Labor and Employment Law

The Fiduciary-Beneficiary Exception to the Attorney-Client Privilege as Applied to the Duty of Fair Representation Owed to Union Nonmembers

*By James J. Plunkett**

I. Introduction

The current labor law in the United States allows unions in non-Right to Work states to compel payments from nonmembers as a condition of employment.[1] Although the duty of fair representation requires unions to establish procedures to ensure that these compelled payments are not used improperly, nonmembers must often turn to the courts to enforce their rights. Complicated legal procedures, court rules, and technicalities can make this a daunting proposition. However, two recent cases have made it easier for nonmembers to hold unions accountable for compulsory unionism abuses. That is because these cases have demonstrated that the attorney-client privilege does not apply to communications between a union's officers and its in-house counsel that concern the union's duty of fair representation owed to nonmembers forced to pay union fees as a condition of employment.

II. The Attorney-Client Privilege

The attorney-client privilege has long been recognized in the United States. It is intended to promote the public's interest in justice by encouraging candid disclosures between an attorney and his client. Indeed, in *Hunt v. Blackburn*,[2] the Supreme Court determined that the attorney-client privilege was "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[3] Nearly 100 years later in *Upjohn Co. v. United States*,[4] the Court reasoned that the purpose of the privilege was "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[5]

The Federal Rules of Evidence do not have a specific rule of privilege, but instead instruct federal courts to apply "principles of the common law…in the light of reason and experience," or, in diversity cases, the rule of the state which "supplies the rule of decision."[6] Thus, as alluded to above, the courts have been left with the task of developing and shaping the law of privileges with regard to confidential communications, including the attorney-client privilege.[7] Accordingly, most courts have adopted the following principles of the attorney-client privilege as formulated by Wigmore:

> (1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his or her insistence permanently protected, (7) from disclosure by the client or by the legal advisor, (8) except if the protection is waived.[8]

Furthermore, the attorney-client privilege has been described as a "two way street."[9] That is, not only does it protect communications made by a client to his or her lawyer, but it also protects the lawyer's communications made in response to those inquiries.[10] Lastly, the party claiming the privilege has the burden of establishing the attorney-client relationship and the privileged nature of the communications.[11]

III. Exceptions to the Attorney-Client Privilege

A. The Crime-Fraud Exception

Although the attorney-client privilege may be the "most sacred of all legally recognized privileges," it is not without its exceptions.[12] In certain cases, the privilege will be superseded by other public policy interests that are deemed more important. For example, when communications between a client and his or her attorney concern a continuing or future crime or fraud, the privilege cannot be invoked.[13] This is generally referred to as the crime-fraud exception.[14]

B. The Fiduciary-Beneficiary Exception

1. The Evolvement of the Standard to its Application in the ERISA Context

Another exception to the attorney-client privilege that is almost as old as the privilege itself is the fiduciary-beneficiary exception.[15] This exception is derived from the common law of trusts and is applied to situations in which an attorney's advice is provided to assist a fiduciary in carrying out his obligations to a beneficiary.[16] Under the exception, communications between an attorney and a trustee regarding the administration of the trust are not privileged and are therefore discoverable by the beneficiaries in a suit against the trustee.

In the trust context, the fiduciary-beneficiary exception has two rationales.[17] First, some courts have held that the exception is rooted in the trustee's duty to provide the beneficiaries with information regarding the administration of the plan or trust.[18] Indeed, the Restatement (Third) of Trusts § 82 (Tentative Draft No. 4, 2005), states that a "[t]rustee has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property

holdings." Under this rationale, communications between a fiduciary and the attorney would be considered "information" that the fiduciary would be obligated to provide to the beneficiaries.

