

NOTES

THE RIGHT OF ATTORNEYS TO UNIONIZE, COLLECTIVELY BARGAIN, AND STRIKE: LEGAL AND ETHICAL CONSIDERATIONS*

I. INTRODUCTION

Some analysts believe that the birth of the new century will witness the death of the organized labor movement.¹ During the past two decades, participation in organized labor unions has declined dramatically.² Historically, the labor movement has derived its strength from blue-collar employees.³ The decrease in the number of blue-collar employees in the workforce is the principle cause of the decline in union membership.⁴ During this same period, however, the rate of unionization among professional employees has substantially increased.⁵ Doctors, nurses, architects, journalists, musicians, pharmacists, and even lawyers now belong to unions.⁶ Indeed, professional employees have been characterized as the “primary hope for the future of the American labor

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1. See Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 17 (1998) (“Many people believe that labor organizations are outmoded institutions providing representational services no longer needed by individuals employed by enlightened business enterprises.”) [hereinafter Craver, *Why Labor Unions*].

2. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 400 (1992); see also David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689, 690 (1990) [hereinafter Rabban, *American Labor Law*].

3. See Craver, *Why Labor Unions*, *supra* note 1, at 25.

4. See Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. REV. 987, 996 (1989); Marina Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 385 (1982).

5. See Rabban, *American Labor Law*, *supra* note 2, at 690; see also Sockell, *supra* note 4, at 995; Angel, *supra* note 4, at 385.

6. See Bruce Roepe, *Law, Lawyers & Labor*, OR. ST. B. BULL., June 1997, 21, at 21.

movement.”⁷

This Note argues that lawyers in both the public and private sectors have an interest in joining the current trend toward unionization among professional employees. Part II identifies the conditions under which lawyers qualify as “employees” and, thus, have the right under federal and state law, to organize and collectively bargain. Part III examines specific workplace problems that might lead attorneys to seek relief in collective action. Part IV considers circumstances in which workplace problems undermine lawyers’ ability to comply with their ethical obligations as set forth in rules of professional conduct. Part V discusses the ways in which attorneys who belong to unions can use their organizational power to achieve their professional goals.

II. THE RIGHT TO ORGANIZE

This Part identifies the conditions under which attorneys have the right to unionize and collectively bargain. The first section notes the distinction between private and public sector employees with respect to this right and discusses the status of private sector professional employees under the National Labor Relations Act (“NLRA” or “Act”).⁸ The second section focuses on administrative and judicial rulings that have recognized the circumstances in which attorneys are entitled to protection under federal and state law.

A. Professional Employees Under the National Labor Relations Act

The NLRA, the basic federal law governing collective bargaining, applies only to employees in the private sector.⁹ Public sector employees, on the other hand, are covered by state and federal law, which incorporates many of the doctrines of the NLRA model.¹⁰ For employees who qualify as “professionals,” the relevant distinction for coverage is between those who have supervisory or managerial authority and those who lack such authority.¹¹ In the private sector, any

7. Rabban, *American Labor Law*, *supra* note 2, at 690.

8. See 29 U.S.C. §§ 151-169 (1994).

9. See 29 U.S.C. § 152(2) (excluding the United States and “any State or political subdivision thereof” from the definition of “employer” and thus from NLRA coverage).

10. See *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1678-80 (1984) (explaining how state legislatures began enacting statutes in the late 1950s and 1960s enabling collective bargaining by state, county, and municipal employees).

11. See David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775, 1782 (1989) [hereinafter Rabban, *Distinguishing*

professional employee who is not also a supervisor or manager is on the side of labor and entitled to protection under the NLRA.¹² However, many public employees who would be excluded as supervisors or managers under the NLRA are allowed to bargain under protection of state law.¹³ According to rulings of the National Labor Relations Board ("NLRB" or "Board") and the courts, attorneys in both the public and private sectors are subject to the rules governing professional employees.¹⁴

The NLRA is this country's most significant legislation protecting a worker's right to collectively bargain. When the NLRA was enacted in 1935, it gave protection to anyone who qualified as an "employee."¹⁵ No distinction was made between professional and nonprofessional employees.¹⁶ Subsequent to the passage of the NLRA, employers argued that professional, supervisory, and managerial employees should be excluded from the Act's definition of an employee "because of their special relationships with management."¹⁷

In 1947, Congress responded by passing the Taft-Hartley Amendments, which excluded "supervisors" from the Act's protection.¹⁸ The term "supervisor" describes an individual who has 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."¹⁹ A professional employee who does not engage in any of these twelve activities is not a supervisor within the meaning of the Act.

The key to the managerial exception is the requirement that managerial employees participate in the determination of company policy.²⁰ For example, an employee who makes decisions about wage rates,²¹ determines the conduct of labor relations,²² has authority to make

Excluded Managers].

12. See *id.* at 1799; see also Roepe, *supra* note 6, at 22.

13. See Rabban, *Distinguishing Excluded Managers*, *supra* note 11, at 1780 n.13.

14. See discussion *infra* Part II.B.

15. See 29 U.S.C. § 152(3) (stating who qualifies as an "employee" under the Act).

16. Twelve years later, the Supreme Court stated that supervisors are employees covered by the Act and that it was "for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947).

17. Rabban, *Distinguishing Excluded Managers*, *supra* note 11, at 1782.

18. See 29 U.S.C. § 152(11).

19. *Id.*

20. See *Chrysler Corp.*, 58 N.L.R.B. 239, 247 (1944); *Armour & Co.*, 54 N.L.R.B. 1462, 1465 (1944).

21. See, e.g., *Elec. Auto Lite Co.*, 57 N.L.R.B. 723, 725-26 (1944).

22. See, e.g., *Yale & Towne Mfg. Co.*, 60 N.L.R.B. 626, 628-29 (1945).

financial commitments,²³ or participates in the selection of production techniques,²⁴ has been determined to be a managerial employee. These responsibilities are similar to those of supervisors, but the Board has held that there is a difference between supervisors and managers: supervisors have the authority to make personnel decisions while managers do not.²⁵ Thus, a professional employee who does not participate in the determination of company policy is not a managerial employee for the purposes of the Act. As the Supreme Court stated in *NLRB v. Yeshiva University*,²⁶ "an application of the managerial exclusion . . . would [not] sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. . . . Only if an employee's activities fall outside the scope of the duties routinely performed by . . . professionals will he be found aligned with management."²⁷

At the same time that Congress excluded "supervisors" and "managers" from coverage under the NLRA, Congress amended the Act explicitly to cover "professional employees."²⁸ The NLRA defines a "professional employee" as:

[A]ny 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

In further identifying the employees covered by this definition, the NLRB, in a series of decisions, has reasoned that professionals have interests and functions that differ from those of traditional rank-and-file employees,³⁰ and often work in different departments.³¹ In addition, they

23. See, e.g., *Inland Steel Container Co.*, 56 N.L.R.B. 138, 141 (1944).

24. See, e.g., *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1496 (1944).

25. See *Chi. Daily News, Inc.*, 56 N.L.R.B. 274, 278 (1944).

26. 444 U.S. 672 (1980).

27. *Id.* at 690.

28. See Rabban, *Distinguishing Excluded Managers*, *supra* note 11, at 1794.

29. 29 U.S.C. § 152(12)(a).

30. See *Gen. Cable Corp.*, 57 N.L.R.B. 1651, 1652-55 (1944); *Oliver Farm Equip. Co.*, 53

tend to have greater training,³² skill,³³ responsibility,³⁴ autonomy and discretion,³⁵ as well as higher salaries.³⁶

While the Taft-Hartley Amendments created ambiguities in distinguishing supervisors and managers from rank-and-file professional employees, a professional employee is not per se excluded from coverage under the NLRA.³⁷ As long as a professional employee is outside the supervisory and managerial exceptions, he or she has all the rights of a nonprofessional employee.³⁸ These include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of [his or her] own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."³⁹

B. When an Attorney is Neither a Supervisor Nor a Manager

Like other professional employees in the private sector, attorneys are subject to rulings of the NLRB with respect to their status as "employees." The NLRB has addressed the question of when an attorney is neither a supervisor nor a manager primarily in decisions involving private, nonprofit legal aid organizations. In *Neighborhood Legal Services, Inc.*⁴⁰ the Board found that attorneys employed as "unit heads" by a nonprofit organization engaged in the provision of legal services to indigent clients were neither supervisors nor managers, and were thus properly included in a bargaining unit as employees.⁴¹ The attorneys in question engaged in such activities as interviewing clients, researching the facts and law of their particular cases, preparing court pleadings,

N.L.R.B. 1078, 1086-87 (1943).

31. See *Micamold Radio Corp.*, 58 N.L.R.B. 888, 890 (1944); *Permanente Metals Corp.*, 45 N.L.R.B. 931, 934 (1942).

32. See *Gen. Cable Corp.*, 57 N.L.R.B. at 1653; *Oliver Farm Equip. Co.*, 53 N.L.R.B. at 1087; *Allis-Chalmers Mfg. Co.*, 4 N.L.R.B. 159, 171 (1937).

