee and is not expected to render the interview an adversary proceeding."); Customs Serv., 5 F.L.R.A. 297, 306 (1981) ("[T]he employee may be too fearful or inarticulate to relate an incident accurately[.] . . . [T]he union representative could assist the employer in eliciting the facts and get 'to the bottom of the incident.'").

version of the events and to gain a familiarity with the facts."[176] In this regard, an employee undoubtedly would be more inclined "to discuss the incident fully and accurately with his union representative *without the presence of an [employer representative]* contemplating the possibility of disciplinary action."[177]

This recognition of an employee's need for privacy when consulting with a union representative[178] would be meaningless if the employer could subsequently compel the union representative (or, for that matter, the employee) to disclose their confidential communications.[179] This obviously suggests the need for some form of evidentiary privilege applicable to such communications.[180] The critical unresolved question is the extent to which such a privilege should apply in forums other than those (like the PERB, the NLRB, and the FLRA) devoted exclusively to the resolution of labor-management disputes.[181]

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[176] *Climax Molybdenum Co.*, 227 N.L.R.B. at 1190; *see also* U.S. Postal Serv. v. NLRB, 969 F.2d 1064, 1071 (D.C. Cir. 1992) ("Absent . . . familiarity [with the matter under investigation], the representative will not be well-positioned to aid in a full and cogent presentation of the employee's view of the matter, bringing to light justifications, explanations, extenuating circumstances, and other mitigating factors.").

[177] *Climax Molybdenum Co.*, 227 N.L.R.B. at 1190 (emphasis added); *cf.* Ortonix, Inc., 173 N.L.R.B. 385, 390 n.25 (1968) (asserting that an employee, "if she did engage in . . . activity[ ] contrary to [a] company rule, would not be likely to disclose that fact to higher management").

[178] *See* System 99, 289 N.L.R.B. 723, 727-28 (1988) (indicating that an employee's "right to consult with an employee representative before undergoing an [investigatory] interview" includes the right to consult "in a candid, private setting," because "a private, candid conference with an employee representative might give him a more reliable basis for deciding how to answer [the employer's] question[s]"); Bureau of Prisons, 52 F.L.R.A. 421, 440-41 (1996) (Wasserman, dissenting) ("[A] union representative must be allowed to take an active role in assisting an employee's defense . . . . [A] representative cannot adequately perform [that] 'active role' . . . if he or she is not permitted sufficient privacy to confer with an employee when the employee most needs assistance.").

[179] *See generally* Customs Serv., 38 F.L.R.A. 1300, 1309 n.1 (1991) ("[T]he rights of employees to be represented by their labor organizations in disciplinary proceedings would be seriously weakened if the confidentiality of their conversations with union representatives could be easily violated.").

[180] *See* HILL & SINACROPI, *supra* note 19, at 164 (asserting that an employee's confidential communications with a union representative "should be privileged" because the employee's right to union representation would otherwise be "worthless") (quoting Hughes Aircraft Co., 86 Lab. Arb. Rep. (BNA) 1112, 1118 (1986) (Richman, Arb.)).

[181] *Compare* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 155 (Ct. App. 2003) (questioning "why [the Board's] narrow holding [in *Cook Paint*] should be adopted to create a new evidentiary privilege in civil actions") *with* Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1029 (1992) (asserting that, "*as a general principle*, statements by an employee to his or her designated union representative are privileged and information acquired by a union official while engaged in protected [representational] activity should be protected from disclosure") (emphasis added).

III. The Potential Recognition of a Union Representation Privilege Under Rule 501 and the Wigmore Test

A. The Courts' Authority to Recognize New Evidentiary Privileges Under Rule 501

Neither the NLRB nor the FLRA (nor, for that matter, the New York state court that decided *City of Newburgh*)[182] is bound by the Federal Rules of Evidence.[183] However, both state courts[184] and federal boards and administrative agencies frequently look to the federal rules for guidance in analyzing evidentiary issues that come before them.[185] Rule 501 of the rules addresses the subject of evidentiary privileges.[186] It states, in pertinent part, as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, 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.[187]

This language obviously provides no specific guidance with respect to the possible existence of a union representation privilege.[188] However, in *University of Pennsylvania v. EEOC*,[189] the United States Supreme Court concluded that the rule reflects "a congressional desire 'not to freeze the law of privi-

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[182] *See* New York v. Santana, 600 N.E.2d 201, 205 (N.Y. 1992) (noting that "the Federal Rules of Evidence . . . [are] not binding" in New York state court proceedings); New York v. Philips, 692 N.Y.S.2d 915, 917 (Sup. Ct. 1999) ("[T]he Federal Rules of Evidence do not bind this Court . . . .").

[183] *See* Alvin J. Bart & Co., 236 N.L.R.B. 242, 242 (1978) ("[T]he Board is not bound to follow the strict rules of evidence applicable in the Federal courts."); U.S. Dep't of Veterans Affairs, 57 F.L.R.A. 681, 682 (2002) (noting that "the Federal Rules of Evidence do not govern Authority proceedings"). *See generally* Wharton v. Calderon, 127 F.3d 1201, 1205 (9th Cir. 1997) ("[T]he Federal Rules of Evidence apply only to courts and proceedings conducted by judges.").

[184] *See* Minot Sand & Gravel Co., 231 N.W.2d 716, 727-28 (N.D. 1975) ("Even though [the federal] rules are not mandatory upon State courts, they nevertheless constitute a reliable guide for State courts, in the absence of statutory provisions on the subject matter or rules of evidence declaring otherwise."); *cf.* Latine v. Mann, 830 F. Supp. 774, 779 n.5 (S.D.N.Y. 1993) (asserting that a federal evidence rule was "not applicable at [a] state court trial, . . . but [was nevertheless] useful, as are other parts of those rules, for definitional purposes"), *vacated and remanded*, 725 F.2d 1162 (2d Cir. 1994).

[185] *See, e.g.*, Guirguess v. U.S. Postal Serv., 32 Fed. Appx. 555, 563 (Fed. Cir. 2002) ("Although the Federal Rules of Evidence do not govern Board proceedings, they provide helpful guidance for proper [administrative] hearing practices."). For an academic discussion of this issue, see Richard J. Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1 (1987).

[186] *See In re* Grand Jury Investigation, 918 F.2d 374, 378 (3d Cir. 1990); Walker v. Lewis, 127 F.R.D. 466, 468 (W.D.N.C. 1989).

[187] Fed. R. Evid. 501.

[188] *See generally* Montone v. Radio Shack, 698 F. Supp. 92, 94 (E.D. Pa. 1988) ("[W]hen [Congress] . . . adopted Rule 501, it offered little guidance by way of statutory language or legislative history as to what constitutes a 'privilege' for the purposes of the rule."); Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. School Dist., 514 N.E.2d 465, 470 (Ill. Ct. App. 1987) (noting that Rule 501 "does not attempt to define or even list the various common law privileges"), *aff'd*, 547 N.E.2d 182 (Ill. 1989).

[189] 493 U.S. 182 (1990).

lege'" as it existed at the time the rule was enacted,[190] and thus permits privilege law to evolve and develop incrementally.[191] Thus, in the absence of a federal constitutional or statutory provision[192] or Supreme Court rule[193] to the contrary (which does not exist in this context),[194] Rule 501 authorizes the federal courts, and Congress,[195] to recognize new evidentiary privileges on a case-by-case basis.[196]

As a matter of policy, it might be preferable for Congress (or the state legislatures)[197] to take the initiative in recognizing a union representation privi-

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[190] *Id.* at 189 (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

[191] *See* Smith v. Smith, 154 F.R.D. 661, 673 (N.D. Tex. 1994) (citing *Trammel*, 445 U.S. at 47). *See generally* United States *ex rel.* Falsetti v. S. Bell Tel. & Tel. Co., 915 F. Supp. 308, 310 (N.D. Fla. 1996) ("*University of Pennsylvania v. E.E.O.C.* is especially important for it sets forth the rules for determining generally whether a new privilege exists under Rule 501.").

[192] *See* Roberts v. Hunt, 187 F.R.D. 71, 75 (W.D.N.Y. 1999) ("Fed. R. Evid. 501 states that *other than as established by the Constitution or Congress* privileges in federal court proceedings are determined under the principles of the common law and by reason and experience.") (emphasis added); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998) ("The federal common law is inapplicable when Congress enacts a law governing a particular privilege.") (citing FED. R. EVID. 501), *aff'd*, 216 F.3d 1082 (9th Cir. 2000).

[193] *See Montone*, 698 F. Supp. at 95 ("Congress, in adopting Rule 501, . . . did not at the same time express an intention to . . . mute the effect of other federal evidentiary rules."); *In re* Grand Jury Proceedings (Sealed), 607 F. Supp. 1002, 1003 (S.D.N.Y. 1985) (noting that Rule 501 leaves the development of privilege law to the courts "in the absence of federal statute or rule").

[194] *See generally* Baird v. Koerner, 279 F.2d 623, 628 (9th Cir. 1960) ("We have been cited to no federal statute or rule purporting to set up federal rules governing privilege in civil cases."); Kelly v. San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987) ("[T]here has been no codification of federal privilege law.").

[195] Congress clearly has the authority to recognize new evidentiary privileges. *See* D'Aurizio v. Palisades Park, 899 F. Supp. 1352, 1359 (D.N.J. 1995) ("Rule 501 contemplates that privileges may derive from . . . Act of Congress . . . ."); *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1005 n.8 (D.N.J.) ("[T]here is no doubt that Congress could . . . fashion privileges which may give way only in certain specified situations . . . ."), *aff'd*, 879 F.2d 861 (3d Cir. 1989). However, it has not done so in the present context. *See, e.g.*, Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 154 (Ct. App. 2003) (finding nothing "that expressly or implicitly indicates Congress intended to create a communications privilege between union representatives and employees").

[196] *See In re* Grand Jury Investigation, 918 F.2d 374, 383 (3d Cir. 1990) ("Rule 501 grants the federal courts power to create new privileges . . . as the need arises . . . ."); *Roberts*, 187 F.R.D. at 75 ("The recognition of new privileges in federal court evolves on a case-by-case basis."); Farley v. Farley, 952 F. Supp. 1232, 1237 (M.D. Tenn. 1997) (observing that "flexibility to develop rules of privilege on a case-by-case basis is the hallmark of Rule 501") (citing *Trammel*, 445 U.S. at 47).

[197] Prior to the adoption of Rule 501, "neither Congress nor the federal courts played a significant role in the development of the American law of testimonial privileges; state legislators and local courts largely determined what privileges would be recognized." *In re* Agosto, 553 F. Supp. 1298, 1322 (D. Nev. 1983) (quoting Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 614 (1976)). In addition, although the rule's provision for the common law development of federal privileges now makes it clear that "state privilege law is not controlling in federal question cases," Freed v. Grand Court Lifestyles, Inc., 100 F. Supp. 2d 610, 612 (S.D. Ohio 1998), the Supreme Court has indicated that federal courts

lege.[198] Courts expressing reluctance to recognize new evidentiary privileges have often asserted that the legislative branch of government is better-equipped to weigh the competing social policies at issue in considering whether a privilege should be recognized.[199] As one federal appellate court has stated:

> The legislature, not the judiciary, is institutionally better equipped to perform the balancing of the competing policy issues required in deciding whether the recognition of a . . . privilege is in the best interests of society. Congress, through its legislative mechanisms, is also better suited for the task of defining the scope of any prospective privilege. Congress is able to consider, for example, society's moral, sociological, economic, religious and other values without being confined to the evidentiary record in any particular case. Thus, in determining whether a . . . privilege should obtain, Congress can take into consideration a host of facts and factors which the judiciary may be unable to consider.[200]

Nevertheless, balancing the competing policy interests underlying the potential adoption of an evidentiary privilege is *not* exclusively a legislative function.[201] The recognition of such a privilege instead "represents a determination – *either judicial or legislative* – that fostering certain relationships outweighs the potential benefit to the judicial system of compelled disclosure."[202] Indeed, because "Rule 501 was adopted precisely because Congress wished to

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should "treat a consistent body of policy determinations by state legislatures as reflecting both 'reason' and 'experience'" when considering the possible recognition of a federal common law privilege. Jaffee v. Redmond, 518 U.S. 1, 13 (1996).

[198] *See Am. Airlines*, 8 Cal. Rptr. 3d at 153 ("Although there may be various . . . policy reasons why a union representative should *not* be compelled during civil litigation to disclose factual information obtained from other union members he or she represents, that policy determination (and the parameters of any concomitant evidentiary privilege) is the province of the Legislature, not [the] court[s]."); *cf.* United States *ex rel.* Riley v. Franzen, 653 F.2d 1153, 1160 (7th Cir. 1981) ("[C]ourts have been reluctant to create new privileges, preferring to leave such matters to the legislature despite any policy reasons supporting recognition of a particular privilege.").

[199] *See, e.g., Am. Airlines,* 8 Cal. Rptr. 3d at 155 ("Whether an allegedly unfair labor practice should rise to the level of creating an evidentiary privilege, and under what circumstances, are questions more appropriately posed to and answered by the legislative branch."); *see also In re* Grand Jury, 103 F.3d 1140, 1154 (3d Cir. 1997) ("[C]ourts . . . should be circumspect about creating new privileges based upon perceived public policy considerations. This is particularly so where there exist policy concerns which the legislature is better equipped to evaluate."); Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985) ("The delicate balancing of the interests implicated [by the potential recognition of an evidentiary privilege] is more properly a concern of the legislature of [a] state.").

[200] *In re Grand Jury*, 103 F.3d at 1154-55 (footnote omitted) (considering the potential recognition of a parent-child privilege).

[201] *See In re* Grand Jury Subpoena dated Nov. 14, 1989, 728 F. Supp. 368, 370 (W.D. Pa. 1990) ("In developing the federal common law of privilege, federal courts attempt to balance the public's need for the full development of relevant facts in federal litigation against the need for confidentiality in order to achieve the objectives underlying the privilege claimed."); *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1005 (D.N.J.) ("[T]hough this balancing of interests seems incongruously legislative in nature, we take some solace in . . . the fact that our task is by no means alien to us."), *aff'd*, 879 F.2d 861 (3d Cir. 1989).

[202] Diehl v. Texas, 698 S.W.2d 712, 718 (Tex. App. 1985) (Levy, J., dissenting) (emphasis added); *see also* Illinois v. Foggy, 521 N.E.2d 86, 93 (Ill. 1988) (Simon, J., dissenting) ("In determining which interests and relationships should be protected by privilege, and to what extent they should be protected, *courts and legislatures* must balance the [public's] interest

leave privilege questions to the courts rather than attempt to codify them,"[203] the recognition of new evidentiary privileges has to a large extent now become a "uniquely *judicial* function[ ]."[204]

B. The Wigmore Test for Recognizing New Evidentiary Privileges

1. Background

Courts applying Rule 501 frequently rely upon what has come to be known as the "Wigmore test"[205] in determining whether to recognize a new common law privilege.[206] As one federal court stated:

> [One] standard to be applied in determining whether a privilege should be recognized is that propounded by Wigmore. The Wigmore test provide[s]:
>
> 1) The communication must originate in a confidence that it will not be disclosed.
> 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> 3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
> 4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[207]

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in the privilege against the constraints the privilege places on the fair and effective administration of justice.") (emphasis added).

[203] United States v. Weber Aircraft Corp., 465 U.S. 792, 803 (1984); *see also In re* Sealed Case, 676 F.2d 793, 807 n.45 (D.C. Cir. 1982) ("Congress has preferred to leave to the courts questions of which privileges to recognize and when to apply them."); *Grand Jury Subpoena*, 728 F. Supp. at 370 (noting that Rule 501 "grants to the federal judiciary the responsibility of developing recognized privileges and formulating new privileges").

[204] Kuprion v. Fitzgerald, 888 S.W.2d 679, 688 n.2 (Ky. 1994) (Miller, J., concurring) (emphasis added); *see also* Socialist Workers Party v. Grubisic, 619 F.2d 641, 643 (7th Cir. 1980) ("[F]ederal common law is the source of any privilege."); United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977) ("Rule 501[ ] places on the federal courts the responsibility of examining the policies behind the federal common law privileges so as to alter or amend them when reason and experience demand."); Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 771 & n.2 (1999) ("The federal system relies almost exclusively on the judicial recognition of new privileges.") (citing FED. R. EVID. 501).

[205] *See* Hanson v. Allen Mem'l Hosp., 141 F.R.D. 115, 122 n.13 (S.D. Iowa 1992). This characterization stems from the fact that the test was originally formulated by Professor Wigmore in his highly regarded treatise on the law of evidence. *See* Douglas v. Windham Superior Court, 597 A.2d 774, 777 (Vt. 1991) (citing 8 WIGMORE, *supra* note 6 § 2285, at 527). Although other aspects of Professor Wigmore's treatise have become somewhat outdated, his view of evidentiary privileges "continues to exercise considerable sway, more than any other part of the dean's treatise." Imwinkelreid, *supra* note 21, at 316.

[206] *See, e.g., In re* Grand Jury Investigation, 918 F.2d 374, 383-84 (3d Cir. 1990); *In re* Doe, 711 F.2d 1187, 1193 (2d Cir. 1983); *see also* Thomas J. Molony, *Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant-Client Privilege in the Aftermath of* Jaffee v. Redmond, 55 WASH. & LEE L. REV. 247, 286 (1998) (noting that the judiciary's approach to recognizing new privileges under Rule 501 "appears to be evolving toward that used by Wigmore").

[207] *In re* Agosto, 553 F. Supp. 1298, 1308 (D. Nev. 1983) (emphasis omitted) (citing 8 WIGMORE, *supra* note 6 § 2285, at 527).

In applying this test, federal courts have generally been hesitant to recognize new evidentiary privileges,[208] primarily because privileges exclude relevant evidence and impede the search for truth.[209] Nevertheless, courts have been willing to recognize new privileges when doing so would promote "sufficiently important interests to outweigh the need for probative evidence."[210] An analysis of the Wigmore test suggests that the privacy interests underlying the relationship between employees and their union representatives rise to this level,[211] and that the recognition of a union representation privilege would therefore be appropriate.[212]

2. Walker v. Huie

The first federal court decision to apply the Wigmore test in considering the possible recognition of a union representation privilege was *Walker v. Huie*.[213] In that case, the defendant was a police officer accused of violating the plaintiffs' rights during an arrest.[214] The plaintiffs sought to depose the union official who represented the officer in internal police department disciplinary proceedings.[215] Both the officer and the union official objected to the deposition, asserting that any communications between them were privileged.[216]

The court began its analysis by noting that "Professor Wigmore has described four criteria which are useful in analyzing and determining whether [a] court should create a new evidentiary privilege."[217] Under the facts presented,[218] the court concluded that the first two criteria of the test were

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[208] The "criteria of the Wigmore test" have been described as "demanding." Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 168 (E.D.N.Y. 1988); *cf.* Hercules, Inc. v. Martin Marietta Corp., 143 F.R.D. 266, 270 n.7 (D. Utah 1992) ("Professor Wigmore recognized that privileges frustrate truth and are an exception to the liability of every person to give evidence.").

[209] *See generally* Branzburg v. Hayes, 408 U.S. 665, 690 n.29 (1972) ("The creation of new testimonial privileges has been met with disfavor by commentators since such privileges obstruct the search for truth."); Dixon v. Rutgers, State Univ. of N.J., 521 A.2d 1315, 1317 (N.J. Super. Ct. App. Div. 1987) ("As privileges do not further the ascertainment of truth but rather permit the concealment of relevant, reliable information, courts have been reluctant to expand or create new privileges in the absence of compelling reasons.").

[210] Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)); *see also In re* Dinnan, 661 F.2d 426, 429 (5th Cir. 1981) ("Privileges are based upon the idea that certain societal values are more important than the search for truth").

[211] *Compare* Knickerbocker Plastic Co., 96 N.L.R.B. 586, 586 (1951) (discussing "employees' right to privacy in their union activities") *with In re* Agosto, 553 F. Supp. 1298, 1323 (D. Nev. 1983) (noting that "interpersonal testimonial privileges serve as important protectors of the right of privacy") (quoting Krattenmaker, *supra* note 197, at 616).

[212] *See* Gruwell Anderson, *supra* note 17, at 522 ("Professor Wigmore's privilege definition provides [a] foothold for advancing the labor official privilege outside the administrative realm and into common law privilege status.").

[213] 142 F.R.D. 497 (D. Utah 1992).

[214] *See id.* at 498-99.

[215] *See id.* at 499.

[216] *See id.*

[217] *Id.* at 500.

[218] Application of the Wigmore test is often highly fact-specific. *See, e.g.*, Zaustinsky v. Univ. of Cal., 96 F.R.D. 622, 625 (N.D. Cal. 1983) (stating that the impact of Wigmore's

satisfied in the union representation context.[219] However, the court also concluded that neither the third nor the fourth element of the test was satisfied.[220] Because satisfaction of all four prongs of the Wigmore test is ordinarily a prerequisite to the recognition of a new evidentiary privilege,[221] the court declined to create a new union representation privilege.[222]

The *Walker* court's analysis of the Wigmore test was relatively cursory,[223] and the conclusions reached in that case are certainly debatable.[224] Indeed, a more thorough analysis of the Wigmore criteria strongly suggests that the union representation privilege "meets Wigmore's fundamental conditions test and should be recognized as a common-law privilege applicable to all labor disputes."[225]

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fourth criterion on the potential recognition of an evidentiary privilege "cannot be resolved in the abstract but only in the particular litigation context in which [the issue] arises"); Molony, *supra* note 206, at 261 (noting that "the Wigmore criteria . . . facilitate a case-by-case approach to all privileges").

[219] *See Walker*, 142 F.R.D. at 500. In reaching this conclusion, the court relied primarily upon affidavits submitted by the officer and his union representative, which reflected that they both "intended that their communications remain confidential," and considered such confidentiality to be "essential for the relationship between them." *Id.*

[220] *See id.* at 500-01.

[221] *See In re* Grand Jury, 103 F.3d 1140, 1152 (3d Cir. 1997) ("Dean Wigmore's four-factor formula requires satisfaction of all four factors in order to establish a privilege."); ITT Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 186 (M.D. Fla. 1973) ("[T]he testimonial privilege relative to confidential communications will be available only if all four of Professor Wigmore's conditions . . . are satisfied . . . .") (footnote omitted); *In re* Inquest Proceedings, 676 A.2d 790, 792 (Vt. 1996) ("The party seeking creation of the privilege has the burden of satisfying the four Wigmore conditions, and must satisfy all four conditions before the privilege will be recognized.") (citations omitted).

[222] *See Walker*, 142 F.R.D. at 501.

[223] For example, the court's analysis of the fourth prong of the test was limited solely to the following unexplained observations: "With respect to criteria four, there will no doubt be injury to the relationship between [employees] and their union representatives. However the court does not find that that injury is greater than the benefit gained 'for a correct disposal of the litigation.'" *Walker*, 142 F.R.D. at 501 (quoting 8 WIGMORE, *supra* note 6 § 2285, at 527).

[224] *Compare* Gruwell Anderson, *supra* note 17, at 524 n.254 (asserting that the *Walker* court "refused to recognize the important public policy behind the union/union member relationship") *with In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 335 (E.D.N.Y. 1998) ("This court finds the reasoning of *Walker* persuasive . . . .").

[225] Gruwell Anderson, *supra* note 17, at 522; *see also* Daiske Yoshida, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 FORDHAM L. REV. 209, 215-16 & n.43 (1997) ("Wigmore himself proposed that a 'professional privilege' be recognized for non-lawyer administrative practitioners on the principle that people who seek their advice would be in the position of clients.") (citing 8 WIGMORE, *supra* note 6 § 2300a, at 582).

C. *Applying the Wigmore Test to the Union Representation Privilege*

1. Communications Between Employees and Their Union Representatives May Originate in a Confidence That They Will Not Be Disclosed

Although the inquiry is typically fact-specific,[226] many communications between employees and their union representatives are premised upon an expectation that they will not be disclosed to others.[227] In *Stow Manufacturing Co.*,[228] for example, a group of employees submitted signed union authorization cards[229] to a union in reliance on its assurance that both the cards and the identities of the employees who signed them would be kept confidential.[230]

The union's assurance presumably reflected its desire "to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing,"[231] as well as the union's own interest in obtaining signed authorization cards from the employees.[232] Assuring confidentiality is, in fact, a common union organizing tactic,[233] and the Board has generally taken the position that "[a]

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[226] The NLRB has indicated that "not . . . all discussions between employees and [their union representatives] are confidential." Cook Paint & Varnish Co., 258 N.L.R.B. 1230, 1232 (1981). *See generally* Shrecker v. United States Dep't of Justice, 74 F. Supp. 2d 26, 35 (D.D.C. 1999) (discussing the "case-by-case inquiry" necessary to determine whether a particular individual "spoke with an understanding that the communication would remain confidential") (internal quotation marks and citation omitted), *aff'd in part and rev'd in part*, 254 F.3d 162 (D.C. Cir. 2001).

[227] *See, e.g.*, NLRB v. A.W. Thompson, Inc., 525 F.2d 870, 872 (5th Cir. 1976) (describing a union's use of direct mailing "as a means of employee communication because of the privacy of the communication"); *see also* City of Newburgh v. Newman, 421 N.Y.S.2d 673, 675 (App. Div. 1979) (observing that "internal communications . . ., like other internal union affairs, . . . may be deemed confidential by the union and the employees").

[228] 103 N.L.R.B. 1280 (1953).

[229] Obtaining signed authorization cards from employees in a bargaining unit is the typical means by which a union makes the preliminary "showing of interest" necessary to obtain a Board investigation into whether the union represents a majority of the employees in the unit. *See* NLRB v. Metro-Truck Body, Inc., 613 F.2d 746, 749 (9th Cir. 1979); Motion Picture & Videotape Editors Guild, 311 N.L.R.B. 801, 806 (1993); Passaic Daily News, 222 N.L.R.B. 1162, 1166 n.13 (1976).

[230] *See Stow Mfg.*, 103 N.L.R.B. 1230, 1285-86 n.6 (1953).

[231] Wright Elec., Inc., 327 N.L.R.B. 1194, 1195 (1999), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *see also* Manila Mfg. Co., 171 N.L.R.B. 1259, 1261 (1968) ("[A]n employee's desire to conceal the fact that he has signed an authorization card has its origin in the fear of employer retaliation.").