Second, other courts have held that the exception is not really an "exception" at all, because the trustee is not the real client when it comes to advice concerning the plan or trust.[19] Indeed, courts have reasoned that the privilege should not apply in such a situation because the real client is not actually the fiduciary, but rather the beneficiary—the person to whom the fiduciary owes a duty.[20]

Not surprisingly, the fiduciary-beneficiary exception to the attorney-client privilege has been applied most frequently in actions arising under the Employee Retirement Income Security Act (ERISA).[21] This is because ERISA, the federal law that sets standards for private sector health and pension plans, was founded largely on common law trust principles. Referring specifically to the fiduciary duties outlined in ERISA, the Supreme Court has stated that they "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment."[22] Moreover, the statute explicitly enumerates the duties of an ERISA fiduciary.[23] Therefore, because ERISA was derived from the common law of trusts, and because it sets forth specific duties of a fiduciary, ERISA litigation has become a logical forum in which to extend the application of the common law fiduciary-beneficiary exception to the attorney-client privilege.[24]

2. The Exception Does Not Apply When The Advice Sought by the Fiduciary Relates to His Personal Protection or Liability

In its application to ERISA litigation, the fiduciary-beneficiary exception applies to instances in which an attorney's advice is sought regarding administration of the trust or plan. However, what if a trustee is sued by the beneficiaries for mismanagement of the trust and subsequently seeks the advice of an attorney in order to defend himself? Should these communications be discoverable by the plan beneficiaries? In such a case, the fiduciary-beneficiary exception would not apply.[25]

The Restatement (Second) of Trusts § 173, Comment b (1959), states that a trustee need not disclose "information acquired . . . at his own expense and for his own protection. Thus, he is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection." When a plan fiduciary retains counsel in order to defend himself from suit by the plan beneficiaries, the exception would not apply, and the communications would be privileged.[26] Of course, distinguishing between legal advice that is being used to carry out the fiduciary's obligations to the beneficiary, which is discoverable, and legal advice that is used for the fiduciary's own personal reasons, which is not discoverable, can be a confusing undertaking.

In *Mett*, the Ninth Circuit dealt with this very issue. The defendants in *Mett* ran a retail art gallery and were trustees of their employees' pension benefit plans. When the art gallery ran into some economic difficulties, defendants withdrew $1.6 million from the benefit plans and were convicted of embezzlement. On appeal, the defendants argued that two memoranda sent to them by their then-counsel should not have been admitted into evidence because they were privileged communications.

The first memorandum "explained the nature of the legal advice that was being provided: You have asked our advice regarding the criminal and civil sanctions which may [sic] applicable to the following facts."[27] Furthermore, the first memorandum "detail[ed] the potential civil and criminal exposure the defendants might face in light of the withdrawals."[28] The second memorandum in question "further detail[ed] the civil and criminal penalties associated with transactions by ERISA and related tax laws."[29]

The court reasoned that both memoranda clearly addressed the defendants' potential civil and criminal liabilities in relation to their withdrawal of money from the pension funds, and neither memorandum contained advice on a matter of plan administration.[30] Accordingly, the court ruled that the fiduciary-beneficiary exception did not apply, and that both memoranda should have been excluded as privileged.[31]

Thus, as the court pointed out in *Mett*, there are distinct limitations to the fiduciary-beneficiary exception to the attorney-client privilege. "On the one hand, where. . .[a] trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel in order to defend herself against the plan beneficiaries (or the government acting in their stead), the attorney-client privilege remains intact."[32] This is the ERISA standard of the fiduciary-beneficiary exception to the attorney-client privilege.

IV. Application of The Fiduciary-Beneficiary Exception to Labor Law

The fiduciary-beneficiary exception to the attorney-client privilege has been applied to several other fiduciary relationships, not just the relationship that exists between trustee and beneficiary.[33] Indeed, the exception has been applied in several cases in which union members sought production of communications between union officials and union attorneys.[34] The following section describes another way that the fiduciary-beneficiary exception to the attorney-client privilege has recently been applied to labor law. Specifically, the section details the exception to the privilege in the context of a union's duty of fair representation toward nonmembers under a so-called "union security" clause in a collective bargaining agreement.