33. See *Permanente Metals Corp.*, 45 N.L.R.B. at 934; *Warfield Co.*, 6 N.L.R.B. 58, 64 (1938); *Allis-Chalmers Mfg. Co.*, 4 N.L.R.B. at 171.

34. See, e.g., *Warfield Co.*, 6 N.L.R.B. at 64.

35. See, e.g., *Shell Dev. Co.*, 38 N.L.R.B. 192, 196 (1942).

36. See *Gen. Cable Corp.*, 57 N.L.R.B. at 1654; *Warfield Co.*, 6 N.L.R.B. at 64.

37. See *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 271 (8th Cir. 1984); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1551 (D.C. Cir. 1984); *Meredith Corp. v. NLRB*, 679 F.2d 1332, 1342 (10th Cir. 1982); *NLRB v. Actors' Equity Ass'n*, 644 F.2d 939, 943 (2d Cir. 1981).

38. See 29 U.S.C. § 157.

39. *Id.*

40. 236 N.L.R.B. 1269 (1978).

41. See *id.* at 1273.

negotiating settlements, and contacting administrative agencies.⁴² As unit heads, the attorneys represented clients in court, had administrative responsibility for various record-keeping functions, communicated between management and the staff members of their units, and assumed professional responsibility for the non-attorneys' work, as required by the ethics rules.⁴³ In addition, the unit heads were responsible for monitoring timecards of both the professionals and nonprofessionals in their units.⁴⁴

The Board rejected the employer's contention that the unit heads had developed into a "first layer of supervision over the operation of the units."⁴⁵ In so finding, the Board noted that the attorneys were without the power to "hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of other employees" within their units and lacked the authority to recommend any of these actions.⁴⁶ Further, although the unit heads performed certain administrative functions for the units, such as validating timecards and preparing unit reports, these tasks were found to be of a routine clerical nature.⁴⁷ Moreover, to the extent that the unit heads guided the work of legal assistants and paralegals, this did not "confer supervisory status within the meaning of Section 2(11) of the Act, but rather [was] an incident of their professional responsibilities as attorneys and thereby as officers of the court."⁴⁸ The Board concluded that the unit heads were not supervisors within the meaning of the Act.⁴⁹

The Board further held that the unit heads were not managerial employees.⁵⁰ Although the board of directors sometimes sought the opinions of the unit heads, these attorneys played "at best an informational or professional advisory role" and thus neither determined, established, nor carried out management direction or policy.⁵¹ The Board

42. See *id.* at 1270. Based on these activities, the parties stipulated, and the Board agreed, that the attorneys, designated as "staff attorneys," were "professional employees" within the meaning of the Act. They performed work that was "predominantly intellectual and varied in character," exercised "discretion and independent judgment in dealing with clients and handling legal caseloads[.]" and had "completed courses of specialized study at institutions of higher learning which they appl[ied] in their daily work." *Id.*

43. See *id.* at 1271-72.

44. See *id.* at 1272.

45. See *Neighborhood Legal Servs., Inc.*, 236 N.L.R.B. at 1272.

46. *Id.* (referring to the language of the Act).

47. See *id.*

48. *Id.* at 1273.

49. See *id.*

50. See *Neighborhood Legal Servs., Inc.*, 236 N.L.R.B. at 1273.

51. *Id.*

explained:

It is clear from the legislative history of the Taft-Hartley Act of 1947 . . . that managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management . . . professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status.⁵²

In another decision involving legal aid lawyers, the Board considered whether “supervising attorneys,” as distinguished from “managing attorneys,” were supervisors within the meaning of the Act.⁵³ Both the “supervising attorneys” and the “managing attorneys” were employed by a private nonprofit corporation offering legal assistance to the poor in Maryland.⁵⁴ According to their job description, the supervising attorneys had responsibility for supervising managing attorneys, legal assistants, and clerical employees; organizing the office work; interviewing potential employees; and overseeing the caseloads of junior associates and assessing their quality of work.⁵⁵

The Board noted that the administration of the employees in the units by the supervising attorneys was “indistinguishable from that provided by managing attorneys,” who were found not to be supervisors.⁵⁶ Both allocated work and provided the type of guidance that senior attorneys lacking supervisory authority gave junior associates and paralegals.⁵⁷ The Board found, however, that the supervising attorneys had greater authority than the managing attorneys, and identified two indicia of that authority.⁵⁸ First, the supervising attorneys had “authority ‘responsibly to direct’ employees” and exercised this authority without seeking the approval of senior management.⁵⁹ Second, the supervising attorneys had the authority to recommend “the

52. *Id.* at 1273 (quoting Gen. Dynamics Corp., Convair Aerospace Div., San Diego Operations, 213 N.L.R.B. 851, 857-58 (1974)).

53. *See* Legal Aid Bureau, Inc., 319 N.L.R.B. 159, 160 (1995).

54. *See id.* For collective bargaining purposes, many of the employees of the Legal Aid Bureau were represented by the National Organization of Legal Service Workers. *See id.*

55. *See id.* at 161.

56. *Id.*

57. *See id.*

58. *See* Legal Aid Bureau, Inc., 319 N.L.R.B. at 162.

59. *See id.* (quoting 29 U.S.C. § 152(11)).

'discharge . . . or discipline' of the employees in a situation that 'require[d] the use of independent judgment.'"⁶⁰ The Board concluded that "[t]hrough both the job description for the supervising attorney position and the application process, persons selected by the Bureau to be supervising attorneys [were] told that they [had] authority that [made] them supervisors within the meaning of Section 2(11) of the Act."⁶¹

In *Northwest Florida Legal Services, Inc.*,⁶² the Board again addressed the question of an attorney's status in a nonprofit legal services organization.⁶³ The attorney, who was the head of a litigation unit, wrote evaluations of a paralegal and a secretary, reviewed files, and directed the work of her secretary.⁶⁴ The Board found that the "record as a whole does not establish that [she] had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of other employees."⁶⁵ Rather, her "exercise of responsibilities in relation to other employees was routine in nature . . . [and] [h]er direction of [the] work of nonprofessional employees was that common in a professional situation."⁶⁶ Ultimately, the Board concluded that the attorney was not a supervisor because her duties were not those included section 2(11) of the Act.⁶⁷

In the public sector, federal and state law determines when attorneys and other professionals have the right to organize and collectively bargain.⁶⁸ In a recent decision, attorneys employed by state government agencies in Florida were given the right to bargain collectively when the Florida Supreme Court struck down a 1994 law which prohibited public sector attorneys from organizing.⁶⁹ The employees were members of the State Employees Attorneys' Guild and were employed in agencies such as the Department of Insurance, the comptroller's office, Department of Transportation, and the Department of Business and Professional Regulations.⁷⁰ The court noted that although "the state constitutional right to work provision contemplate[d]

60. *Id.* (quoting 29 U.S.C. § 152(11)).

61. *Id.* at 162-63.

62. 320 N.L.R.B. 92 (1995).

63. *Id.* at 93-94.

64. *See id.* at 93.

65. *Id.* (referring to the language of the Act).

66. *Id.*

67. *See Northwest Fla. Legal Servs., Inc.*, 320 N.L.R.B. at 93-94.

68. *See Developments in the Law*, *supra* note 10, at 1678-80.

69. *See Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1036 (Fla. 1999).

70. *See Carol Marbin Miller, Fla. Attorneys Clear Way for Collective Bargaining*, MIAMI DAILY BUS. REV., May 28, 1999, at <http://www.law.com/cgi-bin/gx.cgi/AppLog>.

legislative implementation . . . [t]he Legislature [could not] . . . abridge public employees' right to bargain collectively, absent a compelling state interest making it necessary to do so."⁷¹ Moreover, the court rejected the state's argument that allowing public sector attorneys to unionize would jeopardize their loyalty to their employer.⁷² Accordingly, the court held that the state statute implementing a complete ban on all public sector attorney collective bargaining was unconstitutional.⁷³ In reaching its decision, the court noted that other jurisdictions "permit[ted] state-employed attorneys to bargain collectively without any apparent harm to the attorney-client relationship . . . [and that] [a]ttorneys employed by the federal government," and by the NLRB itself, engage in collective bargaining.⁷⁴

In another case involving public sector employees, *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*,⁷⁵ the Illinois Supreme Court held that assistant public defenders employed by the circuit court were managerial employees and therefore not subject to the collective bargaining provisions of the Illinois Public Labor Relations Act.⁷⁶ In reaching its finding, the court stated that the assistant public defenders possessed "significant authority and discretion to discharge the mission of the public defender's office" and were, "[i]n effect, . . . surrogates for the public defender."⁷⁷ Specifically, the assistant public defenders had independent judgment, participated in promoting the goals of the public defender's office, and had professional interests that were "fundamentally identical to [those] of the public defender."⁷⁸

These administrative and judicial rulings suggest the parameters of the supervisory and managerial exceptions with respect to attorneys in the private and public spheres. When they perform purely administrative duties, have no power to discipline employees under their supervision, lack policymaking authority and, in general, are not allied with the interests of their employers, attorneys have the right to organize and collectively bargain.