[232] The Board has noted "the vital role played by the solicitation of authorization cards in an organizational campaign and the chilling effect on the right of employees to signify their union support if they know that their employer can readily ascertain their identity." Logo 7, Inc., 284 N.L.R.B. 204, 204 (1987); *see also* Windee's Metal Indus., Inc., 309 N.L.R.B. 1074, 1075 n.5 (1992) ("[S]uch common organizational tools as soliciting authorization cards . . . have as their ultimate goal the union's recognition as majority representative.").

[233] *See* Collins & Aikman Corp., 187 N.L.R.B. 620, 621 (1970) (discussing the assertion that "union organizers 'always' assure employees that the union cards they sign are confidential and would not be seen by anybody but the Union and the Labor Board"); M. Koppel Co., 166 N.L.R.B. 975, 978 (1967) (observing that it is "common practice among labor organizations . . . [to] attempt to keep information received in connection with membership applications or authorization cards as confidential as possible"); Consol. Rendering Co., 161

signature on an organization card is confidential and essentially none of the employer's business except as subsequent litigation might make it relevant."[234]

Many other statutorily protected union activities may involve confidential communications,[235] such as strategic discussions between employees and their representatives during union meetings.[236] Indeed, the statutory protection afforded the latter type of communication[237] reflects the employees' expectation that their conversations during union meetings will remain confidential:

> It is self-evident that when a union member goes to a closed union meeting for the purpose of discussing his or her legal rights against the employer . . . the member rationally would expect that any statements made concerning the legal problem would remain confidential. The fear of possible employer retribution would compel a reasonable expectation of privacy on the member's part . . . .[238]

The fact that employees and their union representatives may expect their communications to remain confidential[239] does not necessarily make those communications privileged.[240] The Board itself has noted that "the mere fact

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N.L.R.B. 1, 14 (1966) ("It is well known that it is the policy of labor unions to keep their authorization cards confidential, and that they are loath to show such cards to employers.").

[234] Foamex, 315 N.L.R.B. 858, 864 (1994); *see also* NLRB v. Martin's Ferry Hosp. Ass'n, 649 F.2d 445, 449 (6th Cir. 1981) ("Authorization cards are not discoverable by an employer under the rules of the Board . . . ."); Int'l Union v. Garner, 102 F.R.D. 108, 114 (M.D. Tenn. 1984) ("[U]nion authorization cards signed by . . . employees should be protected from discovery as privileged communications.").

[235] *See, e.g.*, Mallick v. Int'l Bhd. of Elec. Workers, 749 F.2d 771, 785 (D.C. Cir. 1984) (discussing a union's "organizing strategy" and "other secrets"); *Garner*, 102 F.R.D. at 113 (discussing the potentially privileged nature of "documents or internal memoranda relating to [a union's] policy or plan to unionize [a] plant"); Detroit Newspaper Agency, 326 N.L.R.B. 700, 751 n.25 (1998) (noting "the importance of . . . bargaining strategy confidentiality"); *Foamex*, 315 N.L.R.B. at 864 (referring generally to "the secrecy of an organizing campaign").

[236] *See, e.g.*, Winery, Distillery & Allied Workers Union, 296 N.L.R.B. 519, 522 (1989) (referring to "proceedings or deliberations of the Union relative to Union meetings, negotiation discussions, and similar confidential communications"); Bureau of Engraving & Printing, 15 F.L.R.A. 977, 982 (1984) (indicating that "union meetings between employees . . . by their nature are private").

[237] The Board has described "statements . . . made at a union meeting" as "intraunion activity protected under the Act." UAW, 248 N.L.R.B. 1013, 1015 (1980); *see also* Raytheon Missile Sys. Div., 279 N.L.R.B. 245, 248 (1986) ("There is no question that attendance at a union meeting . . . is protected activity."). Courts also recognize that "union meeting activities" are "generally a protected area." Pub. Employees Relations Comm'n v. City of Vancouver, 33 P.3d 74, 83 (Wash. Ct. App. 2001).

[238] Benge v. Superior Court, 182 Cal. Rptr. 275, 281-82 (Ct. App. 1982); *see also* Int'l Union v. Garner, 601 F. Supp. 187, 191 (M.D. Tenn. 1985) (describing employees who "claim[ed] that they had a reasonable expectation that their participation in [union] meetings and the topics discussed therein were private"); Caldor, Inc., 319 N.L.R.B. 728, 732 (1995) (discussing an employee who "thought that her union meetings were private").

[239] *See generally* 52nd Street Hotel Assocs., 321 N.L.R.B. 624, 637 (1996) ("It is well established that employees have a paramount interest in keeping their union activities confidential from their employer."); Application of Dist. No. 1-PCD v. Apex Marine Ship Mgmt. Co., 745 N.Y.S.2d 522, 526 n.2 (App. Div. 2002) (referring to "the confidentiality . . . attaching to communications between a union member and the union with respect to representation matters").

[240] *See* Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 961 (Ohio Ct. App. 1983) ("[A] witness may not refuse to testify to pertinent facts in a judicial proceeding merely

that a communication was made in express confidence or in the implied confidence of a confidential relation, does not create a privilege."[241] Nevertheless, as suggested by the analysis in *Walker v. Huie*,[242] at least the first element of the Wigmore test – which merely requires that the communication at issue originate in a confidence that it will not be disclosed[243] – will ordinarily be satisfied in the union representation context.[244]

2. *Confidentiality Is Essential to the Relationship Between Employees and Their Union Representatives*

The second element of the Wigmore test, which may be the most significant,[245] focuses on whether confidentiality is essential to the parties' relationship.[246] As one state court has noted, the theoretical basis for recognizing any new evidentiary privilege is a determination that "secrecy and confidentiality are necessary to promote the relationship fostered by the privilege."[247]

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because such testimony involves information obtained in confidence from another party."). As one federal appellate court has stated: "There is a vast difference between confidential and privileged. Almost any communication . . . may be confidential . . . . But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure." Communist Party of the United States v. Subversive Activities Control Bd., 254 F.2d 314, 321 (D.C. Cir. 1958).

[241] Talladega Cotton Factory, Inc., 106 N.L.R.B. 295, 306 (1953) (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2286 (3d ed. 1940)). In addition, "certain courts have concluded that [even] a *legislative* pronouncement of confidentiality does not equate to the creation of an evidentiary privilege." Farley v. Farley, 952 F. Supp. 1232, 1238 (M.D. Tenn. 1997) (emphasis added). For a recent academic discussion of this issue, see Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999).

[242] *See* Walker v. Huie, 142 F.R.D. 497, 500 (D. Utah 1992) (discussing a union representative's assertion that his communications with the employees he has represented were "always . . . based on the understanding that they would remain confidential") *cf.* McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 384 (C.D. Cal. 2002) (describing an employee who "intended and understood his communications with [union] personnel would be confidential") (internal quotation marks omitted).

[243] *See In re* Hampers, 651 F.2d 19, 23 (1st Cir. 1981); *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1012 n.13 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989).

[244] For example, "deliberations . . . concerning collective-bargaining strategy," whether engaged in by "union negotiating teams" or by members of management, clearly "originate in a confidence that they will not be disclosed." Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist., 547 N.E.2d 182, 185 (Ill. 1989) (quoting 8 WIGMORE, *supra* note 6 § 2285, at 527); *see also* Gruwell Anderson, *supra* note 17, at 522 (discussing cases in which "[t]he privilege was carefully construed . . . and met Wigmore's first condition: that the communications originate in a confidence that they will not be disclosed") (citing City of Newburgh v. Newman, 421 N.Y.S.2d 673 (App. Div. 1979) and Seelig v. Shepard, 578 N.Y.S.2d 965 (Sup. Ct. 1991)).

[245] *See In re* Pittsburgh Action Against Rape, 428 A.2d 126, 144 (Pa. 1981) (Larsen, J., dissenting) (referring to "[t]he second, and most important, condition of Wigmore's test"). *But cf.* Harold N. Bynum, *Evidence – Privileged Communications – Accountant and Client*, 46 N.C. L. REV. 419, 424 (1968) (characterizing Wigmore's fourth criterion as the "most important condition" for the recognition of an evidentiary privilege).

[246] *See In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1012 n.13 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989).

[247] Danielson v. Superior Court, 754 P.2d 1145, 1150 (Ariz. Ct. App. 1988) (citing von Bulow by Auersperg v. von Bulow, 114 F.R.D. 71 (S.D.N.Y. 1987)); *cf. In re* Grand Jury

Although the *Walker* court indicated that "one could perhaps envision a satisfactory union representation relationship without confidentiality,"[248] it ultimately concluded that the second prong of Wigmore's test is satisfied in the union representation setting.[249] The court was undoubtedly correct in concluding that confidentiality may be essential to the maintenance of a satisfactory relationship between employees and their union representatives.[250]

For example, in discussing a union's statutory role as the exclusive bargaining agent for the employees it represents,[251] the Board has asserted that the relationship between those employees and their union representatives is necessarily confidential.[252] The Board explained that confidentiality is necessary to enable the union representative "effectively to coalesce an admixture of views of various segments of his constituency, and to determine, in the light of that knowledge, which issues can be compromised and to what degree."[253]

In *Berbiglia, Inc.*,[254] a Board administrative law judge relied on this reasoning to revoke a subpoena issued on behalf of an employer that sought the disclosure of union records reflecting communications between the union and its members.[255] The employer contended that a review of the records was necessary to enable it to respond to the union's allegation that a strike called during the course of unsuccessful collective bargaining negotiations was an unfair labor practice strike.[256]

Proceedings of John Doe v. United States, 842 F.2d 244, 247 (10th Cir. 1988) ("Confidentiality is the essential element of any privilege . . . .").

[248] Walker v. Huie, 142 F.R.D. 497, 500 (D. Utah 1992); *cf. In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 335 (E.D.N.Y. 1998) (asserting that "the subjective assertions of . . . union officials and [employees] that total confidentiality [is] essential to the maintenance of their relationship are not enough to establish this element conclusively").

[249] *See Walker*, 142 F.R.D. at 500.

[250] *See* Rubinstein, *supra* note 18, at 601 ("[U]nions must be free to consult with their members and officials in full confidence . . . . [¶] If unions and members did not have this privilege, it would chill full and frank communications, reduce the candor of discussions, and not serve the public interest.").

[251] *See generally* Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138, 141 (5th Cir. 1979) ("In order to achieve the collective bargaining recognized . . . as national labor policy . . . the statutory plan permits a majority of employees in a [bargaining] unit to elect a union to serve as their collective bargaining agent.").

[252] *See* Obie Pac., Inc., 196 N.L.R.B. 458, 459 (1972).

[253] *Id.* at 459.

[254] 233 N.L.R.B. 1476 (1977).

[255] *See id.* at 1495. The Board's rules authorize administrative law judges to revoke subpoenas if "the evidence whose production is required does not relate to any matter . . . in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid." 29 C.F.R. § 102.31(b) (2001).

[256] *See Berbiglia*, 233 N.L.R.B. at 1479, 1495-96. An unfair labor practice strike is one "initiated or prolonged, in whole or in part, in response to unfair labor practices committed by an employer." Gatliff Bus. Prods., 276 N.L.R.B. 543, 563 (1985). The most significant distinction between an unfair labor practice strike and an economic strike (*i.e.*, one that is "not caused by an employer's unfair labor practices," Rose Printing Co., 289 N.L.R.B. 252, 275 (1989)), is that only unfair labor practice strikers have a substantially unqualified right to reinstatement upon making an unconditional offer to return to work. *See* Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990). For the author's previous discussion of the two types of strikes, see Michael D. Moberly, *Striking a Happy Medium:*

In a decision that was ultimately affirmed by the Board,[257] and that has since been followed in other Board and court cases,[258] the administrative law judge first noted that the employer made no offer of proof as to the nature of the strike,[259] presumably because it had never seen the union's records, and thus "was in no position to indicate what they might show."[260] Characterizing the employer's attempt to review the records under these circumstances as the "proverbial fishing expedition,"[261] the judge held that inspection of the records was unwarranted,[262] "[a]t least in the absence of any indication of reasonable ground . . . to believe that the Union's files contain reasonably specific, substantial, probative evidence establishing that [the employer's] unfair labor practices played no causative role in the employees' decision to strike."[263]

Despite her suggestion that the result might have been different if the employer had presented some evidence that the union records contained relevant information,[264] the administrative law judge indicated that her principal reason for revoking the subpoenas was her view that opening such records to

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The Conversion of Unfair Labor Practice Strikes to Economic Strikes, 22 BERKELEY J. EMP. & LAB. L. 131 (2001).

[257] *See Berbiglia*, 233 N.L.R.B. at 1476.

[258] *See, e.g.*, Champ Corp., 291 N.L.R.B. 803, 817-18 (1988) (quoting *Berbiglia* with approval); Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist., 547 N.E.2d 182, 187 (Ill. 1989) (quoting and following *Berbiglia*). *But see* Taylor Lumber & Treating, Inc., 326 N.L.R.B. 1298, 1300 n.11 (1998) (expressing "doubts not only about the soundness of the policy reasoning advanced by the administrative law judge in *Berbiglia* to justify revoking an employer subpoena for a union's bargaining-strategy records, but about the degree to which the Board itself [has] genuinely embraced that reasoning").

[259] *See Berbigilia*, 233 N.L.R.B. at 1495. Such a failure may be fatal to a party's position in Board proceedings. *See, e.g.*, Bremerton Sun Publ'g Co., 311 N.L.R.B. 467, 470 n.8 (1993) ("In the absence of an offer of proof detailing proposed evidence which, if credited, would warrant a different result, we decline to find that the [administrative law] judge erred . . . .").

[260] *Berbiglia*, 233 N.L.R.B. at 1495; *cf.* Smitty's Supermarkets, Inc., 310 N.L.R.B. 1377, 1380 (1993) (noting that "one cannot know without examining them" what information is contained in "minutes and reports [a] Union refuses to produce").

[261] *Berbiglia*, 233 N.L.R.B. at 1495. The administrative law judge specifically noted that the employer "sought to obtain a wide-ranging examination of the Union's records, including communications between the Union and its members and with other organizations." *Id.*

[262] *See id.* at 1496. The Board has long held that "union records are generally of a confidential nature and their production ought not lightly to be required over the Union's objections." Paul Uhlich & Co., 26 N.L.R.B. 679, 681 n.1 (1940); *cf.* United States v. Allison, 619 F.2d 1254, 1260 (8th Cir. 1980) (holding that union officials have "a reasonable expectation of privacy in . . . union records" and can reasonably expect that such records will "'not be touched except with their permission or that of union higher-ups'") (quoting Mancusi v. DeForte, 392 U.S. 364, 369 (1968)).

[263] *Berbiglia*, 233 N.L.R.B. at 1496.

[264] As a general proposition, "a labor organization's duty to furnish information is parallel to that of an employer," and encompasses information relevant to the parties' collective bargaining relationship where "there is no evidence that it is confidential or otherwise privileged, or that its production would be unduly burdensome." Plasterers Local Union, 273 N.L.R.B. 1143, 1144-45 (1984) (footnotes omitted). Some information, such as that pertaining to represented employees' terms and conditions of employment, "is presumptively relevant and must be provided on request, without need on the part of the requesting party to establish specific relevance or particular necessity." Iron Workers, 319 N.L.R.B. 87, 90-91 (1995).

inspection by employers "would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members."[265] The judge explained that in order for collective bargaining to operate effectively, "the parties must be able to formulate their positions and devise their strategies without fear of exposure."[266]

The judge drew an analogy to "the long accepted privilege of conciliators not to testify concerning contract negotiations,"[267] which exists to encourage the parties to conciliation proceedings to "feel free to talk without any fear that the conciliator may subsequently make disclosure as a witness in some other proceeding."[268] She concluded that employee communications with their union representatives should receive similar protection.[269] The judge explained: "Statements of union representatives and agents of the employee . . . should normally be protected from disclosure as a matter of law. Otherwise, the danger of their withholding relevant information for fear of exposing crucial material regarding pending union negotiations would be manifest."[270]

Although the analysis in *Berbiglia* focused on the union's essential role in negotiating a collective bargaining agreement,[271] the same reasoning applies to

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[265] *Berbiglia*, 233 N.L.R.B. at 1495. *But cf.* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 153 (Ct. App. 2003) ("[T]here is no foundation from which to make the legal leap from the freedom of designation, self-organization and collective bargaining to an evidentiary privilege for communications between a union representative and a union member.").

[266] *Berbiglia*, 233 N.L.R.B. at 1495; *see also* Bachner v. Air Line Pilots Ass'n, 113 F.R.D. 644, 650 (D. Alaska 1987) ("[A] union would be unable to formulate and carry out its collective bargaining strategy if it could not communicate confidentially . . . ."); Sunland Constr. Co., 311 N.L.R.B. 685, 699 (1993) (referring to "the need for protection of privacy with respect to the development of bargaining strategies").

[267] *Berbiglia*, 233 N.L.R.B. at 1495 n.22 (citing Tomlinson of High Point, Inc., 74 N.L.R.B. 681 (1947)); *see also* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 53 (9th Cir. 1980) (discussing the "long-standing policy that mediators, if they are to maintain the appearance of neutrality essential to successful performance of their task, may not testify about the bargaining sessions they attend"); Nassau County Typographical Union,, 105 N.L.R.B. 902, 907 (1953) (referring to "the possibly privileged character of . . . private communications to [a] conciliator").

[268] *Tomlinson of High Point*, 74 N.L.R.B. at 685.

[269] *See Berbiglia*, 233 N.L.R.B. at 1495 & n.22; *see also* Raytheon Missile Sys. Div., Raytheon Co., 279 N.L.R.B. 245, 248 (1986) (asserting that "internal recommendations concerning . . . collective-bargaining proposals" constitute "confidential labor relations information"). *But cf.* EEOC v. Peoples Gas, Light & Coke Co., 92 Lab. Cas. (CCH) ¶ 34,070, at 44,076 (N.D. Ill. 1981) (distinguishing between the potential recognition of "a broad federal policy holding labor negotiations nondiscoverable" and "the narrower public policy of guarding the sanctity of labor mediators").

[270] *Berbiglia*, 233 N.L.R.B. at 1495 (quoting Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1143 (9th Cir. 1976)); *cf.* Seelig v. Shepard, 578 N.Y.S.2d 965, 967 (Sup. Ct. 1991) ("[U]nion leadership councils must be free to confer among themselves, exchange views, make plans and arrive at negotiating strategies without intrusion from the organs of official power.").

[271] One Board administrative law judge has noted that "a primary function of a bargaining representative (the Union) of employees is to negotiate a contract on their behalf." Clinton Food 4 Less, 288 N.L.R.B. 597, 604 (1988); *see also* Lone Star Steel Co. v. United Mine Workers, 691 F. Supp. 1280, 1283 (E.D. Okla. 1986) ("One of the Union's primary functions is to periodically negotiate collective bargaining agreements on behalf of its members regarding wages, hours, and other terms and conditions of employment.").

many of a union's other statutory functions,[272] including its role as the representative of bargaining unit employees in disciplinary investigations and grievance proceedings.[273] As one court that recognized "a species of privilege for labor union leaders" explained:

> If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an overzealous governmental agency.[274]

In *Hughes Aircraft Co.*,[275] a labor arbitrator relied on similar reasoning to recognize a union representation privilege in a labor arbitration proceeding.[276] The grievant in *Hughes* had been terminated after a prolonged dispute with her supervisor.[277] At the subsequent arbitration hearing in which the grievant challenged the validity of the discharge, the employer presented testimony from a union steward with whom the grievant had conferred that supported the testimony of the grievant's supervisor.[278]

The union objected to the admission of this evidence, asserting that the information to which the steward testified was privileged.[279] The arbitrator concluded that the steward's testimony was admissible and not privileged, because it involved his personal knowledge of the dispute itself,[280] and did not

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[272] *But see* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 153 (Ct. App. 2003) ("[A]ny [union representation] privilege . . . would exist at most in the context of negotiating 'the terms and conditions' of employment.") (quoting CAL. LAB. CODE § 923 (1998)). *See generally* Aguinaga v. John Morrell & Co., 112 F.R.D. 671, 680 (D. Kan. 1986) ("While a union's duties may well vary according to context – a union may take quite a different role in a union-processed employee grievance than it does in collective bargaining negotiations – courts have repeatedly characterized the general nature of a union's duty toward its members as fiduciary.").

[273] *See* Holland Am. Water Co., 260 N.L.R.B. 267, 274 (1982) (discussing a union's "role in collective bargaining and grievance resolution"); *cf.* United Elec., Radio & Mach. Workers of Am., 230 N.L.R.B. 406, 407 n.8 (1977) (noting that "grievance adjustors by their involvement in the enforcement of the collective-bargaining agreement further[ ] the whole process of collective bargaining").

[274] *Seelig*, 578 N.Y.S.2d at 967. *But cf.* Smitty's Supermarkets, Inc., 310 N.L.R.B. 1377, 1379-80 (1993) (rejecting the contention that records reflecting "the internal affairs of [a union] and its interunion [sic] activities" are "insulated from production by legal privilege").

[275] 86 Lab. Arb. Rep. (BNA) 1112 (1986) (Richman, Arb.).

[276] *See id.* at 1117-18. It is not uncommon for the courts to "look to the common law of labor arbitration to devine statutory meaning." Devine v. White, 697 F.2d 421, 425 (D.C. Cir. 1983). As one court observed, "there is not the slightest doubt about the all-important role of the labor arbitrator in the developing federal common law of labor relations." Hill v. Aro Corp., 263 F. Supp. 324, 326 (N.D. Ohio 1967).

[277] *See Hughes Aircraft*, 86 Lab. Arb. Rep. (BNA) at 1113-16.

[278] *See id.* at 1117.

[279] *See id.*; *cf.* City of Sterling Heights, 80 Lab. Arb. Rep. (BNA) 825, 827 (1983) (Ellman, Arb.) (discussing testimony of a union representative that "was excluded because of privileged information between the grievant and his representative").

[280] *See generally* Canteen Corp., 89 Lab. Arb. Rep. (BNA) 815, 819 (1987) (Keefe, Arb.) ("It is proper for [a union steward] . . . to testify to the facts which he personally saw transpire or heard being expressed.").

require him to disclose confidential information he had obtained from the grievant in the course of representing her.[281]

However, the arbitrator also indicated that information the grievant disclosed to the steward in confidence *would* have been privileged.[282] The arbitrator asserted that the recognition of a privilege covering confidential communications between employees and their union representatives is "consistent with the [statutory] protection afforded employees in their insistence on union representation during the grievance process."[283] The arbitrator explained that the right to such representation recognized in *Weingarten* would be of little value to an employee if the content of such communications could subsequently be discovered by the employer for the purpose of attacking the credibility of the employee's testimony.[284]

3. Relationships Between Unions and Employees Should Be Fostered

Wigmore's third criterion for recognizing a new evidentiary privilege requires that the relationship be one that in the community's opinion ought to be sedulously fostered.[285] As one federal appellate court has explained, "the existence of a confidential relationship the law should foster is critical to the establishment of a privilege."[286] Thus, an essential factor in assessing any proposed new evidentiary privilege is the importance of the relationship at issue.[287]

The Board has characterized the relationship between a union and the employees it represents as a complex one governed in large part by "the prescripts of Federal labor law."[288] In *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District*,[289] the Illinois Supreme Court in turn noted that those prescripts include a policy of keeping the parties' respective bargaining strategies confidential.[290] Relying on the Board's analysis of that policy in *Berbiglia, Inc.*,[291] the *Homer* court concluded that the third element of the Wigmore test is satisfied in the collective bargaining context:

> [T]here exists a strong public policy protecting the confidentiality of labor-negotiating strategy sessions . . . . [T]his policy sufficiently satisfies that portion of the four-prong test for the establishment of a common law privilege which requires that the opinion of the community sedulously fosters this privilege. Accordingly, we hold

[281] *See Hughes Aircraft*, 86 Lab. Arb. Rep. (BNA) at 1118.

[282] *See id.*; *see also* Loomis Armored Inc., 94 Lab. Arb. Rep. (BNA) 1097, 1101 (1990) (Gentile, Arb.) ("[T]estimony that is sought from a union steward concerning confidences obtained from a grievant in the course of representing [her] should be privileged in an arbitration proceeding.") (emphasis omitted) (quoting HILL & SINICROPI, *supra* note 19, at 164).

[283] *Hughes Aircraft*, 86 Lab. Arb. Rep. (BNA) at 1117.

[284] *See id.* at 1118.

[285] *See* EEOC v. Univ. of Notre Dame, 551 F. Supp. 737, 741 (N.D. Ind. 1982), *rev'd on other grounds*, 715 F.2d 331 (7th Cir. 1983).

[286] United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998).

[287] *See* Corman v. McDonnell Douglas Corp., 114 F.3d 790, 793 (8th Cir. 1997).

[288] Int'l Bhd. of Firemen & Oilers, 302 N.L.R.B. 1008, 1009 (1991).

[289] 547 N.E.2d 182 (Ill. 1989).

[290] *See id.* at 187 (citing Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139 (9th Cir. 1976)).

[291] 233 N.L.R.B. 1476 (1977) (discussed *supra* notes 254-70 and accompanying text).

> that some type of privilege is necessary to prevent disclosure of either party's negotiating strategy during an unfair labor practice proceeding . . . .[292]

Because most relationships for which a privilege is claimed are deemed sufficiently important to satisfy this requirement,[293] the third prong of the Wigmore test is, in fact, rarely an impediment to the recognition of an evidentiary privilege.[294] Nevertheless, in contrast to the analysis in *Homer*, the court in *Walker v. Huie*[295] concluded that this element of the test is not satisfied in the union representation context.[296] The court reached this conclusion primarily because the relationship between a union and the employees it represents, while admittedly important,[297] is not one of "the special relationships heretofore protected by the federal common law of privileges."[298]

The *Walker* court's focus on whether the relationship between employees and their union representatives is "the type of relationship . . . that over time the common law has considered important enough to sustain as privileged"[299] is not unique.[300] However, the court's treatment of that issue *is* inconsistent with the principles underlying Rule 501.[301] As noted previously,[302] that rule reflects

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[292] *Ill. Educ. Labor Relations Bd.*, 547 N.E.2d at 187 (internal punctuation omitted); *see also* People *ex rel.* Birkett v. Chicago, 686 N.E.2d 66, 72 (Ill. Ct. App. 1997) ("[T]he *Homer* court was . . . recognizing . . . a labor negotiations privilege applicable . . . to a union and a nongovernmental employer and based on the confidentiality of the information sought."), *aff'd*, 705 N.E.2d 48 (Ill. 1998).