A. "Union Security" Agreements

The National Labor Relations Act (NLRA)[35] authorizes

employers and unions to enter into agreements requiring employees in the bargaining unit to acquire and maintain "membership" in the union as a condition of employment.[36] The NLRA covers most employees working in the private sector.[37] Many states have enacted laws which authorize unions and state or local governmental employers to include provisions in their collective bargaining agreements requiring all employees to either join or financially support the union or which make such a requirement mandatory in all public sector bargaining units.[38]

The Supreme Court has determined that the "membership" requirement under the NLRA is "whittled down to its financial core," and the most that can be required of private sector employees is the "payment of fees and dues."[39] Moreover, the Court has limited that "financial core" to "only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"[40]

Stated otherwise, the "'financial core'" objecting nonmembers may lawfully be forced to pay in the private sector does not include "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment."[41] Similarly, although nonmember public employees can be required to subsidize a union's "collective-bargaining activities," a nonmember public employee cannot constitutionally be forced to "contribute to the support of an ideological cause he may oppose as a condition of holding a job."[42]

Thus, even under so-called "union security" agreements, both private and public sector employees can choose to be a nonmember of the union, pay less than full dues, and still retain their employment. The fee that a nonmember pays to a union under a "union security" provision is often called an "agency fee" or a "financial core fee."

Compelled union payments implicate the First Amendment rights of public employees.[43] Forced union fees also impact the rights of private employees to be represented fairly.[44] Therefore, the courts and federal and state agencies have determined that unions must provide nonmembers certain procedures to ensure that any agency fee that they are forced to pay is only used for representational expenses. In other words, the exclusive bargaining representative must establish procedures to make certain that the fees collected from objecting nonmembers are not used for ideological, political or other non-representational activities.[45]

For example, in the public sector, the Supreme Court has set forth the procedures that a union must follow in order to collect an agency fee from a nonmember. According to the Court in *Hudson*, the union must provide nonmembers with audited financial information about how the agency fee was calculated, as well as information on how to challenge the union's calculation of the fee before an independent arbitrator or other "impartial decisionmaker."[46] Moreover, if a nonmember employee challenges the union's calculation, the union must place the contested amount of the fee in escrow pending a decision by the impartial decisionmaker.[47]

Similarly, in the private sector, "when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause," the union must, at a minimum, notify the employee "that he has the right to be or remain a nonmember" and, as such, object to and obtain a reduction in fees for "activities not germane to the union's duties as bargaining agent." If an employee then objects, the union must inform the objector "of the percentage of the reduction," the basis for the union's calculation, and the right to challenge its figures.[48] This information is required so that nonmembers can make a reasoned decision about whether to challenge the union's calculation of their required fee amount.[49]

B. The Duty of Fair Representation

The procedures that a union must provide to a nonmember as outlined in *Hudson* and its progeny flow from a union's duty of fair representation.[50] This duty is a judicially-created standard that requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[51] The duty of fair representation is breached when a union's actions towards the employees it represents are "arbitrary, discriminatory, or in bad faith."[52]

This duty of fair representation requires the union to fairly represent all employees in the bargaining unit—member and non-member alike.[53] Part of a union's duty of fair representation is to provide nonmembers with adequate notice and procedures concerning any representation fee that they might have to pay under a compulsory union fee agreement.[54]

The Supreme Court has held that the "duty of fair representation is akin to the duty owed by other fiduciaries to their beneficiaries."[55] The Court has compared this duty to the duty that a corporate officer owes the company's shareholders.[56] More importantly, the Court has also compared this duty to the duty that a trustee owes to the trust beneficiaries.[57]

We have seen how the fiduciary-beneficiary exception to the attorney-client privilege developed from the common law of trusts to apply to ERISA litigation. Analogizing further, because the duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries,"[58] it is only logical that the fiduciary-beneficiary exception as set forth in ERISA cases applies to labor law cases in which the union's fiduciary duties are at issue. As will be discussed below, plaintiffs in two recent cases convinced courts to apply the ERISA standard of the fiduciary-beneficiary exception to situations involving advice given by a union's in-house counsel concerning the union's representation of nonmembers.

V. Expansion of the Fiduciary-Beneficiary Exception in the *Wessel* and *Harrington* Cases

A. The Wessel *Case*

The plaintiffs in *Wessel v. City of Albuquerque*,[59] who were represented by attorneys from the National Right to Work Legal Defense Foundation, were nonmembers employed by the City of Albuquerque, New Mexico. Plaintiffs filed suit against the city and Local 624 of the American Federation of State, County, and Municipal Employees (AFSCME). Their complaint alleged deficiencies in the process by which Local 624 collected "fair share" fees from the plaintiffs. The plaintiffs claimed that these deficiencies violated their rights under the First Amendment.