Among private sector attorneys, it seems clear that partners in law firms, chief counsels of corporations, and chief attorneys in legal aid

71. *Chiles*, 734 So. 2d at 1032-33.

72. *See id.* at 1034-35.

73. *See id.* at 1037.

74. *Id.* at 1034-35.

75. 687 N.E.2d 795 (Ill. 1997).

76. *See id.* at 798.

77. *Id.* at 800.

78. *Id.* at 797.

organizations would not be covered under the NLRA. On the other hand, staff attorneys employed under various job descriptions, private court-appointed counsel, and possibly even associates in law firms presumably would be entitled to protection. In the public sector, although assistant public defenders were found in one case to fall within the managerial exception, it is likely that some attorneys employed in public defender's offices would qualify as rank-and-file employees and thus be entitled to protection under relevant state laws. Similarly, attorneys employed in staff positions in government agencies presumably would belong on the side of labor rather than that of management.

Although some attorneys in both the public and private spheres clearly have the right to organize, it is possible that not all of them would be inclined to resort to collective bargaining to obtain relief from problems at work. After all, attorneys are professionals. Their workplace problems are bound to be different from those of the industrial workers for whom the NLRA was originally enacted. Associates at law firms, for example, are likely to be concerned about issues such as the timing and frequency of partnership decisions and increasing billable hour requirements, hardly the traditional subjects of collective bargaining. Yet, some attorneys work in conditions that are problematic in ways comparable to those experienced by their counterparts in trade unions. For these attorneys, collective bargaining and other concerted activities may look like the answer.

III. THE NEED TO ORGANIZE

Under the NLRA, the duty to bargain requires the parties "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."⁷⁹ These topics of mandatory bargaining constitute substantive workplace issues for many rank-and-file attorneys. In particular, attorneys employed by legal aid organizations, private court-appointed counsel, and staff attorneys in public defender's offices are constantly beset by low wages, long hours, and unsatisfactory working conditions. This Part identifies specific problems facing attorneys in each of these groups.

A. Legal Aid Lawyers

Legal Aid lawyers work for private organizations that have

79. 29 U.S.C. § 158(d).

contractual relationships with government entities.⁸⁰ Legal aid societies typically are nonprofit organizations and exist to provide aid to indigent clients.⁸¹ It is well known that underfunding is an ongoing problem for legal aid societies.⁸² The situation in New York City illustrates the severity of this problem.

In 1963, a state judiciary committee concluded that "[i]n our judgment, the Legal Aid Society, Criminal Branch, is severely overtaxed."⁸³ Almost ten years later, in 1972, the Legal Aid Society's Criminal Defense Division received only thirty-seven percent of the funds that the district attorney's offices received, even though it represented seventy-five percent of all defendants in New York City.⁸⁴ In October 1982, the Association of Legal Aid Attorneys went on strike.⁸⁵ After ten weeks, the strike ended and a joint labor-management committee was formed by contractual settlement.⁸⁶ In the following year, the Association of the Bar of the City of New York issued a report "which seemed to realize the odds against any positive steps being taken."⁸⁷

Despite the Legal Aid Association's plea, two years later, Legal Aid attorneys had, on average, caseloads of 439 clients per year.⁸⁸ In October 1994, the attorneys went out on strike for the first time since 1982, following the expiration of a two-year collective bargaining agreement.⁸⁹ The union had voted to strike to increase wages and reduce

80. See STATE OF N.Y. JUDICIARY COMM. OF THE ASSEMBLY, REPORT ON ITS SPECIAL INVESTIGATION OF THE PRACTICES AND PROCEDURES IN THE CRIMINAL COURT OF THE CITY OF NEW YORK, ASSEMBLY 88-37, 186th Sess. at 15 (1963) [hereinafter SPECIAL INVESTIGATION].

81. See *id.*

82. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 395 (1993) (noting the perpetual nature of this problem for the New York Legal Aid Society).

83. SPECIAL INVESTIGATION, *supra* note 80, at 17.

84. See Klein, *supra* note 82, at 395.

85. See *id.* at 395-96.

86. See *id.* at 396 (noting that the committee was designed to improve working conditions).

87. *Id.* Professor Klein quotes from the 1968 Annual Report of the Administrative Board of the Judicial Conference of New York:

This report is a *plea for attention* to the essential needs of the Criminal Court of the City of New York Because of the staggering volume of its caseload and its inability to provide trials, the Criminal Court has been virtually incapacitated in the last few years. *Everyone exposed to the Court knows this*—victims, defendants, witnesses, police officers, lawyers on both sides, court personnel and judges.

Id. (alternations in original) (citation omitted).

88. See Stanley Penn, *Seeking Justice: How Public Defenders Deal With the Pressure of the Crowded Courts*, WALL ST. J., July 5, 1985, § 1, at 1; see also Klein, *supra* note 82, at 396.

89. See *New York Mayor Drops Legal Aid Society After Defense Attorneys Go Out on Strike*, Lab. Rel. Rep. (BNA) A-12, A-12 (Oct. 5, 1994) [hereinafter *New York Mayor*].

individual caseloads.⁹⁰ A spokesman for the Association of Legal Aid Attorneys, the union that represents society lawyers, said at the time, "[t]he society devotes only \$40 million of its \$140 million annual budget to staff attorney salaries."⁹¹ The attorneys returned to work when they were faced with threats from city officials and Mayor Giuliani of losing their jobs.⁹²

The following year, the mayor cut the Legal Aid Society's city funding, "forcing the layoff of dozens of experienced lawyers and drastically reducing training and supervision for the staff."⁹³ The mayor also requested proposals from other criminal defense providers throughout the city.⁹⁴ As a result, and in response to concerns about fixed price contracts awarded through competitive bidding, the Supreme Court, Appellate Division, First Department enacted a rule creating an eight-member Indigent Defense Organization Oversight Committee.⁹⁵ The Committee was given the power "to monitor the provision of all defense services in the First Department."⁹⁶ In 1998, a *New York Times* editorial observed:

The quality of legal services for New York City's poor defendants continues to decline. The city has steadily reduced its contributions to the Legal Aid Society, the main nonprofit agency providing representation for indigent defendants, even as caseloads have grown. . . . [Since the 1994 strike], City Hall has steadily cut Legal Aid's funding from \$79 million in 1994 to roughly \$52 million [in 1998], based on the assumption that the agency's workload would drop accordingly. But the decline did not materialize. Instead the agency has been representing nearly the same number of clients for far fewer dollars. . . . The average lawyer in the agency's Manhattan office is assigned some 650 criminal cases a year, a breathtakingly high number that makes proper representation extremely difficult if not impossible.⁹⁷

90. See *id.* ("The union [was] seeking 4.5 percent wage increases in each of the next two years . . ."); see also Adele Bernhard, *Private Bar Monitors Public Defense*, CRIM. JUST., Spring 1998, at 25, 25 ("The confrontation between The Legal Aid Society (LAS) and the city began when . . . the lawyers' union[] voted to strike over . . . a 15 percent increase in individual caseloads.").

91. *New York Mayor*, *supra* note 89, at A-13.

92. See *NY Legal Aid Lawyers Return*, 147 Lab. Rel. Rep. (BNA) 221, 221 (Oct. 17, 1994) [hereinafter *NY Legal Aid*].

93. Bernhard, *supra* note 90, at 25.

94. See *id.*

95. See *id.* at 26.

96. *Id.*

97. *The Crisis at Legal Aid*, Editorial, N.Y. TIMES, Sept. 1, 1998, at A24.

More recently, in October 1999, lawyers employed by the Legal Services of New York, a group of twelve New York City offices providing legal aid to the poor, threatened to go out on strike if they did not get a "significant pay hike."⁹⁸ Two weeks earlier, the union representing these legal services professionals had asked management for a twelve percent pay increase.⁹⁹ The union, known as the Legal Services Staff Association, contended the pay raise was "crucial to halt the defection of attorneys."¹⁰⁰ According to the co-president of the union, the salary of a twenty-year legal services staff attorney will peak at \$65,000 per year, far less than the \$80,000 earned by a legal aid attorney with comparable experience.¹⁰¹ Management refused the union's request for a twelve percent raise, instead offering a three percent increase, on average.¹⁰²

B. Private Court-Appointed Counsel

Private counsel who represent poor defendants are appointed by administrators, judges, or court clerks.¹⁰³ Administrators may provide training or investigative services to appointed counsel and are responsible for paying the attorneys' fees.¹⁰⁴ Judges and court clerks keep lists of attorneys who have volunteered to represent indigent defendants and assign these attorneys to cases on a revolving basis.¹⁰⁵

Fees for private appointed counsel vary according to jurisdiction and may differ depending on the type of work undertaken.¹⁰⁶ In the federal system, the Criminal Justice Act sets fees for court-appointed counsel.¹⁰⁷ At the state level, fees differ widely. For example, in Colorado in 1991, court-appointed attorneys were paid between \$45 and \$50 an hour for non-capital felony cases.¹⁰⁸ Two years earlier, in 1989,

98. Victoria Rivkin, *Legal Services Union Threatens Strike Monday*, 222 N.Y.L.J. 1 (1999).

99. *See id.*

100. *Id.*

101. *See id.*

102. *See id.*

103. *See Klein, supra* note 82, at 370.

