Is a Full Labor Relations Evidentiary Privilege Developing?

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“[C]onsultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms.”
– Members Fanning, Jenkins, & Zimmerman, NLRB (1981)¹

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

Whether a full labor relations privilege is developing is one of the most interesting as well as difficult aspects of labor law and the law of evidence. This issue typically arises when an employee has a confidential conversation with a non-attorney union representative concerning a labor relations issue and the employer or a third-party seeks to learn about that confidential communication. A labor relations privilege is critically important in labor law because much of labor-management relations is conducted by non-attorneys.

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While a number of courts have recognized a labor relations privilege in the context of an employee-employer relationship, courts have issued widely conflicting opinions with respect to the application of this privilege to third parties. I refer to the application of this privilege to third parties as a "full labor relations privilege."

In supporting the recognition of a full labor relations privilege, this Article examines general principles of privilege law, the treatment of lay privileges in other contexts, freedom of association principles, and the litigation that has taken place concerning the recognition of a labor relations privilege. This Article also explores the unique features of labor law that support the recognition of a full labor relations privilege. The handful of courts and commentators who have examined whether a labor relations privilege should be recognized have not examined these critically important labor law principles.

As the Supreme Court has recognized, it is in no one's interest to have uncertain privileges. That is exactly the state of the law this Article addresses and hopes to clarify.

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I. INTRODUCTION

A labor relations privilege is defined as a confidential communication exchanged between an individual union member and a union official concerning labor relations information, or a confidential communication exchanged between an individual management member and a management official concerning labor relations information. The labor relations information might concern collective bargaining strategy, arbitration, union organizing plans, or information about an individual employee who is about to face discipline. As developed in this Article, a number of courts and administrative agencies have recognized a labor relations privilege with respect to parties involved in an employee-employer relationship. However, courts have issued widely conflicting decisions with respect to the recognition of what I term a "full labor relations privilege." A full labor relations privilege would apply to strangers to the employment relationship, such as a litigant who might subpoena an individual union officer in order to seek information that an individual might have been told in confidence by one of his union members. A full labor relations privilege is critically important because much of labor-management relations is conducted by non-attorneys who may be acting without advice from counsel. Indeed, practice before the NLRB is not limited to attorneys, and many non-lawyers also represent parties in labor arbitrations.


4. If a full labor relations privilege is recognized, it must be recognized for management as well as for labor. See infra notes 129 and 154-158 and accompanying text (discussing authority holding labor relations privilege applied to information sought from management). Illinois, which is the only state which has enacted legislation codifying a full labor relations privilege defines it as privileging a "union agent, during the agency or representative relationship . . . [from being] compelled to disclose, in any court or any administrative board or agency arbitration or proceeding, whether civil or criminal, any information he or she may have acquired . . . while acting in his or her representative capacity . . . ." 735 ILL. COMP. STAT. 5/8-803.5 (2007). This statutory privilege has a number of exceptions. See infra notes 159-161 and accompanying text (discussing Illinois statutory labor relations privilege).

5. There is no doubt that an employer or union would find it useful to obtain private confidential labor relations information. In Bartnicki v. Vopper, the Supreme Court held that the First Amendment protected a radio re-broadcast of an illegally intercepted cellular phone conversation that a negotiator had with a union officer. 532 U.S. 514 (2001). Though this case had nothing to do with a labor relations privilege, it does demonstrate that if confidential bargaining information was readily available, it might be sought out and perhaps even publicized.

6. An example of this might be Seelig v. Shepard, where a City Commissioner subpoenaed a union president and sought information that the union president was told in confidence by his members. 578 N.Y.S.2d 965 (N.Y. Sup. Ct. 1991). See infra notes 140-146 and accompanying text (discussing Seelig).

7. See 29 C.F.R. § 102.38 (2007) (stating who can appear before the Board); NATIONAL LABOR RELATIONS BOARD (NLRB), ADMINISTRATIVE LAW JUDGE BENCH BOOK § 7-100 (2005) (stating that NLRB rules permit representation by non-lawyers). The NLRB, however, has recognized the importance of lawyers to the process of labor-management relations. See Patrick Cudahy, Inc., 288
In discussing the possible recognition of a full labor relations privilege, it is important to distinguish between other privileges such as those involving tort law and the attorney-client privilege, which the Labor Board and courts, of course, all recognize. Although the attorney-client privilege has been successfully invoked by unions where legal advice was sought from an attorney, courts have generally refused to extend the attorney-client privilege to lay union representatives.

The subject of a full labor relations privilege has been litigated in only a handful of judicial and administrative cases. While several courts in

N.L.R.B. 968 (1988) (stating that labor attorneys often advise an employer or a union in contract negotiations and may even serve as the party's chief negotiator because of their expertise and knowledge in this highly specialized area of law).

8. I have personally appeared before many excellent labor arbitrators whom were not lawyers. I have also appeared in several arbitrations where an employer or a union was represented by a non-lawyer labor relations professional. They often did an excellent job as well.

9. Sometimes the word "privilege" is used in state tort law to determine whether or not certain statements are defamatory. There are a number of cases holding that statements made during a grievance proceeding, during a collective bargaining session or during disciplinary hearings are privileged. See, e.g., Hyles v. Mensing, 849 F.2d 1213, 1217 (9th Cir. 1988) (statements during grievance procedure are privileged and immune from defamation action); Hasten v. Phillips Petroleum Co., 640 F.2d 274, 278 (10th Cir. 1981); Gen. Motors v. Mendicki, 367 F.2d 66, 70 (10th Cir. 1966) (statements during collective bargaining session are privileged); DeTomaso v. Pan Am. World Airways, Inc., 733 P.2d 614, 622 (Cal. 1987) (statements during disciplinary hearing are privileged). See also SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 129 (2d ed. 2004) ("Some courts have been willing to extend absolute-privilege treatment to statements required by collective bargaining agreements or arising out of grievance proceedings."); Gary D. Spivey, Annotation, Libel and Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement, 60 A.L.R.3d 1041 (2002).

While these cases utilize the term "privilege," they are not referring to a labor relations privilege as utilized in this Article because these cases do not analyze privilege as a rule of evidence. Rather, these cases involve the substantive law of defamation.


11. See, e.g., Benge v. Superior Court, 131 Cal. App. 3d 336 (Cal Ct. App. 1982) (attorney-client privilege applied to meeting of union members in which members discussed lead dust conditions at their plant with attorney retained by union); but see In Re Tire Workers Asbestos Litig., 125 F.R.D. 617 (E.D. Pa. 1989) (denying attorney-client privilege where an attorney makes a presentation to union members that does not include any confidential client information).

12. See Walker v. Huie, 142 F.R.D. 497 (D. Utah 1992) (refusing to apply attorney-client privilege to union representative because he was not an attorney). Rawlings v. Police Dep't of Jersey City, 627 A.2d 602 (N.J. 1992) (same). See also Atwood v. Burlington Indus. Equity, Inc., 908 F. Supp. 319 (M.D.N.C. 1995) (concluding presence of union representative at meetings between plaintiffs and their counsel destroyed attorney-client privilege as union was not agent of attorney); Gruwell Anderson, supra note 3 at 495-96 (discussing obstacles to extending attorney-client privilege to labor union members). But see Jenkins v. Barlett, 487 F.3d 482, n.6 (7th Cir. 2007), cert. denied, 128 S. Ct. 654 (2007) (third-party union representative presence does not destroy attorney-client privilege when union representative is present to assist attorney in rendering legal services); Zurich Am. Ins. Co. v. Superior Court, 66 Cal. Rptr. 3d 833 (Cal. Ct. App. 2007) (extending corporate attorney-client privilege to communications not involving attorney, but which discussed legal advice). Cf. In Re Grand Jury Subpoena (Issued July 10, 2006), 926 A.2d 280 (N.H. 2007) (noting issue of whether union attorney-client privilege can be extended to communications between stewards and union members, but not deciding issue as it was not properly preserved for appellate review).
different jurisdictions have recognized this privilege, others have rejected it. Additionally, a labor relations privilege has been recognized in many arbitrations as well as in administrative decisions under collective bargaining statutes. However, the U.S. Supreme Court has never addressed this issue. Legislatively, a labor relations privilege of general applicability has only been addressed in Illinois. Additionally, Illinois is also only one of two jurisdictions where a state supreme court has recognized this privilege. In New Hampshire, the Supreme Court approved of a state administrative decision recognizing the privilege, but only with respect to employers and employees. By regulation, New York has recognized a labor relations privilege, but only in the public sector, with


15. See infra notes 94-136 and accompanying text.


17. See Homer, 547 N.E.2d 182 (recognizing labor relations privilege); In Re Grand Jury Subpoena (issued July 10, 2006), 926 A.2d 280 (N.H. 2007). California has also recognized a limited labor relations privilege by legislation, but the statute is only applicable to public safety officers in limited situations. CAL. GOV. CODE § 3303(i) (2007).

18. In Re Grand Jury Subpoena, 926 A.2d 280, 283 (citing N.H. Troopers Ass'n v. N.H. Dep't of Safety, Div. of State Police, PELRB Decision No. 94-74 (August 31, 1994)).
The paucity of authority is stunning—particularly because labor management relations in this country is litigious, highly adversarial, and often outright hostile. Remarkably, in light of the importance of this issue and the conflicting jurisprudence, the subject of a labor relations privilege has received little scholarly attention.

Due to the limited authority and because a full labor relations privilege would cut across both the private and public sectors, whether such a privilege is developing is one of the most interesting as well as difficult aspects of labor and evidence law.

A leading treatise describes this

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20. By this time in our labor relations history, I would have expected several decisions from state courts of last resort and perhaps even a U.S. Supreme Court opinion or two. Interestingly, the United States does not appear to be the only country grappling with whether the law should recognize a full labor relations privilege. Courts in New Zealand also appear to be struggling with this issue as they have also issued conflicting decisions. Paul Roth, Review: Employment Law, 2003 N.Z. L. REV. 609, 612-14 (2003) (discussing New Zealand case law).

21. Few scholarly articles address the labor relations privilege. See, e.g., Gruwell Anderson, supra note 3, at 518 (arguing that a labor relations privilege is a newly emerging privilege); David I. Goldman, Union Discovery Privileges: Protecting Union Documents and Internal Union Information, 17 LAB. LAW. 241 (Fall 2001) (arguing that a labor relations privilege exists under the NLRA); Michael D. Moberly, Extending A Qualified Evidentiary Privilege To Confidential Communications Between Employees And Their Union Representatives, 5 REV. L.J. 508 (arguing that a qualified labor relations privilege should be recognized); Rubinstein, supra note 3 (arguing for the recognition of a labor relations privilege). Whether a labor relations privilege should be recognized is also briefly discussed in a few publications which focus on other areas of law. These include the John G. Adam, Privileges Under the NLRA: Attorney-Client, Work-Product, Collective Bargaining and Strike Strategy, and Mediator, 48 LAB. L.J. 570, 573-75 (1997); MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 164 (2d ed. 1987); 2 PUBLIC SECTOR LABOR AND EMPLOYMENT LAW 948, 970 (Jerome Lefkowitz et al. eds., 3d ed. 2008).