In July 1999, New Mexico AFSCME Council 18, acting as agent for Local 624, sent nonmember employees a notice which stated that the fair share fee would be 75% of union dues. Just one month later, the city began deducting 75% of dues from the wages of all nonmembers, and remitted these to Local 624. The plaintiffs' suit alleged that Local 624 and Council 18 knew or should have known that the chargeable portion should have only been 50.08% of union dues. They further alleged that the subsequent seizure of 75% of dues from their wages coupled with inadequate notice of the fees' basis violated their constitutional rights. Council 18 sent out a revised notice in May, 2000.

During discovery, through a subpoena *duces tecum* issued in the United States District Court for the District of Columbia, plaintiffs sought production of documents that contained advice given by AFSCME International's in-house counsel regarding the administration of Local 624's fair share collection procedure. Specifically, the documents in question concerned the administration of the revised notice sent to nonmember employees. AFSCME refused to produce these documents, claiming that they contained confidential communications protected by the attorney-client privilege. Upon AFSCME's refusal to produce the documents, the plaintiffs moved to compel production of the documents.[60]

The plaintiffs argued that even if the documents in question did contain privileged communications, they were discoverable because they fell within the fiduciary-beneficiary exception to the attorney-client privilege.[61] The plaintiffs claimed that AFSCME owed a fiduciary duty to all city employees to provide them with adequate financial disclosure concerning their fee payments. Plaintiffs argued that this duty was similar to the duty owed by other fiduciaries to their beneficiaries.[62]

In comparing AFSCME's fiduciary duty to that of a trustee, the plaintiffs urged the court to apply the ERISA standard set forth in *United States v. Mett*.[63] The *Mett* standard, described in detail *supra* pp. 5-6, draws a distinction between communications between a trustee and in-house counsel that relate to administration of the trust, and communications that relate to the trustee's own personal liability.[64] The former fall within the fiduciary-beneficiary exception and are therefore discoverable, while the later are privileged and therefore not discoverable.[65]

Although AFSCME did not dispute the application of the fiduciary-beneficiary exception in the labor law context, it did dispute its applicability to the immediate case.[66] In particular, AFSCME claimed that the exception to the privilege should not apply because the plaintiffs represented only a small minority of the "beneficiaries" and their interests were adverse to the majority.[67] In support of this proposition, AFSCME cited cases in which the attorney-client privilege was not abrogated because the courts determined that the plaintiffs consisted of only a small minority of the union members whose interest was adverse to the majority of the members. One such court had ruled that allowing minority employees to circumvent the attorney-client privilege "would result in the union's virtual paralysis of decision-making."[68]

In response, plaintiffs reasoned that AFSCME's argument was inapplicable, because the fiduciary duty in question applied only to nonmembers. That is, members do not have a right to receive the financial information required by *Hudson*.[69] Furthermore, unlike the cases cited by the defendants, which involved plaintiffs who were only a small segment of the bargaining unit, the *Wessel* plaintiffs represented a putative class of all nonmembers in Local 624's bargaining unit who all had a common interest in being fully informed of their objection rights.[70]

The district court agreed with the plaintiffs.[71] In applying the fiduciary-beneficiary exception to the attorney-client privilege, the district court followed the standard set forth in *Mett*.[72] That is, the district court determined that AFSCME and its affiliates were not seeking advice regarding their own civil or criminal liabilities, but rather, "they were seeking advice on how to correct an error in the original notice, which should be considered an administrative function."[73] Because the information sought by plaintiffs concerned advice relating to the administration of Local 624's fair share plan, which was undertaken out of the union's fiduciary duty to nonmembers, the fiduciary-beneficiary exception applied. The district court therefore ordered AFSCME to produce the documents.[74]

B. The Harrington *Case*

Harrington is a companion case to *Wessel*, and featured virtually the same fact scenario.[75] The nonmember plaintiffs in *Harrington* were also represented by attorneys from the National Right to Work Legal Defense Foundation. However, the issue in *Harrington* was whether matters which occurred *after* the filing of *Wessel* could be discoverable.[76]

In *Harrington*, plaintiffs deposed AFSCME's in-house counsel and asked him a series of questions regarding "the basis for, the preparation of, and the delay in the distribution of the revised 'fair share' notice" and "as to the preparation of future notices."[77] The attorney refused to answer these questions, claiming that the attorney-client privilege and the work product doctrine covered the information sought by plaintiffs because everything that happened after the *Wessel*

suit was filed was done in defending the litigation.[78] Plaintiffs responded by filing a motion to compel AFSCME's in-house counsel to provide the testimony sought.