104. *See id.*

105. *See id.*; *see also* Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 582, 901 (1986-87) (explaining that judges and clerks assign cases to 18-B Panel attorneys who regularly represent indigent clients).

106. *See Klein, supra* note 82, at 371.

107. *See id.*; *see also* 18 U.S.C. § 3006A(d)(1) (1994) (stating that an appointed attorney shall receive not more than \$60 an hour for in-court time and not more than \$40 an hour for out-of-court time).

108. *See Spangenberg Group, Non-Capital Felonies*, CRIM. JUST., Summer 1990, at 45; Klein,

California court-appointed attorneys were paid a maximum of \$75 per hour.¹⁰⁹ Often states will not pay above a certain amount, regardless of how many hours an attorney works on a case.¹¹⁰

According to the Oregon Criminal Defense Lawyers Association, "after deducting the mean overhead in Oregon, where the hourly rate of compensation for indigent defense work is \$30 per hour (which is about average nationally), a lawyer doing *only* indigent defense work [has] a net annual income of just \$72.00."¹¹¹ A study done for the Joint Subcommittee Studying Alternative Indigent Defense Systems for the Virginia General Assembly and the Criminal Law Section of the Virginia State Bar found that, in capital cases at trial, a sample of Virginia attorneys representing indigents were paid approximately \$13 an hour.¹¹²

In Louisiana, court-appointed counsel in death penalty cases receive at most \$1,000 per case.¹¹³ In Alabama, attorneys are paid the same amount for time spent preparing capital cases before trial.¹¹⁴ The Oklahoma Supreme Court, in *State v. Lynch*,¹¹⁵ found that a \$3,200 fee on a death penalty case was inadequate and "an unconstitutional taking of private property."¹¹⁶ In 1987, the Rural Justice Center found that, in some areas, attorneys are paid so little per hour that they cannot even make back their costs for the representation.¹¹⁷

C. Public Sector Lawyers

The problem of inadequate wages also plagues attorneys in the public sector.¹¹⁸ To say that the wage problem is critical is to underestimate its effect.¹¹⁹ Budget cuts are strapping public defender's

supra note 82, at 371.

109. See Edward C. Monahan, *Attorneys Must Be Paid Fairly*, CRIM. JUST., Summer 1990, at 16, 43.

110. See Klein, *supra* note 82, at 371.

111. Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 16, 19 (discussing a 1986 survey).

112. See *id.* at 18.

113. See Klein, *supra* note 82, at 366.

114. See *id.* at 366-67.

115. 796 P.2d 1150 (Okla. 1990).

116. *Id.* at 1153.

117. See Mark Curriden, *Indigent Defense in the South: Begging for Justice*, 77 A.B.A. J. 64, 67 (1991).

118. See, e.g., John B. Arango, *Defense Services for the Poor*, CRIM. JUST., Summer 1995, at 37, 38 (discussing the low starting salaries of staff attorney public defenders).

119. See, e.g., Cary B. Willis, *Judge's Bid to Aid Public Defender May Face Legal Test*, COURIER-J. (Louisville, Ky.), Mar. 6, 1992, at 1 (explaining that a lack of money for the public

offices nationwide, resulting in salaries of less than \$26,000 a year for some public sector attorneys.¹²⁰ The project coordinator of the ABA's Bar Information Program has noted that public defender's offices throughout the country are inadequately funded and, with few exceptions, are beginning to feel the effects.¹²¹ In addition to poor pay rates, public sector attorneys generally have a substandard benefits package.¹²²

Excessive caseloads also add to public defenders' problems.¹²³ The indications are that this problem is getting worse instead of better.¹²⁴ The statistics associated with the caseloads of public defenders are staggering.¹²⁵ "While the National Advisory Commission on Criminal Justice Standards recommends that a public defender close no more than 150 cases a year, [one public defender] had already closed 476 in the first 10 months of 1990."¹²⁶ In 1992, the Jefferson County Public Defender's office in Kentucky had thirty-one public defenders and handled 54,000 cases, requiring each defender to handle more than 150 cases at any given time, more than double the acceptable standard.¹²⁷ "[I]n Atlanta, the two dozen public defenders have caseloads of more than 500 each, with some approaching 700 [and] [s]upport staff for these overburdened lawyers is deplorably inadequate."¹²⁸ The situation prompted one Atlanta public defender to comment: "I used to look hard for the one issue that I could use to win the case[:]; I now look for the one issue that I can find to dispose of the case."¹²⁹

In addition to being overworked and underpaid, public sector attorneys also face poor working conditions.¹³⁰ Specifically, attorneys have sought to negotiate for larger libraries, updated computers and access to online legal research, as well as law clerks and paralegals.¹³¹

defender's office caused a breakdown in the system and that indigent defendants were being denied their constitutional right to counsel).

120. See *id.*; see also Arango, *supra* note 118, at 38.

121. See Klein, *supra* note 82, at 393.

122. See Miller, *supra* note 70.

123. See Klein, *supra* note 82, at 393. In some places, public defenders spend only ten minutes on a case because of their enormous caseloads. See Richard Shumate, "I Will Not Accept Any More Cases," BARRISTER MAG., Winter 1991-92, at 11, 11.

124. See Klein, *supra* note 82, at 393.

125. See Shumate, *supra* note 123, at 11.

126. *Id.*

127. See Willis, *supra* note 119.

128. Monroe Freedman, *Third World Justice*, LEGAL TIMES, Feb. 11, 1991, at 1.

129. *Id.*

130. See Miller, *supra* note 70.

131. See *id.*

According to the attorney representing the State Employees Attorneys Guild in Florida, "[t]hey don't expect what you make in a private firm . . . that's not the level to which they reasonably aspire . . . they just want better working conditions."¹³²

While attorneys who represent indigent defendants face problems comparable to those experienced by nonprofessional employees, they also encounter a type of workplace problem that lies outside the traditional area of mandatory bargaining.

IV. ETHICAL CONSIDERATIONS: BEYOND MANDATORY BARGAINING

As noted above, in Part II, professional employees engage in activities that reflect their capacity for independent judgment and their high level of education and training.¹³³ Thus, they seek to influence the policies of the organizations that employ them, to participate in the establishment of professional standards, and to comment on the proper allocation of institutional resources.¹³⁴ These employment issues fall outside the traditional scope of mandatory bargaining. Yet, while lawyers have values and interests similar to those of other professional employees, they also have concerns unique to their profession. These are best identified and understood in terms of the rules regulating lawyers' behavior. Every attorney, whether employed by a government agency, a legal aid organization, or in the private sector, is bound by strict ethical obligations. These are set forth in state bar associations' rules of professional conduct, which are patterned on the Model Code of Professional Responsibility ("Model Code") and the Model Rules of Professional Conduct ("Model Rules"). Part IV will discuss, first, the positions taken by the American Bar Association's Committee on Ethics and Professional Responsibility ("ABA Committee") concerning attorney membership in unions and, second, ethical considerations facing attorneys in the workplace.

A. ABA Committee Opinions on Union Activity by Lawyers

Until recently, the legal profession has been opposed to attorneys

132. *Id.*

133. See *supra* notes 8-78 and accompanying text.

134. See Rabban, *American Labor Law*, *supra* note 2, at 691. The author notes, specifically, "the participation of musicians in the personnel decisions of orchestras . . . adherence by hospitals to standards of nursing practice developed by the American Nurses' Association, [and] controls by reporters on revisions of their articles." *Id.* at 715 (citations omitted).

joining unions or other employee associations. The Model Code,¹³⁵ which was adopted by the American Bar Association in 1969, contains no disciplinary rule that specifically prohibits membership by lawyers in unions or associations representing lawyers.¹³⁶ However, in 1947, Pre-Model Code Opinion 275 prohibited a lawyer who was employed full time by a casualty insurance company from joining a union created by claim adjusters, many of whom were lawyers.¹³⁷ According to the opinion, allowing the lawyer to join a union could lead to violations of rules concerning client loyalty and confidentiality.¹³⁸ The opinion further held that "to permit an outside group such as a union to fix a fee schedule by concerted action would violate . . . Canon 12 (fees)."¹³⁹

In 1966, the ABA Committee determined that a government lawyer could not join a labor union.¹⁴⁰ As the ABA Committee explained, a lawyer employed by a government agency owes it his "undivided loyalty."¹⁴¹ If he were to join a labor union, he would have an obligation to the union, which might conflict with his obligation to his client.¹⁴² In that instance, the lawyer would be "surrendering his independent judgment" and would become "subject to the direction of the union and its officers."¹⁴³ The ABA Committee concluded that a lawyer should never be in such a position.¹⁴⁴

One year later, however, the ABA Committee reversed its opinion.¹⁴⁵ In Informal Opinion 986, it was held that salaried, employee-lawyers could join a union or organization to negotiate wages and working conditions, but that they could not strike or withhold their

135. See MODEL CODE OF PROF'L RESPONSIBILITY (1983). The Model Code, which replaced the ABA's Canons of Professional Ethics, was approved by the ABA House of Delegates in August of 1969. By 1980, a Code of Professional Responsibility, patterned after the ABA Model Code, had been adopted by nearly every state. Since 1983, however, more than 35 states have adopted the Model Rules of Professional Conduct. The Model Code has not been amended since then and the ABA does not plan to amend it in the future. See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 447-48 (Aspen Law & Business 1999).

136. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975).

137. See *id.*

138. See *id.* (referring to Pre-Code Canons 35 (intermediaries) and 37 (client confidences)).

139. *Id.*

140. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 917 (1966); see also Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1160 (Cal. 1994) (forbidding attorneys from unionizing).

141. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 917 (1966).

142. See *id.*

143. *Id.*

144. See *id.*

145. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 986 (1967).

services in any way.¹⁴⁶ Another condition of membership was that the union be independent of unions representing non-lawyers.¹⁴⁷ This became the pre-Model Code attitude toward union membership.

Following adoption of the Model Code, the ABA Committee again took up the question of the ethical propriety of attorney membership in a union. In Informal Opinion 1325, the ABA Committee explained that the Model Code gives ethical guidance concerning union membership in EC 5-13.¹⁴⁸ EC 5-13 provides:

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.¹⁴⁹

According to the ABA Committee, this provision expresses a concern that a lawyer belonging to a union is likely to be confronted with a choice between participating in certain union activities and violating certain disciplinary rules.¹⁵⁰ In this context, the ABA Committee refers specifically to "DR 6-101(A)(3), proscribing neglect of a legal matter entrusted to a lawyer, DR 7-101(A)(2), forbidding a lawyer to intentionally fail to carry out a contract for employment with a client, and DR 7-101(A)(3), prohibiting a lawyer to intentionally prejudice or damage his client during the course of the professional relationship."¹⁵¹

Regarding strikes and other collective bargaining matters, the ABA Committee takes a pragmatic approach.¹⁵² Thus, in some circumstances, an attorney who participates in a strike could "neglect a legal matter entrusted to [him]," thereby violating a disciplinary rule.¹⁵³ In other situations, however, participating in a strike might be "no more disruptive of the performance of legal work than taking a two week's

146. *See id.*

147. *See id.*

148. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975).

149. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-13 (1983).

150. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975).

151. *Id.*

152. *See id.*

153. *Id.*

vacation might be.”¹⁵⁴ In short, in any case of possible violation of a disciplinary rule by a striking attorney, issues of fact will be involved.

B. Ethical Considerations

In interpreting EC 5-13, the ABA Committee draws attention to disciplinary rules connected with the Model Code’s Canon 6, “A Lawyer Should Represent a Client Competently,”¹⁵⁵ and Canon 7, “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.”¹⁵⁶ The ethical obligation to represent clients competently and zealously identifies an area of particular concern for lawyers. However, for lawyers employed by legal aid organizations and certain government entities, and as court-appointed counsel, meeting these and other ethical obligations may pose special workplace problems. The following example will illustrate this difficulty.

A New Orleans public defender, Rick Teissier, refused to go to trial when there was not enough money available in the system to pay for the testimony of an expert witness.¹⁵⁷ He was subsequently cited for contempt “and took the unusual step of asking the judge to find that, under the circumstances, he was incapable of providing his client an effective defense.”¹⁵⁸ In his motion he stated: “With no experts, there is no need for trial; the defendant’s conviction is assured.”¹⁵⁹

Ethics rules require that lawyers provide adequate and competent representation. DR 6-101(A)(1) of the Model Code states that “[a] lawyer shall not [h]andle a legal matter which he knows or should know that he is not competent to handle.”¹⁶⁰ DR 6-101(A)(3) states that “[a] lawyer shall not neglect a legal matter entrusted to [him].”¹⁶¹ What happens when a staff defender, like Rick Teissier, determines that he can handle no more cases without violating these ethics rules and his clients’ constitutional rights? Should he refuse to go to trial, as Teissier did, or should he continue on the job in violation of his ethical obligations and, perhaps, the dictates of his conscience?

In Teissier’s case, the decision to comply with the ethics rules had

154. *Id.*

155. MODEL CODE OF PROF’L RESPONSIBILITY Canon 6 (1983).

156. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1983).

157. See Mark Hansen, *P.D. Funding Struck Down*, A.B.A. J., 18, 18 (1992).

158. *Id.*

159. *Id.*

160. MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(1) (1983).

161. MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(3) (1983).

an unusual outcome.¹⁶² The judge declared the city's entire indigent defense program unconstitutional and ordered the state to come up with a way to pay for eleven new public defenders, sixteen more employees, a law library and a separate expert witness fund.¹⁶³ The judge also said he would cut Teissier's caseload in half and assign private practice lawyers to the public defender program's lesser felony and misdemeanor cases.¹⁶⁴

Teissier's response to the situation at the New Orleans public defender's office turned out to be an effective choice under the circumstances. However, lawyers who attempt to remedy deplorable work conditions rarely meet with such success. More often, they are forced to violate ethics rules or risk being fired.¹⁶⁵ A 1975 opinion of the New York County Bar Association's Committee on Legal Ethics ("Committee") further illustrates the problem.¹⁶⁶

The opinion addressed the question of whether it is ethically proper for legal aid society lawyers to engage in a strike.¹⁶⁷ The lawyers were striking for better hours, higher pay, and improved working conditions, as well as changes in the society's representation system.¹⁶⁸ The union representing the Legal Aid Society lawyers contended that it was impossible for them to render proper legal representation of their clients because of the society's practice of having different lawyers represent the same client at successive stages of a case.¹⁶⁹ This practice, the union held, deprived the client of the "continuous personal representation to which he [was] entitled."¹⁷⁰ Moreover, in criminal cases, the lawyers met with their clients under conditions that lacked the privacy necessary for discussions of confidences and secrets.¹⁷¹

The New York Code of Professional Responsibility ("New York Code"), a version of the Model Code, contains the following provision: "A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment . . . if . . . [t]he lawyer knows or it is obvious that continued employment will result in

162. See Hansen, *supra* note 157, at 18.

163. See *id.*

164. See *id.*

165. See, e.g., Shumate, *supra* note 123, at 11-12 (noting how one attorney's motion for fewer cases resulted in transfer from the Atlanta public defender's office).

166. See Op. Comm. on Prof'l Ethics: The N.Y. County Lawyers Ass'n No. 645 (June 2, 1975).

167. See *id.*

168. See *id.*

169. See *id.*

170. *Id.*

171. See Op. Comm. on Prof'l Ethics: The N.Y. County Lawyers Ass'n No. 645 (June 2, 1975).

violation of a Disciplinary Rule.”¹⁷² DR 1-102(A)(5) of the New York Code states that a lawyer shall not “[e]ngage in conduct that is prejudicial to the administration of justice.”¹⁷³ The Committee found that this duty took precedence over any right of the lawyers to strike.¹⁷⁴ However, the fragmentation of services caused by the practice of assigning different lawyers to the same client at various stages of a proceeding, made it impossible for the lawyers to avoid engaging in the conduct “prejudicial to the administration of justice” as required by the New York Code.¹⁷⁵ Moreover, under these conditions, the lawyers were unable to render proper legal representation of their clients, and were thereby violating the disciplinary rules requiring a lawyer to represent a client competently. These rules forbid a lawyer from handling “a legal matter which the lawyer knows or should know that he or she is not competent to handle,”¹⁷⁶ and from handling a legal matter “without preparation adequate in the circumstances.”¹⁷⁷ Therefore, under the rule governing mandatory withdrawal, the lawyers of the Legal Aid Society arguably had no option but to “withdraw,” that is, strike, since continued employment would result in a violation of the New York Code.

Similarly, since the conditions under which they worked made it impossible for the lawyers to consult with their clients in privacy, the lawyers were unable to continue in their employment without violating the rule forbidding them knowingly to “[r]eveal a confidence or secret of a client.”¹⁷⁸ Hence, under the rule governing mandatory withdrawal, the lawyers were required to withdraw. The same logic would apply in the case of the rules concerning zealous representation. Thus, if the lawyers were to comply with the rules forbidding them intentionally to “[f]ail to carry out a contract of employment entered into with a client”¹⁷⁹ or “[p]rejudice or damage the client during the course of the professional relationship,”¹⁸⁰ they would, again, be compelled to withdraw from employment under the New York Code.