[293] *See* Deborah A. Ausburn, *Circling the Wagons: Informational Privacy and Family Testimonial Privilege*, 20 GA. L. REV. 173, 180 (1985) ("Most proposed privileges easily meet this requirement."); *cf.* People v. Suarez, 560 N.Y.S.2d 68, 70 (Sup. Ct. 1990) ("[T]he relationships to which [a] privilege could apply are diverse.").

[294] *See* William Fullmer,*Protecting an Independent Accountant's Tax Accrual Workpapers from an Internal Revenue Service Summons*, 44 OHIO ST. L.J. 743, 763 (1983) ("Wigmore's third requirement is . . . quite easily satisfied . . . .").

[295] 142 F.R.D. 497 (D. Utah 1992).

[296] *See id.* at 501.

[297] *See id.*; *cf.* EEOC v. Peoples Gas, Light & Coke Co., 92 Lab. Cas. (CCH) ¶ 34,070, at 44,076 (N.D. Ill. 1981) ("[L]abor negotiations are entitled to a higher degree of protection than other forms of information because there is a 'policy favoring private, extra-legal judicial resolutions of labor-management disputes.'") (quoting Affiliated Food Distribs., Inc. v. Local Union, 483 F.2d 418, 419 (3d Cir. 1973).

[298] *Walker*, 142 F.R.D. at 501; *cf.* Pearson v. Miller, 211 F.3d 57, 71 (3d Cir. 2000) (asserting that potential privileges that "would be unlike any currently recognized Rule 501 privilege" are "poor candidates for the protection of a Rule 501 privilege").

[299] *Walker*, 142 F.R.D. at 500-01.

[300] *See, e.g.*, *In re* Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir. 1989) ("[O]ur discretion under Rule 501 is limited to the development of privileges extant in the common law . . . ."); *see also* Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 121 (1973) ("There is a real danger, reflected in the reported cases, that [Rule 501's] reference to 'common law principles' will be taken to exclude automatically recognition of any claim of privilege not grounded in nineteenth century common law opinions.") (footnote omitted).

[301] In *In re August, 1993 Regular Grand Jury*, 854 F. Supp. 1392 (S.D. Ind. 1993), for example, the court noted that "cases rest[ing] their decision not to recognize [a] privilege on the mere fact that such a privilege was not recognized at common law" are "inconsistent with the Supreme Court's interpretation of Rule 501, which emphasizes the 'flexible' nature of privilege development in the federal courts and the need for case-by-case development of the law of privilege – not the mechanical freezing of privilege as it existed at the common law." *Id.* at 1398 (citing Trammel v. United States, 445 U.S. 40, 47 (1980)); *see also In re*

"Congress' desire for an *evolutionary* development of the federal law of privileges, an evolution which is to occur by the careful evaluation of the asserted privileges in the context of concrete disputes."[303]

Thus, the fact that no union representation privilege existed at common law[304] is no impediment to the judicial recognition of such a privilege,[305] because the courts "are empowered to adopt *new* common law privileges pursuant to Rule 501 . . . on a case by case basis."[306] As one court stated:

> [T]his court does not view Congress' decision to enact Rule 501 . . . as an intendment that the federal common law of privileges should be frozen as it existed at the time the Federal Rules of Evidence took effect. Rather, Rule 501 is a mandate to the courts to develop the federal common law of privileges as reason and experience dictate.[307]

This point is illustrated by a closer examination of the analysis in *Walker* itself.[308] In particular, the court in that case emphasized that the relationship between employees and their union representatives is "no more deserving of a privilege than other important relationships that courts have found are not privileged."[309] However, since *Walker* was decided, one of the other "unrecognized" privileges to which the court made reference – the parent-child

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Doe, 964 F.2d 1325, 1328 (2d Cir. 1992) ("[T]he view that Rule 501 limits the development of privileges to those recognized by the common law . . . [is] contrary to the teaching of *Trammel* 'not to freeze the law of privilege.'") (quoting *Trammel*, 445 U.S. at 47).

[302] *See supra* notes 186-96 and accompanying text.

[303] *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1005 n.8 (D.N.J.) (emphasis added), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *see also* Smith v. Smith, 154 F.R.D. 661, 673 (N.D. Tex. 1994) ("Rule 501 does not 'freeze' the law of privilege, but expressly envisions that the law will develop incrementally.") (citing *Trammel*, 445 U.S. at 47).

[304] The early common law did not recognize the existence of union representation, let alone a union representation privilege. *See* Krystad v. Lau, 400 P.2d 72, 75 (Wash. 1965) (noting that "under the common law, unions were not only unlawful but were held to be a criminal conspiracy which workingmen had neither the right to organize nor join").

[305] *See generally In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1493 (E.D. Wash. 1996) (observing that courts are "not bound to consider only judicially created 'common-law rulings' as the source of new privileges"); *In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. at 1004 ("[T]he common law's failure to recognize [a] privilege is not determinative.").

[306] Reichhold Chems., Inc. v. Textron, 157 F.R.D. 522, 526 (N.D. Fla. 1994) (emphasis added); *see also In re* Int'l Horizons, Inc., 689 F.2d 996, 1003 (11th Cir. 1982) ("Rule 501 clearly provides federal courts with the statutory power to recognize new or 'novel' evidentiary privileges."); Syposs v. United States, 63 F. Supp. 2d 301, 307 (W.D.N.Y. 1999) ("[U]nder Rule 501 the federal courts have authority to declare new privileges . . . .").

[307] *In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. at 1012; *see also* Mullen v. United States, 263 F.2d 275, 279 (D.C. Cir. 1958) (Fahy, J., concurring) ("When reason and experience call for recognition of a privilege which has the effect of restricting evidence the dead hand of the common law will not restrain such recognition."). *See generally* Nilavar v. Mercy Health Sys., 210 F.R.D. 597, 606 (S.D. Ohio 2002) (noting that "there must always be, in the absence of legislation, that court which takes the first step into an area left to common law development").

[308] The *Walker* decision has attracted relatively little scholarly interest. However, one commentator has criticized the court for "belittling the labor relationship" and failing to take into consideration "fundamental labor policy realized in important labor statutes." Gruwell Anderson, *supra* note 17, at 524 n.254, 525 n.256.

[309] *Walker*, 142 F.R.D. at 501.

privilege[310] – *has* been recognized by another federal court using the prevailing Rule 501 analysis.[311] In addition, another unrecognized privilege discussed by the *Walker* court – the accountant work-product privilege[312] – also recently has begun to receive favorable statutory[313] and judicial attention.[314]

The *Walker* court also advanced an alternative argument in support of its finding that the third element of the Wigmore test is not satisfied in the union representation context.[315] This argument was premised upon the fact that in 1973,[316] the Supreme Court, acting on a recommendation from the Judicial Conference Advisory Committee on Rules of Evidence,[317] proposed to Congress that "nine specific nonconstitutional privileges" be included in the Fed-

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[310] *See id.* (citing *In re* Grand Jury Proceedings of John Doe v. United States, 842 F.2d 244 (10th Cir. 1988)). For the author's previous analysis of the frequently debated privilege, see Michael D. Moberly, *Children Should Be Seen and Not Heard: Advocating the Recognition of a Parent-Child Privilege in Arizona*, 35 ARIZ. ST. L.J. 515 (2003).

[311] *See In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F. Supp. 1487, 1493-94 (noting that Rule 501 authorizes the courts "to define new privileges by interpreting 'common law principles . . . in the light of reason and experience,'" and that "[b]oth reason and experience mandate the recognition of some form of a parent-child privilege") (internal punctuation and citations omitted).

[312] *See Walker*, 142 F.R.D. at 501 (citing United States v. Arthur Young & Co., 465 U.S. 805 (1984)).

[313] *See* Vellone v. First Union Brokerage Servs., 203 F.R.D. 231, 233 (D. Md. 2001) (discussing a state statute that "could be interpreted to protect any part of the accountant's work product, so long as it was derived from the client directly or from the client's material") (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-110(b)(2) (1998)); *cf.* Cannon F. Allen, *Aftermath of* United States v. Arthur Young & Co.: *Surveying the Damage Done to the Accountant-Client Relationship*, 6 VA. TAX REV. 753, 761-62 n.44 (1987) (noting that commentators have "called for Congress to enact some form of limited work-product immunity or privilege for accountants").

[314] *See Vellone*, 203 F.R.D. at 234 n.6 (suggesting that "an accountant, working as the representative of a client in anticipation of litigation, would . . . be covered by the work product protection provided by Federal Rule of Civil Procedure 26(b)(3)") (citing United States v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998)); *see also* Miller, *supra* note 204, at 794 n.158 ("In addition to the example of the parent-child privilege, the accountants' work product privilege has also been actively considered by the federal judiciary.").

[315] *See Walker*, 142 F.R.D. at 501 ("[T]his relationship is not one that the Supreme Court found important enough to address in its Article V of the Proposed Rules of Evidence which dealt with evidentiary privileges.").

[316] The privilege rules discussed here were promulgated by the Supreme Court, as part of the proposed Federal Rules of Evidence, on November 20, 1972, and sent to Congress for consideration on February 5, 1973. *See In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1005 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989); Jessica G. Weiner, *"And the Wisdom to Know the Difference": Confidentiality vs. Privilege in the Self-Help Setting*, 144 U. PA. L. REV. 243, 265 n.127 (1995).

[317] The advisory committee was appointed by Chief Justice Earl Warren in 1965 for the purpose of drafting federal evidence rules. *See* Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1123 n.103 (E.D. Ky. 1980). It consisted of federal judges, experienced trial lawyers, and distinguished evidence scholars. *See* United States v. Zubkoff, 416 F.2d 141, 143 (2d Cir. 1969); Scott v. Hammock, 133 F.R.D. 610, 615 (D. Utah 1990). The committee worked for several years, through a number of different drafts, before submitting its proposal to the Court. *See* United States v. Mackey, 405 F. Supp. 854, 858 (E.D.N.Y. 1975).

eral Rules of Evidence,[318] and "the union relationship was not among those specifically enumerated for the protection of a privilege."[319]

Although this argument has more superficial appeal than the court's first argument,[320] it is ultimately no more persuasive.[321] The advisory committee unquestionably viewed evidentiary privileges with disfavor,[322] and it therefore intended to limit the privileges available in federal court litigation.[323] How-

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[318] Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979); *see also* Ott v. St. Luke Hosp. of Campbell County, 522 F. Supp. 706, 707-08 (E.D. Ky. 1981) ("The Advisory Committee which originally drafted the Federal Rules of Evidence proposed nine specific privileges to be made applicable in actions in federal courts. The Advisory Committee's recommendations were accepted by the Supreme Court and referred to Congress.") (footnote omitted).

[319] *In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 335 (E.D.N.Y. 1998). The enumerated privileges were "a privilege protecting required reports privileged pursuant to other statutes; an attorney-client privilege; a psychotherapist privilege; a husband-wife privilege; a privilege covering communications to the clergy; and privileges protecting political votes, trade secrets, the identity of an informer, and secrets of state and other official information." *In re* Grand Jury Investigation, 918 F.2d 374, 379-80 n.8 (3d Cir. 1990).

[320] Other courts have alluded to the potential "impediment" to the recognition of a privilege "caused by the Advisory Committee's decision to not list [the] privilege in its draft," Weekoty v. United States, 30 F. Supp. 2d 1343, 1347 (D.N.M. 1998), and the courts' rejection of other potential privileges has occasionally been "based in part on the fact that these asserted privileges were not included in those recommended by the Advisory Committee." Spencer Sav. Bank, SLA v. Excell Mortgage Corp., 960 F. Supp. 835, 842 n.10 (D.N.J. 1997); *see also* Tesser v. Bd. of Educ., 154 F. Supp. 2d 388, 392 n.3 (E.D.N.Y. 2001) ("Other courts have also looked to the proposed rules for guidance in recognizing new privileges and developing the contours of existing privileges.").

[321] As another commentator has noted:

> Some courts . . . have examined whether the nine privileges spelled out in the proposed Federal Rules of Evidence include the privilege claimed in the current litigation, viewing the proposals as a reflection of dominant common law analysis. *The proposed rules are useful only as guides, however, and are rarely dispositive.*

Jayna Jacobson Partain, *A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?*, 40 VAND. L. REV. 1397, 1407 n.63 (1987) (emphasis added); cf. *In re* Grand Jury Investigation, 918 F.2d at 378 (noting that the evidence rules "do[ ] not contain . . . [an] exclusive list of privileges recognized in the federal courts"); *In re* Horizons, Inc., 689 F.2d 996, 1003 (11th Cir. 1982) ("Federal Rule of Evidence 501 does not purport to enumerate a finite list of evidentiary privileges that are to be recognized in federal courts.").

[322] *See In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1011 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989) (noting that "the Advisory Committee which drafted the original Federal Rules of Evidence did not look favorably upon privileges in general"); Michael W. Mullane, Trammel v. United States: *Bad History, Bad Policy, and Bad Law*, 47 ME. L. REV. 105, 117 (1995) ("The committee's conceptual approach . . . was antithetical to all evidentiary privileges."); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[01], at 501-13 (1988) ("[T]he Advisory Committee . . . viewed privileges as hindrances which should be curtailed.").

[323] *See In re* Agosto, 553 F. Supp. 1298, 1324 (D. Nev. 1983) (referring to "the Advisory Committee's proposal to severely restrict the testimonial privileges for confidential communications available to individuals in federal courts"); Mullane, *supra* note 322, at 117 ("The Advisory Committee wished to expand admissibility to encompass all relevant information. Whenever possible, privileges would be eliminated. If this was not possible, they would be pared to the bone in scope and applicability.").

ever, the committee's proposal generated a "storm of controversy,"[324] and its hostility to evidentiary privileges, in particular, has been characterized as an "extreme view, unwelcome to the bar and the general public."[325] As a result, the committee's attempt to codify federal privilege law through the promulgation of enumerated privileges was ultimately rejected by Congress.[326]

In refusing to codify the federal law of privilege,[327] Congress did not disapprove of any of the committee's proposed privileges,[328] but instead rejected the proposition that the evidentiary privileges applicable in federal cases should be *limited* to those the committee had proposed.[329] Indeed, Congress's refusal to adopt the committee's enumerated privileges has prompted some courts and commentators to suggest that the omission of a particular privilege from the enumerated list "shows an ultimate desire for the Courts to *develop* such a privilege."[330]

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[324] *Agosto*, 553 F. Supp. at 1324 (quoting Krattenmaker, *supra* note 197, at 638); *see also* United States v. Weber Aircraft Corp., 465 U.S. 792, 802 n.21 (1984) (referring to "the controversy surrounding the proposed provisions of the Federal Rules of Evidence governing privileges"); *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 379 n.11 (3d Cir. 1976) ("The history of the privilege article of the Federal Rules of Evidence was a stormy one."); Walker v. Lewis, 127 F.R.D. 466, 468 (W.D.N.C. 1989) ("From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial.") (quoting S. REP. No. 93-1277, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7053).

[325] *Agosto*, 553 F. Supp. at 1324; *see also* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 529 (1994) ("[T]he vast majority of the criticisms . . . faulted the Advisory Committee for cutting back on evidentiary privileges.").

[326] *See Grand Jury Investigation*, 918 F.2d at 377 ("Congress chose not to codify the draft Rules comprehending specific privileges."); *In re* Sealed Case, 676 F.2d 793, 807 n.45 (D.C. Cir. 1982) ("In adopting Rule 501 Congress rejected a set of rules proposed by the Supreme Court that would have codified the law of privileges . . . .").

[327] If Congress had acquiesced in the committee's attempt "to reduce federal privilege law to a comprehensive set of rules," the result would have been the "codification" of the committee's enumerated privileges. Kelly v. City of San Jose, 114 F.R.D. 653, 656 (N.D. Cal. 1987); *see also Grand Jury Investigation*, 918 F.2d at 379 (noting that the advisory committee was charged with responsibility for "codifying federal rules of evidence").

[328] *See Grand Jury Investigation*, 918 F.2d at 380 ("Although Congress chose not to adopt the proposed rules on privileges, it did not disapprove them."); United States v. Freund, 525 F.2d 873, 878 n.6 (5th Cir. 1976) ("[T]here is no indication that Congress, in rejecting the entire privilege article of the proposed rules, intended to express disapproval of any specific rule.").

[329] For example, the proposed rules included "no rule of privilege for a newspaperperson," and yet it is clear that Congress' rejection of those rules "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis." *Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d at 379 n.11 (quoting 120 CONG. REC. H12253-54 (daily ed. Dec. 18, 1974)); *see also* Douglas H. Frazer, *The Newsperson's Privilege in Grand Jury Proceedings: An Argument for Uniform Recognition and Application*, 75 J. CRIM. L. & CRIMINOLOGY 413, 428-29 n.80 (1984) ("Because the proposed rule did not include the newsperson's privilege in its original list of privileges and because the draftsmen later deleted the enumerated privileges, the Third Circuit [has] inferred that Congress' ultimate desire was for the courts to develop such a privilege.") (citing Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979)).

[330] Williams v. Am. Broad. Cos., 96 F.R.D. 658, 663 (W.D. Ark. 1983) (emphasis added) (discussing *Riley*, 612 F.2d at 714); *see also* Robert J. Bush, *Stimulating Corporate Self-Regulation – The Corporate Self-Evaluation Privilege: Paradigmatic Preferentialism or*

That the privileges applicable in federal court are not limited to those proposed by the advisory committee is further illustrated by the fact that, as originally submitted to Congress by the Supreme Court at the time it recommended adoption of the committee's enumerated privileges,[331] Rule 501 *would* have precluded the judicial recognition of any privilege not specifically provided for in the Court's proposed rules[332] or, alternatively, in a federal statutory or constitutional provision.[333] However, like the committee's enumerated privileges, the original version of Rule 501 was rejected by Congress[334] in favor of a common law approach that permits the judiciary to develop evidentiary privileges on a case-by-case basis.[335]

Pragmatic Panacea, 87 Nw. U. L. REV. 597, 614 n.112 (1993) (indicating that "Congress's [sic] rejection of the proposed [r]ules could be interpreted as an implicit mandate to federal courts to develop privileges" that were not proposed by the advisory committee).

[331] The proposed rule stated:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
>
> (1) Refuse to be a witness; or
>
> (2) Refuse to disclose any matter; or
>
> (3) Refuse to produce any object or writing; or
>
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

PROPOSED FED. R. EVID. 501, *reprinted in* 56 F.R.D. 183, 230 (1973).

[332] In Baylor v. Mading-Dugan Drug Co., 57 F.R.D. 509 (N.D. Ill. 1972), the court indicated that under Rule 501 as originally proposed by the Supreme Court, evidence was "not to be considered privileged" unless it was "defined as an exception" to the rule. *Id.* at 512; *see also In re* Verplank, 329 F. Supp. 433, 437 (C.D. Cal. 1971) (citing the original version of Rule 501 for the proposition that "only the privileges therein specified should be recognized in the absence of action by the Supreme Court or Congress").

[333] *See* United States v. Craig, 528 F.2d 773, 776 (7th Cir. 1976) ("[P]roposed Rule 501 provided that only the enumerated privileges and those required by the federal Constitution or Act of Congress need be recognized by the federal courts.") (citation omitted); *In re* Agosto, 553 F. Supp. 1298, 1323 (D. Nev. 1983) ("Proposed Rule 501 provided that no testimonial privilege would be recognized if it was not contained in the Rules themselves or in an Act of Congress, or in the Constitution . . . .").

[334] *See* Brink's, Inc. v. City of New York, 717 F.2d 700, 708 (2d Cir. 1983) ("[O]f the rules promulgated by the Supreme Court, Rules 501-513 were not adopted by Congress although Rule 501 was amended by the Congress and became a substitute for all of the court's promulgated privilege rules."); *In re* Lewis, 384 F. Supp. 133, 137 (C.D. Cal. 1974) ("[T]he House Judiciary Committee . . . refused to go along with the proposed Rule 501 of the new Federal Rules of Evidence submitted to Congress by the United States Supreme Court."); Imwinkelried, *supra* note 325, at 526 ("The Advisory Committee's draft of Rule 501 would have expressly mandated that the courts recognize only the privileges codified in proposed Rules 502-10 and in other statutes. Whatever else Congress did, it rebuffed that version of Rule 501.").

[335] *See* United States v. Gillock, 445 U.S. 360, 367 (1980) ("Congress substituted the present language of Rule 501 for the draft proposed by the Advisory Committee . . . to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis."); Hucko v. City of Oak Forest, 185 F.R.D. 526, 530 (N.D. Ill. 1999) ("In declining to adopt the proposed rules . . . Congress expressed the view that the law of privilege was still evolving and did not want codification to stifle that evolution."); Torres v. Kuzniasz, 936 F. Supp. 1201, 1208 (D.N.J. 1996) ("Congress declined to reduce federal privilege law to a comprehensive set of rules, leaving federal courts to develop privilege doctrine on a case-by-case basis.").

This legislative history[336] demonstrates that the *Walker* court's reliance on the advisory committee's enumerated privileges was misplaced.[337] The fact that no union representation privilege was included in the unenacted evidence rules the Supreme Court submitted to Congress in 1973 is simply no impediment to the judicial recognition of such a privilege.[338]

4. Weighing the Competing Interests

The fourth element of the Wigmore test is closely related to the third,[339] and involves balancing the potential benefit the disclosure of confidential communications may have on the administration of justice against the potential harm such disclosure might have upon the relationship at issue.[340] Because this aspect of the test obviously requires the weighing of competing interests that militate "both for and against disclosure,"[341] it generally presents the courts

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[336] For a more detailed discussion of Rule 501's legislative history see, Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1191-95 (1978).

[337] One federal court has asserted that because Congress chose not to codify the law of privilege, "no inference regarding the validity of [a] privilege ought to be gleaned from [the committee's] proposed rule[s]." *In re* August, 1993 Regular Grand Jury, 854 F. Supp. 1392, 1396 (S.D. Ind. 1993). The court properly recognized that "Congress' failure to enact specific privileges was not meant to inhibit courts from developing and recognizing specific privileges to protect important relationships." *Id.*; *see also* Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979) (asserting that "[t]he legislative history of Rule 501 manifests that its flexible language was designed to encompass" privileges that the advisory committee "failed to include among the enumerated privileges"); Lewis v. United States, 517 F.2d 236, 238 n.4 (9th Cir. 1975) ("The legislative history of Rule 501 of the Federal Rules of Evidence makes it clear that Congress intended that the courts should continue to develop the federal common law of privilege on a case-by-case basis.").

[338] *Cf.* Weekoty v. United States, 30 F. Supp. 2d 1343, 1347 (D.N.M. 1998) (recognizing a "self-critical analysis privilege" even though the privilege "was not included in the Advisory Committee's proposed privilege rules"); Amee A. Shah, *The Parent-Child Testimonial Privilege – Has the Time for It Finally Arrived?*, 47 CLEV. ST. L. REV. 41, 57 (1999) ("The physician-patient privilege was not included in the proposed rules and has since gained wide recognition."). In fact, "[w]hen reason and experience lead [courts] in a different direction than a rejected provision in the proposed rules, [they] are bound by law to follow the former." *In re* Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 78 (1st Cir. 1999).

[339] *See In re* Contempt of Wright, 700 P.2d 40, 48 (Idaho 1985) (Bistline, J., concurring) ("Wigmore's fourth requirement is interrelated to the third requirement . . . ."); Bynum, *supra* note 245, at 423 (noting that Wigmore's third criterion, "the extent to which the relationship is to be fostered," must be evaluated "in relation with condition four"); Molony, *supra* note 206, at 260 n.92 (asserting that "both the second and third [Wigmore] criteria require evaluation in light of the fourth criterion").

[340] *See In re* Doe, 711 F.2d 1187, 1193 (2d Cir. 1983); Carr v. Monroe Mfg. Co., 431 F.2d 384, 388 (5th Cir. 1970) (citing 8 WIGMORE, *supra* note 6 § 2285, at 527-28); Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970); EEOC v. Univ. of Notre Dame, 551 F. Supp. 737, 743 (N.D. Ind. 1982), *rev'd on other grounds*, 715 F.2d 331 (7th Cir. 1983).

[341] Hanson v. Rowe, 500 P.2d 916, 919 (Ariz. Ct. App. 1972); *cf.* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 158 (Ct. App. 2003) (noting that the potential recognition of a union representation privilege "presents a backdrop of competing social policies: a union member's right to organize and collectively bargain, a union's obligations to its members . . . and a search for truth in the adversarial process").

with the most analytical difficulty.[342] Not surprisingly, it is also the issue upon which courts contemplating the recognition of new privileges often focus.[343]

In applying the fourth Wigmore criterion, the court in *Walker v. Huie*[344] acknowledged that "there will no doubt be injury to the relationship between [employees] and their union representatives" if their communications are not protected by an evidentiary privilege.[345] The court nevertheless concluded that this potential injury did not outweigh the potential harm to the administration of justice that would result from recognizing the privilege.[346] However, the court failed to offer any explanation for this conclusion.[347]

The court's failure to explain its weighing of the competing interests may have been based upon the absence of any meaningful empirical evidence concerning the actual impact of comparable evidentiary privileges,[348] and the fact that the balance a court ultimately strikes under the fourth Wigmore criterion necessarily depends upon "its own normative predilections."[349] As one state court judge has stated: "One can never prove that costs outweigh benefits or vice versa with regard to a particular privilege; such arguments inevitably degenerate into simple unsupported assertions."[350]

However, the lack of empirical evidence does not excuse courts and other tribunals from articulating the reasons for their decisions,[351] nor does it justify

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[342] *See, e.g., In re* Agosto, 553 F. Supp. 1298, 1309 (D. Nev. 1983) ("The fourth component of Wigmore's test presents a more difficult problem in analysis . . . ."); *cf.* Molony, *supra* note 206, at 260-61 (asserting that "in any privilege debate, the fourth condition [is] the [expected] battleground").