22. I have previously referred to this privilege as a “labor union privilege.” Rubinstein, supra note 3. However, this privilege has also been referred to by scholars in other ways. See, e.g., Goldman, supra note 21, at 242 (“collective bargaining strategy privilege”); Gruwell Anderson, supra note 3 (“labor official privilege”); Moberly, supra note 21, at 510 (“union representation privilege”). Courts have used differing nomenclature as well. See, e.g., Winnett v. Caterpillar, Inc., No. 3:06-cv-00235, 2008 WL 399301, at *3 (M.D. Tenn. Feb. 6, 2008) (“collective bargaining privilege”); Patterson v. Heartland Indus. Partners, 225 F.R.D. 204, 205 (N.D. Ohio 2004) (“NLRA privilege”); Am. Airlines, Inc. v. Superior Court, 8 Cal. Rptr. 3d 146, 151 (Cal. Ct. App. 2003) (“union representative-union member evidentiary privilege”); Seelig, 578 N.Y.S.2d at 968 (“labor relations privilege”). Indeed, Illinois—the only state legislature which has codified a full labor relations privilege of general applicability—refers to this privilege as a “union agent and union member privilege.” 735 ILL. COMP. STAT. 5/8-803.5. I now prefer to use the term “labor relations privilege,” which is how the Seelig court referred to this principle. My reasoning for changing the term is because if such a privilege is recognized, it would protect both the internal communications of management as well as labor with respect to confidential labor relations matters. See Homer, 547 N.E. 2d 182 (recognizing a labor relations privilege that prevents a union from obtaining management bargaining strategy information). Accord Boise Cascade Corp., 279 N.L.R.B. 422 (1986) (holding that employer did not commit unfair labor practice by refusing to disclose historical overview of negotiation history and future negotiation strategy information to union even though it was relevant to the case). Several commentators have noted the differing nomenclature and have indicated that this reflects the fact that this privilege is new.
privilege as a developing area of law; however, it largely relies on my 1993 law review article as support.23 The Supreme Court has recognized that uncertain privileges are not in the public interest.24 Unfortunately, that is exactly the state of affairs regarding the recognition of a full privilege. Irrespective of whether a formal full labor relations privilege exists, recent authority suggests that at least materials that reflect internal collective bargaining strategy information can be protected from disclosure under Federal Rules of Civil Procedure (F.R.C.P.) 26(c)(1)(G).25

Part II of this Article examines general principles which courts consider when analyzing whether to recognize a new privilege. Part III examines lay privileges in other contexts and demonstrates that this line of case law supports the recognition of an expanded full labor relations privilege. Part IV examines the litigation that has taken place concerning the recognition of a full labor relations privilege. Part IV.A analyzes the antecedents of a full labor relations privilege, which can be traced to unfair labor practice cases in the public and private sectors. Part IV.B examines the conflicting case law that has developed. Part IV.C then discusses how freedom of association principles buttress the recognition of a full labor relations privilege. Part V explores the unique features of labor law that support the recognition of a full labor relations privilege. Part VI demonstrates that regardless of whether a full labor relations privilege is recognized, recent case law suggests that collective bargaining strategy information can be protected from disclosure under F.R.C.P. 26(c)(1)(G). Part VII concludes by summarizing the applicable law and demonstrating that public policy is furthered by the recognition of a full labor relations privilege.

II. GENERAL PRINCIPLES OF PRIVILEGE LAW

The mere fact that information was communicated to another person in confidence or under some type of secrecy does not cloak that
communication with an exemption from full disclosure.\textsuperscript{26} Certain confidential information, however, is protected by law from disclosure. These protections, whether enacted by legislation or recognized judicially, are known as privileges.\textsuperscript{27}

Legal privileges have existed since the earliest days of the common law. Some commentators have noted that the oldest privilege, that of attorney-client, originates from Roman and canon law.\textsuperscript{28} A privilege can be an oral or written communication. Thus, unlike most other evidentiary rules, privileges can, and often do, prevent the disclosure of relevant information.\textsuperscript{29}

Federal Rule of Evidence (F.R.E.) 501\textsuperscript{30} governs privileges in federal courts and such issues are frequently litigated.\textsuperscript{31} New privileges are determined on a case by case basis because Congress left recognition in the hands of the courts.\textsuperscript{32} The Supreme Court has held that F.R.E. 501 “manifested an affirmative intention not to freeze the law of privilege. Its

\textsuperscript{26} JEROME PRINCE, RICHARDSON ON EVIDENCE § 5.101 (11th ed. 1995).

\textsuperscript{27} Id. See also Alissa Marie Bassler, Comment, Federal Law Should Keep Pace With States and Recognize a Medical Peer Review Privilege, 39 IDAHO L. REV. 689, 696 (2003); Timothy P. Glynn, Federalizing Privilege, 52 AM. U. L. REV. 59, 67 (2002); Moberly, supra note 21, at 508-09. Indeed, the Federal Rules of Civil Procedure provide that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.” FED. R. CIV. P. 26(b)(1). Interestingly, the federal judicial system relies almost exclusively on the courts to recognize new privileges while the various state judicial systems principally adopt privileges through legislation. Raymond F. Miller, Comment, Creating Evidentiary Privileges: An Argument for the Judicial Approach, 31 CONN. L. REV. 771 (1999).

\textsuperscript{28} Glynn, supra note 27, at 65 n.12 (2002); EDWARD J. IMWINKELFRIED, EVIDENTIARY FOUNDATIONS § 7.01 (6th ed. 2005) (discussing the nature of privileges generally). In addition to the attorney-client privilege, other familiar privileges include the doctor-patient privilege, the priest-penitent privilege and the spousal communication privilege. Id. As Professor Imwinkelreid explains, these privileges have be recognized for extrinsic policy reasons that indicate there is such a high societal value in these communications that it is appropriate to exclude what otherwise would be relevant evidence. Id.

\textsuperscript{29} Glynn, supra note 27, at 67; EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 72 (6th ed. 2002).

\textsuperscript{30} The rule provides:

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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.


\textsuperscript{31} Broun, supra note 30, at 780 (April 2002); Glynn, supra note 27, at 63 (“[T]he law of privilege is largely or exclusively a product of the common law . . . .”).

\textsuperscript{32} See Jaffe v. Redmond, 518 U.S. 1, 9 (1996) (stating privileges are determined on a case-by-case basis); Broun, supra note 30, at 769-70.

Precisely because privileges are litigated on a case by case basis, some commentators believe that privilege law does not foster certainty and predictability. See Glynn, supra note 27, at 62.
purpose was to provide courts with the flexibility to develop rules of privilege on a case by case basis." Although courts have flexibility in determining whether or not to recognize a new privilege, this flexibility is exercised with caution.

In examining the law of privilege, the Supreme Court has approved the common law maxim that has been in existence for three centuries, which holds that "the public . . . has a right to every man’s evidence." Professor Imwinkelried explains that privileges have an important effect on public policy because privileges suppress evidence, which can deprive courts of what would otherwise be needed information. Therefore, the Supreme Court has repeatedly indicated that there is a presumption against the recognition of new privileges.

One scholar has indicated that the law has a love-hate attitude towards privileges. On the one hand privileges, such as attorney-client privilege, exist to foster client candor, full communication, and disclosure, which it is assumed fosters compliance with the law. On the other hand, unlike

34. Walker, 142 F.R.D. at 300; In Re Grand Jury Subpoena, 926 A.2d at 285 ("We must be particularly circumspect about creating new privileges based upon perceived public policy considerations.") (internal quotations omitted).
35. Jaffe, 518 U.S. at 9. This common law maxim was considered to be well known by the mid-18th century. Indeed, it was invoked in 1742 during a debate in the House of Lords in England. Id. at 9, n.8. The issue during that debate was whether a bill should grant immunity to witnesses for providing evidence against a certain Earl. Id.
37. While the Supreme Court has not used the word "presumption," it has effectively created such a presumption by repeatedly instructing courts that privilege analysis starts with assuming that there is a general duty to provide evidence and any exemptions, in the form of privileges, are considered exceptional cases. See, e.g., Jaffe, 518 U.S. at 9; United States v. Nixon, 418 U.S. 683, 709 (1974); United States v. Bryan, 339 U.S. 323, 331 (1950). Though in analyzing privileges, the Supreme Court has applied strict scrutiny, the Court has judicially recognized several privileges. See, e.g., Jaffe, 518 U.S. at 1 (psychotherapist-patient privilege); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (privilege for grand jury proceeding); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (deliberative intra-agency documents); Clark v. United States, 289 U.S. 1 (1933) (deliberations of a petit jury). The Supreme Court has also rejected several privileges. See Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (privileges for confidential university peer review proceedings); United States v. Gillock, 445 U.S. 360 (1980) (state legislators); United States v. Nixon, 418 U.S. 683 (1974) (communications between President and his senior advisors); Couch v. United States, 409 U.S. 322 (1973) (accountant-client privilege). See also In re Grand Jury, 103 F. 3d 1140, 1147 (3d Cir. 1997) (circuit court refuses to recognize parent-child privilege).
38. Professor Glynn has extensively analyzed the attorney-client privilege and has concluded that the law surrounding this privilege is uncertain and "a mess." Glynn, supra note 27, at 59. Because of the inconsistently in the law, he calls for a Congress to federalize the law of attorney-client privilege.
39. Id. at 60-61. See also Upjohn, 449 U.S. at 389 (endorsing this view).
40. See JOHN WILLIAM GEGACZ, ATTORNEY-CORPORATE PRIVILEGE, § 1.12 (3d ed., West Group 2001); Glynn, supra note 27; Imwinkelried, supra note 36, at 512 (stating that "purpose[] of privilege law is to encourage laypersons to . . . make revelations to confidants such as attorneys"); Note, Developments in the Law of Privileged Communications, 98 HARV. L. REV. 1501, 1502 (1985).
most other rules of evidence, privileges are "inhibitive." They are designed "to shut out the light." Therefore, it is not surprising that the Supreme Court has stated that privileges will only be recognized when they are necessary to further some "public good."

A privilege attaches when the communication is made and continues permanently unless waived. Privileges protect "people, not places or property." Significantly, uncertain privileges are not beneficial to society because they can inhibit the truth and create enormous litigation costs and transaction expenses. Without assurance of confidentiality, a privilege can lose many of the benefits it is designed to protect.

In determining whether to recognize a privilege, many courts examine the following four conjunctive criteria identified by Professor Wigmore:

- whether the communication originates in confidence that it will not be disclosed; and
- whether confidentiality is essential to the full maintenance of the relationship between the parties; and
- whether the relationship is one that the community believes should be fostered; and
- whether the injury that would be occur from disclosure would be greater than the benefit gained by the aid given to the litigation.

However, recent Supreme Court precedent has not expressly relied on this classic formulation of privilege law. In University of Pennsylvania v. EEOC, the Court appeared to simply apply a balancing test when it refused a new privilege for university tenure peer review documents. In University of Pennsylvania, a professor sought peer review documents to...
support her claim of race, sex, and national origin discrimination under Title VII. In examining the totality of the circumstances, the Court held that the balance tipped against the recognition of a peer review privilege notwithstanding the policy of non-discrimination embodied in Title VII. The Court reasoned that the statutory language of Title VII did not provide for any privileges but rather supported the right of the EEOC to obtain evidence by use of a subpoena. The Court further found that existing case law did not support recognition and appeared concerned that the recognition of such a privilege would open the flood gates for other privileges.

On the other hand, in Jaffee v. Redmond, the Court applied a balancing test weighing policy concerns and approved a privilege for communications between a psychotherapist and her patient. The Court, while recognizing the case-by-case approach of the common law, stated that changes in privileges are dictated reason and experience. The Redmond Court saw similarities between psychotherapist-patient, spousal, and attorney-client privileges because they are all “rooted in the imperative need for confidence and trust.” The Court also noted that all 50 states recognized a psychotherapist-patient privilege, and that an advisory committee that recommended changes to F.R.E. 501 opined that such a privilege should be recognized.

The Redmond decision, the most recent Supreme Court decision concerning privileges, did not expressly adopt the four Wigmore criteria; however, the Court’s balancing of interests effectively took into account the concerns expressed by Professor Wigmore. Professor Merrick T. Rossein summarized this judicial examination of privileges as a “common law cost benefit analysis.” No matter what nomenclature is used, this Article maintains that public policy supports the recognition of a full labor relations privilege.

50. Univ. of Pa., 493 U.S. at 192.
51. Id.
53. Interestingly, the psychotherapist was not a psychologist or psychiatrist, but a clinical social worker. The Court felt that the same policy reasons which supported a privilege were equally applicable to social workers notwithstanding their differing education. The Court reasoned that recognizing such a privilege would protect clients who were poor or who could not afford a psychiatrist or psychologist. Id. at 15-16.
54. Id. at 8-9. Specifically, the Court stated, “[T]he question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient promotes sufficiently important interests to outweigh the need for probative evidence.” Id. at 9-10 (citations omitted).
55. Id. at 10 (quoting Trammel, 445 U.S. at 51).
56. Since the two most recent Supreme Court decisions have chosen not to analyze privileges by relying on Professor Wigmore’s express criteria, this Article will follow the Court’s lead in analyzing whether a full labor relations privilege should be recognized.
57. MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 17.72 (2006).
III.
Lay Advocate Privileges in Other Contexts Support the Recognition of a Full Labor Relations Privilege

The use of non-lawyer business consultants, compliance consultants, and particularly employment consultants, appears to be increasing.\(^5\) Whether these non-lawyer consultants are protected by a lay advocate privilege is unsettled. Additionally, scant scholarly attention has been paid to this subject.\(^5\) Nevertheless, this area of law appears to be further developed than the law surrounding labor relations privileges, and a sensible rule appears to be emerging which supports the recognition of a full labor relations privilege.