The Society’s system for providing legal representation may also cause a conflict of interest between a lawyer and her clients. Canon 5 of

172. N. Y. CODE OF PROF’L RESPONSIBILITY DR 2-110(B)(2) (1996).

173. N. Y. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5) (1996).

174. See Op. Comm. on Prof’l Ethics: The N.Y. County Lawyers Ass’n No. 645 (June 2, 1975).

175. N. Y. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(5) (1996).

176. N. Y. CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(1) (1996).

177. N. Y. CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(2) (1996).

178. N. Y. CODE OF PROF’L RESPONSIBILITY DR 4-101(B)(1) (1996).

179. N. Y. CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(2) (1996).

180. N. Y. CODE OF PROF’L RESPONSIBILITY DR 7-101(A)(3) (1996).

the New York Code is: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."¹⁸¹ When an attorney has more clients than she can properly represent, there is a reasonable likelihood that her independent professional judgment will be impaired. She may, for example, be forced to choose between clients, to decide which ones she will help and which she will let go to jail with a guilty plea.

The Committee, in its opinion, did not question the right of lawyers to join a labor union, nor did it question whether the lawyers had the *legal* right to strike.¹⁸² The Committee stated, however, that "the right to strike is not an absolute and wholly unrestricted right exercisable irrespective of rights possessed by others."¹⁸³ The Committee concluded, "staff lawyers of a legal aid society cannot ethically exercise their right to strike if doing so either disrupts the proper functioning of the courts and the judicial system or deprives indigent defendants of their right to proper representation and a speedy trial."¹⁸⁴

The opinion of the Committee to the contrary notwithstanding, the Legal Aid Society lawyers not only had the ethical right to strike: it would have been unethical for them *not* to strike. That is, in the circumstances, it was impossible for the lawyers to comply with the ethics rules of their jurisdiction without withdrawing from employment, here, engaging in a strike. The Committee pointed to the fact that the lawyers had duties "to the judicial system, to the public and to clients [that took] precedence over any right of the lawyers to strike against their employer."¹⁸⁵ However, the Committee's position overlooks the fact that by denying lawyers the ethical right to strike, they effectively perpetuate a system in which those duties will be abrogated.

In the examples discussed so far, attorneys risked facing adverse consequences at the hands of their employers as a result of trying to meet their ethical obligations to their clients. Their attempts to gain benefits at work were contemplated or undertaken with the clients' interests in mind. But what if the client is the employer?

As noted above, the American Bar Association's Committee on Ethics and Professional Responsibility has determined that a lawyer may join a union without thereby violating a disciplinary rule.¹⁸⁶ Under Model

181. N. Y. CODE OF PROF'L RESPONSIBILITY Canon 5 (1996).

182. See N. Y. County B. Ass'n Comm. on Legal Ethics, Op. 645 (1975).

183. *Id.*

184. *Id.*

185. *Id.*

186. See discussion, *supra*, Part IV.A.

Code provision EC 5-13, while it is not improper for a lawyer to be a member of an organization of employees, he should be "vigilant to safeguard his fidelity" to the employer.¹⁸⁷ Suppose that a public employee wants to sue his employer in the course of a wage dispute. Can he do so without failing to safeguard his fidelity to the employer? At least one state supreme court has considered this question.¹⁸⁸

In California, attorneys employed in the office of the Santa Clara County Counsel attempted to sue the Santa Clara Board of Supervisors.¹⁸⁹ The California Supreme Court considered, *inter alia*, whether the attorneys' duty of loyalty toward their client prevented such a suit.¹⁹⁰ The court concluded that it did not.¹⁹¹

A fundamental issue posed by the case was the extent to which the collective bargaining relationship between an attorney/employee and a client/employer is itself compatible with the attorney's duty of loyalty.¹⁹² The court found that "government attorneys who organized themselves into associations pursuant to statute and who proceeded to bargain collectively with their employer/clients [were not] *per se* in violation of any duty of loyalty or any other ethical obligation."¹⁹³ The Court further stated, "[t]he growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee."¹⁹⁴ At the same time, the court noted, an attorney cannot assert his or her rights as an employee so far as to transgress ethical boundaries, such as the rules requiring competence and confidentiality.¹⁹⁵

The obligations to serve the client competently, zealously, and faithfully, to promote the administration of justice, and to safeguard the client's confidences, may be impossible without decent pay, reasonable workloads, and adequate support staff and facilities. Lawyers whose workplace problems include the fundamental issues of wages, hours, and conditions of employment have not only the need to improve their

187. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-13 (1983).

188. *See Santa Clara County Council Attorneys Ass'n v. Woodside*, 869 P.2d 1142 (Cal. 1994).

189. *See id.* at 1144-45. The County Counsel was the primary legal adviser to the Board. *See id.* at 1145.

190. *See id.* at 1144.

191. *See id.*

192. *See Santa Clara County Attorneys Ass'n*, 869 P.2d at 1155.

193. *Id.* at 1157.

194. *Id.*

195. *See id.* For example, the court noted that "in pursuing rights of self-representation, [an attorney] may not use delaying tactics in handling existing litigation or other matters of representation for the purpose of gaining advantage in a dispute over salary and fringe benefits." *Id.*

working conditions, but also the legal and ethical right to attempt to do so. Union membership, collective bargaining and concerted action are ways in which lawyers can achieve their professional goals.

V. STRATEGIES AND PROPOSALS

This Note has considered when lawyers have the right to organize and the conditions under which they might need to organize. This Part discusses ways in which lawyers who belong to unions can use their organizational power to achieve their goals in the workplace.

A. Strikes

It was suggested, above, that in some circumstances, lawyers have not only the legal right, but also an ethical obligation to strike. Certainly, it is true that without at least the legal right to strike, the right to collectively bargain has little significance. However, engaging in a strike can be problematic. Under the NLRA, although strikes over mandatory subjects are protected, strikes over permissive subjects are not.¹⁹⁶ Additionally, strikes by public employees are illegal under any circumstances in most public sector jurisdictions.¹⁹⁷ Moreover, as the New York Legal Aid Society lawyers found in 1994, strikes are not always effective.¹⁹⁸ An opinion by the Supreme Court suggests that they may also be costly and counterproductive.

In *FTC v. Superior Court Trial Lawyers Ass'n*,¹⁹⁹ the Court found that a strike by court-appointed counsel violated federal antitrust laws.²⁰⁰ Specifically, the concerted efforts of the attorneys to increase their wage rates was found to be in violation of section 5 of the Federal Trade Commission Act ("FTC Act").²⁰¹ The FTC Act makes it illegal for anyone to use unfair or deceptive competition techniques in commerce.²⁰² The FTC Act states that: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."²⁰³

In the District of Columbia, two groups of attorneys are responsible

196. See Rabban, *American Labor Law*, *supra* note 2, at 693.

197. See *Developments in the Law*, *supra* note 10, at 1702-04.

198. See *NY Legal Aid*, *supra* note 92, at 221.

199. 493 U.S. 411 (1990).

200. See *id.* at 436.

201. See *id.* at 414, 428.

202. See 15 U.S.C. § 45(a)(1) (1994).

203. *Id.*

for indigent defense.²⁰⁴ Full-time public defenders represent the defendants accused of the most serious felonies.²⁰⁵ Attorneys in private practice represent the majority of the remaining criminal defendants, in accordance with the District of Columbia Criminal Justice Act ("DCCJA").²⁰⁶ The DCCJA governs the appointment and compensation of private sector attorneys representing the indigent.²⁰⁷ Approximately eighty-five percent of the 25,000 indigent criminal defendants are represented by these private practice attorneys.²⁰⁸

While 1,200 private attorneys were registered for indigent representation appointment in 1982, only about 100 of these attorneys actually represented clients on a regular basis.²⁰⁹ The income of these "regular" attorneys comes primarily from representing indigents.²¹⁰ The attorneys earned \$30 per hour for in-court time and \$20 per hour for out-of-court time, in accordance with District of Columbia statutes.²¹¹ They had been protesting these pay rates for several years prior to taking the action at issue in this case.²¹²

In 1982, these "regulars," the core of the Superior Court Trial Lawyers Association ("SCTLA"), joined with other associations to try to persuade government officials to raise their pay rates.²¹³ These attorneys wanted wage rates to be increased to \$35 per hour, with an ultimate increase to \$45 per hour for in-court time and \$55 per hour for out-of-court time.²¹⁴ Subsequently, an SCTLA committee was created which determined that previous peaceful attempts to change the status quo had been and would continue to be unsuccessful.²¹⁵ Thus, it decided "that the only viable way of getting an increase in fees was to stop signing up to take new . . . appointments."²¹⁶

The members of the SCTLA agreed with the committee's determination and agreed to strike on September 6, 1983, if wage

204. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 414-15.

205. See *id.* at 414.

206. See *id.* at 415. Furthermore, in a few cases, third-year law students or uncompensated private counsel represented indigent defendants. See *id.* at 415 n.2.

207. See *id.* at 415.

208. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 414-15.