[343] *See, e.g.*, Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1207 (Mass. 1983) ("In the last analysis, the question comes down to a balancing of the public's interest in obtaining every person's testimony against public policy considerations in favor of erecting a testimonial privilege in the circumstances."); *cf.* United States v. Friedman, 636 F. Supp. 462, 463 (S.D.N.Y. 1986) (discussing another court's analysis of an asserted privilege that "focussed on the balancing required by the fourth of Wigmore's conditions").

[344] 142 F.R.D. 497 (D. Utah 1992).

[345] *Id.* at 501.

[346] *See id.*

[347] *See id.*

[348] Opponents of an evidentiary privilege often note that "empirical evidence of the alleged benefits of the privilege is speculative at best," while assuming that "the adverse impact of the privilege on the fact-finding function of the courts is immediate and unquestionable." United States *ex. rel.* Edney v. Smith, 425 F. Supp. 1038, 1040 (E.D.N.Y. 1976); *see also* Broun, *supra* note 14, at 793 ("There is little empirical evidence on the value of evidentiary privileges in promoting the free flow of information in the cases of protected relationships.").

[349] *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1010 (D.N.J.) (considering the potential recognition of a psychotherapist-patient privilege), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *see also* SEC v. Touche Ross & Co., 438 F. Supp. 258, 263 (S.D.N.Y. 1977) (asserting that the determination of "whether creating a new privilege . . . would serve the public better than adherence to [the] basic premise that courts and administrative agencies . . . are entitled to every man's evidence" involves a "value judgment").

[350] Gale v. State, 792 P.2d 570, 624 n.25 (Wyo. 1990) (Urbigkit, J., dissenting) (quoting *Developments in the Law*, *supra* note 13, at 1666); *see also* Mullane, *supra* note 322, at 137 ("[N]o solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privileges.").

[351] *See generally* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 901 (E.D. Pa. 1981) (asserting that "the courts have an obligation to explain their decisions"); Pendleton Citizens for Cmty. Schs. v. Marockie, 507 S.E.2d 673, 682 (W. Va. 1998) ("A

striking the balance required by the fourth element of the Wigmore test in favor of the nonrecognition of a privilege.[352] Instead,

> [t]he debate must . . . focus on the values that society seeks to protect in a particular area or particular relationship. Once these values are identified, the evaluation of the privilege must rest not merely on an attempted cost-benefit analysis, but also on considerations of personal privacy and the social acceptability of a legal system that intrudes into particular areas.[353]

There undoubtedly may be cases in which the disclosure of information pertaining to a party's confidential negotiating strategy would assist a trier-of-fact in reaching "a more just result."[354] However, "this does not mean that [the parties] should or must disclose all such information,"[355] because disclosure would have "a tendency to frustrate the overall purpose of collective bargaining between the parties."[356] As one court has explained:

> "[T]he basic assumption underlying collective bargaining . . . [is] that the parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." Moreover, these "antagonistic" parties are engaged in a process of "bargaining" or "negotiation." Each presents a self-interested demand or proposal, which the other evaluates from its own point of view. Necessarily, the bargainers are not obliged to reveal their *strategies*; the planned sequences of demands and proposals. For if the parties *do* have full strategic information, then the process of offer and counteroffer becomes superfluous, and the bargaining process is transformed into something else entirely.[357]

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court cannot shirk its responsibility to articulate the alternatives forming a basis for its decisions, for well reasoned and fully articulated opinions are a major safeguard against abuse of judicial power.") (quoting Robert M. Bastress, Jr., *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1035 (1974).

[352] *See In re Grand Jury Subpoena (Psychological Treatment Records)*, 710 F. Supp. at 1007 ("[M]erely because empirical data are lacking, [courts] should not assume the asserted benefits flowing from [a] privilege are non-existent when the costs imposed by the existence of the privilege are no more certain."); *Gale*, 792 P.2d at 624 n.25 (Urbigkit, J., dissenting) ("Both camps in the privilege debate are hampered by empirical uncertainty.") (quoting *Developments in the Law*, *supra* note 13, at 1666); Broun, *supra* note 14, at 793 (asserting that "[t]here is little evidence that . . . privileges are *not* effective") (emphasis added); Mullane, *supra* note 322, at 137 ("[A]lthough the benefits attributable to privileges are difficult to estimate, there is little reason to assume that they are necessarily small.").

[353] *Gale*, 792 P.2d at 624 n.25 (Urbigkit, J., dissenting) (quoting *Developments in the Law*, *supra* note 13, at 1666). *But see In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 336 (E.D.N.Y. 1998) ("The inability . . . to reach agreement on the costs and benefits of a union privilege strongly cautions against . . . finding that such a privilege should . . . be enshrined in common law.").

[354] Boise Cascade Corp., 279 N.L.R.B. 422, 432 (1986); *see also* NLRB v. FLRA, 952 F.2d 523, 531 (D.C. Cir. 1992) ("The collective bargaining process arguably is optimized if unions and [employers] have all relevant information about the subjects of collective bargaining.").

[355] *NLRB*, 952 F.2d at 531; *cf. Boise Cascade*, 279 N.L.R.B. at 432 (holding that an employer was not obligated to provide a union with confidential information pertaining to its "negotiating strategy," even though the information "would potentially be relevant to the Union in processing [a] grievance it filed").

[356] *Boise Cascade*, 279 N.L.R.B. at 432.

[357] *NLRB*, 952 F.2d at 530 (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107-108 (1983)); *cf.* Century Elec. Motor Co., 180 N.L.R.B. 1051, 1058 (1970)

Thus, at least in the ordinary collective bargaining context,[358] a balancing of the competing interests generally weighs in favor of permitting parties to withhold confidential information pertaining to their negotiating strategies.[359] Indeed, it was primarily on this basis that the Board in *Berbiglia, Inc.*[360] recognized a "collective bargaining and strike strategy" privilege protecting the confidentiality of internal union communications pertaining to such matters.[361]

In *Boise Cascade Corp.*,[362] the Board engaged in similar balancing to hold that comparable information pertaining to the *employer's* negotiating strategy is likewise "either confidential or privileged in nature."[363] The rationale for treating the employer's negotiating strategy as privileged mirrors the reason for according privileged status to the union's strategy:

> The very existence of a successful working relationship between labor and management is dependent upon the ability to negotiate freely in the spirit of compromise toward which the collective bargaining process strives. Disclosure of the . . . employer's internal discussions concerning negotiations, including its strategies, options and proposals, whether accepted or rejected, could seriously endanger the

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(observing that "collective bargaining traditionally involves a give-and-take process aimed toward mutually acceptable compromise").

358 *See* Pennsylvania *ex rel.* Gallas v. Pennsylvania Labor Relations Bd., 636 A.2d 253, 265 (Pa. Commw. Ct. 1993) (Smith, J., concurring in part and dissenting in part) ("[C]ollective bargaining . . . typically involves negotiation over wages and other financial terms of employment."); Joseph C. Collins & Co., 184 N.L.R.B. 940, 946 (1970) (referring to "the conventional type of collective bargaining where all terms [of employment], including the economic, are open for discussion").

359 *See Boise Cascade*, 279 N.L.R.B. at 432 ("[A] balancing of the parties' interests must be weighed in favor of [a party] being allowed to withhold . . . [information pertaining to] its future negotiating strategy."); *see also* Mallick v. Int'l Bhd. of Elec. Workers, 749 F.2d 771, 785 (D.C. Cir. 1984) (discussing a union's "negotiating plans" and "other secrets"); Detroit Newspapers, 326 N.L.R.B. 700, 751 n.25 (1998) (referring to "the importance of . . . bargaining strategy confidentiality").

360 Maple Shade Nursing Home, 223 N.L.R.B. 1475, 1476 (1976); *see supra* notes 254-270 and accompanying text.

361 Adams, *supra* note 19, at 573-75, 579 (discussing *Berbiglia*); *see also* Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1011 n.7 (D.C. Cir. 1997) (discussing the contention that "documents concerning confidential union strategies and tactics in the context of collective bargaining relationships are subject to a qualified privilege"); Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1139-40 (R.I. 1992) (referring to "data concerning contract proposals being formulated" as "privileged labor relations materials").

362 279 N.L.R.B. 422 (1986).

363 *Id.* at 432; *see also* Jim Water Resources, Inc., 1987 NLRB GCM LEXIS 113, at *39 (Aug. 10, 1987) (recognizing that information possessed by an employer "might constitute privileged negotiating strategy"); Morton Int'l, Inc., 1993 NLRB LEXIS 1098, at **25-26 (Sept. 30, 1993):

> Notes of a strictly factual nature, reporting only when, where, what, and by whom something was said during bargaining sessions . . . are not privileged as the confidential "work product" of the Company's bargaining committee. . . . Anything else included in the notes, not of a purely factual nature, is, however . . . privileged . . . . There is no requirement for the Company to disclose its bargaining strategy or tactics, or the opinions, mental thought processes, or conclusions and observations of its bargaining team members.

success of pending negotiations or otherwise give an unfair advantage to the bargaining agent for the employees.[364]

Similar reasoning applies to the less typical "collective bargaining" that often occurs in connection with employer disciplinary investigations.[365] Although "*Weingarten* interviews are not bargaining sessions,"[366] the right to union representation at an investigatory interview is nevertheless an aspect of the broader statutory right of employees to bargain collectively[367] and otherwise act in concert for their mutual aid and protection.[368] Indeed, the right to representation reflects recognition of the fact that union officials who participate in such interviews "may be able, through informal discussions and persuasion conducted at the threshold, to serve as the catalyst in the amicable resolution of disputes."[369]

Significantly, the right to union representation likewise encompasses a right to prior consultation in order to "facilitate expeditious and equitable resolution of the matter under investigation."[370] This right to prior consultation in

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[364] Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, 667 N.E.2d 458, 468 (Ohio Ct. App. 1995); *see also* Fisher Scientific Co. v. New York, 812 F. Supp. 22, 27 (S.D.N.Y. 1993) (effectively acknowledging that forcing an employer "to reveal confidential bargaining goals and strategies . . . would compromise its collective bargaining position"); Case Corp., 304 N.L.R.B. 939, 951 (1991) (referring to "labor relations information of the Employer that, if divulged to the Union, would clearly prejudice the Employer's bargaining strategy in negotiations with the Union").

[365] *See* Thomas v. LTV Corp., 39 F.3d 611, 618 (5th Cir. 1994) ("Collective bargaining has been defined as bargaining by an organization or group of workmen on behalf of its members with the employer, *as well as the settlement disputes by negotiation between an employer and the representative of his employees.*") (emphasis added); Fed. Aviation Admin., 35 F.L.R.A. 645, 649 (1990) ("[T]he role of a union at an investigatory examination falls within the ambit of collective bargaining . . . ").

[366] N.J. Bell Tel. Col, 308 N.L.R.B. 277, 306 (1992); *see also* Pac. Tel. & Tel. Col, 262 N.L.R.B. 1048, 1049 (1982) ("The employer, under *Weingarten*, has no obligation to bargain with the representative . . . ."), *enforced in part and enforcement denied in part*, 711 F.2d 134 (9th Cir. 1983).

[367] *See* Materials Research Corp., 262 N.L.R.B. 1010, 1021 (1982) (Hunter, concurring in part and dissenting in part) ("[A]lthough the employer is under no duty to bargain with the union representative who is in attendance at . . . an investigatory interview, it is clear that the *Weingarten* right to the presence of a steward or other union official flows from the status of the union as collective-bargaining representative.").

[368] *See* Southwestern Bell Tel. Co. v. NLRB, 667 F.2d 470, 473 (5th Cir. 1982) (noting that "the *Weingarten* right [is] a derivative of the right of employees to act in concert for mutual aid and protections"); System 99, 289 N.L.R.B. 723, 727 (1988) (observing that "an employee's right under Section 7 of the Act to act in concert with fellow employees . . . is the source of *Weingarten* protections").

[369] E.I. Du Pont de Nemours & Co. v. NLRB, 724 F.2d 1061, 1065 (3d Cir. 1983), *vacated and remanded on other grounds*, 733 F.2d 296 (3d Cir. 1984); *cf.* Papcin v. Dichello Distribs. Inc, 697 F. Supp. 73, 79 (D. Conn. 1988) (referring to the "dispute resolution aspects of the collective bargaining process"). *See generally* Southwestern Bell Tel. Co., 227 N.L.R.B. 1223, 1224 (1977) ("[U]nion stewards all over the nation adjust thousands of grievances every day in an informal, expeditious, and satisfactory manner.").

[370] Climax Molybdenum Co., 227 N.L.R.B. 1189, 1191 (1977) (Fanning, concurring), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978). Although the Court in *Weingarten* stated that "the employer has no duty to bargain with any union representative who may be permitted to attend [an] investigatory interview," NLRB v. J. Weingarten, Inc., 420 U.S. 251, 259 (1975), the Board has taken the position that "there *is* a duty, based on *Weingarten*, to 'deal' with the representative by allowing him or her to speak, to make proposals and

turn demonstrates the need to afford the union representative "sufficient privacy to confer with [the] employee when the employee most needs assistance."[371] Thus, in the *Weingarten* context no less than in more traditional collective bargaining situations,[372] the balancing of interests required by Wigmore's fourth criterion appears to favor the recognition of a union representation privilege.[373]

This conclusion is buttressed by the fact that compelling an employee to testify about confidential communications with a union representative (or vice versa)[374] would not necessarily further the public's interest in ascertaining the truth.[375] Union members and their representatives typically experience conflict over the prospect of testifying against one another,[376] due in part to the existence of an "unwritten law"[377] or "code of ethics"[378] (and perhaps in some

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suggestions or to offer alternative forms of discipline." Slaughter v. NLRB, 794 F.2d 120, 127 (3d Cir. 1986) (emphasis added).

[371] Bureau of Prisons, Office of Internal Affairs, 52 F.L.R.A. 421, 441 (1996) (Wasserman, dissenting).

[372] *See generally* Arizona Portland Cement Co., 281 N.L.R.B. 304, 307 (1986) (referring to "the various phases of a complex collective-bargaining relationship"); Patrick v. Mich. Corr. Org., 2000 U.S. Dist. LEXIS 17789, at *16 (W.D. Mich. Nov. 22, 2000) ("Collective bargaining has taken on many forms in different contexts.").

[373] The recognition of a right to union representation under *Weingarten* reflects a policy determination that "industrial stability . . . would result form a union's presence during interviews that might lead to discipline." Sears, Roebuck & Co., 274 N.L.R.B. 230, 255 (1985), *overruled on other grounds in* Epilepsy Found. Of N.E. Ohio, 331 N.L.R.B. 676 (2000), *enforced in part and rev'd in part*, 268 R.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002); *see also* Pac. Gas & Elec. Co., 253 N.L.R.B. 1143, 1144 (1981) (indicating that the right to union representation under *Weingarten* is intended to "advance the effectuation of employee rights" and "contribute to the stability of industrial relations"). In that regard, one federal appellate court has specifically concluded that "industrial stability [is] a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."

[374] It has occasionally been suggested that the union representation privilege should apply "only to communications from employees to union representatives, and not communications from representatives to employees." U.S. Customs Serv., 57 F.L.R.A. 319, 325 n.4 (2001). However, no tribunal appears to have adopted this position, which is at odds with the fact that, at least under federal law, "communications in both directions" are generally protected by the analogous attorney-client privilege. United States v. Ramirez, 608 F.2d 1261, 1268 n.12 (9th Cir. 1979).

[375] *See* Bay County Div. on Aging, 98 Lab. Arb. Rep. (BNA) 188, 193 (1991) (Daniel, Arb.) ("[I]t is [a union representative's] responsibility to attempt to paint every fact and circumstance in as favorable a light *for* the grievant as possible."). *See generally* United States v. Mara, 410 U.S. 19 (1973) (Marshall, J., dissenting) (discussing "the view that certain forms of compelled evidence are inherently unreliable"); State v. Samuel, 643 N.W.2d 423, 429 (Wis. 2002) ("[S]tatements that are the product of coercion are more likely to be inherently untrustworthy than voluntary statements.") (citing Spano v. New York, 360 U.S. 315, 320 (1959)).

[376] *See* Dist. Council of Painters, 326 N.L.R.B. 1074, 1081 (1998) (observing that an individual "called as a witness . . . to testify against his own bargaining representative" is "placed in a highly uncomfortable position"); Gulf Oil Co., 274 N.L.R.B. 475, 477 (1985) (noting the "potential conflict" facing an employee "who may be called upon to . . . testify against a [fellow] union member"); Hine v. Dittrich, 278 Cal. Rptr. 330, 331 (Ct. App. 1991) (discussing the "conflict of interest for one union member to testify against another").

[377] Cannery Warehousemen, 190 N.L.R.B. 24, 27 (1971).

[378] Freight Drivers Local Union, 218 N.L.R.B. 1117, 1119 (1975).

cases a more formal obligation)[379] prohibiting one union member from testifying against another.[380] As a result, many employees and union representatives might refuse to testify against fellow union members[381] and other members of the bargaining unit[382] – or worse, commit perjury[383] – even if no evidentiary privilege was recognized.[384]

Given this possibility, any benefit to the administration of justice derived from the rejection of a union representation privilege may be relatively mod-

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[379] *See, e.g., Gulf Oil Co.*, 274 N.L.R.B. at 477 (discussing "a union member's oath to refrain from making statements against brothers") (internal punctuation omitted); Building Material & Dump Truck Drivers, 266 N.L.R.B. 1057, 1057 (1983) (describing an employee who, upon joining a union, took "an oath to abide by the Union's constitution and bylaws and promising not to harm fellow union members").

[380] *See Cannery Warehousemen*, 190 N.L.R.B. at 27 (discussing a union official's assertion that "there is an unwritten law that one union member does not testify against another member"); Gen. Motors Corp., 2 Lab. Arb. Rep. (BNA) 491, 502 (1938) (Hotchkiss, Arb.) ("Experienced practitioners in the field of industrial relations accept without rancor, whether they approve or not, the so-called 'code' which estops one member of an organization and frequently one member of an unorganized working force from testifying against another.").

[381] *See, e.g.*, Champion Parts Rebuilders, Inc., 260 N.L.R.B. 731, 740 (1982) (discussing a former shop steward and bargaining unit member who "was clearly biased in favor of the Union's case . . ., even to the degree [that] he initially refused to testify at all when called by [the employer]"); *Freight Drivers Local Union*, 218 N.L.R.B. at 1120 (describing a union member who assured the union that he would not "testify against a fellow union member"); United Parcel Serv., Inc., 67 Lab. Arb. Rep. (BNA) 861, 866 (1976) (Lubow, Arb.) (discussing an employee who was "asked . . . to testify but . . . declined to do so because he could not testify against a fellow union member").

[382] *See* Carter-Wallace, Inc., 89 Lab. Arb. Rep. (BNA) 587, 589 (1987) (Katz, Arb.) (noting "the great difficulty to be experienced by [an] Employer in persuading knowledgeable employees to testify against . . . their fellow worker and fellow Union member"); Alfred M. Lewis, Inc., 81 Lab. Arb. Rep. (BNA) 621, 624 (1983) (Sabo, Arb.) (acknowledging "the existence of a 'code' which inhibits or discourages Co-workers from testifying against one another"); Am. Smelting & Ref. Co., 48 Lab. Arb. Rep. (BNA) 1187, 1190 (1967) (Leonard, Arb.) ("[T]here frequently is a strong personal reluctance on the part of employees to testify against a fellow employee.").

[383] *See* Peoria Dry Wall, Inc., 191 N.L.R.B. 434, 435-36 n.4 (1971) (referring to testimony of "the kind which one employee would be apt to fabricate about a fellow employee, particularly another union member"); *Alfred M. Lewis*, 81 Lab. Arb. Rep. (BNA) at 624 (noting that "there is an inherent bias or interest in the testimony of any Co-worker where it involves conflict with another Co-worker," and that "[t]estimony colored by interest or bias can often take the form of deliberate falsification"); *cf.* Int'l Laborers Union of N. Am., 276 N.L.R.B. 1396, 1398 (1985) (finding that the testimony of two union officers "was deliberately fabricated" due to their "willing[ness] to give whatever testimony would help the Union's cause"); Hotel, Motel & Club Employees Union, 164 N.L.R.B. 491, 497 (1967) (describing a witness who "was obviously unhappy to have been called to testify against his union and . . . gave untruthful testimony").

[384] In *Cook Paint*, the administrative law judge opined that "[a]bsent a specific provision, contractually or otherwise established, calling for mandatory process, there is no apparent reason why any employee (or any nonemployee) may not with impunity decline to appear and testify in an arbitration proceeding." Cook Paint & Varnish Co., 246 N.L.R.B. 646, 652 (1979), *enforcement denied*, 648 F.2d 712 (D.C. Cir. 1981); *cf.* NLRB v. Int'l Union of Elec., Radio & Mach. Workers, 759 F.2d 533, 534 (6th Cir. 1985) (discussing the contention that unions are entitled to "prevent[ ] employers from forcing union members to testify . . . against other union members").

est.[385] Indeed, the recognition of new evidentiary privileges arguably tends to "*promote* truth seeking by avoiding [the] conflicts of interest that could lead to perjury."[386] This suggests that the balancing required by the fourth element of the Wigmore test favors the recognition of a union representation privilege.[387] As one court has noted:

> [I]f a . . . privilege is foreclosed, the truth may yet remain elusive and even just as unobtainable, in light of the perjury which could take place if such testimony is coerced. In explaining Wigmore's fourth criterion for the recognition of a testimonial privilege, then, the expected benefit to justice, used as a rationale for a bar of the privilege, is perhaps illusory.[388]

IV. POTENTIAL LIMITATIONS ON THE UNION REPRESENTATION PRIVILEGE

A. *Applicability of the Privilege in Criminal Proceedings*

1. *Judicial Hostility to the Privilege in Criminal Cases*

Despite potential pressure to do otherwise,[389] many union members and representatives compelled to testify against one another undoubtedly would give truthful testimony.[390] Thus, as with any other evidentiary privilege, the recognition of a union representation privilege would occasionally result in the

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[385] *See generally* Allred v. State, 554 P.2d 411, 429 (Alaska 1976) (Dimond, J., concurring) (asserting that "the truth-finding function of the courts would not be advanced by nonrecognition of [a] privilege" if compelling the witness to testify would not be "effective in breaching . . . existing confidentiality").

[386] Rancho Publ'ns v. Superior Court, 81 Cal. Rptr. 2d 274, 280 n.6 (Ct. App. 1999) (emphasis added) (citing David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 114-15 (1956)); *see also In re* Agosto, 553 F. Supp. 1298, 1309 (D. Nev. 1983) (discussing the possibility that "privileges were originally enacted to prevent courts from being subjected to [perjured] testimony"); Wendy Meredith Watts, *The Parent-Child Privilege: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 614 (1987) (suggesting that "privileges actually aid the ascertainment of truth by eliminating those situations in which perjured testimony is more likely").

[387] *See* Gruwell Anderson, *supra* note 17, at 524 (concluding that Wigmore's fourth requirement is "fulfill[ed]" in the union representation context because "the injury to the union/unionmember's relationship by disclosure would be greater than the benefit gained by disclosure").

[388] *Agosto*, 553 F. Supp. at 1310 (considering the possible recognition of a parent-child privilege); *see also* J. Tyson Covey, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 896 n.142 (observing that "[f]orced testimony" may be "so unreliable that the interests of adjudication are not furthered").

[389] *See, e.g.*, Johnson v. Teamsters Local 559, 102 F.3d 21, 25 (1st Cir. 1996) (noting the "harassment" suffered by an employee "after testifying against other Union members"); Jaeger Mach. Co., 55 Lab. Arb. Rep. (BNA) 850, 852 (1970) (High, Arb.) (describing a union's "instructions to [two of its officials] to not testify after they had been sworn and taken the stand," presumably "because their testimony would have tended to support the Company").

[390] *See, e.g.*, Horsehead Res. Dev. Co., 321 N.L.R.B. 1404, 1420 (1996) (describing a union member who had the "courage . . . to tell the truth in the face of . . . coercion put on him by . . . fellow union members"); *see also* Ball-Foster Glass Container Co., 106 Lab. Arb. Rep. (BNA) 1209, 1214 (1996) (Howell, Arb.) (observing that "union members are not necessarily prejudiced witnesses").

suppression of truth[391] and the defeat of justice.[392] In the view of some courts, this result, however infrequently it may occur,[393] is too high a price to pay in criminal cases,[394] where the search for truth is deemed most critical,[395] and the public interest in the production of evidence may be of constitutional magnitude.[396]

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[391] *See* Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 153 (Ct. App. 2003) ("[C]reating [a union representation] privilege . . . could severely compromise the ability of employers to conduct investigations pertaining to . . . employer rules violations . . . ."). *See generally In re* United States, 872 F.2d 472, 478 (D.C. Cir. 1989) (asserting that "evidentiary privileges by their very nature hinder the ascertainment of the truth"); Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 521 (8th Cir. 1984) (observing that "the law of privileges tends to suppress the truth"); United States v. Sabri, 973 F. Supp. 134, 140 (W.D.N.Y. 1996) (noting that the recognition of any evidentiary privilege "functions as an obstacle to the fact-finder in the search for truth").

[392] *See* Jaffee v. Redmond, 518 U.S. 1, 18-19 (1996) (Scalia, J., dissenting) (asserting that "occasional injustice" is "the cost of every rule which excludes reliable and probative evidence"); N.Y. State Inspection Employees v. N.Y. State Pub. Employment Relations Bd., 629 F. Supp. 33, 53 (N.D.N.Y. 1984) (observing that "every privilege engenders some risk of an erroneous decision"); Johnson v. Trujillo, 977 P.2d 152, 157 (Colo. 1999) ("[I]t is the very nature of evidentiary witness privileges to 'sacrifice some availability of evidence relevant to an administration of justice.'") (misquoting 1 MCCORMICK, *supra* note 1 § 72, at 101).