Under the federal Administrative Procedures Act,\(^6\) a person compelled to appear before an administrative agency is entitled to be represented by counsel or “if permitted by the agency, by other qualified representative.”\(^6\) Several federal agencies, such as the U.S. Patent Office,\(^6\) the Treasury Department,\(^6\) and the Veterans Administration,\(^6\) expressly permit representation by non-attorneys. Under federal and California law, welfare recipients can choose to be represented by non-attorney representatives in hearings concerning eligibility for public assistance.\(^6\) Additionally, some

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58. Tanina Rostain, *The Emergence of Law Consultants*, 75 FORDHAM L. REV. 1397, 1398 (2006). As Professor Rostain explains, it may be sometimes be preferable to organize a consulting service as a non-lawyer business to avoid the restrictions placed upon attorneys, such as rules involving multidisciplinary practice, the advocate witness rule concerning lawyer testimony, and conflict of interest rules. Id. at 1419-25.


61. Id. § 555(b).
62. See Sperry v. Florida Ex. Rel. Florida Bar, 373 U.S. 379 (1963) (discussing appearance of non-lawyers in patent administrative proceedings); 37 C.F.R. § 1.31 (2006) (recognizing an applicant for a patent can be represented by an attorney or other agent authorized to practice before the Patent Office).
states permit "jailhouse lawyers" to represent inmates. Moreover, non-lawyer representatives are permitted in a variety of other contexts including unemployment insurance, workers compensation, agricultural labor relations, public sector labor proceedings, and Tax Court proceedings. The rationale for allowing lay representation and the need for the recognition of a lay advocate type of privilege has been described by one commentator as follows:

The rationale for lay representation is grounded in public policy. Many claimants are indigent and cannot afford to hire legal counsel. Furthermore, claims are often small and therefore, do not justify the use of an attorney. Due to these financial constraints, many claimants would not be represented in administrative hearings if lay representation were not available. If a representative is to serve a claimant effectively, however, a privilege should attach to all confidential communications between the parties, much like the recognized attorney-client privilege. Without this protection, the claimant's freedom of selection in choosing a representative is impaired because anything communicated to a lay representative may later be subject to discovery.

In Welfare Rights Org. v. Crisan, the California Supreme Court held that by enacting a statute that authorized lay representation in welfare administrative hearings, the legislature impliedly established a privilege for

66. The so called "jailhouse lawyer" is a prison inmate who, despite having no formal legal training, is allowed to assist fellow inmates with their legal matters. See Bourdon v. Loughren, 386 F.3d 88, 97, n.12 (2d Cir. 2004).

67. Indeed, the U. S. Supreme Court has recognized that states may prohibit the practice of law by jailhouse lawyers only if the inmates are provided with a reasonable alternative to assistance from jailhouse lawyers. See Johnson v. Avery, 393 U.S. 483, 490 (1969). See also Disciplinary Counsel v. Cotton, 873 N.E.3d 1240 (Ohio 2007) (inmate who prepared court pleadings, research and dispensed legal advice found not to have engaged in authorized practice of law, noting that other inmates did not have a reasonable alternative). Jailhouse lawyers, despite their limited education, can be involved in significant litigation. See Mitchell H. Rubinstein, Jailhouse Lawyer Granted Cert. By Supreme Court, ADJUNCT LAW PROFESSOR BLOG, Feb. 7, 2008, http://lawprofessors.typepad.com/adjunctprofs/2008/02/jailhouse-lawyer.html.


69. See, e.g., CAL. LAB. CODE § 5700 (West 2007).

70. See, e.g., CAL. LAB. CODE § 1151.3 (West 2007).


73. Kaufman, supra note 59, at 247-48, 261. Cf. Feierman, supra note 59, at 370 (discussing the limited literacy skills of prisoners and arguing for additional prisoner legal education as a way to reduce frivolous court claims filed by jailhouse lawyers).

74. 661 P.2d 1073 (Cal. 1983).
confidential communications between an individual seeking welfare benefits and his lay representative. The court reasoned:

Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

....

.... As Justice Broussard noted at oral argument, the Legislature could not have intended that the only sound advice the authorized representative could give was, "Don't talk to me." 75

The court further stated that denial of a lay representative privilege could not be based on the fact that the lay representatives were unlicensed and not bound by professional rules of conduct, because California law does not always require that the attorney be licensed for the attorney-client privilege to attach. Rather, the attorney-client privilege attaches if the client reasonably believed the attorney to be authorized to practice law. 76 In Crisan, the California Supreme Court, however, was careful to state that it was not creating a general, state-wide lay advocate privilege applicable in other forums such as unemployment insurance proceedings and workers compensation proceedings. 77

After Crisan was decided, a California appellate court refused to extend Crisan to recognize a lay advocate type of jailhouse privilege. 78 People v. Velasquez 79 was principally distinguished from Crisan because there was no California state statute authorizing jailhouse lawyer representation of inmates, as there was of welfare recipients in Crisan. 80 Courts in several other jurisdictions have similarly concluded that there is no jailhouse lay advocate type of privilege where there is no statutory or regulatory authority that permits such representation. 81

By contrast, the Arizona Supreme Court in Arizona v. Melendez 82 recognized a jailhouse lawyer privilege protecting confidential

75. Id. at 1077 & n.3 (internal citations omitted).
76. Id. at 1077. Similarly, the law in several jurisdictions appears to recognize that clients may be protected by the attorney-client privilege if the client reasonably believes that the person is a lawyer. Additionally, in most, if not all jurisdictions, the attorney-client privilege covers non-lawyers employed to assist attorneys such as law clerks, paralegals, investigators, similar agents, and office staff. Mueller, Christopher B. and Laird C. Kirkpatrick, Federal Evidence § 183 (2d. ed.) (collecting case law).
77. Crisan, 661 P.2d at 1077. The court did not provide any other analysis as to why it was not recognizing a general lay advocate privilege applicable in all administrative proceedings where lay representation is authorized by statute.
79. Id.
80. Id. at 371-72.
communication between an inmate and inmate representative during prison disciplinary proceedings. Interestingly, the court relied on notions of procedural due process and fundamental fairness to support this privilege, reasoning:

We conclude, therefore, that it would be fundamentally unfair under the due process clause of the Arizona Constitution for the state to allow Defendant to obtain the services of an inmate representative for prison evidence disciplinary proceedings and then, without warning to Defendant, offer the testimony of that inmate representative regarding confidential communications or information acquired in the course of prison representation.\(^3\)

The Arizona Supreme Court appears to have relied on its own state constitution because there was no applicable state statute. By relying on the state constitution, the court avoided the holding in cases such as Velasquez that refused to recognize a jailhouse privilege in the absence of statutory authority.

In at least one other court, the lack of statutory authority authorizing representation was a significant factor where communication between a lay faculty advocate and a faculty member in a university grievance procedure concerning tenure were found not to be privileged.\(^4\) The court, looking to state law as well as to university regulations concerning grievance hearings, found no applicable authority concerning representation by non-attorneys.

By contrast, a federal district court in New Jersey followed Crisan and concluded that a lay advocate privilege existed in special education law proceedings under the Individuals with Disabilities Education Act (IDEA).\(^5\) The issue concerned reimbursement for the residential placement of a child in an out-of-state facility.\(^6\) The lay advocate represented the child in a state law administrative proceeding.\(^7\) The court noted that the judicial treatment of lay advocate privileges is conflicting.\(^8\)

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\(^3\) 834 P.2d at 159.
\(^6\) Woods, 858 F. Supp. 51.
\(^7\) The IDEA is a complicated federal statute which is considered a model of "cooperative federalism." States have the primary duty to develop and execute programs for disabled students while the federal statute imposes significant requirements which states must meet. Shaffer v. Weast, 546 U.S. 49, 52-54 (2005) (discussing the cooperative process of IDEA). For a summary of the IDEA, see Mitchell H. Rubinstein, Parental Reimbursement For Services They Provide As Quasi Therapists Under The Individuals With Disabilities Education Act, 76 U. CIN. L. REV. No. 3 (forthcoming 2008) (manuscript on file with author).
\(^8\) The court cited to conflicting opinions concerning whether non-lawyer patent agent communications with clients are privileged in patent proceedings. Woods, 858 F. Supp at 54, comparing
The New Jersey federal court sided with decisions that have recognized the need for a lay advocate privilege at least where the law authorizes such representation, and the advocates are subject to regulation, compliance with ethical standards, and control by the administrative tribunal. It chose not to follow those decisions which have rejected a lay advocate privilege simply because an attorney was not involved.89

These lay advocate privilege cases tend to provide support for the recognition of a labor relations privilege, because the conduct of labor relations is authorized by statute and is highly regulated. Furthermore, as in the context of lay advocate privileges, public policy supports the recognition of a labor relations privilege in order to foster communication between unions and their members.

IV.
LITIGATION INVOLVING A LABOR RELATIONS PRIVILEGE

The system of private-sector labor relations recognizes the importance that non-lawyers play in the labor-management relations process. Any person can appear before the National Labor Relations Board (NLRB)—the federal agency that administers the National Labor Relations Act (NLRA)—and a party does not need to be represented by an attorney.90 Moreover, if the NLRB issues a complaint, it prosecutes the case on a party’s behalf whether or not the party utilizes counsel. Indeed, the NLRB regulates the conduct of all those who appear before it—both attorneys and non-lawyer representatives—to ensure that advocates conform to ethical and professional standards.91 Thus, the Board also has the authority to discipline non-lawyers for misconduct.92


89. Woods, 858 F. Supp. at 54-55.
90. See 29 C.F.R. § 102.38 (2007) (stating who can appear before the Board); NATIONAL LABOR RELATIONS BOARD, ADMINISTRATIVE LAW JUDGE BENCH BOOK, supra note 7, § 7-100 (stating that NLRB rules permit representation by non-lawyers). See also N.Y. CIV. SERV. LAW § 205(5)(j) (McKinney 2007) (permitting non-lawyer to represent party in proceeding before New York State Public Employment Relations Board).
91. See 29 C.F.R. § 102.177(a) (“Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts.”).
92. See 29 C.F.R. § 102.177(d) (“Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline.”). For examples of discipline imposed by the NLRB on non-attorney representatives, see In
Under the NLRA and analogous state public sector labor relations statutes, unions are the exclusive representatives of employees. To this end, non-lawyer union representatives often administer the collective bargaining agreement. Union members frequently turn to these non-lawyer representatives for explanation and advocacy of their rights. Recognizing the importance of non-lawyers, this Article will now turn to whether non-lawyer representatives are protected by a full labor relations privilege by first examining the antecedents of the recognition of a full labor relations privilege.

A. The Antecedents of the Recognition of a Full Labor Relations Privilege

The antecedents of the recognition of a full labor relations privilege can be found in both federal and state labor law. Here, courts and administrative agencies have found that employers questioning union members about confidential labor relations matters is inherently coercive, constituting an unfair labor practice in violation of labor law. In such

Re David M. Kelsey, 349 N.L.R.B. No. 31 (Jan. 31, 2007) (imposing six-month suspension from practice penalty with respect to a non-lawyer engaging in misconduct); In Re Charles Murphy, 338 N.L.R.B. 769 (2002) (imposing a one year suspension of practice). See also Oak Hill Funeral Home, 345 N.L.R.B. 532 (2005) (discussing NLRB disciplinary process applicable to attorneys and representatives whom appear before it). This is important because non-lawyers are not subject to attorney professional responsibility standards.

93. See 29 U.S.C. § 159(a) (2000) ("Representatives designated or selected for the purposes of collective bargaining... shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."); see also N.Y. CIV. SERV. LAW § 204(2) (McKinney 2007) ("Where an employee organization has been certified or recognized pursuant to the provisions of this article, it shall be the exclusive representative, for the purposes of this article, of all the employees in the appropriate negotiating unit." I have previously discussed importance of the concept of exclusive representation in labor relations and arbitration. See Mitchell H. Rubinstein, Assignment of Labor Arbitration, 81 ST. JOHN'S L. REV. 41, 46-50 (2007).

94. It should be noted that the National Labor Relations Act, 29 U.S.C. § 158 (2006), uses the term "unfair labor practice" to describe unlawful activity in violation of this statute. Public sector labor law statutes may use different terms to refer to unlawful activity in violation of state labor law. See, e.g., N.Y. CIV. SERV. LAW § 209-a (utilizing the term "improper practice").

