Buffalo Law Review

Volume 27 | Number 2 Article 5

4-1-1978

NLRB Asserts Jurisdiction over Law Firms: Has the Door Been Opened to Lawyer Unionization?

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NLRB ASSERTS JURISDICTION OVER LAW FIRMS: HAS THE DOOR BEEN OPENED TO LAWYER UNIONIZATION?

In 1958, white collar workers accounted for just twelve percent of total union membership; by 1977 that figure had doubled.[1] A recent National Labor Relations Board (NLRB) decision to assert jurisdiction over law firms reflects—and may accelerate—this trend.[2] Although the decision directly involved only the firm's clerical employees, it potentially affects lawyers as well. Attempts by attorneys to unionize date back to 1948, when the lawyers employed by an insurance company gained NLRB recognition as a bargaining unit.[3] More recently, the lawyers of two legal services corporations have formed unions.[4] If the experience of some other professions provides a guide, substantial numbers of attorneys may wish to join unions. In examining lawyer unionization, this Comment will describe the process by which the NLRB came to assert jurisdiction over law firms, and consider the legal and ethical problems inherent in the development of lawyers' unions.

I. NLRB Decisions Involving Law Firms

The National Labor Relations Act[5] (the Act) grants the Board power to assert jurisdiction over labor disputes. Although this power is coterminous with Congress' power under the Commerce Clause,[6] in order to keep its caseload manageable the Board has chosen to limit its jurisdiction to disputes having a substantial impact on interstate commerce.[7] A 1959 amendment to the Act authorized the Board to decline jurisdiction over labor disputes involving any class of employers that, in the Board's opinion, has an insubstantial effect on com-

1. Kistler, *Trends in Union Growth*, 28 Lab. L.J. 539, 542 (1977).
2. Foley, Hoag & Eliot, 1977-78 NLRB Dec. 30,067 (1977).
3. Lumberman's Mutual Cas. Co., 75 N.L.R.B. 1132 (1948).
4. Camden Regional Legal Servs., 1977-78 NLRB Dec. 30,615 (1977); Wayne County Neighborhood Legal Servs., 1977-78 NLRB Dec. 30,262 (1977).
5. 29 U.S.C. §§ 141-97 (1970).
6. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (The grant of authority to the Board contemplates NLRB jurisdiction over commerce as defined in Article I, section 8 of the Constitution.).
7. From its inception the Board declined jurisdiction over cases it deemed essentially local in character. *See, e.g.*, NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951).

merce.[8] Thus, the Board possesses discretionary authority to decline jurisdiction over law firms as a class, as it has done with other employers.[9] The first representation case in which the employer was a law firm was *Evans & Kunz Ltd.*[10] The firm argued that the Board should decline jurisdiction over law firms generally, and in the alternative, that it should decline jurisdiction over Evans & Kunz because the firm consisted of only four to six attorneys who practiced mostly within Arizona.[11] A majority of the Board suggested that it would not effectuate the purposes of the Act to assert jurisdiction over law firms in any case, but found it unnecessary to reach this broader question to settle the controversy before it. The Board declined jurisdiction, but limited its decision "solely to the facts of the instant case, and not to law firms as a class."[12]

This indefinite state of law was short-lived. One year later, in *Bodle, Fogel, Julber, Reinhardt & Rothschild,*[13] the Board reevaluated the arguments in *Evans,* and this time declined jurisdiction over law firms *as a class.*[14] The rationale of the decision was that law practice is not commerce, and therefore law firms cannot substantially affect interstate commerce. To reach this result, the Board dichotomized legal and commercial activity. It reasoned that a law firm does not engage in "the production, distribution, or sale of goods in commerce . . . . [Its] connection with the flow of commerce is incidental, and its primary services relate to law, not . . . commercial activity."[15] Ac-

8. 29 U.S.C. § 164(c)(1) (1970). This amendment overruled Supreme Court decisions holding that while the Board could decline jurisdiction over particular disputes it exceeded its authority when it excluded whole categories of employers from coverage under the Act, as in Hotel Employees Local 255 v. Leedom, 358 U.S. 99 (1958), and Office Employees Local 11 v. NLRB, 353 U.S. 313 (1957).

9. For example, in Centennial Turf Club, Inc., 192 N.L.R.B. 698 (1971), and Los Angeles Turf Club, Inc., 90 N.L.R.B. 20 (1950), the Board declined jurisdiction over the horseracing industry as a class. Similarly in Seattle Real Estate Bd., 130 N.L.R.B. 608 (1961), it declined jurisdiction over realtors.