The magistrate judge overseeing discovery ruled that the fact that *Wessel* had been filed did not relieve AFSCME of performing its fiduciary duties to the plaintiffs.[79] Indeed, "[i]f there was an error in the first notice," the defendants' fiduciary obligation to issue accurate financial information to nonmembers included "a duty to issue a correction." The plaintiffs were not seeking information about the handling of the litigation. Therefore, applying *Mett*, the Magistrate held that activities surrounding the performance of the union's duty to issue the revised and future notices were discoverable under the fiduciary-beneficiary exception and granted the plaintiffs' motion to compel testimony.[80]

Defendant unions then filed objections to the Magistrate Judge's Order. They contended that the exception to the privilege did not apply, because the attorney's knowledge concerning the questions at issue "'was generated solely by [his] activities in providing legal advice in the defense of the . . . litigation.'"[81] However, the court found that the attorney's knowledge concerning issuance of "a legally adequate fair share notice," which was all the plaintiffs sought, "was derived prior to and distinct from any activity designed either to protect the union from litigation or defend the union in" either lawsuit.[82]

Moreover, the court reasoned that the unions' obligations to issue a corrected notice and adequate future notices "existed entirely independent of the Plaintiffs' lawsuits." The "union will not be permitted to refuse to answer questions about its failure to meet its constitutionally required fiduciary responsibilities simply because the beneficiaries of that fiduciary relationship were forced to result [sic] to litigation to enforce it."[83] The court therefore overruled the unions' objections and ordered the witness to provide the requested testimony.[84]

VI. Conclusion

The decisions in *Wessel* and *Harrington* described above have established that the fiduciary-beneficiary exception to the attorney-client privilege applies to communications between union officials and their in-house counsel concerning the union's fiduciary duty toward nonmembers who are forced to pay union fees as a condition of employment. As a result, unions can no longer dodge their fiduciary obligations to nonmember employees by claiming the attorney-client privilege. Indeed, because these precedents command fairness and open disclosure with regard to unions' fiduciary obligations toward nonmembers from whom they compel payment of fees, they will no doubt prove useful to those employees who must resort to the courts to enforce their rights under forced unionism provisions.

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Footnotes

[1] The following states have Right to Work Laws that prohibit agreements requiring such payments: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

[2] 128 U.S. 464 (1888).

[3] *Id.* at 470.

[4] 449 U.S. 383 (1981).

[5] *Id*. at 389.

[6] FED. R. EVID. 501.

[7] *See Upjohn*, 449 U.S. at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

[8] *See, e.g*., United States v. Martin, 278 F.3d 988, 999 (9th Cir. 2002); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997); United States v. White, 950 F.2d 426, 430 (7th Cir. 1991). Another variation of the attorney-client privilege that is often cited was first enunciated in *United States v. United Shoe Machinery Corp*., 89 F.Supp. 357 (D. Mass. 1950). In *United Shoe*, the court held that the privilege applied only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of the court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 358-59.

[9] *See* United States v. Bauer, 132 F.3d 504, 507-508 (9th Cir. 1997).

[10] *See id*. (citing United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996)).

[11] *See id*. at 509.

[12] *Bauer*, 132 F.3d at 510.

[13] *See In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984) ("It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.").

[14] *See, e.g*., Clark v. United States, 289 U.S. 1, 15 (1933).

[15] *See* Riggs Nat'l. Bank of Washington, D.C. v. Zimmer, 355 A.2d

709, 712 (Del. Ch. 1976) (citing Talbot v. Mansfield, 62 Eng. Rep. 728 (Ch. 1865)).

[16] *See id*. at 712.

[17] See United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999).

[18] *See id*.; Becher v. Long Is. Lighting Co. (*In re Long Island Lighting Co*.), 129 F.3d 268, 271-72 (2d Cir. 1997).