[393] The Supreme Court has indicated that the evidentiary "cost" of recognizing new privileges actually may be relatively modest: "Without a privilege, much of the desirable evidence to which litigants . . . seek access – for example, admissions against interest by a party – is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Jaffee*, 518 U.S. at 12. Thus, a "primary consideration in privilege cases should be whether the exclusion of the evidence in question would actually promote the creation of information which might not otherwise exist; if so, the exclusion is justified." Shabazz v. Scurr, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (citing Stephen A. Saltzburg, *Privileges and Professionals: Lawyers & Psychiatrists*, 66 VA. L. REV. 597, 600 n. 9 (1980)).

[394] *See generally* United States v. Allison, 619 F.2d 1254, 1260 (8th Cir. 1980) ("The Supreme Court has repeatedly emphasized the high cost to society of suppressing evidence which could otherwise be used at trial against criminal defendants.") (citing Stone v. Powell, 428 U.S. 465 (1976)). Courts have been particularly hesitant "to create privileges in the criminal context where none existed at common law." United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994); *see also* Hade v. City of Fremont, 233 F. Supp. 2d 884, 887 (N.D. Ohio 2002) ("Some courts distinguish between civil and criminal proceedings when allowing a claim of privilege, holding that, because there is little or no public interest in the outcome of civil litigation, privilege claims should more readily be accepted in civil cases."); United States v. Markiewicz, 732 F. Supp. 316, 319 (N.D.N.Y. 1990) (observing that the "invocation of a privilege is not as likely to be successful in a criminal setting as it is in a civil setting"), *aff'd in part and rev'd in part*, 978 F.2d 786 (2d Cir. 1992).

[395] *See In re* Grand Jury Proceedings, 563 F.2d 577, 585 (3d Cir. 1977) ("We recognize the friction between the ancient maxim that the law is entitled to every man's evidence and the existence of any privilege. Particularly in the criminal field, the search for truth should be hampered as little as possible."); United States v. King, 194 F.R.D. 569, 585 (E.D. Va. 2000) ("There is a compelling interest in having every man's evidence at a criminal trial to the extent that it is relevant.") (internal punctuation and citations omitted); United States v. Gullo, 672 F. Supp. 99, 104 (W.D.N.Y. 1987) ("[T]here is a strong policy in favor of full development of facts and admissibility in criminal cases.").

[396] *See* United States v. Nixon, 418 U.S. 683, 711 (1974) ("The right to the production of all evidence at a criminal trial . . . has constitutional dimensions."); *cf.* Brink's Inc. v. City of New York, 717 F.2d 700, 709 (2d Cir. 1983) ("In civil matters . . . there is generally no constitutional interest underlying a particular claim of privilege . . . .").

Although based on a questionable premise,[397] this is essentially the conclusion reached by the court in *In re Grand Jury Subpoenas dated January 20, 1998*.[398] That case involved a union's opposition to grand jury subpoenas issued to union officials who had represented and advised several employees in connection with the grand jury's investigation.[399] The union asserted that any communications between the union officials and the employees were protected by a "privilege generally shielding communications between union members and their representatives on matters of union concern."[400]

The court asserted that the sole support for the union's claim of privilege came from cases such as *Customs Service*[401] and *City of Newburgh*,[402] which held only that an employer commits an unfair labor practice by questioning a union official about communications with a represented employee pertaining to internal disciplinary proceedings.[403] The court concluded that whatever privilege may have been recognized in those cases does not apply "against any party other than the employer."[404]

In reaching this conclusion, the *Grand Jury Subpoenas* court relied primarily upon the District of Columbia Circuit's analysis in *United States Department of Justice v. FLRA* ("*DOJ I*"),[405] which involved an investigation by the Inspector General[406] into the potential theft of government property by an

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[397] The constitutional interest in the production of evidence in criminal cases stems primarily, if not exclusively, from the Fifth and Sixth Amendment due process and fair trial rights of the defendant, *see Nixon*, 418 U.S. at 711, who typically "has more at stake than a civil litigant," and whose "evidentiary needs" therefore "may weigh more heavily in the balance." United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983). Thus, even established evidentiary privileges must "in some circumstances yield to a . . . criminal defendant's federal constitutional right to a fair trial." Delaney v. Superior Court, 789 P.2d 934, 949 n.23 (Cal. 1990). However, these constitutional rights would be protected, rather than impaired, by the recognition of a union representation privilege where (as typically would be the case) the privilege is applied to prevent a union representative from testifying *against* the defendant. *Cf.* United States v. Neill, 952 F. Supp. 834, 839 (D.D.C. 1997) ("The attorney-client privilege . . . is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial. . . . [S]ubstantial questions of fundamental fairness are raised where, in connection with a criminal prosecution, the government invades that privilege.").

[398] 995 F. Supp. 332 (E.D.N.Y. 1998).

[399] *See id.* at 333.

[400] *Id.*

[401] *See id.* at 336 n.3 (citing Customs Serv., 38 F.L.R.A. 1300 (1991)).

[402] *See id.* at 336 (citing City of Newburgh v. Newman, 421 N.Y.S.2d 673 (App. Div. 1979)).

[403] *See id.*; *see also* Poray, Inc., 160 N.L.R.B. 697, 703-04 (1966) (holding that an employer committed an unfair labor practice by questioning an employee about "communications to her from the Union which the Union had delivered to her privately," because the employer's questioning "invaded [the employee's] privacy regarding a matter as to which employees . . . are entitled to be protected from an employer's prying").

[404] *Grand Jury Subpoenas*, 995 F. Supp. at 336; *see also* Seelig v. Shepard, 578 N.Y.S.2d 965, 967 (Sup. Ct. 1991) (citing *City of Newburgh* in support of the proposition that "[t]here arises, *in the context of rules regulating relations between management and labor*, a species of privilege for labor union leaders") (emphasis added).

[405] 39 F.3d 361 (D.C. Cir. 1994).

[406] Congress has established in each of several specified federal government agencies, including the Department of Justice (of which the Immigration and Naturalization Service is a part), an Office of Inspector General "as an 'independent and objective unit,' charg[ed] . . . with the responsibility of conducting and supervising audits and civil and criminal investiga-

employee of the Immigration and Naturalization Service (the "INS").[407] The FLRA held that the Inspector General's representative committed an unfair labor practice by questioning the employee and his union representative "about their 'privileged' conversations."[408]

However, the appellate court vacated the FLRA's ruling.[409] The court had no quarrel with the agency's recognition of an evidentiary privilege protecting confidential union-related communications from disclosure to management.[410] However, because the FLRA's authority is limited to federal labor relations matters,[411] the court held that the privilege the agency had recognized could *only* protect such communications from disclosure to management, and was not enforceable "against the world."[412]

Because the Inspector General's office operates relatively independently,[413] and its investigatory procedures are not subject to collective bargaining obligations,[414] the court concluded that its investigator was not acting on behalf of "management" (i.e.; the INS) when he investigated the INS employee's alleged wrongdoing.[415] And because the court concluded that the union representation privilege is *only* enforceable against management, it held

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tions relating to that agency's operations." U.S. Nuclear Regulatory Comm'n v. FLRA, 25 F.3d 229, 233 (4th Cir. 1994) (quoting 5 U.S.C. App. 3 § 4(a)(1) (2000)).

[407] *See DOJ I*, 39 F.3d at 363.

[408] *Id.* at 364.

[409] *See id.* at 370.

[410] *See id.* at 369 ("We do not question [the] reasoning [of *Customs Service*] insofar as it applies to management.").

[411] *See id.*

[412] *Id.*; *cf.* U.S. Steel Corp. v. Mattingly, 89 F.R.D. 301, 304 (D. Colo.) (finding "no authority whatsoever for [an administrative agency] to restrict the availability of evidence in a judicial proceeding or to confer a testimonial privilege"), *rev'd and remanded*, 663 F.2d 68 (10th Cir. 1980). To illustrate this point, the *DOJ I* court posed – and answered – the following question involving a hypothetical criminal investigation:

> Are we to suppose that the . . . Authority, through its administration of [the FSLMRS] and the prospect of the Justice Department being held responsible for the investigation, may oversee questioning by FBI agents and [Drug Enforcement Administration] agents and Assistant United States Attorneys in cases involving union members? It is impossible to believe Congress intended anything of the sort.

DOJ I, 39 F.3d at 366 (footnote omitted).

[413] *See DOJ I*, 39 F.3d at 369. Specifically, representatives of the various Inspector General's offices are, by statute, generally "shielded with independence" from interference by the agencies they are responsible for investigating. *U.S. Nuclear Regulatory Comm'n*, 25 F.3d at 234 (citing 5 U.S.C. app. 3 §§ 3(a) & 6(a)(2) (1994)).

[414] *See DOJ* I, 39 F.3d at 369; *see also U.S. Nuclear Regulatory Comm'n*, 25 F.3d at 234 ("[P]roposals which concern investigations conducted by the Inspector General . . . are not appropriately the subject of bargaining between an [employer] and a union."). The *DOJ I* court noted that the union did not represent employees of the Inspector General's office, but employees of the INS, and observed that the FSLMRS actually "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly – an apt description of investigators working for the Inspector General." *DOJ I*, 39 F.3d at 365-66 & n.5.

[415] *See DOJ I*, 39 F.3d at 368 ("The Inspector General does not stand in the shoes of management. To perform his duties independently and objectively, the Inspector General cannot side with management . . . .").

that the investigator was not prohibited from pressuring the employee or the union representative to reveal their confidential communications to him.[416]

The *DOJ I* court's analysis has been undermined by the Supreme Court's subsequent decision in *National Aeronautics and Space Administration v. FLRA* ("*NASA*"),[417] and the District of Columbia Circuit's own ensuing interpretation of *NASA* in *United States Department of Justice v. FLRA* ("*DOJ II*").[418] Both *NASA* and *DOJ II* held that the Inspector General's investigators *are* representatives of the agency whose employees they investigate,[419] thus effectively overruling the *DOJ I* court's finding that they do not act on behalf of management when conducting their investigations.[420]

Nevertheless, in refusing to extend the union representation privilege to federal grand jury proceedings, the *Grand Jury Subpoenas* court did not rely on the *DOJ I* court's characterization of the Inspector General's office, but on its assertion that the privilege does "not shield a conversation between an employee and his union representative from disclosure in court, or before a grand jury."[421] This dicta in *DOJ I* was not overruled by *NASA* or *DOJ* II,[422] neither of which addressed the scope of an employee's right to union representation in a criminal investigation conducted by "law enforcement officials with a broader charge" than the Inspector General.[423]

Because federal grand juries and the prosecutors that appear before them clearly *are* independent from management,[424] the *Grand Jury Subpoenas* court indicated that the union representation privilege applies in federal grand jury proceedings only if it is indeed good "against the world."[425] With respect to that issue, the court concluded that the union had failed to establish that soci-

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[416] *Id.* at 369.

[417] 527 U.S. 229 (1999).

[418] 266 F.3d 1228 (D.C. Cir. 2001).

[419] *See NASA*, 527 U.S. at 240-41; *DOJ II*, 266 F.3d at 1229.

[420] Long before *NASA* and *DOJ II* were decided, the Third Circuit had also concluded that the Inspector General's investigators are representatives of the agency whose employees they are investigating. *See* Def. Criminal Investigative Serv. v. FLRA, 855 F.2d 93, 100 (3d Cir. 1988).

[421] *DOJ I*, 39 F.3d at 369. Noting that the union had cited "no case in which a federal or state court has ruled that some form of union privilege bars a prosecutor or grand jury from inquiring into conversations between a union member and his union representative," the *Grand Jury Subpoenas* court held that "no union privilege . . . bar[red] the examination of the subpoenaed witnesses before the grand jury." *Grand Jury Subpoenas*, 995 F. Supp. at 334, 337.

[422] The portion of *DOJ I* on which the *Grand Jury Subpoenas* court relied is dicta because the parties in *DOJ I* "apparently *conceded* that a union [representation] privilege 'would not shield a conversation between an employee and his union representative from disclosure before a grand jury.'" *Grand Jury Subpoenas*, 995 F. Supp. at 337 (emphasis added and ellipses omitted) (quoting *DOJ I*, 39 F.3d at 369).

[423] *DOJ II*, 266 F.3d at 1232 (quoting *NASA*, 527 U.S. at 244 n.8).

[424] *See Grand Jury Subpoenas*, 995 F. Supp. at 337 ("[B]oth the federal grand jury that has subpoenaed the [union] witnesses and the federal prosecutor who seeks to question them before that body are even more independent from management than was the Inspector General's Office . . . ."). *See generally* United States v. Ogden, 703 F.2d 629, 636 (1st Cir. 1983) (discussing "the constitutionally mandated independence of the grand jury and the prosecutor").

[425] *Grand Jury Subpoenas*, 995 F. Supp. at 336 (quoting *DOJ I*, 39 F.3d at 369).

ety's interest in encouraging confidential union communications outweighs its interest in having all relevant evidence of criminal conduct explored.[426] The court therefore declined to interpret the privilege to afford the broad protection from disclosure in criminal proceedings advocated by the union.[427]

2. *The Applicability of Weingarten in Criminal Investigations*

Although the *Grand Jury Subpoenas* court's interpretation of the union representation privilege is not surprising,[428] it is inconsistent with the prevailing interpretation of *Weingarten*.[429] In *Department of Treasury, Internal Revenue Service, Jacksonville District*,[430] for example, the FLRA specifically held that the right to union representation applies to interviews conducted in connection with criminal investigations, and "not just to examinations of employees in connection with non-criminal matters."[431]

The NLRB has similarly held that an employee's right to union representation at an investigatory interview applies in criminal investigations,[432] and even the federal appellate court that decided *DOJ I* has acknowledged that "*Weingarten* protections have been accorded to private sector employees suspected of criminal conduct."[433] The Board has explained this view on the following basis:

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[426] *See id.* at 337; *see also id.* at 335 ("[T]he [union] has . . . failed to show that the union relationship is so highly valued by . . . society that its confidences warrant protection even at the cost of losing evidence important to the administration of justice.").

[427] *See id.* at 333.

[428] The balance struck by the court reflects the widely-held view that the "need for evidence relevant to the truth-seeking process" is "especially important in the context of federal grand jury investigations." *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1010 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *see also In re* Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982) ("Nowhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena."); *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 382 (3d Cir. 1976) (asserting that society's interest in having "every relevant fact . . . developed and presented to the fact-finder" is "particularly compelling in the context of a grand jury").

[429] In addition, although society's interest in the full disclosure of evidence in criminal cases has been described as "compelling," United States v. King, 194 F.R.D. 569, 585 (E.D. Va. 2000), it is also in criminal cases that the countervailing interest in protecting confidential relationships is likely to be most urgent. *See, e.g.*, United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) ("[T]he important social interests in the free flow of information that are protected by [a] privilege are particularly compelling in criminal cases.").

[430] 23 F.L.R.A. 876 (1986).

[431] *Id.* at 878. While the pertinent legislative history contains "no hint of Congress's intention with respect to the interface of criminal and administrative investigations," Congress's codification of the right to union representation in the FSLMRS "literally applies to *any examination* in connection with an investigation aimed at a [bargaining] unit employee," including those involving suspected criminal activity. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 24 F.L.R.A. 521, 534 (1986) (emphasis added).

[432] *See, e.g.*, U.S. Postal Serv., 303 N.L.R.B. 463, 467 (1991) ("The Board has rejected the argument that it is inappropriate to apply an employee's Section 7 right of prior consultation to a criminal investigation . . . .") (citing cases), *enforced*, 969 F.2d 1064 (D.C. Cir. 1992); Internal Revenue Serv., 23 F.L.R.A. at 878 ("[T]he NLRB has applied *Weingarten* rights to the examination of . . . employees . . . in connection with criminal investigations.").

[433] U.S. Postal Serv. v. NLRB, 969 F.2d 1064, 1071-72 (D.C. Cir. 1992); *see also* U.S. Dep't of Justice v. FLRA, 266 F.3d 1228, 1229 (D.C. Cir. 2001) (holding that the right to union representation "applie[s] to . . . *criminal* investigations").

> [W]ere we to accept [the] argument that legitimate employer prerogatives and the public safety require the exclusion of all union representatives from criminal investigations . . . while at the same time permitting [an employer] to administratively discipline employees based on the fruits of such criminal investigations, we would in effect be nullifying the *Weingarten* rights of any . . . employee who might be administratively disciplined as the result of a criminal investigation. Such an outcome is clearly repugnant to the . . . right [of] an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.[434]

3. *Implications of Weingarten's Applicability in Criminal Investigations for the Union Representation Privilege*

The NLRB and the FLRA are the federal agencies charged with primary responsibility for implementing national labor policy.[435] Thus, their interpretations of *Weingarten* have ordinarily been give substantial deference by the courts[436] and labor arbitrators.[437] However, for reasons the court did not adequately explain, those agencies' extension of the right to union representation (and, inferentially, the attendant evidentiary privilege recognized in *Cook Paint* and *Customs Service*)[438] to criminal investigations was not accorded any meaningful deference in the *Grand Jury Subpoenas* case.[439]

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[434] U.S. Postal Serv., 241 N.L.R.B. 141, 142 (1979) (internal quotation marks omitted).

[435] *See* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) ("The function of striking [the] balance [between conflicting legitimate interests] to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."); EEOC v. FLRA, 744 F.2d 842, 845 (D.C. Cir. 1984) ("To . . . establish labor-management relations policy [in the federal sector], Congress created the Federal Labor Relations Authority."), *cert. dismissed*, 476 U.S. 19 (1986).

[436] *See, e.g.*, NLRB v. Columbia Univ., 541 F.2d 922, 932 (2d Cir. 1976) (discussing "the special deference that is to be accorded a Board determination of whether or not the need for union assistance at an interview exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor management relations") (internal punctuation and citation omitted). *See generally* Henry Ford Health Sys. v. NLRB, 105 F.3d 1139, 1144 (6th Cir. 1997) ("The Board has the primary responsibility for developing and applying national labor policy, and [courts] therefore accord Board rules considerable deference."); Albright v. United States, 26 Cl. Ct. 1119, 1124 (1992) ("FLRA decisions are entitled to deference because of the FLRA's expertise in the area of labor law.").

[437] *See, e.g.*, Simkins Indus., Inc., 106 Lab. Arb. Rep. (BNA) 551, 557 (1996) (Fullmer, Arb.) ("It appears to the arbitrator that the National Labor Relations Board is the primary custodian of the *Weingarten* doctrine."); Lancaster City Schs., 81 Lab. Arb. Rep. (BNA) 1024, 1028 (1983) (Abrams, Arb.) ("The National Labor Relations Board enforces *Weingarten*, not labor arbitrators.").

[438] *See, e.g.*, Customs Serv., 38 F.L.R.A. 1300, 1307 (1991) ("[T]he existence of the privilege is an integral part of an employee's statutory right to representation . . . .").

[439] In a footnote, the court did acknowledge that employers "cannot seek to learn from a union official the statements of an employee made in the course of union representation." *In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 336 n.3 (E.D.N.Y. 1998). However, the court made no mention of the federal statutory right to union representation on which this prohibition is based, but instead asserted that "[n]either the collective bargaining process nor the *state laws* that protect that process can limit the scope of a federal criminal investigation." *Id.* at 337 (emphasis added). Once the court cast the issue as a matter of state law, its ultimate holding appears to have been a foregone conclusion, because the Supreme Court itself has held that the "federal interest in the enforcement of federal criminal

The court's oversight may be attributable to the fact that, in contrast to the NLRB, the FLRA and other policy-making administrative agencies,[440] courts tend to favor evidentiary rules that assist them in the search for truth,[441] while attaching relatively little weight to the countervailing policy interests, "external to the adjudicatory process,"[442] that are served by evidentiary privileges.[443] When the pertinent confidentiality interests *are* given due consideration,[444] it seems clear that if the right to union representation applies to interviews conducted in criminal investigations,[445] the correlative evidentiary privilege arising

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statutes" must prevail over "any concern for federal-state comity in the area of evidentiary privilege." *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1010 (D.N.J.) (citing United States v. Gillock, 445 U.S. 360, 373 (1980)), *aff'd*, 879 F.2d 861 (3d Cir. 1989).

[440] The recognition of an evidentiary privilege is "[u]ltimately . . . a policy decision." Ulibarri v. Superior Court, 909 P.2d 449, 456 (Ariz. Ct. App. 1995), *review denied*, 924 P.2d 109 (Ariz. 1996); *see also* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1055 (E.D.N.Y. 1976) (characterizing "questions of testimonial privilege" as "policy issues"). Thus, legislatures, federal administrative agencies, and other policy-making bodies may be "institutionally better equipped" than courts "to perform the balancing of the competing policy issues required in deciding whether the recognition of a . . . privilege is in the best interests of society." *In re* Grand Jury, 103 F.3d 1140, 1154 (3d Cir. 1997).

[441] *See* Pearson v. Miller, 211 F.3d 57, 67 (3d Cir. 2000) (noting that a "principal feature" of the federal common law approach to the development of evidentiary privileges "is that the considerations against the recognition of new privileges that would impede access to probative evidence are granted very significant weight"); People v. Sanders, 457 N.E.2d 1241, 1245 (Ill. 1983) (observing that "courts, as institutions, find it easy to perceive value in public policies . . . favoring the admission of all relevant and reliable evidence which directly assist the judicial function of ascertaining the truth").

[442] Delaney v. Superior Court, 789 P.2d 934, 959 (Cal. 1990) (Broussard, J., concurring); *see also Grand Jury Subpoena (Psychological Theatrical Records)*, 710 F. Supp. at 1009 ("Rules of privilege . . . are not designed to achieve a more effective and truthful result in the litigation process.") (quoting 2 WEINSTEIN & BERGER, *supra* note 322 ¶ 501[01], at 501-13).

[443] *See, e.g.*, *In re* Dinnan, 661 F.2d 426, 430 (5th Cir. 1981) (contrasting "the public policy served by a new privilege" with "normally dominant truth-seeking considerations" in discussing the judiciary's "notable hostility . . . to recognizing new privileges") (footnote omitted); *Sanders*, 457 N.E.2d at 1245 ([I]t is not [the courts'] primary function to promote policies aimed at broader social goals more distantly related to the judiciary."); Mullane, *supra* note 322, at 136 (finding it "hardly surprising" that a court's treatment of a privilege issue "begins with the presumption that courts have a *need* for and *right* to compel all evidence from all sources").

[444] One federal court has asserted that "testimonial privileges should never be considered as merely a frustration of the effective administration of justice or the circumvention of the best interests of society and the state." *In re* Agosto, 553 F. Supp. 1298, 1326 (D. Nev. 1983). Privileges instead "serve as important protectors of the right of privacy," assuring that "our system of justice functions at its optimal integrity." *Id.* at 1323, 1326 (quoting Krattenmaker, *supra* note 197, at 616); *see also* United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986) ("Privileges are recognized because lawmakers and courts consider protecting confidential relationships more important to society than ferreting out what was said within the relationship.").

[445] *See* U.S. Postal Serv., 288 N.L.R.B. 864, 866 (1988) ("*Weingarten* rights are not subservient to Federal criminal proceedings, even when *Miranda* rights have been accorded those accused of violations of law."); U.S. Postal Serv., 241 N.L.R.B. 141, 153 (1979) ("*Weingarten* rights extend to interviews regarding alleged criminal acts.").

from that right[446] should also apply in criminal and other judicial proceedings.[447]

Extending the privilege to judicial proceedings would promote union representation by enabling employees to confide in their union representatives "without concern that such confidences may be divulged to outsiders."[448] As one court has explained:

> If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an overzealous government[ ] . . . .[449]

This was essentially the conclusion reached in *United States Department of Agriculture Farm Service Agency, Kansas City, Mo.* ("*Farm Service*"),[450] where an FLRA administrative law judge specifically rejected the analysis in *DOJ I*,[451] the case on which the *Grand Jury Subpoenas* court primarily relied in refusing to extend the union representation privilege to federal grand jury proceedings.[452] The judge in *Farm Service* began by noting that confidential communications between employees and their union representatives are protected by an evidentiary privilege.[453] He then asserted that this privilege, first recognized by the FLRA in the *Customs Service* case,[454] had also been "recog-

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[446] As alluded to earlier, the union representation privilege traces its origins to the employee's right to union representation at an investigatory interview under *Weingarten*, and in particular to the employee's derivative right to consult confidentially with the union representative prior to that interview. *See, e.g.*, U.S. Dep't of Justice v. FLRA, 39 F.3d 361, 369 (D.C. Cir. 1994) ("The privilege . . . derive[s] from the . . . right of an employee to union representation in an investigation . . . ."); Hughes Aircraft Co., 86 Lab. Arb. Rep. (BNA) 1112, 1117 (1986) (Richman, Arb.) (noting that recognition of the privilege is "consistent with the protection afforded employees in their insistence on union representation" under *Weingarten*).

[447] In *SEC v. Touche Ross & Co.*, 438 F. Supp. 259, 263 (S.D.N.Y. 1977), for example, the court noted that the potential recognition of "a new privilege of confidentiality" is a "policy issue" that, at least in the first instance, should be left to the federal agency "charged . . . with special expertise and rule-making power in administering the federal laws" at issue. The courts, by contrast, should "defer making such a policy judgment until the [agency] itself [has] expressed its official views clearly." *Id. But cf.* Sperandeo v. Milk Drivers Local Union No. 537, 334 F.2d 381, 384 (10th Cir. 1964) ("It is for the Court, and not the governmental agency or executive branch, to determine whether [information] sought to be withheld under a claim of privilege [is] entitled to the protection of that privilege.").

[448] *In re* Estate of Colby, 723 N.Y.S.2d 631, 633 (Sur. 2001) (describing the attorney-client privilege); *see also* Swidler & Berlin v. United States, 524 U.S. 399, 412 (1988) (O'Connor, J., dissenting) (noting that an evidentiary privilege "promotes trust in the representational relationship").

[449] Seelig v. Shepard, 578 N.Y.S.2d. 965, 967 (Sup. 1991).

[450] F.L.R.A. ALJ Dec. No. 130, 1997 FLRA LEXIS 141 (Oct. 23, 1997).

[451] U.S. Dep't of Justice v. FLRA, 39 F.3d 361 (D.C. Cir. 1994).

[452] *See In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 336-37 (E.D.N.Y. 1998).

[453] *See Farm Serv.*, 1997 FLRA LEXIS 141, at *41.