209. See *id.* at 415.

210. See *id.*

211. See *id.*

212. See *id.*

213. See *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 415.

214. See *id.* at 415-16.

215. See *id.* at 416.

216. *Id.* (quoting *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 538 (1986)).

increases were not granted.²¹⁷ The District of Columbia denied the wage increases.²¹⁸ In response, ninety percent of the private attorneys who regularly represented indigent clients refused to take on any new clients.²¹⁹ As a result, there developed an immense backlog of cases requiring immediate investigation and preparation, for which there was no effective contingency plan.²²⁰ Consequently, the District of Columbia was forced to acquiesce to the demands of the striking attorneys.²²¹

Although the strike was successful, three months later the Federal Trade Commission ("FTC") filed a complaint against SCTLA, which stated that the attorneys had "entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the [DC]CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the [DC]CJA program."²²² At an initial hearing, an administrative law judge found that the FTC's accusations had merit, but recommended dismissal because no harm was done.²²³ The District of Columbia Circuit Court of Appeals found that the court-appointed counsel had acted as competitors, but concluded that the

217. *See id.*

[A]bout 100 . . . lawyers met and resolved not to accept any new cases after September 6 [1983] if legislation providing for an increase in their fees had not passed by that date. Immediately following the meeting, they prepared (and most of them signed) a petition stating:

We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

Superior Court Trial Lawyers Ass'n, 493 U.S. at 416 (quoting *Superior Court Trial Lawyers Ass'n v. FTC*, 276, 856 F.2d 226, 230 (1988)) (citation omitted).

218. *See id.*

219. *See id.*

220. *See id.* at 417.

221. *See id.* at 418.

Within ten days, the key figures in the District's criminal justice system "became convinced that the system was on the brink of collapse because of the refusal of [DC]CJA lawyers to take on new cases." On September 15, they hand-delivered a letter to the Mayor describing why the situation was expected to "reach a crisis point" by early the next week and urging the immediate enactment of a bill increasing all [DC]CJA rates to \$35 per hour. The Mayor promptly met with the members of the strike committee and offered to support an immediate temporary increase to the \$35 level as well as a subsequent permanent increase to \$45 an hour for out-of-court time and \$55 for in-court time.

Superior Court Trial Lawyers Ass'n, 493 U.S. at 418 (quoting *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 544) (alteration in original).

222. *Id.* (quoting *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. at 511).

223. *See id.* at 419.

SCTLA boycott contained an element of expression that deserved First Amendment protection.²²⁴ The Supreme Court granted certiorari.²²⁵

Finding that the attorneys had violated the FTC's prohibition against unfair trade practices because they had successfully fixed prices for their services,²²⁶ the Court noted that it did not matter whether the price-fixing was for a "good or bad" purpose.²²⁷ Writing for the majority, Justice Stevens found the political motive of a price-fixing agreement to be of no consequence, and rejected the attorneys' claim that the boycott was a form of political expression entitled to First Amendment protection.²²⁸ The decision of the court of appeals was reversed "insofar as that court held the *per se* rules inapplicable to the lawyers' boycott" and the case was remanded.²²⁹

The Supreme Court's decision in *FTC v. Superior Court Trial Lawyers Ass'n* poses a significant obstacle to attorneys seeking to improve work conditions and protect the interests of their clients by means of concerted action. As one commentator stated:

The Supreme Court's decision is a major setback to counsel representing the indigent defendant. As was true with the SCTLA lawyers, a strike would, in any event, be only a matter of last resort. Court-appointed counsel have few options. In addition, indigent defendants have no political clout and few politicians dare to advocate the allocation of additional funds for their legal representation. In this era of governmental deficits and cuts in expenditures at the county, state, and federal levels, the problems of counsel are steadily becoming exacerbated. If those representing the indigent cannot unite to fight for more funding to protect the constitutional rights of their clients, the criminal justice system as a whole is sure to suffer.²³⁰

An alternative to concerted action is the modification of labor laws to accommodate the needs of professional employees.

B. Attorneys and American Labor Law

As noted above, in Part II, professional employees tend to have greater training, responsibility, autonomy and discretion than

224. *See id.* at 420.

225. *See id.* at 421.

226. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 422-23.

227. *See id.* at 424.

228. *See id.*

229. *Id.* at 436.

230. Klein, *supra* note 82, at 388-89 (citations omitted).

nonprofessional employees.²³¹ As a result, they have different professional goals.²³² This distinction has led to a concern that, if professional employees unionize, they may sacrifice their essential professional values.²³³ This view reflects recognition that American labor law, which developed in response to industrial sector collective bargaining, involves assumptions that conflict with or at least fail to accommodate the concerns of professional employees.²³⁴

It has been suggested that if certain traditional doctrines associated with American labor law were modified, attorneys in both the private and public sectors would be better able to develop a system of collective bargaining that promotes professional values.²³⁵ By abolishing the distinction between mandatory and permissive subjects of bargaining, and by modifying the traditional doctrines of exclusive representation and company domination, unions and employers might develop a system of collective bargaining compatible with attorneys' professional goals.²³⁶ The following discussion outlines one such proposal.

1. The Scope of Bargaining

The NLRA of 1935 did not define the scope of collective bargaining.²³⁷ However, the 1947 Taft-Hartley Amendments added a provision specifying that the duty to bargain requires the parties to meet and confer "in good faith" with respect to "wages, hours, and other terms or conditions of employment."²³⁸ Against the advice of some commentators, the NLRB and the courts have construed the phrase, "terms or conditions of employment," in a way that maintains the distinction between "mandatory" and "permissive" subjects of bargaining that was first developed in interpretations of the Wagner Act.²³⁹ The Supreme Court endorsed this approach in *NLRB v. Wooster*

231. See Rabban, *Distinguishing Excluded Managers*, *supra* note 11, at 1793.

232. See Rabban, *American Labor Law*, *supra* note 2, at 691. Doctors and nurses, for example, seek to improve the nature of health care in hospitals. University professors want guarantees of academic freedom. And, as discussed earlier in this Note, legal aid attorneys negotiate for the chance to render proper legal representation and for adequate facilities in which to counsel their clients. See *id.*

233. See Henry Mintzberg, *A Note on the Unionization of Professionals from the Perspective of Organization Theory*, 5 INDUS. REL. L.J. 623, 631 (1983).

234. See *id.* at 632; see also Rabban, *American Labor Law*, *supra* note 2, at 692.

235. See Rabban, *American Labor Law*, *supra* note 2, at 693-94.

236. See *id.*

237. See 29 U.S.C. §§ 151-169.

238. 29 U.S.C. § 158(d).

239. See Rabban, *American Labor Law*, *supra* note 2, at 703; Theodore J. St. Antoine, *Legal*

Division of Borg-Warner Corp.,²⁴⁰ holding that the duty, to bargain in good faith extends only to mandatory subjects.²⁴¹ Either party may propose additional subjects in negotiations but the other party need not bargain about them.²⁴² Insistence on the resolution of a non-mandatory subject as a condition to an overall agreement violates the duty to bargain in good faith.²⁴³ Subsequent litigation over the scope of bargaining reveals "that labor boards and courts in both the private and public sectors have defined only a relatively narrow range of professional concerns as mandatory subjects of bargaining."²⁴⁴

In the public sector, some state legislation governing collective bargaining contains "meet and confer" provisions, which are intended to expand the scope of bargaining.²⁴⁵ Under these provisions, an employer must "meet and confer" with representatives of employees about professional concerns that are permissive subjects of bargaining.²⁴⁶ However, these provisions often are unsuccessful because they are considered to be ineffective or indistinguishable from collective bargaining.²⁴⁷

In light of the fact that many issues of concern for professionals are excluded from the mandatory sphere, it has been recommended that "[t]he distinction between mandatory and permissive subjects of bargaining should be abolished in the context of professional employment."²⁴⁸ The distinction makes it difficult to preserve professional values during collective bargaining.²⁴⁹ Professional employees, especially attorneys, have a "legitimate and socially useful role to play in determining policies related to their professional expertise, whether or not these policies affect narrowly defined terms of

Barriers to Worker Participation in Management Decision Making, 58 TUL. L. REV. 1301, 1304-05 (1984).

240. 356 U.S. 342 (1958).

241. *See id.* at 349.

242. *See id.*

243. *See id.*

244. Rabban, *American Labor Law*, *supra* note 2, at 705. It is primarily the unions of public school teachers and university professors that have challenged the mandatory/permissive distinction. Issues defined as outside the scope of mandatory bargaining include student-faculty ratio, policies on academic freedom and professional ethics, curriculum, and decisions to hire, promote, and award tenure. Clearly mandatory subjects include supplementary employment, salary, and rules governing travel out of state. *See id.*

245. *See, e.g.*, CAL. GOV'T CODE § 3543.2(c) (West 1985); ME. REV. STAT. ANN. tit. 26, § 965(1) (West 1964).

246. *See* Rabban, *American Labor Law*, *supra* note 2, at 709.

247. *See id.*

248. *Id.* at 711.