10. 194 N.L.R.B. 1216 (1972).

11. The firm's gross volume of business was $300,000. *Id.* Thus it would exceed the present NLRB threshold—$250,000—for jurisdiction over law firms. *See* note 23 *infra.*

12. 194 N.L.R.B. at 1216 (footnote omitted).

13. 206 N.L.R.B. 512 (1973).

14. *Id.* at 514.

15. *Id.* at 513. *Bodle* also cited as secondary concerns the difficulty of establishing a jurisdictional yardstick, and the danger to lawyer-client confidentiality. The opinion was criticized for its concern with problems that were not insurmountable. Note, 7 LOY. L.A.L. REV. 385 (1974); Note, 41 TENN. L. REV. 745 (1974). Subsequently in Foley, Hoag & Eliot, 1977-78 NLRB Dec. 30,067 (1977), the Board resolved both of these problems. It noted that a minimum dollar amount of gross annual revenues has been established as the jurisdictional criterion for all other fields, and stated that one would be established for law firms as well. *Id.* at 30,069. As for confidentiality, the

cording to *Bodle,* it is the clients of lawyers who engage in commerce, not the lawyers themselves. The dissenting opinion pointed out that American business could not function without the legal profession to help it incorporate, procure licenses, obtain governmental approval of rates, and issue stocks and bonds.[16] The dissenters felt that no meaningful distinction could be drawn between such services and "commercial activity."

Although *Bodle* temporarily foreclosed the possibility of unionization by law firm employees,[17] its underlying rationale was soon undercut by the Supreme Court in *Goldfarb v. Virginia State Bar.*[18] The plaintiffs in *Goldfarb* alleged that the Virginia State Bar Association had violated the antitrust law by setting minimum prices for various legal services.[19] As a prerequisite to deciding whether there was an antitrust violation, the Court first had to decide whether law firms engage in interstate commerce. The Court found that examining a land title, the legal service sought by the plaintiffs, is "commerce" when performed for a fee.[20] The Court also reasoned that this service affects "commerce" within the meaning of the Sherman Act. It noted that a title search is a prerequisite to obtaining financing, and that, especially where an FHA or VA mortgage is involved, such financing often involves interstate transactions.[21] Thus the Court in *Goldfarb* affirmed what the dissenters on the *Bodle* Board had said—that legal services are an integral part of American commercial activity.

Goldfarb gave law firm employees grounds for asking the Board to reconsider *Bodle.* In *Foley, Hoag & Eliot,*[22] the Board reviewed a denial of the United File Room Clerks & Messengers' petition to represent the clerical employees of the Boston law firm of Foley, Hoag, & Eliot. Citing *Goldfarb,* the Board found that law firms do engage in

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opinion noted that peculiar situations may arise, as in *Bodle* where one of the law firm's clients was a labor union rivaling the one seeking to represent the firm's employees. However, the Board noted that these problems could be handled on a case by case basis. *Id.* at 30,069 n.12.

16. 206 N.L.R.B. at 515 (Members Fanning & Penello, dissenting).

17. Technically, lawyers still have a first amendment right to organize, but without NLRB recognition they lose the protections of the Act, such as the employer's duty to bargain in good faith and to allow employees to engage in concerted activities, including strikes, without reprimand. Note, *Organizational Rights of Managerial Employees,* 53 N.C.L. REV. 809 (1975).

18. 421 U.S. 773 (1975). In Foley, the Board said that Member Jenkins, the only remaining majority member from the *Bodle* case, suggested this interpretation of *Goldfarb.* Foley, Hoag & Eliot, 1977-78 NLRB Dec. 30,067, 30,068 (1977).

19. 421 U.S. at 778.

20. *Id.* at 787-88.

21. *Id.* at 784.

22. 1977-78 NLRB Dec. 30,067 (1977).

interstate commerce, and that the purposes of the Act would be effectuated by the assertion of jurisdiction over law firms as a class, thereby overruling *Bodle*.[23] To justify its reliance on *Goldfarb,* an antitrust case, the Board noted that Congress intended to regulate labor relations as extensively as it did monopolies,[24] and reasoned therefore that *Goldfarb*'s finding that lawyers engage in interstate commerce should apply to labor relations as well as to antitrust law.