[19] *See Mett*, 178 F.3d 1063; U.S. v. Evans, 796 F.2d 264, 266 (9th Cir. 1986), (quoting Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F.Supp. 906, 908-910 (D.D.C. 1982)).

[20] *See Riggs*, 355 A.2d at 713-714.

[21] *See* 29 U.S.C. § 1001 *et seq*. Before its application in ERISA cases, the fiduciary-beneficiary exception was most notably applied to shareholder litigation. *See* Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970). In *Garner*, the privilege issue arose when plaintiff shareholders sought deposition testimony from the corporation's president, who had previously been the corporation's in-house counsel, concerning advice offered by him in that capacity. Defendant corporation objected, claiming the attorney-client privilege. On appeal, the Fifth Circuit established a "good cause" rule, stating that the attorney-client privilege should be "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." *Id*. at 1103-1104. However, the "good cause" standard set forth in Garner does not apply to ERISA litigation. *See infra* notes 34 and 72.

[22] Varity v. Howe, 516 U.S. 489, 496 (1996).

[23] *See* 29 U.S.C. § 1104. Among other things, this section requires an ERISA fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries", and to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

[24] *See generally*, *In re Long Island Lighting Co*., 129 F.3d 268 (2d Cir. 1997); Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F.Supp. 906 (D.D.C. 1982); Riggs Nat'l. Bank of Washington, D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976).

[25] *See Mett*, 178 F.3d at 1064.

[26] *Id*.

[27] *Id*. at 1062 (alteration in original).

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 1064-66. For a case in which the fiduciary-beneficiary exception *did* apply, and thus allowed communications to be discoverable, *see Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 610 (N.D. Cal. 2000) (fiduciary-beneficiary exception applied to documents reviewed by inside counsel that concerned changes in health care plan benefits to beneficiaries).

[32] *See Mett*, 178 F.3d at 1064.

[33] For other situations in which the exception applies, *see In re Sunrise Sec. Litig*., 130 F.R.D. 560 (E.D. Pa. 1989) (law firm with conflicting fiduciary duties to itself and client); Quintel Corp., N.V. v. Citibank, N.A., 567 F.Supp. 1357 (S.D.N.Y. 1983) (bank acting as fiduciary for purchaser in land acquisition transaction).

[34] *See, e.g*., Arcuri v. Trump Taj Mahal Assocs., 154 F.R.D. 97 (D.N.J. 1994); Nellis v. Air Line Pilots Ass'n, 144 F.R.D. 68 (E.D.Va. 1992); Aguinaga v. John Morrell & Co., 112 F.R.D. 671 (D.Kan. 1986). These cases applied the "good cause" standard set forth in *Garner*, rather than the ERISA standard as described in *Mett*. Unlike the *Garner* standard, which applied to shareholder litigation, the ERISA fiduciary standard does not require the beneficiaries to show "good cause." *See* Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 85 (N.D.N.Y. 2003); Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906, 909 n. 5 (D.D.C. 1982).

[35] 29 U.S.C. §§ 151-169.

[36] 29 U.S.C. § 158(a)(3).

[37] The NLRA does not cover federal, state or local government employees, agricultural employees, railway or airline employees (these employees are covered by the Railway Labor Act (RLA), 45 U.S.C. §§ 151 *et seq*.), independent contractors and supervisors.

[38] *E.g., California*, Cal. Gov't Code § 3502.5; *Washington*, Wash. Rev. Code § 41.56.122; *Illinois*, 5 Ill. Comp. Stat. 315/6.

[39] NLRB v. General Motors Corp., 372 U.S. 734, 742 (1963).

[40] Communications Workers v. Beck, 487 U.S. 735, 762-63 (1988) (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984) (similarly limiting compulsory dues under the RLA)).

[41] *Beck*, 487 U.S. at 745.

[42] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).

[43] *Id*. at 222.

[44] *See Beck*, 487 U.S. at 743-44.

[45] *See, e.g*., Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) (public sector); Abrams v. Communications Workers, 59 F.3d 1373, 1379 n.7 (D.C. Cir. 1995) (NLRA); Crawford v. Air Line Pilots Ass'n, 992 F.2d 1295, 1301 (4th Cir. 1993)(RLA).

[46] 475 U.S. at 306-08.