95. See City of Newburgh v. Newman, 421 N.Y.S.2d 673 (N.Y. App. Div. 1979) (applying New York law to find that interrogation of a union officer about labor relations information is improper practice); Matter of Public Employees Federation (Department of Social Services), 31 PERB ¶ 4634 (N.Y. Pub. Employment Relations Bd. 1998) (same); Matter of Public Employees Federation (Roswell Park Memorial Institute), 26 PERB ¶ 3072 (N.Y. Pub. Employment Relations Bd. 1993) (citing City of Newburgh with approval, but finding questioning was not improper practice because it did not concern confidential labor relations information); Cook Paint and Varnish Co., 258 N.L.R.B. 1230 (1981) (forced interrogation interview of union steward and compelled disclosure of union notes concerning conversation union steward had with a unit member concerning a pending discharge arbitration is an unfair labor practice); U.S. Department of the Treasury, 39 F.L.R.A. 1300 (1991) (under Federal Service Labor Relations Act (FSLRA) statute, employer commits unfair labor practice by requiring a union representative to disclose, under threat of discipline, the substance of statements employee made by employee to union representative in the course of representing that employee in disciplinary proceeding); U.S. Dep't of Justice v. F.L.R.A., 39 F.3d 361 (D.C. Cir. 1994) (same); In Re Grand Jury Subpoena, 926 A.2d 280 (citing with approval N.H. Troopers Ass'n v. N.H. Dep't of Public Safety,
situations, the focus is on whether the questioning itself is unlawful. For a full labor relations privilege to be recognized, the reach of these decisions would have to be extended beyond traditional labor law and the employer-employee relationship.\(^9\)

In *City of Newburgh v. Newman*,\(^97\) the public agency that administers New York's Taylor Law,\(^98\) the Public Employment Relations Board (PERB)\(^99\) held that questioning a union official regarding his observations of a fellow employee who came to him for advice was an improper practice.\(^100\) The employee was a police officer accused of being under the influence of alcohol on duty, and the union official was another police officer who by training would be expected to have some knowledge in determining when someone is under the influence of alcohol. The decision was affirmed by a New York appellate court.

*City of Newburgh* is a watershed decision for the recognition of a labor relations privilege because it recognized the important right of a bargaining unit member to consult with his union in a confidential manner without outside interference. The court found that such questioning may chill lawful union activity.\(^101\) As the court explained:

> Questioning 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.\(^102\)

The court, recognizing the potential implications of its decision, then went on to distinguish this type of coercive questioning from the attorney-client privilege. The attorney-client privilege is applicable to all communications. However, the court limited the application of this labor relations privilege to public employers with respect to confidential labor relations communications between a union and its members. The court did not provide useful analysis or cite any authority in supporting this important distinction.\(^103\) Perhaps because *City of Newburgh* involved an appeal from

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96. See supra notes 5-7 and accompanying text (distinguishing between a labor relations privilege and a full labor relations privilege).
98. N.Y. CIV. SERV. LAW \(\S\) 200-214.
99. For a discussion of New York's Taylor Law and the role of the Public Employment Relations Board, see 2 PUBLIC SECTOR LABOR AND EMPLOYMENT LAW, supra note 21, at 123-128.
100. *City of Newburgh*, 421 N.Y.S.2d at 676.
101. Id.
102. Id. at 675.
103. The court's entire analysis was as follows:
   
   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
a decision of the PERB, the court’s jurisdiction was limited to interpreting whether PERB properly found that an improper practice was committed under the Taylor Law.104

In *Cook Paint and Varnishing Co.*,105 the employer sought to question a union shop steward concerning conversations that the steward had with an injured employee prior to a labor arbitration regarding a disputed incident. The employer’s counsel also sought the steward’s notes and the steward was threatened with discipline if he did not cooperate.106 The NLRB held that because the steward was not an eyewitness to the disputed incident, the questioning arose because of his status as a union representative.107 The employer’s questioning was therefore found to be coercive and an unfair labor practice.108 Employing the same analysis as the *City of Newburgh* court did two years earlier, the Board reasoned:

Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here 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 Respondent also inhibit stewards in obtaining needed information from employees since the steward knows upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent’s probe into the protected activities of [the stewards] has not only interfered with the protected activities of those two individuals but it has also cast a chilling effect over all its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.109

This significant principle means that under federal labor law, employers are prevented from extracting confidential labor relations communications from employees. Like *City of Newburgh*, the Board was

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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. The purpose is the protection of the right to fully participate in an employee organization, with the full benefits thereof and inquires such as the one herein would seriously hamper such participation.


104. N.Y. CIV. SERV. LAW § 200-214.


106. *Id.*

107. *Id.* at 1231-32.

108. *Id.* at 1232.

109. *Id.* Remarkably, the Board did not cite to *City of Newburgh*. 
careful not to create a general labor relations privilege by limiting its
decision to confidential labor relations communications between employers
and employees. As in *City of Newburgh*, no rationale was provided for
this limitation and it may have only been necessary because the NLRB was
adjudicating an unfair labor practice involving an employer and its
employees.

In *U.S. Dep't of Justice v. FLRA*, the D.C. Circuit, in a case arising
under the Federal Service Labor-Management Statute, approved of a
*Newburgh/Cook Paint*-approach to analyzing a unfair labor practice where
the employer sought to question a union official about conversations with a
unit member concerning labor relations information. However, the court
stated that its holding would not protect such a conversation "from
disclosure in court, or before a grand jury." Indeed, the court expressly
stated that the principle it was recognizing "is not good as against the
world." Like the *City of Newburgh* and *Cook Paint* decisions, the court
was only construing a labor statute which governed labor-management

## Footnotes

110. Specifically, the Board stated:

We wish to emphasize that our ruling in this case does not mean that all discussions between
eas with stewards are confidential and protected by the [NLRA]. Nor does our decision
hold that stewards are, in all instances, insulated from employer interrogation. We simply find
herein that, because of [the steward's] representational status, the scope of [the employer's]
questioning, and the impingement on protected union activities, Respondent's April 21, 1978
interview of [the unit member] violated Section 8(a)(1) of the Act.

Id. The Board also left open the possibility that where a union representative was an eye witness, he
might be forced to answer the employer’s questions – at least with respect to what he or she saw. *Id.
See also Morton Int'l Inc., 1993 NLRB Lexis 1098 (A.L.J. 1993) (holding that factual information
contained in bargaining notes can be disclosed, but documents concerning mental thought processes,
conclusions or observations of bargaining team members does not have to be disclosed).


113. 5 U.S.C. § 7101-10106 (2006) (regulating labor management relations involving the federal
government and federal employees).

114. *F.L.R.A.*, 39 F.3d at 369. Similarly, in *U.S. Dep't of Treasury*, 38 F.L.R.A. 1300 (1991), the
FLRA, an administrative agency which adjudicates unfair labor practices in the federal sector, held that
it was unlawful to threaten a union representative with discipline if he does not provide information
regarding conduct of another employee which he acquired in his representational capacity. The FLRA
followed *Cook Paint*, reasoning:

[The Statute clearly assures the right and duty of a union to represent employees in
disciplinary proceedings, and the correlative right of each employee to be represented.
Therefore, it follows, as found by the Judge, that such rights and duties demand that the
employee be free to make full and frank disclosure to his or her representative in order that the
employee have adequate advice and a proper defense. The conversations between Union
Representative Rizzo and employee Mueller occurred while Rizzo was representing Mueller
in a disciplinary proceeding and was assessing Mueller's case, Mueller's version of what
happened, and the defense they would employ at the oral reply meeting. Accordingly, we
conclude that those conversations constituted protected activity.

*Id. at 1308-09* (citing *Cook Paint*, 258 N.L.R.B. at 1232 ("consultation between an employee potentially
subject to discipline and his union steward constitutes protected activity in one of its purest forms").

relations. Several later decisions have also included this limitation with respect to the recognition of a labor relations privilege.116

The NLRB has issued several other decisions that support the recognition of a labor relations privilege. In Berbiglia, Inc.,117 a NLRB administrative law judge (ALJ) revoked a subpoena seeking communications between union members about the reasons for a strike. In revoking the subpoena, the ALJ reasoned:

[M]y view that requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure. This necessity is so self-evident as apparently never to have been questioned.118

The Board itself did not rule on this issue and summarily affirmed the ALJ ruling.

Berbiglia was followed by another NLRB administrative law judge in Champ Corp.119 In this case, a subpoena that sought production of union collective bargaining notes was revoked because it “would do unwarranted injury to the process of collective bargaining.”120 The Board extensively relied on Berbiglia’s reasoning and analysis.121 A third NLRB administrative law judge, in Morton International Inc.,122 held that bargaining notes of a strictly factual nature, reporting only when, where, what, and by whom something was said, could be disclosed, but anything else included in the bargaining notes did not have to be disclosed. Thus, mental thought process, conclusions, or observations of bargaining team members would not have to be disclosed. Additionally, in Boise Cascade Corp.,123 a fourth NLRB administrative law judge124 permitted an employer “to withhold from the union its historical overview of negotiations with the union and its future negotiating strategy” because such disclosure “might well have a tendency to frustrate the overall purpose of collective bargaining between the parties.” These types of cases draw analogies to the attorney-client privilege, but they do not involve attorneys. In a later case involving the attorney-client privilege, Patrick Cudahy,
Inc.,\textsuperscript{125} the full Board cited Berbiglia with approval, reasoning that “if collective bargaining is to work, the parties must be free to formulate their positions and devise their strategies without fear of exposure.”\textsuperscript{126} More recently, the NLRB Division of Advice issued two advice memoranda where it opined that a party’s bargaining notes, which may reveal bargaining strategy, need not be disclosed pursuant to a request for information under Section 8(a)(5)\textsuperscript{127} of the NLRA, reasoning in part that “the interests of collective-bargaining are furthered by the parties’ confidence that their good-faith bargaining strategies can be formulated without fear of exposure.”\textsuperscript{128} While the Board did not speak in terms of a privilege, in concluding that this information did not have to be disclosed, the Board effectively supported the recognition of a labor relations privilege. Notably, under Board law, the protection of confidential labor relations information extends not only to unions, but also management.\textsuperscript{129}

On the other hand, an NLRB administrative law judge held in Taylor Lumber and Treating, Inc.\textsuperscript{130} held that the privilege concerning collective bargaining strategy was limited to attorney-client privilege. The ALJ’s reasoning, which appears solely in a footnote, appears to be that Berbiglia had not been approved by the full NLRB because the Board could have relied upon the Berbiglia labor relations privilege to prohibit disclosure in Patrick Cudahy, but instead chose to rely exclusively on the attorney-client privilege.\textsuperscript{131} This reasoning is unsound because the ALJ simply assumed that a certain line of cases has been disapproved of because the Board did not discuss them. In any event, because no exceptions were filed and the

\textsuperscript{125} 288 N.L.R.B. 968 (1988).
\textsuperscript{126} Id. at 971 (citing Berbiglia, 233 N.L.R.B. at 1495).
\textsuperscript{129} Thus, in Boise Cascade Corp., 279 N.L.R.B. 422 (1986), an administrative law judge held that management could withhold information concerning negotiating strategy in the face of a request for information from a union. See also Goldman, supra note 21, at 243.
\textsuperscript{130} 326 N.L.R.B. 1298 (1998).
\textsuperscript{131} The ALJ reasoned:

In so ruling, I expressed 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 had genuinely embraced that reasoning, especially in the light of the Board’s decision in Patrick Cudahy, infra, where the Board could have, but did not, simply rely on Berbiglia reasoning to shield any management bargaining strategy records, but instead shielded from discovery only those records involving communications with the employer’s attorney, and did so solely on the basis an [sic] attorney-client privilege.

Id. at 1310, n.11.
NLRB simply summarily affirmed the ALJ’s decision, this decision is not considered binding.\(^{132}\)

Several other agencies have also supported labor relations privileges. State administrative agencies in Washington and New Hampshire responsible for public sector labor-management relations held that unions were not required to disclose investigatory notes to employers for use in labor arbitrations.\(^{133}\) Those agencies utilized reasoning similar to the NLRB.

Additionally, in the context of labor arbitration, a number of arbitrators have recognized a labor relations privilege that would shield a union steward from testifying about what the grievant may have told him. In fact, a labor arbitration treatise states that this privilege is applicable in labor arbitration.\(^{134}\)

While most of these labor cases are not “full privilege cases,” strictly speaking, because they involve a labor relations statute and an employer’s own employees, or an administrative agency adjudicating a labor dispute, or a labor arbitrator interpreting a collective bargaining agreement, they support the extension of a labor relations privilege to third parties.\(^{135}\)

Additionally, this body of case law is also consistent with the policies underlying a governmental privilege for information related to the deliberative process. This privilege recognizes that frank discussion and

\(^{132}\) E. Elec. Contractors, 332 N.L.R.B. 174, 175 n.2 (2000); Goldman, supra note 21, at 245 n.15.