[454] Customs Serv., 38 F.L.R.A. 1300 (1991).

nized with approval" by the court in *DOJ I*,[455] although that court had concluded that the privilege is only "good as against management."[456]

Addressing this purported limitation on the scope of the privilege, the judge in *Farm Service* first noted that even before the Supreme Court effectively overruled *DOJ I* in *NASA*,[457] the FLRA had rejected the *DOJ I* court's conclusion that employees have no right to union representation in criminal investigations conducted by the Inspector General.[458] The FLRA instead holds that *Weingarten* rights apply in "criminal investigations as well as . . . non-criminal investigations,"[459] including those conducted by the Inspector General.[460]

In fact, the FLRA has held that, at least in FSLMRS cases, the right to union representation applies to "*any examination* in connection with an investigation aimed at a [bargaining] unit employee."[461] The judge in *Farm Service* therefore concluded, "contrary to [the *DOJ I*] Court," that the evidentiary privilege stemming from the right to union representation recognized in *Customs Service* should likewise be enforceable "against the world."[462]

The judge's conclusion that the union representation privilege should apply in criminal cases was foreshadowed by the FLRA's analysis of an employee's right to union representation in *Department of Justice, Immigration and Naturalization Service* ("*INS*").[463] In *INS*, an employee questioned in connection with a criminal investigation requested that his union representative be present during the interview.[464] One of the investigators initially acknowledged that the employee was entitled to have his representative present during the interview.[465]

However, the investigator then proceeded to inform the employee that he was being interviewed in connection with a criminal investigation and not merely an administrative investigation, and cautioned the employee that his communications with his union representative would not be privileged in any

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[455] *Farm Serv.*, 1997 FLRA LEXIS 141, at *41 n.5.

[456] *Id.* (quoting *DOJ I*, 39 F.3d at 369).

[457] Nat'l Aeronautics & Space Admin. v. FLRA, 527 U.S. 229 (1999).

[458] *See Farm Serv.*, 1997 FLRA LEXIS 141, at *41 n.5 (citing Headquarters, Nat'l Aeronautics & Space Admin., 50 F.L.R.A. 601, 612-19 (1995), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999)); *see also* U.S. Dep't of Justice, 56 F.L.R.A. 556, 570 (2000) (asserting that *DOJ I* was "wrongly decided," and that "the Authority has respectfully declined to follow" the court's decision in that case). *See generally* U.S. Geological Survey Caribbean Dist. Office, 53 F.L.R.A. 1006, 1040 (1997) (noting that a lower federal appellate court decision is "not binding on the Authority unless and until it specifically embraces the decision, or is reversed by the Supreme Court").

[459] *Farm Serv.*, 1997 FLRA LEXIS 141, at *40 (citing Dep't of Treasury, Internal Revenue Serv., 23 F.L.R.A. 876, 878-79 (1986)).

[460] *See, e.g.*, Dep't of Def., Def. Crim. Investigative Serv., 28 F.L.R.A. 1145, 1148-51 (1987), *enforced*, 855 F.2d 93 (3d Cir. 1988); *see also* FLRA v. U.S. Dep't of Justice, 137 F.3d 683, 688 (2d Cir. 1997) ("The FLRA has . . . made clear its position that [*Weingarten*] applies to questioning by [the Inspector General's] agents . . . .").

[461] Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 24 F.L.R.A. 521, 534 (1986) (emphasis added).

[462] *Farm Serv.*, 1997 FLRA LEXIS 141, at *41 n.5.

[463] 36 F.L.R.A. 41 (1990), *enforcement denied*, 939 F.2d 1170 (5th Cir. 1991).

[464] *See id.* at 42-43.

[465] *See id.* at 43.

ensuing criminal proceedings.[466] After the investigator assured the employee that he could interrupt the interview at any time to seek advice from legal counsel or his union representative, the employee elected to be interviewed without his union representative present.[467]

Although the employee was, in fact, subsequently subpoenaed to testify before a grand jury,[468] the administrative law judge ruled that the investigator's reference to the lack of a privilege in those proceedings misled the employee into concluding that he was not entitled to full *Weingarten* rights during his investigatory interview.[469] The FLRA agreed that the investigator's tactics coerced the employee into foregoing his right to union representation.[470] Because the employee's decision to be interviewed without a union representative present could not be considered knowing and voluntary,[471] his right to union representation during the interview had been violated.[472]

In reaching this conclusion, the FLRA found it unnecessary to decide whether communications between the employee and his union representative

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[466] *See id.* The investigator further stated that the union representative "would or could be subject to subpoena and/or interview by [the investigators], to subpoena by a grand jury, or to subpoena at trial," and thus "could become a witness against [the employee] and for the Government as to any communication that indicated possible culpability on the part of [the employee]." *Id.*

[467] *See id.*

[468] *See id.* at 53. It is not clear whether the union representative was also subpoenaed to testify before the grand jury. However, one labor arbitrator has noted that while it would be "improper" for a union representative to testify voluntarily against an employee he represented, "it would not be wrong for him to respond to a properly executed subpoena." Canteen Corp., 89 Lab. Arb. Rep. (BNA) 815, 819 (1987) (Keefe, Arb.)

[469] *See INS*, 36 F.L.R.A. at 45 ("The Judge found that [the] statement conveyed the erroneous impression that [the employee] was not entitled to his full statutory right to a union representative at the examination because the interview was in connection with a criminal investigation.").

[470] *See id.* at 51 ("[T]he manner, nature, and repetition of [the investigator's] statements to [the employee], when [the employee] asserted his right to union representation . . . intimidated [the employee] to give up his expressed desire for, and right to, union representation.").

[471] *See id.* at 52 (concluding that the investigator "discouraged and dissuaded [the employee] from remaining firm in his request and resolve for union representation, and . . . coerced [the] surrender of that protection"). An employee "may, even after having requested that a steward be present, waive the right to representation during a *Weingarten* interview." U.S. Postal Serv., 275 N.L.R.B. 430, 432 n.6 (1985). However, any claim that the right has been waived is carefully scrutinized. *See* Southwestern Bell Tel. Co., 227 N.L.R.B. 1223, 1223 (1977). The Board has explained the reason for viewing such alleged waivers with skepticism:

> Before inferring that a waiver has occurred the Board must assure itself that the employee acted knowingly and voluntarily. The right being waived is designed to prevent intimidation by the employer. It would be incongruous to infer a waiver without a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection.

Id. (internal punctuation omitted) (quoting Theodore C. Hirt, *Union Presence in Disciplinary Meetings*, 41 U. CHI. L. REV. 329, 350 (1974)).

[472] *See INS*, 36 F.L.R.A. at 66 (holding that the employer "constructively denied [the employee's] request for a Union representative to which he was entitled"); *cf. Southwestern Bell Tel. Co.*, 227 N.L.R.B. at 1228 (finding remarks that "discouraged and intimidated . . . employees from exercising their right[ ]" to union representation to be "just like a *denial* of this right") (emphasis added).

actually would have been privileged in the subsequent criminal proceeding.[473] However, the administrative law judge noted that the FLRA was then considering the potential recognition of a union representation privilege in the *Customs Service* case,[474] and the FLRA ultimately did recognize the privilege in that case.[475] Thus, when read together, *INS* and *Customs Service* strongly suggest that the privilege should apply in criminal proceedings[476] in order to "prevent employers from coercing employees" into waiving their *Weingarten* rights[477] in the manner described in the *INS* case.[478]

4. *Policy Considerations Supporting Recognition of the Privilege in Criminal Cases*

a. *Recognizing the Privilege Would Promote Communications Between Employees and Their Union Representatives*

The FLRA is not alone in concluding that the union representation privilege should be "good as against the world."[479] As one federal court recently noted, "[p]rivileges usually do not vary depending upon the nature of the action as their very purpose is to bar compelled disclosure irrespective of the nature of the proceeding in connection with which they may arise."[480] Thus, most evi-

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[473] *See INS*, 36 F.L.R.A. at 51 (rejecting the employer's contention "that the legality of its conduct turned on the truthfulness of the statements [concerning the lack of a privilege] made by [the investigator]"). The administrative law judge also did not reach this issue, but appeared to favor the recognition of such a privilege:

> Except for the fact that [the employee and the union representative] did not have an attorney-client relationship, [the employer] cites no other authority to support [the investigator's] assertion that the conversations between [the employee] and his Union representative would not be privileged and that [the representative] could be compelled to be a witness against [the employee] as to any admissions which [he] made. The truth of these assertions are [sic] not free from doubt. They need not be resolved in this case for it is enough to note that Congress has provided the employee the right to the presence of a union representative . . . and it is for the employee himself to determine whether to exercise the right and obtain the full measure of protection which Congress envisioned.

Id. at 65-66 (footnote omitted).

[474] *See id.* at 66 n.6.

[475] *See* Long Beach Naval Shipyard,, 44A F.L.R.A. 1021, 1031 (1992) (referring to "the privilege accorded by *Customs Service*").

[476] Although the Fifth Circuit refused to enforce the FLRA's decision in *INS*, the court – like the FLRA – found it unnecessary to decide whether the employee had been "correctly advised . . . that no privilege arises out of the employee-union representative relationship." Dep't of Justice Immigration & Naturalization Serv. v. FLRA, 939 F.2d 1170, 1175 (5th Cir. 1991).

[477] Rubinstein, *supra* note 18, at 602; *see also* Fiber Glass Sys., Inc. v. NLRB, 807 F.2d 461, 463 (5th Cir. 1987) ("Employer interviews or 'interrogations' become illegal . . . when 'the words themselves or the context in which they are used . . . suggest an element of coercion or interference.'") (quoting NLRB v. Weingarten, Inc., 339 F.2d 498, 500 (5th Cir. 1964)).

[478] In fact, the Authority in *INS* characterized such "intimidation by the employer" as one of "the very tactics the right is meant to prevent." *INS*, 36 F.L.R.A. at 52 (quoting Southwestern Bell Tel. Co., 227 N.L.R.B. 1223, 1223 (1977)).

[479] U.S. Dep't of Agric. Farm Serv. Agency, F.L.R.A. ALJ Dec. No. 130, 1997 FLRA LEXIS 141, at *41 (Oct. 23, 1997).

[480] Syposs v. United States, 63 F. Supp. 2d 301, 304 (W.D.N.Y. 1999); *cf.* Nilavar v. Mercy Health Sys., 210 F.R.D. 597 (S.D. Ohio 2002):

dentiary privileges apply in both civil and criminal cases,[481] as well as in administrative proceedings,[482] and the union representation privilege should be accorded the same treatment.[483]

For example, to the extent it enables employees to seek the advice of their union representatives without fear that their communications will subsequently be used to incriminate them,[484] the union representation privilege is, once again, analogous to the attorney-client privilege.[485] Thus, in order to be effective, the union representation privilege, like the attorney-client privilege, should apply "regardless of whether the proceeding is civil, criminal or administrative."[486]

> [A] privilege should either be recognized in the common law, or it should not. Its application should not turn on whether, for example, the claim . . . is one arising under malpractice law, discrimination law, or antitrust law.
>
> This observation is not in conflict with the notion that even extant privileges should be strictly construed. To say that a privilege must be strictly construed is not to limit its applicability to certain causes of action . . . .

Id. at 606 & n.17 (citation omitted).

[481] *See* Nixon v. Sirica, 487 F.2d 700, 746 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) ("Common law evidentiary privileges based on encouraging frank and candid communication apply equally in criminal and civil cases."); New Mexico v. Roper, 921 P.2d 322, 324 (N.M. Ct. App. 1996) (indicating that an evidentiary privilege "generally applies to both criminal and civil cases unless [a] rule expressly limits [the] privilege to the latter") (citing 8 WIGMORE, *supra* note 6 § 2385).

[482] *See, e.g.*, Kaiser Aluminum & Chem. Co., 339 N.L.R.B. No. 100, 173 L.R.R.M. (BNA) 1508, 1508 (2003) (holding that "the work product [privilege] as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure applies to [Board] unfair labor practice proceedings"). *See generally* Ashokan v. Nevada Dep't of Ins., 856 P.2d 244, 247 (Nev. 1993) ("Any privilege that is based on substantive policy is obviously as appropriate for an agency proceeding as for a court proceeding.") (quoting 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.10, at 263 (2d ed. 1980)); *In re* Grimm, 635 A.2d 456, 464 (N.H. 1993) ("The general rule is that rules of evidence do not apply to administrative tribunals, though privileges [do] apply . . . .") (internal quotation marks and citation omitted).

[483] *See* Alexander A. Myers, *A Study of the Proposed "Protective Function Privilege:" Compelling Secret Service Testimony*, 1999 ANN. SURV. AM. L. 43, 83-84 ("There are few . . . privileges which apply to only one context, specifically because the importance of the relationship and the preservation of privacy outweighs the need for testimony regardless of the nature of the proceeding. *It makes little sense to treat a [new] privilege any differently.*") (emphasis added).

[484] *See, e.g.*, U.S. Dep't of Justice v. FLRA, 266 F.3d 1228, 1232 (D.C. Cir. 2001) (noting that an employee who "is concerned about the possible testimony of [a] union representative" may "decide not to ask for one"); *cf.* U.S. Postal Serv. v. NLRB, 969 F.2d 1064, 1072 n.5 (D.C. Cir. 1992) (alluding to the potential "impact . . . on [a] union representative-employee conversation" if the union representative could be "compelled to testify in court as to his knowledge of criminal conduct").

[485] *See, e.g.*, United States v. Neill, 952 F. Supp. 834, 839 (D.D.C. 1997) ("To provide effective assistance, a lawyer must be able to communicate freely without fear that his or her advice and legal strategy will be seized and used against the client in a criminal proceeding."); Illinois v. Knight, 486 N.E.2d 1356, 1360 (Ill. Ct. App. 1985) ("[T]o compel a civil attorney to disclose privileged communications in a criminal proceeding would defeat the basic policy underlying the privilege, that of encouraging full and frank consultation between a client and his attorney by removing any fear of compelled disclosure of that information.").

[486] Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 188 F.R.D. 189, 199 (S.D.N.Y. 1999); *see also* Comment, *Functional Overlap Between the Lawyer and Other Profession-*

Indeed, one prominent labor lawyer, Mitchell Rubinstein,[487] has noted that limiting the union representation privilege's application to traditional labor relations disputes would not adequately protect the interests the privilege is intended to serve.[488] He argues that because agencies like the FLRA and the NLRB have no authority to control discovery in other forums,[489] their recognition of the privilege would be largely academic unless its application is extended to courts and other tribunals "outside the context of administrative unfair labor practice . . . proceedings."[490]

While Rubinstein's discussion of this issue is rather cursory, his conclusion is clearly correct.[491] He specifically notes that an administrative agency's potential application of the privilege is likely to be "moot" in cases where a court has already compelled disclosure of the communications at issue.[492] However, to the extent the privilege is intended to encourage confidential com-

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als: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1226 & n.1 (1962):

> The . . . lawyer may remain silent about the confidential communications of his client (if the client desires silence) even when asked to disclose them as a witness in any kind of a courtroom proceeding – civil or criminal.
>
> Although the case law is scanty, and the issue far from clear, it is at least arguable that the attorney-client privilege is also applicable in other proceedings such as administrative and congressional investigations.

[487] In addition to practicing labor and employment law, *see* Rubinstein, *supra* note 18, at 595 n.*, Rubinstein has authored a number of articles addressing labor-related topics. *See id.* at 599 n.37, 600 n.38 (citing articles); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1236-37 n.28 (3d Cir. 1994) (relying on one of Rubinstein's articles).

[488] *See* Rubinstein, *supra* note 18, at 602 ("Limiting the union privilege to unfair labor practice proceedings . . . is inadequate."); *cf. In re* Sealed Case, 124 F.3d 230, 241 (D.C. Cir. 1997) (Tatel, J., dissenting) ("[L]imiting the scope of [a] privilege deters 'full and frank' . . . communication . . . .") (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

[489] Rubinstein specifically states that the Board and comparable state agencies "do not have subject matter jurisdiction to quash a subpoena issued by an unrelated administrative body." Rubinstein, *supra* note 18, at 602. However, his observation is equally applicable to judicially issued subpoenas:

> The Labor Management Relations Act [of which the NLRA is now a part] was not intended to preclude or obstruct the obtaining of evidence for judicial proceedings. Nor does it vest any authority in the National Labor Relations Board to prescribe, in relation to suits to prosecute or defeat justiciable rights, what evidence courts are entitled to receive or the parties are entitled to present, just because the suit is one between an employer and an employee or an employer and a labor union . . . .

NLRB v. Katz Drug Co., 207 F.2d 168, 171 (8th Cir. 1953) (citation omitted).

[490] Rubinstein, *supra* note 18, at 602.

[491] As one federal appellate court has noted, "[f]ew would confide in their [representatives] on the assurance that certain courts would find these communications privileged while other courts would not." *In re* Int'l Horizons, Inc., 689 F.2d 996, 1004 n.18 (11th Cir. 1982). Thus, "some form of categorical protection is necessary to accomplish the social goal for which the privilege is fashioned, *i.e.*, inducing one group to place its confidence in another." *In re* Sealed Case, 676 F.2d 793, 807 n.43 (D.C. Cir. 1982).

[492] Rubinstein, *supra* note 18, at 602; *see also In re* Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993) ("Disclosure of [confidential information] will destroy [an] alleged privilege and moot the question."); Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1052 (1992) ("Information which was privileged loses its immunity upon public disclosure.").

munications between employees and their union representatives,[493] administrative recognition of the privilege may be equally academic[494] unless it is also clear that the courts will uphold the privilege in *future* cases.[495]

For example, regardless of how confident employees may be that the NLRB would not compel the disclosure of their communications with union representatives concerning collective bargaining strategy,[496] "the prospect of future public disclosure through *court records* may . . . [nevertheless] impede the uninhibited expression of opinion and exchange of ideas necessary to arrive at an acceptable proposal or strategy."[497] In this regard, the judiciary's failure to recognize a union representation privilege is likely to make the administrative recognition of the privilege relatively meaningless.[498]

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[493] *See, e.g.*, Rubinstein, *supra* note 18, at 595 (asserting that the privilege "will foster public policy by encouraging free and open communication"). *See generally In re* Grand Jury Subpoenaes dated Jan. 20, 1998, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) ("[F]or a privilege to be recognized it must . . . promote confidential communications valued by the parties . . . .") (discussing Jaffee v. Redmond, 518 U.S. 1 (1996)).

[494] The terms "moot" and "academic" are often used interchangeably. *See, e.g.*, State v. Turner, 658 P.2d 658, 659 (Wash. 1983) ("A case is moot if the issues it presents are 'purely academic.'") (quoting Grays Harbor Paper Co. v. Grays Harbour County, 442 P.2d 967, 969 (Wash. 1968)). However, mootness is actually a somewhat narrower concept, in that a case is generally considered moot "if the issues have become academic so that judgment, if rendered, will have no practical legal effect *upon the existing controversy*." Dubuque v. Pub. Employment Relations Bd., 339 N.W.2d 827, 831 (Iowa 1983) (emphasis added). The resolution of an issue may be academic, on the other hand, if it is, in a more general sense, "of little practical significance." Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 152 (1st Cir. 1989); *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 6 (10th ed. 1997) (defining "academic" as "having no practical or useful significance").

[495] *See, e.g.*, Walker v. Huie, 142 F.R.D. 497, 500 (D. Utah 1992) (describing an employee who "would not have . . . sought the advice and representation" of a union official "had he not been assured that [their] communications . . . would remain confidential"); *see also* Nixon v. Freeman, 670 F.2d 346, 355 (D.C. Cir. 1982) (noting that "fear of disclosure may chill . . . candid advice and discussion"). *See generally* Martin v. Potomac Elec. Power Co., 54 Empl. Prac. Dec. (CCH) ¶ 40,079, at 63,300 n.7 (D.D.C. 1990) ("If the proposed privilege's uncertain application destroys its purported benefits, the privilege does not warrant recognition.").

[496] *See, e.g.*, Berbiglia, Inc., 233 N.L.R.B. 1476, 1495-96 (1977). *See generally* Boise Cascade Corp., 279 N.L.R.B. 422, 432 (1986) ("A proper bargaining relationship between the parties mandates that [each party] be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing its [terms].").

[497] Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees, 667 N.E.2d 458, 468 (Ohio Ct. App. 1995) (emphasis added); *see also* N.Y. News, Inc. v. New York, 745 F. Supp. 165, 168 (S.D.N.Y. 1990) ("Compelled to produce documents and testify under oath, setting forth their bargaining positions, the parties will be unable to be fluid and change positions or make concessions without embarrassment.") (internal quotation marks and citation omitted).

[498] *See, e.g.*, Gregory T. Stevens, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245, 262 (1990) ("[O]nce the . . . judiciary possesses jurisdiction over an appeal from an administrative proceeding, prior communications between a nonlawyer and his client may be subject to discovery."). Similarly, "to narrowly interpret [a] privilege as being applicable only in criminal and civil trials . . . but not in administrative proceedings, would be to substantially diminish its effectiveness to accomplish the purposes for which the privilege was created."

b. Recognition of the Privilege Avoids "Punishing" Unionized Employees for Being Represented by Nonlawyers

Rubinstein also suggests that judicial recognition of the privilege would reflect the fact that attorneys hold no monopoly on representation in labor matters,[499] and that "much of labor relations, negotiation, arbitration and mediation is carried out by labor professionals who are not lawyers."[500] Indeed, many employees being interviewed in connection with employer disciplinary investigations undoubtedly would prefer to be represented by, and confide in, a union representative,[501] rather than an attorney.[502] The same may be true of employees selecting a representative to negotiate a collective bargaining agreement on their behalf.[503]

Dep't of Highway Safety & Motor Vehicles v. Corbin, 527 So. 2d 868, 872 (Fla. Ct. App. 1988) (internal quotation marks omitted).

[499] *See* Rubinstein, *supra* note 18, at 600; *see also* Comm. on Prof'l Ethics and Conduct of Iowa State Bar Ass'n v. Mahoney, 402 N.W.2d 434, 436 (Iowa 1987) ("Doing . . . labor negotiation is not necessarily the practice of law and properly may be done by nonlawyers."); Montebello Rose Co. v. Agric. Labor Relations Bd., 173 Cal. Rptr. 856, 874 (Ct. App. 1981) (asserting that "labor negotiations could [be] conducted by a nonattorney").

[500] Rubinstein, *supra* note 18, at 600; *see also* Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985) ("Labor grievances and arbitrations frequently are handled by union employees or representatives who have not received any professional legal training at all."); Eisen v. Minnesota, 352 N.W.2d 731, 737 (Minn. 1984) (asserting that representation by "a skilled union representative," rather than by an attorney, is "the common form of representation in labor relations controversies"); Matull & Assocs., Inc. v. Cloutier, 240 Cal. Rptr. 211, 215 (Ct. App. 1987) (noting that "collective bargaining and labor contract administration" are "functions which nonlawyer labor relations consultants regularly perform").

[501] In Hunt v. Maricopa County Employees Merit Sys. Comm'n, 619 P.2d 1036 (Ariz. 1980), for example, an employee "wanted to be represented at [her disciplinary] hearing by . . . a person not a lawyer but a representative of . . . [her] union." *Id.* at 1038 (parenthesis omitted). She explained that "her union representative [was] skilled in [the] special field of employer-employee relations," *id.* at 1040, and, unlike an attorney, "was not charging any fee for his representation." *Id.* at 1038; *see also* Atl. Steel Co., 245 N.L.R.B. 814, 820 n.14 (1979) (describing an employee who "preferred that his case be presented by the Union's business agent rather that [sic] the Union's attorney"); Weeks v. State, 603 N.Y.S.2d 249, 250 (App. Div. 1993) (discussing the situation in which "a party to a disciplinary arbitration proceeding chooses to be represented by a union representative who is not an attorney").

[502] On the other hand, there undoubtedly are circumstances under which such an employee would prefer to be represented by an attorney. *See, e.g.*, Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1179 (7th Cir. 1995) ("Employment disputes often involve complex issues of labor law, and it is understandable that an employee receiving union representation would . . . wish to speak to a private attorney about his case."); TCC Ctr. Cos., 275 N.L.R.B. 604, 609 (1985) (describing an employee who sought "the personal and private assistance of his own attorney when faced with possible loss of employment"). As one court explained:

> Members of our society often require information and guidance of a nature that lawyers are uniquely capable of conferring. The intricacies of our labor law often will mean that a layman will be either confused by or wholly ignorant of its provisions. Employees have a legitimate interest in discussing their rights and obligations under the law with an informed but neutral third party. This is especially true where the interests of the union might deviate from those of an individual employee.

Seymour v. Olin Corp., 666 F.2d 202, 209-10 (5th Cir. 1982).

[503] *See, e.g.*, Crockett-Bradley Inc., 212 N.L.R.B. 435, 442 (1974) (discussing an employer's demand that its employees "deal with [it] through a committee or attorney and give up their *preference* for representation by a union") (emphasis added). For various reasons, "many employers [also] prefer to utilize the services of a nonlawyer . . . in their collec-

For one thing, union representatives are likely to be familiar with the terms of any existing collective bargaining agreement.[504] In addition, a union representative who lacks formal legal training[505] may nevertheless have "considerable expertise and extensive knowledge of labor relations law as it pertain[s] to the negotiation of collective bargaining agreements,"[506] and "may also have been specially trained by his or her union in assisting employees at an investigatory interview."[507] On the other hand, there undoubtedly are many attorneys (and perhaps particularly criminal attorneys)[508] who are not sufficiently familiar with "the intricacies and subtleties of labor law and Board stan-

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tive bargaining activities." *Matull & Assocs.*, 240 Cal. Rptr. at 215. *See generally* Robert Feinerman, *Collective Bargaining Techniques and Tactics*, 9 PRAC. LAW. 19, 19 (1963) ("The lawyer's place at the bargaining table has been seriously questioned by many employers and unions, primarily because of the failure of many attorneys to realize that they cannot apply the methodology of the law office to the labor relations arena."); Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. L.J. 465, 504 (1997) ("Lawyers in a collective bargaining arena using traditional adversarial skills may well exacerbate differences between parties and severely undermine the prospect of a trusting relationship at the same time.").