Foley potentially affects two groups of workers: clerical employees of law firms, and staff attorneys. Its impact on the first group is direct. Where an appropriate jurisdictional prerequisite is met,[25] clerical employees will be entitled to exercise the rights enumerated in section 7 of the National Labor Relations Act,[26] including the rights to organize for mutual aid and protection and to engage in collective bargaining. The importance of *Foley* for lawyers, however, is not as clear. To benefit from it, lawyers' unions would have to show that lawyers are "employees"[27] and that their firms are "employers"[28] as defined in the Act. While the term "employees" does include "professionals,"[29] it

23. *Id.* at 30,068. The opinion also noted that a jurisdictional prerequisite would later bet set. This standard was enunciated in Camden Regional Legal Servs., Inc., 1977-78 NLRB Dec. 30,615 (1977), in which the Board declared that law firms grossing $250,000 or more annually will be subject to NLRB jurisdiction.

24. 1977-78 NLRB Dec. 30,067 (1977) (citing Van Camp Sea Food Co., 212 N.L.R.B. 537 (1974)).

25. *See* note 23 *supra.*

26. 29 U.S.C. § 157 (1970).

27. The Act's definition of "employee," in pertinent part, is as follows: "The term 'employee' shall include any employee, . . . but shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by . . . any other person who is not an employer as herein defined." 29 U.S.C. § 152(3) (1970).

28. The relevant portion of the Act defining "employer" states: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2) (1970).

29. The Act defines "professional employee" in this language:

> The term "professional employee" means—
>
> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

29 U.S.C. § 152(12) (1970).

excludes anyone with "supervisory"[30] or "managerial"[31] powers. Analysis of the evolution of these terms will reveal that the distinctions between them are not always clear, creating uncertainty as to whether attorneys will ultimately be allowed to organize under the Act.

II. Some Definitional Problems Posed by the Act

The original Wagner Act did not provide any exclusion for managerial or supervisory employees.[32] As early as 1944, however, the Board recognized that those employees who share close ties with management might have some conflict of interest between their employer and the union. In *Vulcan Corporation*,[33] the employer wanted all employees to be included in the bargaining unit, but the union wanted to exclude some employees whom it felt were more loyal to management. The Board held that one employee who spent seventy-five percent of his time away from the plant buying timber, and who was accompanied on his trips by a timber superintendent, should not be included in the bargaining unit because of "his peculiar relationship to management, and in view of the fact that his interests are apparently different from those of the production and maintenance employees."[34] In subsequent cases, the Board continued to exclude those whom it considered to be supervisory or managerial.[35]

The exclusion of supervisory employees was interrupted by *Packard Motor Car Co. v. NLRB*,[36] in which the Supreme Court affirmed a Board decision to assert jurisdiction over a group of foremen. These individuals had organized as a unit of the Foreman's Association of America, which represented exclusively supervisory employees. Packard's foremen were responsible for maintenance of the quantity and quality of production; they had authority to penalize rank and file employees for violations of discipline, and to initiate recommendations for promotion, demotion, and discipline.[37] The employer argued that its foremen were not employees within the meaning of the Act.

30. "The term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . . " 29 U.S.C. § 152(3) (1970).

31. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

32. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152(3) (1970)).

33. 58 N.L.R.B. 733 (1944).

34. *Id.* at 736.

35. *See* Note, *Will the Real Managerial Employees Please Stand Up?* 9 Loy. L.A.L. Rev. 92, 95-97 (1975), and cases cited therein.

36. 330 U.S. 485 (1947).

37. *Id.* at 487.

At that time there was no statutory exclusion of supervisors, but the employer reasoned that section 2(2) of the Act, defining "employer" as "any person acting in the interest of an employer directly or indirectly," should also include foremen.[38] The Court disagreed with this interpretation, however, noting that, by virtue of their employment, *all* employees act in the employer's interests. Instead, the Court emphasized that the term "employees" includes "any employee,"[39] and that the foremen's interests in pay and working conditions may be adverse to the employer's interests.[40] Therefore, the Court held that foremen should not be denied the right to bargain collectively to protect collective interests.