In Hughes Aircraft, for example, at a discharge arbitration, the employer sought to present testimony from a union steward with whom the grievant had conferred. Hughes Aircraft, 86 Lab. Arb. Rep. (BNA) at 1112. The arbitrator concluded that the steward’s testimony was not privileged because it concerned what the steward observed and not what he was told in confidence by the grievant. Id. at 1117. However, the arbitrator also indicated that he would recognize a labor relations privilege to prevent disclosure of confidential information a union official may have been told. Id. The arbitrator reasoned that such a privilege is “consistent with the protection afforded employees in their insistence on union representation during the grievance process.” Id. The arbitrator explained that this right, known as “Weingarten” would have little value if the content of confidential communications could be subsequently discovered by the grievant’s employer. Id. at 1118. See also infra notes 202-204 and accompanying text (discussing ”Weingarten”).

It is, of course, very difficult to determine how widespread the recognition of a labor relations privilege is in labor arbitration since the vast majority of arbitral decisions are not reported.\(^{135}\)

Though NLRB and other administrative decisions are not technically binding on courts, courts traditionally accord judicial deference to the NLRB’s expertise in matters related to collective bargaining and labor policy. NLRB v. Curtis Matheson Scientific, Inc., 494 U.S. 775, 786 (1990) (“NLRB has the primary responsibility for developing and applying national labor policy.”); Brown v. Pro Football, Inc., 518 U.S. 231, 242 (1996) (“[t]he labor laws give the Board, not . . . courts, primary responsibility for policing the collective bargaining process”).
debate of certain legal and policy matters is essential to the decision-making process of governmental agencies. Taken together, these legal principles support the recognition of a full labor relations privilege.

B. The Conflicting Case Law Concerning the Recognition of a Full Labor Relations Privilege

It appears that the first time a court addressed the issue of a full labor relations privilege was in 1981, and the court held that such a privilege did not exist. A lower federal court had required an employer and a union to provide bargaining documents to the EEOC. The EEOC had filed an Equal Pay Act claim alleging that women were not being paid the same amount as men for equal work. In rejecting the argument that a labor relations privilege existed, the court simply concluded that there was no statutory or common law labor relations privilege, without citing to any authority or providing useful analysis.

Ten years later, the most significant labor relations privilege case to date was decided – Seelig v. Shepard. In Seelig, the court extended City of Newburgh and held that a full labor relations privilege existed under New York Law. A New York City Commissioner investigating a job action by correction officers issued a subpoena ad testificandum to the president of the correction officers union, seeking information about labor relations

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136. See Moore, infra note 220, § 26.52(5) (The governmental deliberative privilege is actually a qualified one and it generally only applies to pre-decisional documents). See e.g., Rodgers v. Hyatt, 91 F.R.D. 399, 406 (D. Colo. 1980) (denying plaintiff discovery of IRS agency deliberations in the form of legal opinions, suggestions, proposals, proposed draft regulations an policy considerations used in making agency decision); U.S. v. Farley, 11 F. 3d 1385, 1389 (7th Cir. 1993) (FTC referral memorandum was pre-decisional and subject to deliberative process privilege).


139. The court's reasoning was as follows: If the subpoena were quashed on public policy grounds alone, the public's right to gather evidence in wage-sex discrimination cases becomes subservient to a general federal policy, as yet unarticulated in case law, protecting the absolute sanctity of labor negotiations. It would raise the area of labor negotiations to an absolute privilege. No such privilege exists either at common law or by statute. To hold that the policy exists here is to create a new privilege. People's Gas, Light & Coke Co., 1981 WL 2332, at *4.


141. 2 Public Sector Labor and Employment Law, supra note 21, at 727-58.

142. The court did not provide much detail with respect to the job action the City was investigating. The court merely stated that after an inmate assaulted a correction officer, the correction officers "staged a job action, and blocked a bridge leading to Rikers Island," which is the prison where the assault took place. 578 N.Y.S.2d at 966. Presumably, there was some type of concern that the corrections officers themselves engaged in unlawful conduct. To the extent that the term "job action" concerned some type of concerted refusal to not work, such an action may be considered to be an illegal strike under the New York Taylor Law.
communications that the president had with his members.\textsuperscript{143} The union moved to quash the subpoena on the ground that such questioning would infringe upon confidential communications the president had with his membership, which, in turn, would have a chilling effect on labor relations.\textsuperscript{144}

The court held that there is a full labor relations privilege that protects communications between labor relations officials and members, reasoning:

There is, however, plainly a need, for the benefit of society as a whole, for unions to be free to function without harassment and interference from government...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. Union members must know that and be secure in feeling that those whom they elect from among their ranks will be their spokespersons and representatives, not the unwilling agents of the employer. The union 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.\textsuperscript{145}

In recognizing this privilege, the court also commented on its scope by drawing an analogy to the attorney-client privilege. The court indicated that like the attorney-client privilege, a labor relations privilege is not absolute.\textsuperscript{146} Very significantly, however, the court did not limit the application of this privilege to employers and employees even though a third-party was seeking confidential labor relations information. \textit{Seelig} is a logical extension of \textit{Newburgh}, which recognized a right to be free from coercive employer questions about what a union member may have told his union representative in confidence.

In 2007, another New York lower court appeared to have recognized a labor relations privilege, but only with respect to individuals involved in an employment relationship with the employer.\textsuperscript{147} The court relied on \textit{City of Newburgh},\textsuperscript{148} but rather remarkably, did not cite to \textit{Seelig}. This decision,

\begin{itemize}
\item \textsuperscript{143} \textit{Seelig}, 578 N.Y.S.2d at 967.
\item \textsuperscript{144} \textit{Id.} at 968.
\item \textsuperscript{145} \textit{Id.} at 967.
\item \textsuperscript{146} As the court stated:
\item A client may consult an attorney about the legality of past actions by the client and what action under the law the client ought to take. The attorney cannot be compelled to testify what the client told him or her (assuming that it was conveyed confidentially, in a professional relationship). But if the attorney then communicates with a police officer or other government agents, that communication, having been made to an outsider to the privilege, is not protected. Similarly, unprotected are any communications by the petitioner to those outside his Union.
\item \textit{Seelig}, 578 N.Y.S.2d at 967-68.
\item \textsuperscript{147} \textit{Sandiford, supra} note 13, at *32061.
\item \textsuperscript{148} 745 N.Y.S.2d 522 (N.Y. Sup. Ct. 2002).
\end{itemize}
which is unreported, appears to conflict with *Seelig*, which did not limit the privilege to parties involved in a direct employment relationship. Because this decision did not cite to *Seelig* or to any labor relations privilege cases from other jurisdictions and because the analysis employed is a bit vague, this decision should be considered questionable.

Significantly, *Seelig* has been cited with approval by two different appellate courts in New York. However, both of these cases did not expressly address the viability of a full labor relations privilege with respect to parties outside the employment relationship as the *Seelig* court did. In *Children's Village v. Greenburg Eleven Teachers' Union Federation of Teachers*, the court found that certain deposition questions of union officials would not interfere with the right to organize and consult with union officials, thus implicitly recognizing a labor relations privilege. The brief court opinion did not, though, discuss what the questions were. In *Matter of Dist. No. 1 v. Apex Marine Ship Mgmt Co.*, the court granted the union's application to vacate a private sector labor arbitration on the grounds that the arbitrator exceeded his authority under the collective bargaining agreement in dismissing the case, because the union refused to provide a copy of a statement the grievant made concerning his discharge. Though the decision was based upon the language of the collective bargaining agreement, the court indicated that "confidentiality protections" may have also protected the grievant's statement.

In 1996, the New York Governor vetoed legislation which would have recognized a full labor relations privilege with respect to police officers. However, because that proposed legislation would only apply to police officers, it is not significantly germane to the broader question whether a full labor relations privilege should be recognized. Interestingly, in 2000, New York enacted a regulation that established a limited labor relations privilege in proceedings before the Public Employment Relations Board (PERB). The regulation, however, only protected "communications in collective negotiations," and therefore in other factual situations, public sector litigants would have to rely on the *Seelig-Newburgh* line of cases.

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150. 745 N.Y.S.2d 522.
151. Specifically, in a footnote, the court stated:
In fact, the arbitrator's insistence that the union turn over [grievant's] statement to the Company during the course of the grievance hearing may have breached the confidentiality protections that have been recognized as attaching to communications between a union member and the union with respect to representation matters. Such protections would be particularly appropriate for the [grievant] statement in view of the Union's explanation of the underlying purposes of [the collective bargaining language].
745 N.Y.S.2d at 526 n.2 (internal citations omitted).
In *Illinois Educational Labor Relations Board v. Homer Community Consolidated School District*, the Supreme Court of Illinois recognized a management labor relations privilege that protected from disclosure of certain information requested by the union. In *Homer Community*, during a hearing alleging bad faith bargaining arising in the public sector, the union sought material concerning the employer’s bargaining strategy and objectives. Looking to the common law of privileges as well as to *Berbiglia*, the court recognized a full labor relations privilege, reasoning:

Keeping bargaining strategy confidential is an important concern in Federal labor law matters . . . . Consequently, we find that there exists a strong public policy protecting the confidentiality of labor-negotiating strategy sessions . . . . Protecting these types of communications and documents from disclosure is not unlike the protection afforded by the attorney-work product privilege.

Significantly, the Court also held that this privilege was qualified and could be overcome by a showing of necessity. The Court did not explain what would constitute such a necessity. Though *Homer Community* involved an employer and an employee, the court, unlike in *City of Newburgh* and *Cook Paint*, did not impose any restriction on the recognition of this privilege. Therefore, this case can be read as supporting the recognition of a full labor relations privilege. In a sense, *Homer Community* is the opposite of *Seelig*, which recognized a full labor relations privilege applicable to unions.

In 2005, *Homer Community* was supplemented by an Illinois statute that established a full limited labor relations privilege applicable to union agents and union members. I use the word “full” because this statutory

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154. 547 N.E.2d 182 (Ill. 1989).
155. *See supra* notes 117-136 and accompanying text (discussing *Berbiglia*).
156. *Homer*, 547 N.E.2d at 187.
157. *Id.* The Supreme Court of Illinois reference to “federal labor law” is questionable as this was a public sector labor case. The NLRA, the major federal statute governing labor relations in the private sector, does not apply in the public sector. *See* Mitchell H. Rubinstein, *Union Immunity From Suit In New York*, 2 N.Y.U. J. L. & Bus. 641, 645, n.8 (2006).
158. *See supra* notes 140-51 and accompanying text (discussing *Seelig*).
159. The entire statute became effective January 1, 2006, and provides as follows:

Union agent and union member. (a) Except when required in subsection (b) of this Section, a union agent, during the agency or representative relationship or after termination of the agency or representative relationship with the bargaining unit member, shall not be compelled to disclose, in any court or to any administrative board or agency arbitration or proceeding, whether civil or criminal, any information he or she may have acquired in attending to his or her professional duties or while acting in his or her representative capacity.
privilege was not limited to parties involved in an employment relationship. I use the word "limited" because the statute has a number of exceptions. One key exception to this privilege allows disclosure "when required by court order." Though there is no reported case law interpreting this statute, there is a danger that this language might permit a very wide exception. Unfortunately, the statute does not provide any guidance with regard to under what circumstances courts should issue such orders. On the other hand, this exception could be read in conjunction with Homer, which requires a showing of "necessity" to pierce the privilege veil. This latter view is likely to prevail as there is no indication that the legislature intended to overrule Homer.

On the other hand, in Walker v. Huie, a federal district court rejected a full labor relations privilege. In Walker, a police officer sought advice from the president of his union concerning an allegation of police abuse. In a lawsuit against the officer, the plaintiff sought to depose the union president. In rejecting the privilege, the court reasoned:

This is not the type of relationship such as attorney-client, husband-wife, or clergy-communicant that over time the common law has considered important enough to sustain as privileged. The communication in this case is no more deserving of a privilege than other important relationships that courts have found not privileged.

In Walker, the collective bargaining agreement between the union and the employer stated that any communication between the officer member and the union would be privileged. The court, however, did not find this controlling because "the scope of federal common law cannot be dictated by agreement among private parties, particularly where the rights of other parties are involved."

(b) A union agent may use or reveal information obtained during the course of fulfilling his or her professional representative duties: (1) to the extent it appears necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death of another person; (2) in actions, civil or criminal, against the union agent in his or her personal or official representative capacity, or against the local union or subordinate body thereof or international union or affiliated or subordinate body thereof or any agent thereof in their personal or official representative capacities; (3) when required by court order; or (4) when after full disclosure has been provided, the written or oral consent of the bargaining unit member has been obtained or, if the bargaining unit member is deceased or has been adjudged incompetent by a court of competent jurisdiction, the written or oral consent of the bargaining unit member's estate. In the event of a conflict between the application of this Section and any federal or State labor law to a specific situation, the provisions of the federal or State labor law shall control.