[504] *See* Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 245 (7th Cir. 1986) (noting that a union representative "may know the ins and outs of the collective bargaining agreement without having a trial lawyer's skills"); Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan, 713 F.2d 247, 252 (7th Cir. 1983) (observing that an employee in a "traditional labor-management arbitration proceeding" is often "assisted in the presentation of his case . . . by a union representative who is knowledgeable with the provisions of the collective bargaining agreement").

[505] *See* Connelly v. Nitze, 401 F.2d 416, 422 (D.C. Cir. 1968) ("[U]nion representatives, like laymen generally, are not notably sensitive to legal niceties."); Ruffin v. U.S. Postal Serv., 141 L.R.R.M. (BNA) 2756, 2758 (E.D. Pa. 1992) ("Union representatives are usually coworkers and are not lawyers or experts . . . ."); Toledo World Terminals, Inc., 289 N.L.R.B. 670, 706 (1988) (asserting that most union officials "lack legal training"); Case v. Monroe Cmty. Coll., 677 N.E.2d 279, 281 (N.Y. 1997) (referring to "a union representative unschooled in the law").

[506] Anderson v. United Paperworkers Int'l Union, 484 F. Supp. 76, 78 n.1 (D. Minn. 1980), *vacated and remanded*, 641 F.2d 574 (8th Cir. 1981); *see also* NLRB v. Hayden Elec., Inc., 693 F.2d 1358, 1367 n.9 (11th Cir. 1982) (describing a union representative who had "dedicated his professional career to understanding the nuances of collective bargaining"); Houston County Elec. Coop., Inc., 285 N.L.R.B. 1213, 1224 (1987) (discussing a union representative with "extensive labor relations experience and training" who had "negotiated nearly 75 collective-bargaining agreements" and "become familiar with labor law principles by attending labor law seminars and [through] independent study").

[507] E.I. DuPont de Nemours, 289 N.L.R.B. 627, 630 (1985), *review denied sub nom.* Slaughter v. NLRB, 876 F.2d 11 (3d Cir. 1989); *see also* O'Brien v. Leidinger, 452 F. Supp. 720, 726 (E.D. Va. 1978) (indicating that union representatives may be "skilled in presenting employee grievances [and] discussing employment matters on behalf of union members"); Int'l Chem. Workers Union, Local No. 190, 251 N.L.R.B. 1535, 1543 (1980) (discussing the "expertise and sophistication" a full-time union representative can "be reasonably expected to bring to grievance processing").

[508] Given the "complex nature of practicing criminal law today," Louisiana v. Wigley, 624 So.2d 425, 430 (La. 1993) (Dennis, J., concurring), there are many attorneys who "specialize[ ] exclusively in the practice of criminal law." Ryan v. Louisiana, 314 F. Supp. 1047, 1049 (E.D. La. 1970). Many such attorneys undoubtedly would "experience[ ] difficulties . . . in connection with civil matters," *In re* Brade, 473 N.Y.S.2d 467, 468 (App. Div. 1984), including specifically the "sometimes esoteric field" of labor law. Overnite Transp. Co., 209 N.L.R.B. 691, 695 (1974).

dards"[509] to represent employees effectively in employer disciplinary investigations[510] or collective bargaining negotiations.[511]

Thus, even when an employee's alleged misconduct rises to the level of a potential violation of the criminal law,[512] the choice of an appropriate representative in an ensuing investigatory interview[513] – if the employee even has such a choice[514] – may not be entirely clear.[515] As one Board administrative law judge has explained:

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[509] Menlo Foods Corp., 330 N.L.R.B. 337, 345 (1999); *see, e.g.*, Vic Koenig Chevrolet, Inc., 321 N.L.R.B. 1255, 1268 (1996) (describing an attorney "who [had] no particular expertise in labor law"); Redway Carriers, Inc., 274 N.L.R.B. 1359, 1385 (1985) (discussing a party's consultation with an attorney who "was not a labor relations specialist"). One Board administrative law judge has noted that "the intricacies of labor law fall into a specialized field even within the legal profession." Purolator Prods., Inc., 270 N.L.R.B. 694, 712 (1984).

[510] *See* Penn-Dixie Steel Corp., 253 N.L.R.B. 91, 95 (1980) (observing that even "many experienced labor lawyers" lacked a thorough understanding of an employee's rights in an investigatory interview "until the Supreme Court spoke definitively" on the subject); Maui Pineapple Co., 86 Lab. Arb. Rep. (BNA) 907, 911 (1986) (Tsukiyama, Arb.) (noting that the right to representation at an investigatory interview is "a sophisticated legal right many lawyers . . . are unaware of"). *But cf.* Am. Fed'n of Gov't Employees, Local 1941 v. FLRA, 837 F.2d 495, 502 (D.C. Cir. 1988) (Starr, J., dissenting) ("It seems beyond cavil that any protections afforded by a union representative to a besieged employee in an investigative interview were more than adequately provided by a lawyer of [the employee's] own choosing.").

[511] *See, e.g.*, *Houston County Elec. Coop.*, 285 N.L.R.B. at 1224 (describing an attorney who "had never before bargained . . . on a labor agreement," and whose labor law experience prior to being asked to do so was "limited to some study of it in a . . . law school course on contracts"); *see also* Vanderbilt Prods., Inc. v. NLRB, 297 F.2d 833, 833 (2d Cir. 1961) (discussing the potential ramifications of a party's decision to "put all authority for the conduct of collective bargaining negotiations in the hands of a newly engaged attorney, unskilled . . . in labor matters").

[512] *See, e.g.*, Gossmeyer v. McDonald, 128 F.3d 481, 497 (7th Cir. 1997) (discussing "allegations of work-related misconduct which was potentially violative of both internal policy and criminal law"); Seymour v. Olin Corp., 666 F.2d 202, 209 n.5 (5th Cir. 1982) (referring to situations in which "there is a potential for criminal proceedings arising out of the incident that gives rise to [an employee] grievance").

[513] *See generally* U.S. Postal Serv., 288 N.L.R.B. 864, 866 (1988) (discussing the application of *Weingarten* at an investigatory interview in which the employee reasonably believes "that discipline *or criminal charges* could, or would, result from the interview") (emphasis added); U.S. Postal Serv., 241 N.L.R.B. 141, 153 (1979) (referring to the extension of *Weingarten* "to interviews regarding alleged criminal acts").

[514] There is considerable authority for the proposition that "[e]mployees have no statutorily protected right to be represented by outside counsel in investigative or disciplinary interviews requested by their employer." Sentry Investigation Corp., 249 N.L.R.B. 926, 936 n.20 (1980); *see also* Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1180 (7th Cir. 1995) (noting that a bargaining unit employee has "no right to be represented by his own counsel at any step of the grievance process"); McLean Hosp., 264 N.L.R.B. 459, 472 (1982) ("[E]mployees have no statutorily protected right to be represented at investigatory and/or disciplinary interviews by their private counsel from the outside."). However, an employee under investigation may have a "*contractual* right to consult an attorney and/or a Union representative." Cerrone v. Cahill, 84 F. Supp. 2d 330, 334 (N.D.N.Y. 2000) (emphasis added), *vacated and remanded sub nom.* Cerrone v. Brown, 246 F.3d 194 (2d Cir. 2001).

[515] *See, e.g.*, Driebel v. City of Milwaukee, 298 F.3d 622, 648 (7th Cir. 2002) (describing an employee who upon being "advised he was under a criminal investigation" made a "request to contact a union representative"); United States v. Doxen, No. S77 Cr. 801, 1978 U.S. Dist. LEXIS 19030, at *8 (S.D.N.Y. Mar. 15, 1978) ("[T]he right to make a phone call is usually

> While an attorney would likely be more familiar than a union representative with the employee's rights under the criminal law, a union representative would likely be more familiar with the employee's bargaining agreement rights regarding the . . . retention of his job, and the disciplinary and grievance-arbitration procedure. Furthermore, the union representative costs the employee no money, the representative is ordinarily . . . immediately available, and the employee is likely to have had some firsthand opportunity to assess the representative's competence. On the other hand, the employee would have to affirmatively seek out an attorney, might well have difficulty finding one whose abilities he knew something about, and would probably have to pay him.[516]

While the wisdom of an employee's preference for union representation in this situation may be debatable,[517] there is no persuasive policy reason for discouraging employees from choosing such representation.[518] In fact, federal labor relations law generally discourages any other choice of a representative,[519] as perhaps most notably reflected in the existence of Board authority implicitly urging unions and employers to *eliminate* attorneys from the labor-management relationship.[520]

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utilized by detainees to consult an attorney. In this case the defendant claims that he wished to call his union delegate . . . ."); Commonwealth v. Rosenthal, 755 N.E.2d 817, 819 (Mass. App. Ct. 2001) (describing an employee who, upon being questioned by a police officer, "demanded to see his . . . Union representative").

[516] *U.S. Postal Serv.*, 241 N.L.R.B. at 152; *see also* Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, 24 F.L.R.A. 521, 532 (1986) ("[W]hile an attorney would be skilled in criminal law, the union representative should be more conversant with contract and other employment rights and relevant grievance or arbitration decisions – in short with the law of the shop.").

[517] *See, e.g.*, Nat'l Treas. Employees Union v. FLRA, 721 F.2d 1402, 1406 (D.C. Cir. 1983) ("[R]epresentation by attorneys, who are formally trained and certified in the practice of law, is demonstrably different from representation by . . . [union] stewards."); *U.S. Postal Serv.*, 241 N.L.R.B. at 152 (discussing the contention that "representation by a lay union steward during a criminal investigation might disadvantage the employee").

[518] *See, e.g.*, *U.S. Postal Serv.*, 241 N.L.R.B. at 152 (noting that "the choice of whether to be represented by a union steward, an attorney, both, or neither during an investigation is normally confided to the employee and/or his bargaining representative"). *See generally In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 337 (E.D.N.Y. 1998) (referring to "society's interest in encouraging confidential communications between union members and their representatives").

[519] *See, e.g.*, Johnson v. United Steelworkers of Am., 843 F. Supp. 944, 947 (M.D. Pa.) ("Federal law provides that unions are to be the exclusive bargaining representatives for workers in union shops and, as such, disfavors attorney involvement in grievance resolution."), *aff'd*, 37 F.3d 1487 (3d Cir. 1994). Thus, unlike a request for union representation, "a request by an employee . . . that his or her private attorney be present at an investigatory and/or disciplinary interview is not protected concerted activity" under the NLRA. TCC Ctrs. Cos., 275 N.L.R.B. 604, 609 (1985); *see also McLean Hosp.*, 264 N.L.R.B. at 472 ("Representation by private counsel is not tantamount to union representation within the rule of *Weingarten* nor does representation of an employee by his private counsel constitute concerted activity within the purview of the Act . . . .").

[520] *See* Southwestern Bell Tel. Co., 227 N.L.R.B. 1223, 1225 & n.7 (1977) (Penello & Walther, dissenting) ("It is time for the chief parties to sit down and say what can we do to get lawyers out of our business?") (quoting former Secretary of Labor John Dunlop, Address before the Chairman's Task Force on the National Labor Relations Board (July 12, 1976)); *Current Problems of Arbitration*, 35 Lab. Arb. Rep. (BNA) 963, 966 (1961) (noting that former NLRB member William M. Leiserson "urged that lawyers be kept out of grievance arbitration and collective bargaining"); *cf.* United Bhd. of Carpenters, 178 N.L.R.B. 351, 357

Because a contrary result would run afoul of this apparent policy objective by encouraging attorney involvement in labor relations matters,[521] an employee's confidential communications with a union representative "should not be given any less protection simply because the person with whom he communicates is a nonlawyer."[522] Rubinstein and other commentators therefore advocate the recognition of a broad union representation privilege,[523] comparable to the attorney-client privilege,[524] that would apply not only in unfair labor practice proceedings,[525] but also in criminal and civil proceedings as a means of assuring effective union representation "in any context."[526]

& n.9 (1969) (asserting that "many labor lawyers tend to prefer to try lawsuits than to find peaceful solutions," which may enable them to "eat higher on the hog" but "does not otherwise lead to good labor relations") (internal quotation marks omitted).

[521] *See, e.g.*, McPherson v. United States, 2 Cl. Ct. 670, 672 (1983) (describing an employee pursuing a grievance who "retained non-Union counsel because of the possibility that any statements [he] made . . . to Union representatives could be used against him in [a] pending criminal investigation"); *Grand Jury Subpoenas*, 995 F. Supp. at 338 ("[A]n [employee] who wishes to ensure that anything he says relating to a criminal matter is shielded by [a] privilege should wait to discuss the particulars with . . . counsel . . . ."); *cf.* Stevens, *supra* note 498, at 262 ("[P]ersons selecting a nonlawyer representative may be at a disadvantage in relation to [a] party who is represented by an attorney and, therefore, enjoys a privilege of confidentiality.").

[522] Rubinstein, *supra* note 18, at 600; *see also* Customs Serv., 38 F.L.R.A. 1300, 1307 (1991) (acknowledging that there may be "no justification whatsoever for applying a [less protective] standard to communications with union representatives than to communications with attorneys"); Montebello Rose Co. v. Agric. Labor Relations Bd., 173 Cal. Rptr. 856, 873 (Ct. App. 1981) (discussing the "unfair[ness]" of "reward[ing] those . . . able to hire attorneys as their negotiators because their communications concerning pending negotiations would be protected, whereas [similar] communications . . . with lay negotiators would not receive protection").

[523] *See, e.g.*, Rubinstein, *supra* note 18, at 601 ("A labor union privilege . . . advances the public policy of this country, which, through its labor laws, recognizes that employees have the right to organize and to bargain collectively through representatives of their own choosing."); Gruwell Anderson, *supra* note 17, at 521 (asserting that "the labor official privilege should assume the effect of a common law privilege across the board").

[524] *See* Rubinstein, *supra* note 18, at 600 ("The . . . analogy to the attorney-client privilege is a good one. The attorney-client privilege, like the labor union privilege, serves a vital public purpose . . . by 'encouraging full and frank communication . . . .'") (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)); *cf.* Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist. No. 208, 547 N.E.2d 182, 187 (Ill. 1989) ("Protecting these types of communications . . . from disclosure is not unlike the protection afforded by the attorney work-product privilege.").

[525] *See* Rubinstein, *supra* note 18, at 602 ("[T]he recognition of a privilege outside the context of administrative unfair labor practice . . . proceedings[ ] is necessary."). There appears to be little dispute over the ability of the NLRB and the FLRA to recognize the privilege for purposes of their own administrative proceedings. *See generally In re* USLIFE Credit Corp. 91 F.T.C. 984, 1037 (1978) ("It is well-settled that, subject to applicable statutes and constitutional privileges, independent agencies need not apply any particular evidentiary rules or procedures, and courts are not free to impose on agency proceedings the rules and privileges developed in the exercise of their supervisory power over federal court trials.").

[526] THR Am., Inc. v. NSK, Ltd., 917 F. Supp. 563, 567 (N.D. Ill. 1996) (characterizing the analogous attorney-client privilege); *see, e.g.*, United States v. Garcia, 291 F.3d 127, 142 n.10 (2d Cir. 2002) (referring to "the efforts of [an employee's] union representative to help him with the criminal case against him").

c. *Recognition of the Privilege Would Accommodate the Employee's Limited Role in Choosing a Representative*

Rubinstein's arguments for recognizing a union representation privilege are bolstered by the fact that once an employee bargaining unit designates a union as its exclusive statutory representative,[527] individual members of the bargaining unit must look to the union for the protection of their rights and interests.[528] Thus, although employees theoretically have the right, "acting through their union, . . . to select their representatives for the processing of grievances and discussion of workplace matters,"[529] it is actually the union that ultimately decides who will represent an employee, or group of employees, during collective bargaining negotiations[530] and in connection with grievance processing and other matters pertaining to their employment.[531]

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[527] The designation of employee bargaining representatives is ordinarily accomplished through representation elections. *See* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1067 (3d Cir. 1980) ("The [Supreme] Court has noted the 'acknowledged superiority of the election process' as a method for selecting a majority representative of employees.") (quoting NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969)). For the author's previous discussion of the NLRB election process, see Michael D. Moberly, *Corrections Before Representation Elections: Restoring "Laboratory Conditions" By Repudiating Unfair Labor Practices*, 4 U. PA. J. LAB. & EMP. L. 375, 380-85 (2002).

[528] *See* Nat'l Ass'n of Letter Carriers v. NLRB, 595 F.2d 808, 811 (D.C. Cir. 1979) ("[T]he Act grants to the majority representative power to act as the exclusive bargaining agent for all the employees in the bargaining unit. Individual employees have no separate negotiating rights; they must look exclusively to the union for protection of their interests.") (footnotes omitted); Crenshaw v. Allied Chem. Corp., 387 F. Supp. 594, 599 (E.D. Va. 1975) ("[C]ollective action . . . necessarily involves extinguishing many of the . . . rights belonging to union members and, instead, vesting the power to act on their behalf with their chosen representative, the union."); Permanente Med. Group, Inc., 332 N.L.R.B. 1143, 1148 (2000) (Fox, dissenting) (noting that the Act "require[es] the employer *and the employees themselves* to look exclusively to the union to represent the employees' interests") (emphasis added).

[529] Missouri Portland Cement Co., 284 N.L.R.B. 432, 433 (1987).

[530] *See* Meter v. Minn. Mining & Mfg. Co., 273 F. Supp. 659, 667 (D. Minn. 1967) ("[U]nions may select union members, or union officers, or lawyers, or outside laymen, or anyone to represent them at the bargaining table . . . ."), *rev'd on other grounds*, 385 F.2d 265 (8th Cir. 1967); Butcher Boy Refrigerator Door Co., 127 N.L.R.B. 1360, 1377 (1960) (referring to "the Union's right to designate its representatives at the bargaining table"); Alcan-Toyo Am., 102 Lab. Arb. Rep. (BNA) 566, 574 (1993) (Draznin, Arb.) ("In a union shop, whatever individual employees may say on an individual basis, the Union bargaining committee is . . . the only entity that can [speak for] the employees in the bargaining unit.").

[531] *See* Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1485 (9th Cir. 1985) (Ferguson, J., concurring) (noting that the union generally has the authority to decide "whether a lawyer or a nonlawyer representative of the union should represent an employee at a particular proceeding"); Lehigh Portland Cement Co., 287 N.L.R.B. 978, 984 (1988) (discussing "a union's right to designate its own representatives for purposes of grievance processing"); Fed. Prison Sys., Fed. Corr. Inst., 25 F.L.R.A. 210, 231 (1987) ("It is the union which designates its representative under [the FSLMRS], not the employee subject to the examination, although the employee must, *inter alia*, request representation."); Pac. Gas. & Elec. Co., 253 N.L.R.B. 1143, 1143 (1981):

> The Supreme Court in *Weingarten* neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a *specific* representative sought by the employee. To the contrary, the focus of the decision is on the employee's right to the presence of a union representative designated by the union to represent all employees.

In many instances, the representative chosen by a union will not be an attorney.[532] As a practical matter,[533] an employee dissatisfied with that decision is powerless to compel a different choice.[534] The fact that an employee who would prefer to be represented by an attorney may be compelled to accept the union's choice of a nonlawyer representative[535] – thereby effectively "waiving" the attorney-client privilege[536] – provides an additional compelling

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[532] *See* Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985) (noting that the handling of labor grievances "often is performed by a union's business agents or representatives"); Johnson v. United Steelworkers of Am., 843 F. Supp. 944, 947 (M.D. Pa.) ("It is common and, indeed, preferable for union representatives to conduct arbitrations."), *aff'd*, 37 F.3d 1487 (3d Cir. 1994); Mullen v. Bevona, 162 L.R.R.M. (BNA) 2856, 2859 (S.D.N.Y. 1999) ("[I]t is not uncommon . . . for unions to send non-attorneys to represent their members in hearings."); Edgar L. Warren & Irving Bernstein, *A Profile of Labor Arbitration*, 16 Lab. Arb. Rep. (BNA) 970, 981 (1951) ("Generally speaking, where . . . labor unions have in their own ranks representatives who are sufficiently articulate the use of attorneys . . . is not desirable.").

[533] The Board has noted that "[u]nit employees, if dissatisfied with the Union's performance . . . , may petition for an election to oust it as their collective-bargaining representative." Henry Bierce Co., 328 N.L.R.B. 646, 650 (1999), *aff'd*, 234 F.3d 1268 (6th Cir. 2000). However, "the difficulty of decertifying a union once it [has been] certified," Action Auto Stores, Inc., 298 N.L.R.B. 875, 905 (1990), makes decertification an inherently unsatisfactory remedy for a union's decision to provide nonlawyer representation to an individual employee, who "has an *immediate* stake in the outcome of the disciplinary process [because] it is his job security which may be jeopardized in any confrontation with management." Appalachian Power Co., 253 N.L.R.B. 931, 933 (1980) (emphasis added).

[534] *See, e.g.*, Atl. Steel Co., 245 N.L.R.B. 814, 820 n.14 (1979) (noting that an employee "requested permission of the Union to permit his own personal attorney to appear at [an] arbitration and that the Union denied him such permission"); *see also Castelli*, 752 F.2d at 1483 ("[N]o court has adopted the rule that [unionized] employees are entitled to independently retained counsel in arbitration proceedings . . . ."); Consol. Casinos Corp., 266 N.L.R.B. 988, 1008 (1983) (rejecting the contention that "an employee may request the presence of any person, including his personal lawyer, and thus invoke *Weingarten* rights"); *Fed. Prison Sys.*, 25 F.L.R.A. at 231 ("[The FSLMRS] accords the employee subject to the examination no right to have his own representative present at his examination, be he an attorney or non-attorney.").

[535] *See, e.g.*, Lettis v. U.S. Postal Serv., 39 F. Supp. 2d 181, 198 (E.D.N.Y. 1998) ("A grievant has no right to a private attorney, or to require a union to utilize a lawyer, at an arbitration."); Shufford v. Truck Drivers Local Union No. 355, 954 F. Supp. 1080, 1091-92 (D. Md. 1996) ("A union has the right to be the sole representative of its members, and it can refuse to include private counsel in its handling of a grievance if it chooses."); Handley v. Phillips, 715 F. Supp. 657, 667 n.6 (M.D. Pa. 1989) ("The union need not have an attorney at [an] arbitration hearing nor permit the grievant to bring an attorney to participate in the hearing.").

[536] As a general proposition, "the attorney-client privilege is personal to the client and may only be waived by the client." Shriver v. Baskin-Robbins Ice Cream Co., 145 F.R.D. 112, 115 (D. Colo. 1992). However, in the collective bargaining context the attorney's principal client is the union, rather than the individual employee. *See Peterson*, 771 F.2d at 1258; Best v. Rome, 858 F. Supp. 271, 276 (D. Mass. 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1995). In any event, the NLRA "contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation." Metro. Edison Co. v. NLRB, 460 U.S. 693, 706-07 n.11 (1983). A union's decision to have a union representative rather than an attorney represent an employee does not constitute such a breach. *See* Vance v. Lobdell-Emery Mfg. Co., 932 F. Supp. 1130, 1136 (S.D. Ind. 1996).

argument for extending a comparable privilege to confidential communications between employees and their union representatives.[537]

B. The Crime-Fraud Exception to the Union Representation Privilege

Neither Rubinstein nor any other commentator has indicated precisely what form an administratively and judicially recognized union representation privilege should take.[538] However, delineating the full scope of the privilege is not a prerequisite to its recognition.[539] As one federal appellate court has observed: "Just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege be considered."[540]

Indeed, under the common law approach prevailing in the federal courts,[541] all evidentiary privileges, including the analogous attorney-client privilege,[542] are in a constant state of evolution.[543] Thus, at any given time, the precise contours of the union representation privilege, or any other evidentiary

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[537] *See* Gruwell Anderson, *supra* note 17, at 518 ("[L]abor officials who are not lawyers carry out much of the union's labor-management relationship, including day-to-day relations, arbitrations, negotiations, and mediations . . . . [T]he labor official privilege[ ] recognizes this reality.") (footnotes omitted); *cf.* John Labatt Ltd. v. Molson Breweries, 898 F. Supp. 471, 476 (E.D. Mich. 1995) ("[W]here Congress allows non-attorneys to practice . . . before federal agencies, a commensurate . . . privilege arises over communications with clients necessary to practice in the areas authorized.").

[538] Rubinstein did assert that the privilege should be sufficiently broad to protect "all confidential communications concerning union matters and strategies between union officers and union members." Rubinstein, *supra* note 18, at 602; *cf.* State Employment Relations Bd. v. Rudolph, 5 OPER (LRP) ¶ 5706, at 8 (1988) ("[O]nly confidential communications between the employee and the union representative would be subject to being privileged, as persons claiming the privilege are not entirely disqualified as witnesses.").

[539] *See* Jaffee v. Redmond, 518 U.S. 1, 18 (1996) (asserting that "it is neither necessary nor feasible to delineate [the] full contours" of an evidentiary privilege in "the first case in which [it is] recognized"); *In re* Grand Jury, 821 F.2d 946, 955 (3d Cir. 1987) (stating that "a court must first decide whether a . . . privilege exists or should exist before deciding how to apply it to a particular case.").

[540] *In re* Zuniga, 714 F.2d 632, 639 (6th Cir. 1983); *see also* United States v. Hansen, 955 F. Supp. 1225, 1226 (D. Mont. 1997) (noting that the "precise contours" of a particular evidentiary privilege are to be "developed in specific cases.").

[541] *See* Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 780 (9th Cir. 1994) ("The Federal Rules of Evidence specifically provide that common law governs privileges recognized by federal courts.") (citing FED. R. EVID. 501); *In re* Sause Bros. Ocean Towing, 144 F.R.D. 111, 113 (D. Or. 1992) ("The federal common law of privileges governs in federal question cases.").

[542] *See* Whitehouse v. United States Dist. Court, 53 F.3d 1349, 1358 (1st Cir. 1995) ("[T]he common law of attorney-client privilege is still evolving . . . ."); State v. Soto, 933 P.2d 66, 80 n.14 (Haw. 1997) ("[T]he federal construct of the attorney-client privilege derives from the ever-evolving 'common law.'"); People v. Sorna, 276 N.W.2d 892, 895 (Mich. Ct. App. 1981) ("[T]he common-law attorney-client privilege is not immune from development by case law . . . .").