Congress responded to *Packard* by including in the Taft-Hartley Act a specific exclusion for "supervisors."[41] The exclusion failed to mention "managers," those who formulate the company's policy but exercise no direct control over employees. In *Swift & Co.*,[42] decided in 1956, the Board cleared up this possible confusion by deciding that "[i]t was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. . . . [R]epresentatives of management may not be accorded bargaining rights under the Act."[43]

The status of managerial employees was thus clear, but the question of which employees are managerial was not. No precise definition has since emerged. In 1970, the Board acknowledged this confused state of affairs in *North Arkansas Electric Cooperative, Inc.*,[44] and outlined its reasons for excluding managerial employees:

> [O]ur concern has been whether certain non-supervisory employees have a sufficient community of interest with the general group or class of employees constituting the bulk of a unit so that they may

38. *Id.* at 488 (quoting National Labor Relations Act, ch. 372, § 2(2), 49 Stat. 450 (1935)) (current version at 29 U.S.C. § 152(2) (1970)).

39. *Id.* (quoting 29 U.S.C. § 152(3) (1935)).

40. *Id.* at 488-90.

41. "The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1970). Supervisor is defined in the Act as:

> 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 responsibility 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.

Id. § 152(11).

42. 115 N.L.R.B. 752 (1956).

43. *Id.* at 753-54 (footnote omitted).

44. 185 N.L.R.B. 550 (1970).

> appropriately be considered a part thereof. Where the interests of certain employees seemed to lie more with those persons who formulate, determine, and oversee company policy than with those in the proposed unit who merely carry out the resultant policy, we have held them to be excluded, and have commonly referred to such excluded persons as "managerial employees," without ever having attempted a precise definition of that term.[45]

The opinion went on to suggest that the "community of interest" test was not satisfactory because an employee might have no community of interest with a proposed bargaining unit and still be entitled to protections of the Act. It suggested that the decision to exclude an employee should focus on whether the employee has any authority to speak for the employer in the context of labor relations. The Board found nothing in the record to suggest that the employee in question participated in the "formulation, determination, or effectuation of policy *with respect to employee relations matters.*"[46] It held that since there was no conflict of interest between the proper performance of the employee's job and the implementation of his right to engage in concerted activity, he would not be excluded from the Act. This decision to exclude managerial employees only when their job duties required them to participate in labor policy greatly clarified the definition of "manager."

Unfortunately, the Board's efforts were soon thwarted in *NLRB v. Bell Aerospace*,[47] a 5-4 decision in which the Supreme Court held that the Board's limitation of the managerial-employees exception to only those employees with authority to formulate labor policy was too narrow. The majority viewed the Taft-Hartley amendment excluding supervisors as evidence of Congress' intent to exclude all persons allied with management,[48] and concluded that a group of employees who had discretion to commit the employer's credit and to select the company's suppliers might be sufficiently allied to warrant exclusion. The Court remanded to the Board to determine whether the purchasing employees were managerial. On remand, the Board held that the definition of managerial included "those who formulate and effectuate management policies by expressing and making operative the deci-

45. *Id.*
46. *Id.* at 550-51.
47. 416 U.S. 267 (1974).
48. The dissent argued that the legislative history called for the opposite result. *See* 416 U.S. at 295-311 (dissenting opinion). *See also* Note, 24 CATH. U.L. REV. 118, 120-23 (1974); Note, *supra* note 35, at 99-108 (discussing the Court's interpretation of Taft-Hartley).

sions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy."[49] Using this test, the Board found that the purchasing employees were not managerial because their discretion in buying and obtaining credit was subject to strict guidelines of the employer.

The Board's definition of "managerial employees" closely resembles the Act's definition of "professional employees," who are specifically covered by the Act. A "professional employee" includes "any employee engaged in work . . . involving the consistent exercise of discretion and judgment in its performance."[50] Similarly, managerial employees are those who have "discretion in the performance of their jobs *independent of their employer's policy.*"[51] The distinction would appear to be that discretion "independent" of the employer's policy makes one managerial, while "mere" discretion renders one professional.

There are no Board or Court decisions applying the "managerial" exclusion to lawyers. A note in *Bell* states that " 'professional employees' . . . are plainly not the same as 'managerial employees.' . . . [T]he term 'professional employees' refers to 'such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants.' "[52] This optimistic note suggests that lawyers are professional, not managerial, and that in any case the distinction between the two groups is clear. Several commentators, however, suggest that the distinction is not at all obvious.[53] Future case law may provide guidelines concerning the types of discretion that would make lawyers "managers" within the meaning of the Act. Such discretion might include the attorneys' authority to make settlements on their own,[54] or to participate in policy decisions such as whether to advertise, what fees to charge, or what cases or clients the firm should take on.