735 ILL. COMP. STAT. 5/8-803.5.

160. Id. at 5/8-803.5(b)(3).

161. Interestingly, by its terms, this statute does not apply to confidential labor relations communications of management. Perhaps the Illinois legislature was not concerned with the rights of management because it felt that Homer sufficiently addressed this issue.


163. Id. at 500.

164. Id at 501. The court did not extensively analyze whether certain statutory rights could be altered by contract. There is a significant controversy over that issue and there are a number of cases
In 1998, in *In Re Grand Jury Subpoenas*, then U.S. District Judge Reena Raggi held that union representatives could be forced to testify before a grand jury about conversations with members facing possible criminal charges. Judge Raggi extensively reviewed the case law and concluded that the union movant had not demonstrated that society's interest in encouraging confidential union communications was so strong as to outweigh the public interest in having all relevant evidence of criminal conduct explored. Judge Raggi specifically distinguished a number of cases, including *Seelig*, because "the privilege recognized in these cases has not, however, been held to apply against any party other than the employer." Judge Raggi appears to have erred in her analysis of *Seelig*, in that the information that was sought from union officials was not sought by Seelig's employer. Rather, a third-party conducted an investigation and issued a subpoena.

In 2007, in another grand jury case, the New Hampshire Supreme Court followed Judge Raggi's reasoning and held that it would not recognize a full labor relations privilege preventing a union steward's testimony before a grand jury with respect to what he was told by a bargaining unit employee. The court, however, approved of a New Hampshire administrative agency decision that recognized a labor relations privilege in the context of employment.

In *American Airlines, Inc. v. Superior Court of LA*, a case arising under the Railway Labor Act, the court refused to recognize a labor relations privilege and compelled a union official to testify about conversations he had with a member during a deposition concerning alleged wrongful discharge. The court distinguished the California Supreme Court decision in *Crisan*, which recognized a lay advocate privilege between welfare claimants and authorized representatives because the welfare statute involving arbitration of contractual claims where the standard of judicial review is sought to be altered by contract. See Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235 (2006). In *Hall Street Associates v. Mattel*, No. 06-989, 552 U.S. ___ (2008), the Supreme Court held that under the Federal Arbitration Act, the parties to an arbitration cannot alter the standard of judicial review. Significantly, the Court limited its holding to cases arising under that statute, and it is questionable whether that decision would have any application to other arbitral statutes. See Slip Op. at 13. See Mitchell H. Rubinstein, *Supremes Hold That Under The FAA Parties May Not Alter The Standard Of Judicial Review; But What About Labor Arbitration?*, ADJUNCT LAW PROFESSOR BLOG (March 26, 2008)(discussing the application of the Federal Arbitration Act to labor arbitration), http://lawprofessors.typepad.com/adjunctprofs/2008/03/supremes-hold-t.html.

167. *Id.* at 336.
168. *In re Grand Jury Subpoena, 926 A.2d 280.*
169. *Id.*
170. 8 Cal. Rptr. 3d 146 (Cal. Ct. App. 2003).
172. 661 P.2d 1073. See supra notes 74-77 and accompanying text (discussing *Crisan*).
specifically permitted non-attorney representatives to appear before the agency. The court reasoned that the Railway Labor Act contained no similar language, and held that "there is no foundation from which to make the legal leap" from general labor relations principles authorizing collective bargaining to recognizing a labor relations privilege. The court did recognize the importance of this issue and held that although policy reasons might support the recognition of this privilege, the creation of such a privilege was best left for the legislature. Interestingly, the court also distinguished Seelig, asserting that "New York law, . . . contrary to California law, gives leeway to state judges to fashion evidentiary privileges in extraordinary circumstances." Additionally, the court distinguished Cook Paint by noting that case involved an unfair labor practice under the NLRA and the testimony sought in American Airlines concerned an eyewitness who also happened to be a union officer, and therefore not a person involved solely because of their status as a union representative.

C. First Amendment Freedom of Association Principles Support the Recognition of a Full Labor Relations Privilege

The right to freedom of association was elucidated in N.A.A.C.P. v. Alabama, where the Supreme Court held that the National Association for the Advancement of Colored People (NAACP) did not have to disclose its membership lists to the state of Alabama pursuant to a court order issued under a state statute applicable to foreign corporations. The Court reasoned that First Amendment freedom of association principles protected disclosure of membership lists due to the chilling effect disclosure would have on the organization. Today, freedom of association is considered a basic constitutional right which lies at the foundation of our free society.

173. Am. Airlines, 8 Cal. Rptr. 3d at 153.
174. As the court stated, "Although there may be various countervailing 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" (emphasis added). Id. at 153.
175. Id at 155 n.3. See supra notes 105-111 (discussing Cook Paint) and 140-146 (discussing Seelig) and accompanying text.
177. As the Court stated: We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from
First Amendment freedom of association principles were strongly implied as support for the recognition of a full labor relations privilege in Seelig. However, the court in Seelig ultimately held that it did not have to decide this issue in light of its determination that the court action was premature. It noted that a witness must assert a First Amendment privilege during the actual questioning, and cannot use the privilege to refuse to appear at all, as had happened in the case.

A labor relations privilege based upon freedom of association principles has been recognized by two lower court cases and rejected by one. In International Union v. Garner, a federal district court recognized a labor relations privilege protecting the disclosure of union authorization cards. The court was concerned that permitting disclosure might have a chilling effect on union activity and, therefore, adversely affect employee associational rights under the First Amendment. Though this case did involve an employee and an employer in an employment relationship, the court did not limit its holding to employment relationships. Thus, this decision can be read as supporting a full labor relations privilege. Unfortunately, the court’s analysis is quite brief.

the Association and dissuade others from joining it because of fear of exposure of their beliefs show though their associations and of the consequences of this exposure. 357 U.S. at 462-63. See also McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003) (discussing, briefly, the freedom of association); Church of the Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004) (discussing freedom of association).

178. The First Amendment protects both the speech and the right to associate with others, "no matter how different, unpopular or morally repugnant" the activity. Meltzer v. Bd. of Educ., 336 F.3d 185, 192 (2d Cir. 2003), cert. denied, 540 U.S. 1183 (2004). See also Donald T. Kramer, Constitutional Law, 16A AM. JUR. 2D, Constitutional Law § 542 (2007). Specifically, Justice Baer, Jr. stated in Seelig:

Petitioner contends that compelling his testimony would have a chilling effect on the associational rights of his members. Insofar as intra-Union communications on labor relations matters are concerned, the privilege I have described above is available to protect the members' rights. To the extent that questioning about communications made by petitioner to non-Union members is concerned, such questioning, allowed by the labor relations privilege described above, may well give rise to serious problems for the preservation of First Amendment rights.

Seelig, 578 N.Y.S.2d at 968.

179. Id. There is no additional reported decision after Justice Baer, Jr.'s decision in Seelig.


181. 102 F.R.D. 108.

182. Id. at 115.

183. The court’s entire analysis is as follows:

In the present case, the union authorization cards signed by Maremont employees should be protected from discovery as privileged communications. The employees who signed did so under a promise of confidentiality. It is doubtful that union certification election procedures would be effective if employees who signed authorization cards would be revealed in the course of litigation. Confidentiality is important the policies of the National Labor Relations Act which provides generally for secrecy in elections. Finally, the interests Maremont has asserted in discovering the evidence to locate witnesses and determine the effect of the
In 2004, in *Patterson v. Heartland Industrial Partners*, an employer again sought to discover the names of union supporters.\(^{184}\) Certain employees had claimed that the union and the employer entered into a neutrality agreement in violation of the Labor-Management Relations Act (LMRA).\(^{185}\) The court recognized that this information would be protected under the First Amendment freedom of association principles under *Garner* because disclosure could result in reprisals against the employees.\(^{186}\) However, ultimately, no First Amendment privilege was found applicable because the employer agreed to accept the documents in question with the names of the employees redacted.\(^{187}\)

Significantly, the court also stated and held that, outside the protection of freedom of association, there was no labor relations privilege recognizable in law.\(^{188}\) The court reasoned that there was no federal court authority, other than *Garner*, that recognized such a privilege and characterized *Garner* as a freedom of association case.\(^{189}\) The court both questioned and refused to follow *Berbiglia* as a non-mandatory administrative law judge decision. Additionally, the court held that *Berbiglia* itself was questionable as a later NLRB decision refused to follow it.\(^{190}\)

On the other hand, in 2002, a different federal district court refused to recognize a labor relations privilege where the employer was seeking documents from the union that indicated the union's level of support.\(^{191}\) Interestingly, the court did indicate that it was sensitive to the concerns of the union with respect to confidentiality and agreed to enter a protective order.\(^{192}\) However, the court distinguished its holding from *Garner* because *Garner* involved an employer that had previously engaged in illegal surveillance on employee associational activity are insufficient to outweigh the injury to first amendment interests that would result if this discovery were permitted.

102 F.R.D. at 114 (citations omitted).

184. 225 F.R.D. 204.
185. *Id.* at 205.
186. *Id.* at 206.
187. *Id.*
188. *Id.* at 205.
189. In discussing the scope of disclosure under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401, *Mallick v. International Brotherhood of Electrical Workers*, 749 F.2d 771 (D.C. Cir. 1984), indicated that the union would not be required to disclose organizing strategy, negotiating plans or trade secrets. The *Patterson* court distinguished *Mallick* as a decision which simply addressed whether the need for disclosure of union organizing information to an individual union member outweighed the potential damage caused by such disclosure to the union under the LMRDA. *Patterson*, 225 F.R.D. at 8-9. The court did not read *Mallick* as a privilege case.
190. For a discussion of *Berbiglia* as well as later NLRB decisions on this issue, see *supra* notes 117-133 and accompanying text.
192. *Id.* at 568.
activity, which might have continued had the employer been provided with a list of union authorization cards.\(^\text{193}\)

While the harm that union members might face if no labor relations privilege was recognized is much less than NAACP members faced in *NAACP v. Alabama*, privileged union information could be used by unscrupulous employers and others to threaten and discharge employees—particularly in an union organizing campaign where employees may be afraid to speak up if they knew that their names would be disclosed.\(^\text{194}\)

More fundamentally, the First Amendment is not always applicable. While First Amendment freedom of association principles would apply in public sector labor management relations, they may not apply in the private sector because the First Amendment limits government action, not the actions of private employers.\(^\text{195}\) However, where the government is imposing some limit on a union’s right to assemble and freely associate, First Amendment freedom of association principles would probably apply.\(^\text{196}\)

Perhaps the most significant aspect of freedom of association is that the policies that underlie this right are the same as those underlying a labor relations privilege. Specifically, for unions to operate, union members must be free to interact with their elected officers. It is simply none of the employer’s business if an employee chooses to consult with his union representative. Without such privileges, members may not have such meetings, thereby chilling union activity. Additionally, if employers were able to find out who attended certain union meetings, some employers might take advantage of this information, using it to harass or fire employees. Therefore, freedom of association as recognized under the First

\(^{193}\) Id. at 569. The court did not indicate exactly the scope of protective order it was issuing, other than to state that it was using *D’Amico v. Cox Creek Refining Co.*, 126 F.R.D. 501, 506-07 (D. Md. 1989), as a model. In *D’Amico*, the court issued a protective order that limited disclosure of union authorization cards to only the attorneys and the court, and stated that the identity of affiants did not have to be disclosed unless their identity was necessary for a review of the facts.

\(^{194}\) Goldman, *supra* note 21, at 256.

\(^{195}\) A fundamental principle of constitutional law is that the First Amendment only applies to state action. 16B AM. JUR. 2d Constitutional Law § 800 (2007) (discussing constitutional requirement of state action). In *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court adopted a two-part test to define state action necessary to trigger the application of the constitution as follows:

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937.

Amendment provides support for the fact that there is a need—a tremendous need—for the recognition of a full labor relations privilege.

V. THE UNIQUE FEATURES OF LABOR LAW SUPPORT THE RECOGNITION OF A FULL LABOR RELATIONS PRIVILEGE

This Article maintains that there is a compelling need for the recognition of a full labor relations privilege due to the many unique aspects of American labor law. Remarkably, most of the courts that have addressed labor relations privileges have not examined the privilege in the context of important labor law principles. 197

In the private sector, key policy objectives supporting recognition of a full labor relations privilege are found in section 7 of the NLRA, which provides that "employees shall have the right... to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." 198 In NLRB v. City Disposal Systems, 199 the Supreme Court upheld the Board’s "Interboro" doctrine, which provides that an individual’s assertion of a right grounded in a collective bargaining agreement is recognized as protected concerted activity under the Act. Surely an employee’s consultation with his or her union constitutes concerted protected activity—at least with respect to labor relations issues covered under a collective bargaining agreement that may also affect others. 200 Related to this principle is the right of employees to speak to other employees at least with respect to non-working time and in non-
working areas. These protections would mean little if an employer could turn around and inquire about what took place during these meetings and conversations.