[543] *See In re* LTV Sec. Litig., 89 F.R.D. 595, 621 (N.D. Tex. 1981) ("Changing circumstances require courts constantly to review the need for and extent of existing privileges."); L.A. Mem'l Coliseum Comm'n v. NFL, 89 F.R.D. 489, 492 (C.D. Cal. 1981) (referring to the courts' "moulding [of] federal privileges under the common law development approach") (quoting 10 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 501.08 (2d ed. 1976)).

privilege, may be unclear.[544] In addition, to the extent that recognition of the privilege is treated as a matter of state rather than federal law[545] (as occurred in both *In re Grand Jury Subpoenas dated January 20, 1995*[546] and *City of Newburgh v. Newman*),[547] the parameters of the privilege may vary from jurisdiction to jurisdiction.[548]

Nevertheless, some understanding of the general contours of the privilege is essential to any practical ability of employees and their union representatives to rely upon it.[549] In this regard, it is clear that even the broad privilege favored by Rubinstein and other commentators would not be an absolute one.[550] For example, even the more established and venerable attorney-client privilege,[551] upon which the development of the union representation privilege

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[544] *See, e.g., In re* Grand Jury Investigation, 918 F.2d 374, 385 (3d Cir. 1990) ("The [clergy-communicant] privilege is a common law rule. The precise scope of the privilege and its additional facets . . . are, therefore, most suitably left to case-by-case evolution."); Weekoty v. United States, 30 F. Supp. 2d 1343, 1345 (D.N.M. 1998) ("[T]he nature and scope of the self-critical analysis privilege is [sic] undefined."); Doe v. Unum Life Ins. Co., 891 F. Supp. 607, 611 (N.D. Ga. 1995) ("[T]he law of peer review privilege has not ceased evolving.").

[545] *See generally* Warner v. Transamerica Ins. Co., 739 F.2d 1347, 1351 n.6 (8th Cir. 1984) ("[P]rivileges may be matters of state law."); Farley v. Farley, 952 F. Supp. 1232, 1236 (M.D. Tenn. 1997) ("[S]tate privileges and the policies underlying them may not be ignored in applying Rule 501 to discovery disputes arising in federal question cases."); Rubinstein, *supra* note 18, at 600 ("In some labor law situations . . . state law is more highly developed than federal law in the private sector, and astute litigators may look to state law.").

[546] 995 F. Supp. 332 (E.D.N.Y. 1998). Specifically, the *Grand Jury Subpoenas* court discussed state legislative efforts "to codify some form of union privilege in New York." *Id.* at 335-36.

[547] 421 N.Y.S.2d 673 (App. Div. 1979).

[548] *See* Union Pac. R.R. Co. v. Mower, 219 F.3d 1069, 1076 (9th Cir. 2000) ("Evidentiary privileges [that] are the subject of state law . . . vary by jurisdiction."); Mason Ladd, *Privileges*, 1969 LAW & SOC. ORD. 555, 590 n.83 (asserting that "state created privilege[s]" are "as varied as there are states").

[549] *See* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("[I]f the purpose of [a] privilege is to be served, the [parties] must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain, but results in widely varying application by the courts, is little better than no privilege at all."); United States v. D.F., 857 F. Supp. 1311, 1320 n.20 (E.D. Wis. 1994) (noting that individuals "are not as likely to rely on the existence of a . . . privilege when its application and scope varies from case to case"), *aff'd*, 63 F.3d 671 (7th Cir. 1995), *vacated and remanded*, 517 U.S. 1231 (1996).

[550] Rubinstein himself acknowledges that the privilege is "not absolute." Rubinstein, *supra* not 18, at 599; *see also* Customs Serv., 38 F.L.R.A. 1300, 1307 (1991) (discussing a union's acknowledgment that the privilege "is not absolute"). *See generally In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1013 (D.N.J.) ("Privileges judicially created under Rule 501 are not absolute but remain capable of being overcome in the context of specific cases in which their justifications are not implicated."), *aff'd*, 879 F.2d 857 (3d Cir. 1989).

[551] The attorney-client privilege has been described as the "most venerated of the common law privileges of confidential communications." United States v. Edwards, 303 F.3d 606, 618 (5th Cir. 2002); *see also* United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997) ("[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges . . . .").

is likely to be patterned,[552] does not apply when an individual communicates with an attorney "for the purpose of committing a crime or perpetrating a fraud in the future (as opposed to referring to prior wrongdoing)."[553]

In particular, where a communication is made for the purpose of committing a crime or fraud, the Board holds that an exception to the privilege applies "to permit the disclosure of the otherwise privileged [evidence]."[554] The courts have uniformly reached the same conclusion.[555] As one jurist has observed:

> [N]o privilege is absolute. Even the attorney-client privilege – one of the oldest privileges of confidentiality known to the common law, often described as essential to the functioning of the adversary system – is inapplicable where a client seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activities.[556]

Although this "crime-fraud exception"[557] may not apply to all evidentiary

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[552] The substantial body of existing case law interpreting and applying the attorney-client privilege sets that privilege apart from other evidentiary privileges, *see* Yaron v. Yaron, 372 N.Y.S.2d 518, 522 (Sup. Ct. 1975), and frequently provides courts with guidance in developing less established privileges. *See, e.g.*, Pepsico, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 816 (8th Cir. 2002) (noting that the court's interpretation of the accountant-client privilege was "guided by cases construing the attorney-client privilege"); Ravary v. Reed, 415 N.W.2d 240, 243 (Mich. Ct. App. 1987) (construing the scope of a private detective-client privilege "by analogy to the attorney-client privilege").

[553] Patrick Cudahy, Inc., 288 N.L.R.B. 968, 969-70 (1988); *cf.* Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1211, 1216 (M.D.N.C. 1996) ("Even the attorney-client privilege . . . gives way in the face of communications made for the purpose of furthering a crime or a fraud.").

[554] *Patrick Cudahy*, 288 N.L.R.B at 970; *see also* BP Exploration (Alaska), Inc., 337 N.L.R.B 887, 895, 2002 NLRB LEXIS 377, at *46 (July 29, 2002) (describing the crime-fraud exception as one of the "most obvious exceptions" to the attorney-client privilege).

[556] D.C. v. S.A., 670 N.E.2d 1136, 1142 (Ill. App. Ct. 1996) (Lytton, J., dissenting), *rev'd and remanded*, 687 N.E.2d 1032 (Ill. 1997).

[555] *See* United States v. Ballard, 779 F.2d 287, 292-93 (5th Cir. 1986):

> Once the party seeking disclosure makes a prima facie case that the attorney-client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded. These precepts have . . . been applied consistently and have come to be known as the crime or fraud exception to the attorney-client privilege.

[556] D.C. v. S.A., 670 N.E.2d 1136, 1142 (Ill. Ct. App. 1996) (Lytton, J., dissenting), *rev'd and remanded*, 687 N.E.2d 1032 (Ill. 1997).

[557] Despite its widespread recognition, the exception is not without detractors. *See, e.g*, Zacharias, *supra* note 241, at 104 (referring to the courts' "strained justifications for the exception"). Critics contend that its application may deny protection to, and thus discourage, attorney-client communications precisely when they are likely to be most socially beneficial – "where a client seeks counsel's advice to determine the legality of conduct *before* the client takes any action." United States v. White, 887 F.2d 267, 272 (D.C. Cir. 1989). As one court has explained:

> Broadening the exception . . . might lead, at least initially, to greater disclosure (more evidence with which to get at the truth), but in the long run surely the effect would be to discourage clients from attempting to conform their conduct to legal requirements and to discourage lawyers from seeking information from clients in order to advise them effectively.

Oil, Chem. & Atomic Workers Int'l Union v. Sinclair Oil Corp., 748 P.2d 283, 291 (Wyo. 1987) (quoting 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 213, at 823-24 (rev. ed. 1985)).

privileges,[558] there is no persuasive reason for refusing to extend it to the union representation privilege.[559] In fact, the FLRA effectively applied the exception to the representation privilege in *United States Department of Treasury, United States Customs Service, Customs Management Center* ("*Customs Management Center*").[560]

In that case, an employer questioned one of its employees, under threat of discipline and criminal prosecution, concerning an allegation that his union representative instructed him to lie during the employer's investigation of the employee's alleged misconduct.[561] When the employee indicated that the union representative had given him no such instruction,[562] the employer elected not to investigate the allegation further.[563] The union nevertheless filed an unfair labor practice charge with the FLRA,[564] and the FLRA's General Counsel subsequently issued a complaint based on that charge alleging that the employer acted unlawfully in questioning its employee about his privileged communications with a union representative.[565]

The FLRA began its analysis by noting that communications between employees and their union representatives are ordinarily privileged,[566] and that absent a waiver of the privilege an employer may question an employee about

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[558] *Compare In re* Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71, 74 (1st Cir. 1999) ("We hold that the crime-fraud exception applies to the psychotherapist-patient privilege."), *and In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979) ("[G]enerally the crime-fraud exception applies to the work product as well as to the attorney-client privilege . . . ."), *with* United States v. Neal, 743 F.2d 1441, 1448 (10th Cir. 1984) (Logan, J., concurring) ("I would not adopt a crime-fraud exception to the privilege for confidential marital communications . . . ."), *and* State v. Wilson, 26 P.3d 1161, 1166 (Ariz. Ct. App. 2001) (declining to recognize "any 'crime-fraud exception' to the physician-patient privilege").

[559] Although the exception "grew up in the shadow of the attorney-client privilege," *Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d at 75, it "has been interpreted . . . to apply to other privileges." Smith v. United States, 193 F.R.D. 201, 209 (D. Del. 2000); *see, e.g.*, Multinational Force & Observers v. Arrow Air, Inc., 662 F. Supp. 162, 163 (S.D. Fla. 1987) (applying the exception to the accountant-client privilege by "[d]rawing [on] crime-fraud cases involving an attorney-client privilege for analogy").

[560] 57 F.L.R.A. 319 (2001).

[561] *See id.* at 320 (observing that the employee "was advised that he could be subject to disciplinary action for failure or refusal to answer proper questions and subject to criminal prosecution for any false answer").

[562] *See id.* (describing the employee's assertion "that he was never instructed to lie about what he was going to say or what he was going to put on paper").

[563] *See id.* at 325 (noting that the employer's investigator "ended this line of questioning immediately on being told by the employee that there had been no instruction to provide false information").

[564] *See id.* at 326.

[565] In particular, the General Counsel contended that the employer interfered with "privileged communications made in the context of official union business between a bargaining unit employee and a Union representative," without demonstrating the "overriding need that would warrant investigation into the privileged communications" under existing FLRA precedent. *Id.* at 324 (citing Long Beach Naval Shipyard, 44 F.L.R.A. 1021, 1037 (1992)).

[566] *See id.* ("Confidential communication between a union representative and an employee made during the course of representation constitutes protected activity under [the FSLMRS].") (citing *Long Beach Naval Shipyard*, 44 F.L.R.A. at 1037-38).

such communications only if it can demonstrate an overriding need to do so.[567] However, the FLRA concluded that the employer's interest in investigating the union representative's alleged misconduct[568] was sufficient to overcome the right of the employee and the union representative to keep their communications confidential.[569]

In reaching this conclusion, the FLRA noted its general agreement with the administrative law judge's analysis,[570] and particularly with his assertion that a union representative "may not aid and assist an employee to engage in conduct that the representative knows is criminal or fraudulent."[571] In particular, the administrative law judge characterized the union representative's alleged instruction to the employee as fraudulent[572] and a potential violation of federal criminal law,[573] and held that such communications are not protected by the privilege:

> The general social benefit of providing for confidential communications between a union representative and an employee so that the employee may have adequate advice and a proper defense cannot be assumed where the purpose is to enable or aid the employee to commit a crime or fraud. . . . If a union representative knowingly aided and assisted an employee in the preparation and presentation of an official response to an [employer] containing fraudulent or false statements regarding a material matter, . . . such action would . . . not [be] protected activity . . . .[574]

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[567] *See id.* (citing *Long Beach Naval Shipyard*, 44 F.L.R.A. at 1038; *and* Customs Serv.,, 38 F.L.R.A. 1300, 1309 (1991)).

[568] The administrative law judge noted that "the allegation that [the union representative] had instructed the employee to lie . . . if true, would be considered by the [employer] to constitute misconduct on [the union representative's] part." *Id.* at 320.

[569] *See id.* at 324-25:

> [T]he [employer was] justified in attempting to verify the . . . [alleged] instruction by the Union [representative] to falsify an official investigation. This is a serious allegation, and the record does not reveal any way that the [employer] could have determined whether a formal investigation was warranted without questioning the employee . . . engaged in protected activity. . . . Under these circumstances, the [employer has] established a need for [its] very limited investigation sufficient to override the right of the employee to keep the conversation confidential.

(Footnotes omitted.)

[570] *See id.* at 320 ("Upon consideration of the Judge's decision and the entire record, we adopt the Judge's findings and conclusions as modified . . . ."); *id.* at 324 ("We conclude that the Judge did not err in finding that [the employer] established a sufficient need to justify the . . . questions asked by the [investigator].").

[571] *Id.* at 323; *see also* Gazette Pbl'g Co., 101 N.L.R.B. 1694, 1726 (1952) ("[A]cts of fraud . . . cannot be said to be protected concerted activities."); W.T. Rawleigh Co., 90 N.L.R.B. 1924, 1968 (1950) (characterizing "a violation of criminal law" as "unprotected").

[572] *See Customs Mgmt. Ctr.*, 57 F.L.R.A. at 330 (indicating that the union representative was alleged to have "aided and assisted [the] employee in the preparation and presentation of . . . fraudulent or false statements").

[573] The judge indicated that the allegations against the union representative involved "probable violations of Federal law" prohibiting conspiracies to defraud federal agencies, and the making of "false statements" in connection with federal agency investigations. *Id.* (citing 18 U.S.C. §§ 371, 1001 (2000)).

[574] *Id.*; *cf.* Climax Molybdenum Co., 227 N.L.R.B 1189, 1198-99 (1977) (asserting that the right to union representation at an investigatory interview "should not be used by the Union to suppress the facts," and that "[s]uch conduct on the part of . . . a union representative is not protected by the Act"), *enforcement denied*, 584 F.2d 360 (10th Cir. 1978).

V. CONCLUSION

The traditional judicial hostility to evidentiary privileges[575] is gradually abating in the face of societal pressure for the protection of additional relationships and privacy interests from governmental intrusion.[576] This phenomenon was fueled in part by Congress' rejection of a restrictive approach to the recognition of testimonial privileges when it enacted Rule 501.[577] Thus, despite continued resistance on the part of many federal courts,[578] there has been a notable increase in the number of judicially-recognized privileges in the nearly three decades[579] since the rule was enacted.[580]

The judiciary's willingness to recognize new evidentiary privileges has been particularly pronounced in cases involving professional relationships.[581] The relationship between employees and their union representatives at least

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[575] *See In re* Dinnan, 661 F.2d 426, 430 (5th Cir. Unit B Nov. 1981) ("[T]here has been a notable hostility on the part of the judiciary to recognizing new privileges . . . ."); *In re* Parkway Manor Healthcare Ctr., 448 N.W.2d 116, 121 (Minn. Ct. App. 1989) (discussing "the longstanding judicial hostility towards evidentiary privileges").

[576] *See, e.g.*, United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1055 (E.D.N.Y. 1976) (discussing "increasing pressures for the creation of entirely new privileges . . . and the expansion of older privileges predicated upon expanding concepts of privacy."); *cf. In re* Agosto, 553 F. Supp. 1298, 1324 (D. Nev. 1983) (characterizing an overly restrictive approach to the recognition of new testimonial privileges as a view "unwelcome to the bar and the general public.").

[577] *See* Spencer Sav. Bank, SLA v. Excell Mortgage Corp., 960 F. Supp. 835, 838 (D.N.J. 1977) (suggesting that the perceived "need for federal courts to be cautious in recognizing a new privilege" may be inconsistent with Rule 501, "which allows federal courts to be flexible in the development of rules governing privileges"); *Agosto*, 553 F. Supp. at 1324 ("Rule 501 . . . declined to restrict testimonial privileges as they had developed up to that point. But what is perhaps even more significant is the fact that Rule 501 recognized and arguable even advocated the evolution of new testimonial privileges as they were deemed necessary by courts in the future.")

[578] *See* EEOC v. Ill. Dep't of Employment Sec., 995 F.2d 106, 107-08 (7th Cir. 1993) (citing "recent decisions that have declined opportunities to create new evidentiary privileges"); *Spencer Sav. Bank*, 960 F. Supp. at 838 ("[F]ederal courts have rarely exercised their authority under Rule 501 to expand common law testimonial privileges.").

[579] Rule 501 was enacted on January 2, 1975, and became effective on July 1, 1975. *See In re* Grand Jury Investigation, 918 F.2d 374, 377 n.3 (3d Cir. 1990); Kinoy v. Mitchell, 67 F.R.D. 1, 7 n.15 (S.D.N.Y. 1975).

[580] *See, e.g., Dinnan*, 661 F.2d at 429 (observing that "a number of new privileges have been established recently"); Nilavar v. Mercy Health Sys. – W. Ohio, 210 F.R.D. 597, 605 (S.D. Ohio 2002) ("[L]ower courts have not felt inhibited from recognizing new privileges on an ad hoc basis in the absence of Supreme Court precedent."); *In re* Grand Jury Proceedings (Sealed), 607 F. Supp. 1002, 1003 (S.D.N.Y. 1985) (referring to "the trend of . . . courts in expanding testimonial privileges").

[581] *See In re* Grand Jury, 103 F.3d 1140, 1161 n.8 (3d Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) (referring to "the more widely recognized professional testimonial privileges"); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1408 n.5 (D. Mass. 1989) ("[A]n evidentiary privilege . . . is – or should be – a highly functional and strictly limited device for advancing some particular professional role . . . ."); Marianne E. Scott, *Parent-Child Testimonial Privilege: Preserving and Protecting the Fundamental Right to Family Privacy*, 52 U. CIN. L. REV. 901, 902 (1983) ("[I]n the past thirty years . . . courts have accepted new privileges protecting communications between laypersons and professionals.").

arguably falls within this category,[582] and its similarity to the most rigorously protected professional relationship[583] – that of attorney and client[584] – makes it a logical candidate for the protection of an evidentiary privilege.[585] More importantly, the recognition of such a privilege would further significant federal policies underlying the NLRA and the FSLMRS.[586]

Nevertheless, only the NLRB, the FLRA and the New York state courts[587] have recognized any form of union representation privilege to date.[588] The

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[582] *See, e.g.*, NLRB v. Hayden Elec., Inc., 693 F.2d 1358, 1367 n.9 (11th Cir. 1982) (describing a union representative as "a professional in the field of labor relations"); Kathleen S. v. Dep't of Pub. Welfare, 10 F. Supp. 2d 460, 463 (E.D. Pa. 1998) (referring to "union representatives, and other professionals"); Graham v. Crow Wing County Bd. of Comm'rs, 515 N.W.2d 81, 83 (Minn. Ct. App. 1994) (discussing "[p]rofessional union representatives [who] represent . . . employees in contract negotiations."). *But cf.* Cottrell v. Candy Workers Union, Local 342, 630 F. Supp. 1081, 1085 n.1 (C.D. Ill. 1986) ("Union officials are not professional advocates . . . .").

[583] *See* Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 74 (1991) ("Others have likened the relationship between union and employee to that between attorney and client.") (citing Teamsters v. Terry, 494 U.S. 558, 582 (1990) (Stevens, J., concurring)); Spyrnal v. Prudential Ins. Co., 156 L.R.R.M. (BNA) 2474, 2476 (N.D. Ill. 1997) (asserting that an employee's "consent to have union representatives act on his behalf" is "analogous to his hiring an attorney"); Int'l Bhd. of Firemen & Oilers, 302 N.L.R.B. 1008, 1009 (1991) (noting that "the legal relationship between a union and the employees it represents" has been "analogized to . . . the relationship between attorney and client").

[584] *See* United States v. Hurley, 728 F. Supp. 66, 67 (D. Mass. 1990) ("The attorney-client privilege is the most fundamental of all legal relationships and any interference with or disruption of that relationship should be exercised only under extraordinary circumstances."); *cf. In re* Impounded, 241 F.3d 308, 320 (3d Cir. 2001) (Nygaard, J., dissenting) ("American jurisprudence has long recognized the central importance of the attorney-client relationship. The privilege is the most common means of protecting the relationship, but it is not the only one.").

[585] *See* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1198 (D.S.C. 1974) ("[T]he attorney-client *and analogous relationships* are 'recognized in law by privileges against forced disclosure . . . .'") (emphasis added) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). *See generally Jackson*, 721 F. Supp. at 1408 n.5 (noting the "periodic claims of various professional groups for recognition of an evidentiary privilege concerning their professional communications and papers"); Coulter v. Rosenblum, 682 A.2d 838, 840 (Pa. Super. Ct. 1996) (discussing "the crucial role that uninhibited speech, fostered by privilege, plays in professional relationships.").

[586] One federal court has noted that "the creation of entirely new privileges . . . and the expansion of older privileges" are essentially "policy issues," United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1055 (E.D.N.Y. 1976), and "[c]onfidentiality is important to the policies of the National Labor Relations Act." Int'l Union v. Garner, 102 F.R.D. 108, 114 (M.D. Tenn. 1984); *see also* Nat'l Tel. Directory Corp., 319 N.L.R.B. 420, 421 (1995) ("The confidentiality interests of employees have long been an overriding concern to the Board.").

[587] A California trial court also recently concluded that there "should be a privilege as to communications between a union officer and members." Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 150 (Ct. App. 2003). However, the California Court of Appeals declined to recognize the privilege, noting that unlike the New York courts, courts in California have the authority to recognize a new privilege "only if . . . statutory language and legislative history plainly demonstrate the Legislature's intent to create such a privilege." *Id.* at 152.

[588] *See* U.S. Dep't of Justice v. FLRA, 39 F.3d 361, 368-69 & n.11 (D.C. Cir. 1994); *In re* Grand Jury Subpoenas dated Jan. 20, 1998, 995 F. Supp. 332, 336 & n.3 (E.D.N.Y. 1998).

only federal courts to consider the issue have either rejected the privilege[589] or declined to decide whether it should be recognized.[590] In many cases, employees aware of that fact[591] will be hesitant to confide in their union representatives.[592] Thus, until the federal courts are also willing to recognize and enforce the privilege,[593] federal agency and state court decisions recognizing the privilege may be of little practical significance,[594] and the policies intended to be served by the privilege will not be adequately fostered.[595]

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[589] *See* McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 386 (C.D. Cal. 2002); *Grand Jury Subpoenas*, 995 F. Supp. at 336-37; Walker v. Huie, 142 F.R.D. 497, 501 (D. Utah 1992). *See generally* Chemise Fabrik v. Hygrade Food Prods. Corp., 253 F. Supp. 999, 1001 (D.N.J. 1966) ("[T]he rule is simply that communication[s] between a client and an administrative practitioner who is not an attorney are not privileged.").

[590] *See, e.g.*, Dep't of Justice Immigration & Naturalization Serv. v. FLRA, 939 F.2d 1170, 1175 (5th Cir. 1991) ("*Amicus curiae* . . . suggests that we address whether . . . [a] privilege arises out of the employee-union representative relationship. Our decision makes it unnecessary to reach the issue, and we decline to do so."); *see also Am. Airlines*, 8 Cal. Rptr. 3d at 153-54 (noting that "there are no cases where a court has ever found a union privilege" under the Railway Labor Act, 45 U.S.C. §§ 151-88 (2000), a federal labor relations statute that grants employees of common carriers "the right to organize and bargain collectively through representatives").

[591] Like other professionals, a union representative presumably "can be expected to inform the other [party to the relationship] of the existence [or nonexistence] of the privilege." *In re* Grand Jury, 103 F.3d 1140, 1153 n.21 (3d Cir. 1997) (quoting PROPOSED FED. R. EVID. 505 advisory committee's note, *reprinted in* 56 F.R.D. 183, 246). In University of Michigan, 103 Lab. Arb. Rep. (BNA) 401, 401 (1994) (Daniel, Arb.), for example, a union representative "decided that [the employees he was representing] needed to be represented by legal counsel at [an investigatory] meeting because any statements [they] made to an attorney would be protected from disclosure in a criminal proceeding but not those that might have been made to him as their union representative."

[592] *See* U.S. Dep't of Justice v. FLRA, 266 F.3d 1228, 1232 (D.C. Cir. 2001) ("[A] union representative might be called to testify at a [federal] trial . . . . And if the employee is concerned about the possible testimony of the union representative, he [may] simply decide not to ask for one."); *cf. Grand Jury Subpoenas*, 995 F. Supp. at 338 ("[A]n [employee] who wishes to ensure that anything he says relating to a criminal matter is shielded by [a] privilege should . . . not [assume] that any communications he has with a union representative are somehow shielded from . . . inquiry.").

[593] The present prospects for such enforcement may be dim: "That the courts of a particular state . . . recognize a given privilege will not often of itself justify a federal court in applying that privilege." Am. Civil Liberties Union of Miss. v. Finch, 638 F.2d 1338, 1343 (5th Cir. 1981); *cf.* Johnson v. Nyack Hosp., 169 F.R.D. 550, 559 (S.D.N.Y. 1996) ("Only by forging independent rules of privilege after taking into account the policy determinations of *all of the states* can the federal courts develop a uniform federal law of privilege.") (emphasis added).

[594] The Supreme Court itself has noted that "any . . . promise of confidentiality would have little value if the [communicant] were aware that the privilege would not be honored in federal court." Jaffee v. Redmond, 518 U.S. 1, 13 (1996); *see also In re* Int'l Horizons, Inc., 689 F.2d 996, 1005 (11th Cir. 1982) (noting that a state law privilege is unlikely "to foster candor and confidential communications . . . if other courts refuse to follow the State's rules of evidentiary privilege").

[595] Indeed, one state court has asserted that "an uncertain privilege has the potential of achieving the worst possible result: it could harm the truth seeking process without a corresponding increase in candor." Samaritan Found. v. Goodfarb, 862 P.2d 870, 879 (Ariz. 1993) (citing Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 434 (1970)).