The statutory exclusion of "supervisors" from the protections of

49. Bell Aerospace, 219 N.L.R.B. 384, 385 (1975) (citing General Dynamics Corp., 213 N.L.R.B. 851, 857 (1974)).

50. 29 U.S.C. § 152(12) (1970).

51. Bell Aerospace, 219 N.L.R.B. 384, 385 (citing General Dynamics Corp., 213 N.L.R.B. 851, 857 (1974)) (emphasis added).

52. 416 U.S. at 285 n.13 (quoting H.R. Cong. Report No. 510, 80th Cong., 1st Sess., 36, *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135, 1141).

53. *See* Note, *supra* note 48, at 118; Note, *supra* note 35; Note, *Organizational Rights of Managerial Employees,* 53 N.C.L. REV. 809 (1975).

54. In Lumberman's Mutual Cas. Co., 75 N.L.R.B. 1132 (1948), the Board found some insurance company lawyers to be protected by the Act, relying in part on their lack of authority to make out-of-court settlements.

the Act may also hinder lawyer unionization.[55] (Recall that "supervisors" directly regulate other employees, whereas managers formulate company policy but have no direct control over employees.)[56] As unionization has become more common among white collar workers, the Board has been forced to consider the application of the supervisory exclusion to such professionals as pharmacists,[57] engineers,[58] and university professors.[59] In these cases, the Board must decide whether the employee's authority is no more than an inherent aspect of professional status, or is supervisory authority within the meaning of the Act.[60] For example, registered nurses direct the work of lesser-trained employees in the care of patients, yet they have been held to be covered by the Act.[61] Where the nurses' authority can affect job status and pay of other employees, however, they have been excluded.[62]

Despite the exclusions of managers and supervisors, there have been a few cases in which the Board has found lawyers to be "employees" within the meaning of the Act. In *Lumberman's Mutual Casualty Co.*,[63] the Board held that attorneys who work for an insurance company but who lack discretion to make any settlements on their own are covered by the Act. Later, in *Fordham University*[64] and *Syracuse University*,[65] the Board deemed the faculties of two law schools to be bargaining units appropriate for coverage under the Act. In the time since it decided *Foley, Hoag, & Eliot,* the Board has not heard any cases involving lawyer unionization in private law firms, but it has decided two cases involving attorneys working for legal services corporations. In the first, *Wayne County Neighborhood Legal Services*,[66] several attorneys who acted in a supervisory capacity voluntarily excluded themselves from the bargaining unit,[67] and the em-

55. *See* note 41 *supra* for the definition of "supervisor."
56. *See* text following note 41.
57. *See, e.g.*, Musselman's Apothecary, 188 N.L.R.B. 105 (1971).
58. *See, e.g.*, Western Elec. Co., 126 N.L.R.B. 1346 (1960).
59. *See, e.g.*, Adelphi Univ., 195 N.L.R.B. 639, 641-46 (1972); Cornell Univ., 183 N.L.R.B. 329 (1970) (the Board's first assertion of jurisdiction over private, nonprofit universities).
60. The overlap between the terms "professional" and "supervisor," and the Board's efforts to apply these terms, are discussed in Finkin, *The Supervisory Status of Professional Employees,* 45 FORDHAM L. REV. 805 (1977).
61. *See, e.g.*, Doctor's Hosp. of Modesto, Inc., 183 N.L.R.B. 950, 951 (1970).
62. *Id.* at 951-52.
63. 75 N.L.R.B. 1132 (1948).
64. 193 N.L.R.B. 134, 137 (1971).
65. 204 N.L.R.B. 641, 643 (1973). The Board noted that a bargaining unit of law professors and other professors would also be appropriate. *Id.*
66. 1977-78 NLRB Dec. 30,262 (1977).
67. *Id.* at 30,263.

ployer did not argue that the other lawyers served in a supervisory or managerial capacity.[68] Similarly, in *Camden Regional Legal Services,*[69] the employer did not contend that the lawyers were not "employees" within the meaning of the Act.[70] Thus no litigation to date focused on the question of when, if ever, a lawyer working for a law firm or legal aid office will be outside the Act's definition of "employee" because of managerial or supervisory authority.