249. *See id.*

employment.”²⁵⁰ In fact, “most professionals consider input into such policy issues an important condition of professional employment.”²⁵¹

2. Exclusive Representation

Section 9(a) of the NLRA requires that a union selected by the majority in an appropriate unit of employees be the exclusive bargaining representative for all employees in the unit regarding wages, hours, and other conditions of employment.²⁵² After the selection of an exclusive representative, “employers are precluded from bargaining about these subjects with anyone else.”²⁵³

The elimination of the distinction between mandatory and permissive subjects of bargaining would require a simultaneous loosening of the principle of exclusive representation.²⁵⁴ Where employers are required to bargain with union representatives, strict adherence to the doctrine of exclusive representation would impose limits on independent contacts between employers and employees unless the union allows them.²⁵⁵ Consequently, exclusive union representation would preempt important discussions about professional issues concerning attorneys.

3. Company Domination

In order for attorneys to effectively bargain, the doctrine of company domination also needs to be modified in the context of professional employment. Section 8(a)(2) of the NLRA states that it is an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”²⁵⁶ Not every employee group is considered a “labor organization.”²⁵⁷ However, Supreme Court

250. *Id.* at 712.

251. Rabban, *American Labor Law*, *supra* note 2, at 712.

252. See 29 U.S.C. § 159(a).

253. Rabban, *American Labor Law*, *supra* note 2, at 723.

254. See *id.* at 694.

255. See *id.*

256. 29 U.S.C. § 158(a)(2).

257. See Rabban, *American Labor Law*, *supra* note 2, at 740. Section 2(5) of the NLRA defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5).

interpretations of this provision stress that any continuing body of employees is "dominated unless it is entirely free from employer support or influence."²⁵⁸

Committees of professional employees, such as trial attorney associations, need the support of employers, which would violate section 8(a)(2).²⁵⁹ Attorneys and their employers should be allowed to choose these committee structures as an alternative to collective bargaining. The employers of attorneys "should have discretion to establish such structures as long as they do not manipulate them to avoid unionization."²⁶⁰

In short, modifications in the principles of exclusive representation and company domination, together with the elimination of the distinction between mandatory and permissive subjects of collective bargaining, would promote the application of labor law to professionals such as attorneys.

C. Interest Arbitration

A third strategy open to attorneys who seek to unionize is interest arbitration. Interest arbitration provides an alternative to striking.²⁶¹ Such arbitration is already in use in some areas of labor law.²⁶² For example, in New York, where police officers and firefighters are forbidden to strike, this type of arbitration has been used to prevent work stoppages.²⁶³ It has been argued that interest arbitration is an effective alternative to concerted action.²⁶⁴

Interest arbitration presents an alternative to striking when attempts to bargain have reached an impasse.²⁶⁵ Ordinarily, employers and employees negotiate in an attempt to settle their disputes.²⁶⁶ When a settlement cannot be reached, employers and employees sometimes

258. Rabban, *American Labor Law*, *supra* note 2, at 740.

259. *See id.* at 754.

260. *Id.*

261. *See* Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 153 (1987).

262. *See, e.g.*, ALASKA STAT. § 23.40.200 (Michie 1998); HAW. REV. STAT. § 89-11 (1993); MINN. STAT. ANN. § 179A.16 (West 1993); OHIO REV. CODE ANN. § 4117.14 (Anderson 1995); OR. REV. STAT. § 243.742 (1998); 43 PA. CONS. STAT. ANN. § 1101.2002 (West 1995); VT. STAT. ANN. tit. 21, § 1733 (1987).

263. *See* N.Y. CIV. SERV. § 209(2) (1999). This statute is the model used for the following discussion.

264. *See* Anderson & Krause, *supra* note 261, at 153.

265. *See* N.Y. CIV. SERV. § 209(1).

266. *See* N.Y. CIV. SERV. § 209(2).

resort to an independent mediator in an effort to reach resolution.²⁶⁷ Mediators try to bring the parties together by proposing solutions to the conflict.²⁶⁸

When a mediator fails to resolve a dispute, employers and employees in some cases appeal to fact-finding commissions.²⁶⁹ Such commissions have access to the documents of both parties and present their findings as to the issues in dispute.²⁷⁰ If a party objects to one of the findings, it is given an opportunity to file an exception, which the commission will consider before issuing a final report.²⁷¹

If none of these methods is successful, an interest arbitration may occur.²⁷² An interest arbitration is a hearing in which both sides argue their respective positions.²⁷³ A panel of arbitrators then determines the outcome of the dispute.²⁷⁴ Normally, panels consist of three arbitrators, and consider three factors when making their decisions.²⁷⁵ First, they compare "wages, hours[,] and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities."²⁷⁶ Secondly, they consider the ability of the employer to accommodate the employees' demands.²⁷⁷ Finally, they examine the terms of agreements negotiated between the parties in the past.²⁷⁸ The panels also have the authority to examine other relevant information and to insert binding clauses into collective bargaining agreements.²⁷⁹ Review of decisions is granted upon clear and convincing

267. See N.Y. CIV. SERV. § 209(3)(a). "[T]o assist the parties to effect a voluntary resolution of the dispute, the board shall appoint a mediator or mediators representative of the public from a list of qualified persons." *Id.*

268. See Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L.J. 523, 532 (1987).

269. See N.Y. CIV. SERV. § 209(3)(b).

270. See *id.*

271. See N.Y. CIV. SERV. § 209(3)(c)-(d).

272. See N.Y. CIV. SERV. § 209(4)(c) (stating that "upon petition of either party, the board shall refer the dispute to a public arbitration panel").

273. See *id.*

274. See *id.*

275. See *id.* The N.Y. Civil Service statute requires an examination of four factors, however, one relates only to police officers and firefighters. This factor need not be considered in applying interest arbitration to disputes involving attorneys. See *id.*

276. N.Y. CIV. SERV. § 209(4)(c).

277. See *id.*

278. See *id.*

279. See *id.*

evidence of abuse of discretion.²⁸⁰

Whether by concerted action, interest arbitration, or in the context of a restructured labor law, attorneys have an interest in forming and joining labor unions. Collective action is a powerful means by which attorneys, especially those engaged in the defense of the indigent, may improve their conditions of employment. With better pay, reasonable caseloads, and proper facilities and support, attorneys will be better able to serve the interests of their clients and thereby fulfill their ethical obligations.

VI. CONCLUSION

In *Gideon v. Wainwright*,²⁸¹ the Supreme Court held that indigent defendants in state court have the right to have counsel appointed for them.²⁸² Writing for the Court, Justice Black stated:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.²⁸³

Lawyers in both the public and private sectors often face substantial workplace problems. These problems constitute more than an inconvenience. In some cases, they lead to the deprivation of clients' constitutionally guaranteed rights. Thus, for lawyers who represent the indigent, the existence of workplace problems may result in a failure to protect a defendant's Sixth Amendment right to counsel. In these circumstances, lawyers become "luxuries," a result that Justice Black cautioned against in *Gideon*.²⁸⁴

280. *See id.*

281. 372 U.S. 335 (1963).

282. *See id.* at 339-40 (concluding that the Sixth Amendment guarantee of counsel is so fundamental and essential to a fair trial that it is made obligatory upon the states by the Fourteenth Amendment).

283. *Id.* at 344.

284. *See id.*

Lawyers can solve their workplace problems through collective action. Although lawyers traditionally have not seen collective action as a solution to their workplace problems, attorneys in both the public and private sectors frequently have an interest in joining unions. They also have the right to do so, provided they do not fall within the supervisory or managerial exceptions. Legal Aid lawyers, private court-appointed counsel, and staff attorneys in public defender's offices and government agencies are among those who are entitled to protection.

Attorneys employed in these capacities often are poorly paid and burdened with excessive caseloads. In addition, they work in circumstances that tend to interfere with their ability to comply with their ethical obligations as set forth in rules of professional conduct. Collective bargaining offers these attorneys a means of increasing their wages, reducing their caseloads, and improving the conditions in which they work.

In addition to traditional collective bargaining, attorneys may also achieve their goals through modifications in labor law. For example, the scope of bargaining may be expanded to require negotiations beyond mandatory wages, hours, and terms and conditions of employment. Also, the principles of exclusive representation and company domination could be expanded to allow attorneys to retain their professional autonomy while engaging in collective action.

In certain circumstances, strikes may provide a solution to attorneys' workplace problems; however, this form of concerted action raises significant problems. In one instance, attorneys who engaged in a work stoppage were convicted of violations of anti-trust law and, in general, strikes tend to pose a risk of employer retaliation.²⁸⁵ For these reasons, less extreme forms of collective action are preferable.

The most promising alternative open to lawyers who have become union members is interest arbitration. Interest arbitration has been used to prevent strikes by employees, such as firemen and policemen, whose jobs are necessary for the maintenance of social order. It requires attorneys and their employers to bargain in good faith about their disputes. Where good faith negotiations cannot resolve their problems, attorneys and their employers may resort to arbitration proceedings.

Interest arbitration provides attorneys with an effective way to improve their wages, hours, and working conditions. For some lawyers, these workplace improvements are a necessity. In their absence, the lawyers' professional obligation to provide competent, zealous, and

285. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990).

faithful representation of their clients is compromised and the “noble ideal” of “fair trials before impartial tribunals” is seriously undermined.²⁸⁶

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286. *Gideon*, 372 U.S. at 344.

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