Most significantly, in *NLRB v. J. Weingarten, Inc.*, the Court held that under section 7 of the NLRA, an employee has the right to refuse to submit to an investigatory interview he reasonably fears may result in discipline if he is denied his request for union representation. Very significantly, the Board has long held that *Weingarten* rights permit the right of an individual grievant to consult with his or her union representative before the interview takes place, and to be represented at an investigatory interview by a worker. Such a meeting would have little value if the employer could require the individual grievant, the union representative, or both, to disclose what had transpired during the pre-interview meeting.

In a subsequent case, *Weingarten* was expanded to include the right to have a non-represented employee represented by a co-worker at such an interview. In *IBM Corporation*, the Board reversed itself and held that non-union employees do not enjoy a *Weingarten* right to representation at

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201. *See Republic Aviation Corp. v. NLRB, 345 U.S. 793 (1945)* (holding an employer no-solicitation policy that applies to employees on its property during non-working time and in non-working areas is unlawful under the NLRA).


204. Interestingly, a California statute applicable to public sector public safety officers codifies the *Weingarten* right to union representation and adds that the union representative is not required to disclose any information that the representative receives from the officer under investigation with respect to non-criminal matters. The statute provides:

> When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer, or any other member of the employing public safety department, that could lead to punitive action the interrogation shall be conducted under the following conditions. ... (i) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action against any public safety officer, that officer, at his or her request, shall have the right to be represented by a representative of his or her choice who may be present at all times during the interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

CAL. GOV. CODE § 3303(i) (emphasis added). Under this statute, at least one labor arbitrator held that a union representative did not have to disclose the substance of his conversations with a union member facing potential discipline in a non-criminal matter. Matter of BART Police Officers Ass’n, Index 918-06 (Alexander Cohen, Arb. May 11, 2006) (n.o.r.) (on file with author).

205. *Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001)*.

206. 341 N.L.R.B. 1288 (2004). Board reversals are fairly common in labor law. As I have previously recognized, the presidentially-appointed and politically sensitive NLRB is known to reverse itself when the administration changes. *See Mitchell H. Rubinstein, Our Nation’s Forgotten Workers: The Unprotected Volunteers, 9 U. PA. J. LAB. & EMP. L. 147, 164 n.92 (2006)* (discussing political nature of NLRB). By custom, the President appoints a majority of three members from his political party and appoints two members from the opposition party. *Roger Blanpain et al., The Global Workplace: International and Comparative Employment Law: Cases and Materials 114 (2007)*.
an investigatory interview that they reasonably believe may result in discipline. One of the reasons why the Board held that non-represented employees should not, as a matter of policy, be entitled to such representation was because unrepresented employees have no duty to keep information confidential, while union representatives do have such a duty. The Board reasoned:

Union representatives, by virtue of their legal duty of fair representation, may not, in bad faith, reveal or misuse information obtained in an employee interview. A union representative’s fiduciary duty to all unit employees helps to assure confidentiality for the employer.

A coworker, however, is under no similar legal constraint. A coworker representative has no fiduciary duty to the employee being questioned or to the workplace a whole. Further, it is more likely that a coworker representative in casual conversation among other coworkers and friends in the workplace, could inadvertently ‘let slip’ confidential, sensitive, or embarrassing information.

Thus, IBM supports the recognition of a full labor relations privilege because the Board recognized that union representatives have a fiduciary duty that encompasses confidentiality.

Other labor law principles in the NLRA also support the recognition of a full labor relations privilege. For example, the NLRA expressly provides that supervisors are excluded from the definition of employee and therefore are not protected under the Act. Additionally, the Supreme Court has judicially recognized that “confidential employees” are not employees under the NLRA. The Supreme Court has also recognized that certain

207. Id. at 1293.
208. The NLRA defines a supervisor as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152 (11). In NLRB v. Health Care & Retirement Corporation of America, 511 U.S. 571 (1994), the Supreme Court described the test to determine whether someone was a supervisor as follows:

[T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities? Second, does the exercise of that authority require the “use of independent judgment”? Third, does the employee hold the authority “in the interest of the employer”?

Id. at 573-74. The intent of the supervisory exclusion was to exclude individuals who exercise “genuine management prerogatives” from the protection of the Act. Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37 (Sept. 29, 2006).

209. In determining who is a confidential employee and thus unprotected under the Act, the Board adopted the so called “labor nexus test.” The Supreme Court in NLRB v. Hendricks Co., 454 U.S. 170, 189 (1981), approved of this test and stated that a confidential employee encompasses:

1. Employees who assist and act in a confidential capacity to person who formulate, determine and effectuate management policies in the field of labor relations; and
2. Employees who regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.
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High level policy makers are not employees under the Act. These individuals, known as "managerial employees," are considered and expected to be aligned with management, not labor. Thus, labor law principles recognize that there is a line between the role of an employee and the role of an employer, reinforcing the need for confidential labor relations communications.

Other litigation involving the NLRA supports the recognition of a full labor relations privilege. In *NLRB v. Robbins Tire Co.*, the Court held that an employer could not obtain investigatory affidavits from potential witnesses under the Freedom of Information Act (FOIA). In reaching this result, the Court was concerned with the chilling effect that disclosure might have on potential witnesses, as well as the possibility that disclosure would expose witnesses to intimidation. Though this case did not directly involve a full labor relations privilege and the U.S. Supreme Court did not analyze this issue as a privilege, the Court recognized that disclosure of confidential labor relations information may chill the protected union activity that the NLRA encourages. This need to prevent

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See also *N.L.R.B. v. Meenan Oil Co.*, 139 F.3d 311 (2d Cir. 1995) (discussing confidential employees); *Erica, Inc.*, 344 N.L.R.B. 79 (2005), enforced, No. 05-60706, 2006 WL 2683363 (5th Cir. 2006) (n.o.r.) (same).


213. Specifically, in *Robbins*, the Court stated:

The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the peculiar character of labor litigation the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment.

437 U.S. at 240 (internal citations omitted).

214. Section 1 of the NLRA states that the policy of the Act is to encourage the process of collective bargaining. That statute provides in relevant part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

union activity from being stymied is the principle public policy that later decisions utilize as a rationale for a labor relations privilege.\textsuperscript{215}

Also relevant to the issue of a labor relations privilege is whether the identities of union supporters can be ordered disclosed. The NLRB has consistently held that the NLRA prohibits the disclosure of the identities of union supporters and union authorization cards. Again, the public policy concern is the protection of union activity.\textsuperscript{216}

Perhaps the most important reason why a full labor relations privilege needs to be recognized has not been addressed by any court. Unions are typically made up of individual employees who may have differing interests with respect to issues such as seniority and contract interpretation. The law recognizes that unions are entitled to extreme deference when their judgment is second guessed in a duty of fair representation lawsuit brought by an unhappy unit member.\textsuperscript{217} Therefore, unions need to be able to freely consult with their members and officials in confidence. They must be able to rely on the fact that such discussions will not be disclosed to a dissenting member who may file a lawsuit against the union. Any other rule would chill legitimate union activity.

Further, labor-management disputes are highly adversarial in a manner no different than civil litigation involving the U.S. court system. The labor-management relations system in this country is accustomed to working under conditions where lawyers often play a central role. Therefore, it is likely that labor relations professionals are familiar with rules governing attorneys such as attorney-client privilege.\textsuperscript{218} Labor law principles already

\begin{footnotes}
\item[215] See \textit{e.g.}, supra notes 140-146 (discussing Seelig) and 154-158 (discussing Homer) and accompanying text. See also supra notes 94-136 and accompanying text (discussing other decisions involving the issue of a labor relations privilege under labor law statutes).
\item[216] National Telephone Directory Corp., 319 NLRB 420 (1995) (collecting cases). The Board reasoned:

\[\text{[W]e take very seriously the possibility of intimidation of employees by employers seeking to learn the identity of employees engaged in organizing. We conclude that the danger of employee intimidation would be severely heightened if an employer could obtain the names of employees who signed cards or attended meetings. Therefore, we believe the policies of the Act are best effectuated by prohibiting the Respondent from obtaining on cross-examination the names of the employees who attended union meetings and signed authorization cards.}\]

\item[217] Rubinstein, supra note 157, at 672 (discussing the duty of fair representation).
\item[218] Indeed, when non-lawyers provide advice in labor management relations, a fine line delineates the provision of appropriate advice from the unauthorized practice of law. The law in this area is not fully developed. See Ohio State Bar Assoc. v. Burdzinski, 858 N.E.2d 372 (holding that it is not the unauthorized practice of law for a non-lawyer to represent another employee with respect to union election advice and to negotiate a collective bargaining agreement, but it is considered the unauthorized practice of law for a non-lawyer to draft a collective bargaining agreement even if that contract is copied from a form book or was previously prepared by a lawyer); Bd. of Educ. Union Endicott Cent. Sch. Dist. v. N.Y. State Public Employment Relations Bd., 649 N.Y.S.2d 523 (N.Y. App. Div. 1996) (holding that non-attorney labor relations specialist who appeared before the Public Employment Relations Board did not engage in the unauthorized practice of law). See also N.Y. Civ. SERV. LAW § 205(5)(j) (McKinney
\end{footnotes}
support the principles underlying a full labor relations privilege. Therefore, it should not be a giant leap for courts to support the recognition of a full labor relations privilege.

VI.
F.R.C.P. 26(C)(1)(G) PROTECTS FROM DISCLOSURE INTERNAL STRATEGY INFORMATION CONCERNING COLLECTIVE BARGAINING NEGOTIATIONS

Regardless of the conflicting case law concerning the issue of whether a full labor relations privilege should be recognized, there is a significant body of recent case law that suggests that F.R.C.P. 26 (c)(1)(G) would protect from disclosure internal strategy information concerning collective bargaining negotiations. F.R.C.P. 26 governs discovery in federal court. Items can be protected from disclosure if they are privileged under F.R.C.P. 26(b)(1) or if the documents in question contain sensitive and confidential information. This federal rule protects from disclosure material and information that may harm the opposing party by placing it in a competitive disadvantage.

2007) (enacted before appellate decision in Union Endicott, which authorizes non-lawyers to appear before PERB). The issue non-lawyer representation and the line between what is and what is not the practice of law is of course, not unique to labor-management relations. Management consultants, many of whom are not attorneys, face many of the same issues. However, as Professor Rostain has recognized, “there have been few, if any, cases involving claims that nonlawyers were impermissibly providing legal services to corporations . . . .” Rostain, supra note 58, at 1408.

219. See Kerns, No. 3:06-cv-1113, 2008 WL 351233; Winnett, 3:06-cv-00235, 2008 WL 399301; Bonin, 204 F.R.D. 67, 70 (E.D. Pa. 2001); Titan, supra note 13 (order regarding motions to compel); Ahearn, 208 F.R.D. 565. Cf. Mallick, 749 F.2d at 785 (while not a discovery case, in discussing the scope of disclosure under the LMRDA of 1959, 29 U.S.C. § 401, the court stated that if the sought after material related to “disclosure of organizing strategy, negotiating plans, or other secrets,” then disclosure can be refused).

220. This rule provides as follows:
   Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

The burden of establishing a privilege is on the party asserting it, and a "bald assertion of privilege" is insufficient. To establish a privilege, a movant under this rule of federal procedure must establish that "(1) the interest for which protection is sought is an actual trade secret or other confidential information that is protected under the rule; and (2) there is good cause for the entry of a protective order," such that "disclosure will work a clearly defined and serious injury" to the party making the application. This is a very difficult standard to meet because courts do not easily recognize privileges, and there is a presumption against the recognition of new privileges.

With respect to protection orders under F.R.C.P. 26(c)(1)(G), the standard is a bit more relaxed. For example, in *Winnett v. UAW*, the union was able to establish its entitlement to a protective order because it was able to show that its bargaining and labor strategy materials were paradigmatic confidential information entitled to protection from disclosure under the Federal Rules of Civil Procedure.

In *Winnett*, the employer had sought to subpoena from the union an array of materials concerning its past collective bargaining negotiations with the union. Included in this request was material reflecting union internal strategies that had not previously been disclosed. The underlying lawsuit concerned claims that the employer had promised certain employees and their surviving spouses lifetime health insurance. The action was for breach of contract under the LMRA and under the Employee Retirement Income Security Act (ERISA). It appears that plaintiffs argued that the contract constituted the collective bargaining agreement, which is why the employer wanted to subpoena the information.