To benefit from *Foley,* lawyers must not only be "employees" as defined by the Act, but must also work for an "employer" as defined in section 2(2), which exempts "the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof."[71] Attorneys employed by a city, county, or state attorney's office or by a public defender's office are thus excluded from the protection of the Act,[72] while those employed by private law firms are not.

Section 2(2)'s effect on quasi-governmental employers is less certain. The recent Board decisions concerning legal services corporations may provide some guidance. In *Wayne County Neighborhood Legal Services,* the employer was a non-profit corporation funded by Legal Services Corporation, a Congressionally-created organization. The Act of Congress which established Legal Services Corporation provides that it is not an agent or instrumentality of the federal government, and that its employees are not employees of the government.[73] Relying on this, the Board held that section 2(2) did not exclude Wayne County Legal Services from the Act. This decision was closely followed in *Camden Regional Legal Services,* in which the employer was also a non-profit corporation funded by Legal Services Corporation. Here, though, state and local governments also helped to fund the corpora-

68. *Id.* The employer did contend, however, that employees classified as Attorney I (recent law school graduates not yet admitted to the Bar) lacked a community of interest with other employees and should therefore be excluded. The board disagreed. *Id.* at 30,263-64.

69. 1977-78 NLRB Dec. 30,615 (1977).

70. Although the employer did not dispute the "employee" status of the attorneys, the NLRB could not have exercised jurisdiction without first determining that the petitioners were "employees."

71. 29 U.S.C. § 152(2) (1974). Technically, § 152(3) defining "employee" excludes those who do not work for an "employer" as defined in § 152(2).

72. Public employees can, however, take advantage of state and federal statutes authorizing them to form employee groups. *See* Exec. Order No. 11,491, 3 C.F.R. 191 (1969). *See also* Bornstein, *Perspective on Change in Local Government Collective Bargaining,* 28 LAB. L.J. 431 (1977) (discussing recent trends in public employee unionism).

73. 42 U.S.C.A. § 2996d(e)(1) (1977).

tion. Nonetheless, the corporation was deemed a private employer not excluded by section 2(2). Thus, for purposes of section 2(2), financial contributions from a political subdivision do not make the corporation a "wholly owned government corporation."[74]

III. Ethical Considerations

A further impediment to lawyer unionization is the possibility that such activity might be forbidden by the American Bar Association's Code of Professional Responsibility. Although ABA standards do not affect the Board's power to assert jurisdiction, they could nonetheless effectively deter lawyers from unionizing.

The ABA's first pronouncement concerning lawyer unionization was a response to the successful attempt of several lawyers employed by an insurance company to gain recognition as a bargaining unit.[75] The Committee on Professional Ethics issued Formal Opinion 275,[76] which said that lawyer unionization would violate six of the Canons of Ethics. The committee cited as potential evils: conflict of interest between client and union,[77] divulgence of confidential information,[78] price-fixing,[79] and, in the event of a strike, failure to maintain the

74. Similarly, in an advisory opinion, Legal Servs. for Northwestern Pa., 1977-78 NLRB Dec. 30,438 (1977), the Board stated that if the jurisdictional minimum were met, it would assert jurisdiction over the employer, even though it was a noncommercial, nonprofit enterprise receiving 25% of its funding from the state of Pennsylvania, and the other 75% from the federal government. *Id.* at 30,439 n.2.

75. Lumberman's Mutual Cas. Co., 75 N.L.R.B. 1132 (1948).

76. ABA Comm. on Professional Ethics, Opinions, No. 275 (1947).

77. ABA Canons of Professional Ethics, No. 6 provides in part:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

78. *Id.* No. 37 provides in part:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

79. *Id.* No. 12 provides in part:

> In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

dignity of the profession,[80] and unjustified withdrawal from a case.[81]

For almost 20 years, Formal Opinion 275's condemnation of lawyer unionization stood as the ABA's official position. During that time an increasing number of governmental units recognized the right of public employees to organize and bargain collectively.[82] These public employee organizations included a higher proportion of white collar and professional workers than had been organized in the private sector.[83] Since the employees' elected representatives were exclusive bargaining agents, lawyers were deprived of any means of negotiating salary, hours, and conditions of employment. Thus, publicly employed lawyers were the first to put pressure upon the ethics committee to modify its earlier condemnation of unionization. However, in Opinion 917,[84] the committee reaffirmed its earlier stand and noted that Canon 35,[85] which prohibited the exploitation of the services of a lawyer by any lay agency, would be in jeopardy as long as lawyers belonged to unions with non-lawyers.