[47] *Id*. at 310.

[48] California Saw & Knife Works, 320 N.L.R.B. 224, 233 (1995), *enf'd* 133 F.3d 1012 (7th Cir. 1998); *but see* Penrod v. NLRB, 203 F.3d 41, 47-48 (D.C. Cir. 2000) (*all* "new employees and financial core payors . . . must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors").

[49] *See Penrod*, 203 F.3d at 45-46; *Abrams*, 59 F.3d at 1379-80.

[50] *Penrod*, 203 F.3d at 45; *Abrams*, 59 F.3d at 1379 n.7. In the public sector, a union's duty to provide nonmembers with adequate financial disclosure also flows from the First Amendment. *See Hudson*, 475 U.S. at 306.

[51] Vaca v. Sipes, 386 U.S. 171, 177 (1967) (citing Humphrey v.

Moore, 375 U.S. 335, 342 (1964)).

[52] *Vaca*, 386 U.S. at 190. (Depending on the circumstances, the duty of fair representation is enforceable in federal court, state court, and various federal and state labor agencies.).

[53] *Abood*, 431 U.S. at 221; *see* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998); *see also* Steele v. Louisville & N.R.R.., 323 U.S. 192, 202 (1944) ("the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.").

[54] *See Penrod*, 203 F.3d at 45; *Abrams*, 59 F.3d at 1379-80; Beck v. Communications Workers, 776 F.2d 1187, 1203 (1985) (2-1 decision), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986) (6-4 decision), *aff'd on other grounds*, 487 U.S. 735 (1988).

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

[56] *Id*. at 75.

[57] *Id*. at 74; Teamsters v. Terry, 494 U.S. 558, 567-68 (1990); *see also* NLRB v. Hotel Employees Local 568 (Philadelphia Sheraton), 320 F.2d 254 (3d Cir. 1963) (union enforcement of "union security" provisions gives rise to "a fiduciary duty that the union deal fairly with employees.").

[58] *O'Neill*, 499 U.S. at 74.

[59] 299 F.3d 1186 (10th Cir. 2002). Proceedings on remand in Wessel are reported at 327 F. Supp. 2d 1332 (D.N.M. 2004).

[60] *See* Wessel v. City of Albuquerque, 48 Fed. R. Serv. 3d 349, 2000 WL 1803818 (D.D.C. 2000) (Kay, Mag. J.). Although the lawsuit was filed in the United States District Court for the District of New Mexico, the subpoena was issued in the District of Columbia, because that is where AFSCME International's headquarters are located.

[61] *Id*., 2000 WL 1803818, at *6.

[62] *Id*.

[63] 178 F.3d 1058 (9th Cir. 1999).

[64] *See Id*. at 1064.

[65] *Id*.

[66] *See Wessel*, 2000 WL 1803818, at *6.

[67] *Id*.

[68] Arcuri v. Trump Taj Mahal Assocs.,154 F.R.D. 97, 109 (D.N.J. 1994). AFSCME also cited *Cox v. Administrator U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1415 (11th Cir. 1994), and *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988).

[69] *See* Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283, 291-302 (4th Cir. 1991).

[70] *See* 2000 WL 1803818, at *6.

[71] *See* id., at *7.

[72] Although the court discussed Garner, see supra note 21, and its "good cause" standard for application of the fiduciary-beneficiary exception, the court decided the case under the ERISA fiduciary standard detailed in *Mett*. *Compare* 2000 WL 1803818, at *4 *with id*. at *7.

[73] *See* 2000 WL 1803818, at *7.

[74] *Id*.

[75] *See* Harrington v. City of Albuquerque, 2003 WL 21525073 (2003) (Schneider, Mag. J.), objections overruled, 174 L.R.R.M. (BNA) 3362, 2004 WL 1149494 (D.N.M. 2004). *See also* Harrington v. City of Albuquerque, 222 F.R.D. 505 (class certified), *summary judgment granted in part, denied in part*, 329 F. Supp. 1237 (D.N.M. 2004).

[76] *See* 2003 WL 21525073 at *1.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. at *1-*2.

[81] 2004 WL 1149494, at *2.

[82] *Id*.

[83] *Id*.

[84] *Id*. at *3.