"seek a competitive advantage by obtaining information of a competitor, the court may eliminate discovery entirely." *JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 715 (4th ed. 2005).*


224. See notes 35-42 and accompanying text. See also MOORE'S, supra note 220, § 26.47(1) ("Privilege, unlike relevance is narrowly construed").

225. 2008 WL 399301, at *5. *Winnett* involved a class action of employees and surviving spouses who retired between 1992 and 1998. A companion case, *Kerns*, involved a class of surviving spouses of retirees who retired after 1998. The analysis utilized in both of these cases was virtually identical and therefore, this article focuses on the *Winnett* decision.

226. 29 U.S.C. § 185(a). This statute provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


228. The court did not expressly explain why the employer sought this information. Presumably, this was in furtherance in some type of argument over the meaning of contractual language that it sought to make.
Interesting, the union specifically stated that it was not arguing that the information was privileged. Rather, the union’s sole argument was that this matter was so sensitive that it should be protected from disclosure under F.R.C.P. 26(c)(1)(G). The court ruled in favor of the union and followed an earlier decision in *Titan International, Inc. v. George Becker*, reasoning:

"[T]he facts show that the parties here in their ongoing collective bargaining relationship revisit and renegotiate the same issues again and again. The court finds that, as in *Titan*, the UAW’s internal strategy materials should be protected from disclosure under Rule 26 (c)(1)(G) to maintain the ability to represent employees in future negotiations with Caterpillar." In *Titan*, the court—in an unreported forty-three page opinion that has been widely cited—the court held that F.R.C.P. 26(c)(7) (now F.R.C.P. 26(c)(1)(G)) protects internal collective bargaining materials from disclosure in discovery. *Titan* was a Racketeering Influenced and Corrupt Organization Act (RICO) case brought by an employer against several unions claiming that the unions engaged in acts of violence to extort money. Through the discovery process, the employer sought information from the unions relating to collective bargaining strategies and strike activities. In holding that these materials were protected from disclosure, the court reasoned:

In this case, Plaintiffs and Defendants continue to deal with each other and anticipate negotiating future labor agreements. If the information sought is disclosed, future negotiations may be jeopardized. The Court agrees with Defendants that such information is confidential business information. Defendants’ persuasive argument that future negotiations may be hampered is a legitimate reason to protect such information as confidential.... As there is an ongoing relationship between the parties, it is important that the parties remain assured that negotiation history be kept confidential to protect the ability to discuss similar issues in the future.

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229. There is no indication as to why the union was not at least arguing in the alternative that the information in question was also subject to a labor relations privilege. Presumably, for strategic reasons, the union chose not to make the privilege argument.

230. *Titan, supra* note 13 (order regarding motions to compel).

231. *Id. at* *4.* Interestingly, at times, the court also referred to this case involving a privilege and even ordered that a privilege log be produced.

232. As a result of the 2007 amendments to the Federal Rules of Civil Procedure, Rule 26(c)(7) was renumbered 26(c)(1)(G). The advisory notes accompanying the 2007 amendments indicate that the changes were “intended to be stylistic only.” FED. R. CIV. P. 26 (advisory committee’s note).


235. *Id. at* *15-16.

236. *Id. at* *20. See also* Boise Cascade, 279 N.L.R.B. 422 (1986), where the Board expressed similar policy concerns in refusing to order the production of negotiation strategic information.
In reaching this conclusion, the Titan court looked to the NLRB’s Berbiglia decision and the Illinois Supreme Court decision in Homer, which recognized a privilege with respect to labor negotiation information.

Similarly, in Bonin v. World Umpires Association, the court issued a protective order prohibiting disclosure of union financial records. The court reasoned that “[i]f Major League Baseball should obtain detailed knowledge about the finances of the [union] through discovery in this case, the scales will undoubtedly tip unfairly against the union and its members” with respect to future collective negotiations.

This case may even support the recognition of a full labor relations privilege because the employer, Major League Baseball, was not a party to the case. However, the full reach of this case is unclear because Major League Baseball was involved in other litigation with the parties, and the court’s concern was with disclosing sensitive information that Major League Baseball might be able to use in other forums.

This line of case law is entirely consistent with the line of administrative labor relations agency decisions that protect strategic labor relations information from disclosure. This case law is also analogous to the “business strategy doctrine” utilized in corporate law to protect sensitive corporate documents from disclosure. The same policy reasons that protect the confidentiality of company strategy and alternative proposals under consideration with respect to a possible corporate takeover are also implicated with respect to disclosure of confidential labor relations information.

VII.
CONCLUSION

It is important to recognize that while many of the cases discussing whether a full labor relations privilege should be recognized arose in the public sector, as I have previously recognized, there do not appear to be any compelling policy reasons why those cases should not apply to employees.

237. See notes 117-36 and accompanying text (discussing Berbiglia and other administrative decisions).
238. See notes 154- and accompanying text (discussing Homer decision).
240. Id. at 70.
241. See supra notes 91-136 and accompanying text.
242. See, e.g., Temple Holding, Ltd. v. Sea Containers, Ltd. 131 F.R.D. 360, 361 (D.D.C. 1989) (“[D]iscovery relating to a target company’s strategies, alternatives or proposals under consideration is protected from disclosure. . . .”); Grand Metro, PLC v. Pillsbury Co., C.A. Nos. 10319, 10323, 1988 WL 130637 (Del. Ch. Nov. 21, 1988) (“[T]he board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote to corporate shareholder welfare. . . . [D]isclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests.”).
in the private sector. The policy reasons that either do or do not support a full labor relations privilege are the same in both the public sector and the private sector.

In the ideal world of labor relations, a full labor relations privilege would be legislatively recognized (or perhaps rejected), thus avoiding litigation over this issue. To date, however, only Illinois has done this. The paucity of legislation is not surprising since American labor law itself has been in need of reform for a number of years, but politics are such that the NLRA has not been amended since 1974.

In an early U.S. Supreme Court decision involving the NLRA, the Court stated that the ability of employees to select representatives of their own choosing for purposes of collective bargaining without coercion or restraint by their employer "is a fundamental right." For this fundamental right to have meaning, employees, and employers for that matter, must have the right to discuss labor relations matters with the confidence that what is discussed is privileged.

Though a full labor relations privilege does not necessarily directly involve the NLRA when third-party non-employee and/or non-employers are involved, it is related to NLRB jurisprudence. Therefore, it is important to consider NLRA law (and analogous state public sector labor relations statutes) in order to determine if a privilege should be recognized.

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243. Rubinstein, supra note 3, at 602 (1991). Indeed, the Supreme Court has applied public sector principles to private sector labor law. In NLRB v. Transportation Management Corp., the Supreme Court adopted a mixed motive test where it was alleged that an employee was discharged for anti-union animus and the employer claimed that it would have terminated the employee anyway. 462 U.S. 393 (1983). In adopting the mixed motive test, the Court looked to a First Amendment decision involving the discharge of a public employee for guidance. Id. at 403. The Court stated that "[t]he analogy to [the First Amendment decision] drawn by the Board was a fair one." Id. Similarly, in NLRB v. U. S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993), in interpreting the NLRA, the court followed a court decision which interpreted the Federal Service Labor Management Relations Act, 5 U.S.C. § 7101 et seq., which governs labor management relations matters in the federal government.

244. See supra notes 159-161 and accompanying text. One other state, California, has enacted legislation creating a limited privilege for certain public safety officers. See supra note 204. The New York legislature also passed a bill in 1996 that would have created a labor relations privilege for police, but the Governor vetoed that bill. In re Grand Jury Subpoenas Dated Jan. 20, 1998, 995 F. Supp. at 336. New York did pass a regulation, applicable in the public sector, which establishes a limited labor relations privilege with respect to collective bargaining negotiations. See supra note 19.


247. See supra notes 91-136 and accompanying text (discussing NLRB and analogous state agency decisions).
The doctrinal principles of the NLRB and other administrative agencies support the recognition of a full labor relations privilege. Specifically, they support the recognition of the right to engage in protected concerted activities\textsuperscript{248} and of the employee right to union representation (employee Weingarten rights) at investigatory interviews\textsuperscript{249} The fact that a union cannot in bad faith release confidential labor relations information under the duty of fair representation also supports the recognition of a full labor relations privilege. NLRB and judicial case law that recognizes the exclusion of supervisors, managers, and confidential employees from the protection of the NLRA further recognizes the importance of maintaining an independent line between management and labor\textsuperscript{250} If this division is to have any real meaning, individuals must be free to communicate with one another without any fear that the employer or a third-party might find out about any confidential labor relations communications.

Cases recognizing lay advocate privileges in other contexts support the recognition of a labor union privilege because non-lawyers are permitted to practice before the NLRB as well as other agencies\textsuperscript{251} Additionally, freedom of association principles support a full labor relations privilege protecting the identity of union supporters\textsuperscript{252} The attorney-client privilege exists because we value confidential communications between an attorney and his client. Similarly, the law should value and protect confidential labor relations information between unions and their members and between management and its officials.

The law appears somewhat settled with respect to the recognition of a labor relations privilege in the context of an employee-employer relationship under statutes such as the NLRA\textsuperscript{253} The next logical step is the recognition of a full labor relations privilege. Unfortunately, the courts are conflicted with respect to the recognition of a full labor relations privilege involving third-parties\textsuperscript{254} This results in an uncertain full labor relations privilege. An uncertain privilege does not further public policy because it breeds misinformation and confusion\textsuperscript{255}

Whether or not a full labor relations privilege is recognized can have enormous implications for labor relations and associated litigation. If

\textsuperscript{248} See supra notes 198-201 and accompanying text (discussing concerted activities under NLRA).
\textsuperscript{249} See supra notes 202-204 and accompanying text.
\textsuperscript{250} See supra notes 208-210 and accompanying text.
\textsuperscript{251} See supra notes 60-72 and accompanying text (discussing non-lawyers appearing before administrative agencies such as the NLRB).
\textsuperscript{252} See supra notes 176-196 (discussing freedom of association).
\textsuperscript{253} See supra notes 94-136 and accompanying text (discussing labor relations privilege under NLRA and state labor relations statutes).
\textsuperscript{254} See supra notes 137-175 and accompanying text (discussing conflicting case law concerning the recognition of a full labor relations privilege).
\textsuperscript{255} See Upjohn, 449 U.S. at 393.
members cannot speak to their representatives in confidence, they may have less faith in their union, which ultimately will chill the strength of the union. On the other hand, such a privilege may prevent disclosure of important information, compromising the search for truth and justice – which is what the litigation process fundamentally is supposed to promote. While there are clearly policy reasons on both sides of the argument, it is notable that there is so little litigation over this issue. One would have expected that, given that the 1935 NLRA has been in force for more than seven decades, this issue would have been decided decades ago. The paucity of litigation over this issue may be due to the fact that both management and labor believed that it was obvious that confidential communications between unions and their members or between management and its members would be privileged.

Even if courts ultimately reject the notion of a labor relations privilege, there is substantial authority which nevertheless would protect such information from disclosure under F.R.C.P. 26(c)(1)(G). Several cases have recognized that internal collective bargaining information is considered confidential and analogous to sensitive commercial information, which is not subject to disclosure.

As one scholar has recently explained, "the limits of human foresight prevent us from envisioning every circumstance that a legal rule might cover." In the final analysis, whether confidential labor relations information requires the protection afforded by a privilege depends upon whether this information is deemed by society as essential. Our national labor relations policy is fostered by the encouragement of frank and open communication. The only way such communication can be encouraged is by the recognition of a full labor relations privilege.

256. Indeed, as late as 2002, in McCoy v. Southwest Airlines, Inc., 211 F.R.D. 381 (C.D. Cal. 2002), a federal court appeared completely unaware of the case law that had been developed concerning a labor relations privilege. In a short opinion, the court refused to recognize a lay advocate privilege to bar disclosure of discussions between union representatives and union members concerning grievance hearings under the Railway Labor Act. Id. at 386. The court distinguished cases that recognized a lay advocate privilege because those courts recognized such a privilege where a statute specifically authorized it. Id. at 387 (distinguishing Crisan, 661 P.2d 1073 (recognizing privilege between welfare claimants and lay representatives)).

257. In deciding whether to uphold a subpoena seeking confidential labor relations information, a NLRB administrative law judge reasoned that the need to prevent disclosure was "so self-evident as apparently never to have been questioned." Berbiglia, 233 N.L.R.B. at 1495.