Although a temporary obstacle to lawyer unionization, Opinion 917 provided a basis for limiting Opinion 275. If lawyers could not join unions because of exploitation by non-lawyers, could they form unions having only lawyers? Yes, said the committee in Opinion 986,[86] as long as the lawyers adhered to the other canons. In subsequent opinions, the ethics committee enlarged the situations in which lawyers could ethically unionize.[87]

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80. *Id.* No. 29 provides in part "[the lawyer] should strive at all times to uphold the honor and to maintain the dignity of the profession."

81. *Id.* No. 44 provides in part:

> The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect.

82. Between 1956 and 1968 public employee unionism expanded from 915,000 to 2,155,000. Gitlow, *Public Employee Unionism in the United States: Growth & Outlook,* 21 LAB. L.J. 766 (1970).

83. *Id.* at 768.

84. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 917 (1966).

85. ABA CANONS OF PROFESSIONAL ETHICS, No. 35, provides:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corprate, which intervenes between client and lawyer. . . . He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.

86. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 986 (1967).

87. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1029 (1968). The committee decided that it was immaterial whether the union's bylaws required adherence to the Canons of Ethics as long as the lawyers acted in accordance with them. *Id.* Later, the committee approved of law professors' joining a union with non-lawyers,

The 1969 revision of the Canons of Ethics[88] continued the trend towards formal ABA acceptance of attorney unionization. In the preface to the Code of Professional Responsibility, the authors note that "[c]hanged and changing conditions in our legal system and urbanized society require new statements of professional principles."[89] Ethical Consideration 5-13 of the Code states:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.[90]

Since the adoption of the new Code, the Committee on Professional Ethics has issued Informal Opinion 1325,[91] the most recent attempt to deal with the issue of lawyer unionization. The opinion specifically states that "[t]he Code of Professional Responsibility contains no Disciplinary Rule that specifically prohibits membership by lawyers in unions or associations representing lawyers."[92] The committee's opinion distinguishes between membership in an employee organization and participation in acts which would violate other disciplinary rules, such as failing to protect a client's confidences, or neglecting a legal matter by lengthy participation in a strike. The issue today is not whether lawyers may unionize,[93] but to what extent they may engage in concerted activities to achieve better salaries and terms of employment.

CONCLUSION

The NLRB's decision in *Foley, Hoag & Eliot* to assert jurisdiction over law firms comports with two other trends: increased membership in unions by white collar workers and professionals, and the

noting the absence of any attorney-client relationship that might be compromised. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1060 (1967).

88. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT. (1976).

89. *Id.*

90. *Id.* at EC 5-13.

91. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1325 (1975).

92. *Id.*

93. *See* Note, *The Unionization of Attorneys,* 71 COLUM. L. REV. 100, 111-17 (1971) (discussing the problems of lawyer unionization under the Canons of Ethics).

tendency of judicial bodies to dispense with special treatment of the legal profession.[94] *Foley* has raised the possibility that privately-employed attorneys may unionize under the Act. Furthermore, the ABA's decision to sanction lawyer unionization has removed another, perhaps greater, impediment to the formation of lawyers' unions. Although some concerted activities, such as strikes, would still violate the Code of Professional Responsibility, the bulk of union activity, especially collective bargaining, may now be carried on without fear of reprimand.

The extent to which *Foley* will ultimately affect the legal profession, however, depends on whether attorneys are held to be "employees" within the meaning of the Act. Their inclusion hinges on whether the NLRB finds that privately-employed lawyers are "professional," and thus included, or "managerial," and therefore excluded. Because the definitions overlap, the distinction between the two categories is difficult to pinpoint. The only distinction to be gleaned from the decisions is a formalistic one between having discretion in the performance of one's job and having discretion "independent" of the policies of one's employer. Clearly, the rights of lawyers to form unions should not depend on such an evanescent distinction. Rather, the Act's protections should be denied only when the attorney's loyalty to the employer would interfere with effective participation in union activities. Recent representation cases in which lawyers were found to be appropriately included within a bargaining unit indicate that the Board does consider lawyers to be "employees" within the meaning of the Act, at least in some cases. These decisions, coupled with the ABA's approval of lawyer membership in unions, signal a green light for future lawyer unionization.

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94. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (lawyers have a first amendment right to advertise despite bar association rules to the contrary); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (establishment of a minimum fee schedule for legal services violates antitrust law).