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CONTINUING THE WHITE COLLAR UNIONIZATION MOVEMENT: IMAGINING A PRIVATE ATTORNEYS UNION

INTRODUCTION

“Such equality [between employers and employees] is the central need of the economic world today. It is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.”

— Senator Robert Wagner (1934)¹

“These law firms are large, wealthy and powerful institutions that generally don’t like to talk about how they work. So when you proffer information, people get excited. They are peeking behind the curtain. . . . We are moving in the direction of greater and greater transparency.”

— David Lat, Founder of AboveTheLaw.com (2009)²

Over the past year, the legal industry has been rocked with turmoil. In January 2008, Cadwalader Wickersham & Taft became the first major New York law firm to conduct attorney layoffs in anticipation of the economic downturn.³ Since then, over 5500 attorneys employed at the nation’s top-tiered law firms have been laid off.⁴ Additionally, private law firms across the country have restructured associate compensation, reduced or eliminated bonuses, or instituted

¹ 78 Cong. Rec. 3443 (1934) (statement of Sen. Wagner), *reprinted in*, 1 NRLB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1949).

² Rachel M. Zahorsky, *David Lat: Gossip at Law*, LEGAL REBELS, Sept. 23, 2009, http://www.legalrebels.com/posts/david_lat_gossip_at_law/.

³ See Press Release, Cadwalader Wickersham & Taft (January 10, 2008), *available at* <http://blogs.wsj.com/law/2008/01/10/cadwalader-laying-off-35-lawyers/> (explaining that the firm was responding to “market developments” with “a number of initiatives” including “targeted personnel reductions”).

⁴ See Lawshucks.com, Layoff Tracker, <http://lawshucks.com/layoff-tracker/> (last visited Dec. 21, 2009). The top ten firms in attorney layoffs are, in alphabetical order: Allen & Overy, Baker & McKenzie, Cadwalader Wickersham & Taft, Clifford Chance, DLA Piper, Dechert. Latham & Watkins, Linklaters, Orrick, White & Case. Lawshucks.com, Law Shucks BigLaw Layoff Tracker – Top 10 Firms – Attorney Layoffs, <http://lawshucks.com/layoff-tracker/layoff-tracker-top-10-lists/#law> (last visited Dec. 21, 2009).

voluntary departure plans or sabbatical programs to encourage associates to leave.⁵ In the past year alone, several major law firms have collapsed.⁶

The legal industry's responses to the difficult economic climate left attorneys with low morale, anxiety, frustration and unhappiness.⁷ The majority of associates were troubled by their firm's lack of transparency regarding financial issues and layoffs.⁸ Laid-off associates reported being shocked at the news of their firing.⁹ In fact, some associates became aware of potential layoffs only after noticing that top firm managers and human resources directors had reserved the majority of the firm's conference rooms.¹⁰ Other associates blasted their law firms for failing to distinguish between layoffs that were performance-based and those that were economically

⁵ See, e.g., Susan Dominus, *\$80,000 for a Year Off? She'll Take It!*, N.Y. Times, Apr. 12, 2009, at A1, available at <http://www.nytimes.com/2009/04/13/nyregion/13bigcity.html> (describing Skadden's effort to cut costs by offering all associates "the option of accepting a third of their base pay to not show up for work for a year"); Eilene Zimmerman, *Chill of Salary Freezes Reaches Top Law Firms*, N.Y. Times, Jan. 25, 2009, at BU11, available at <http://www.nytimes.com/2009/01/25/jobs/25lawyers.html> (discussing associate salary freezes and the move toward merit-based bonus systems); Elie Mystal, *Pillsbury's 'Voluntary Departure' Plan*, ABOVE THE LAW, February 24, 2009, http://abovethelaw.com/2009/02/pillsburys_voluntary_departure.php (providing the text of the internal firm memo which offers associates, senior associates and counsel "who elect to leave" . . . "a severance package that consists, among other thing, of three months of base pay").

⁶ See Niraj Chokshi, et al., *Struggling Heller Calls it Quits*, THE RECORDER, Sept. 26, 2008, available at <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202424812918>; Martha Neil, *Thelen Leaders Seek Vote to Dissolve, Hope to Close By Dec. 1*, ABA JOURNAL, Oct. 28, 2008, available at http://www.abajournal.com/news/thelen_leaders_seek_vote_to_dissolve_hope_to_close_by_dec_1/; Debra Cassens Weiss, *Thacher Proffitt Announces Expected Dissolution*, ABA JOURNAL, Dec. 22, 2008, available at http://www.abajournal.com/news/is_thacher_proffitt_dissolving_before_christmas/.

⁷ See Rachel Brietman, *A Year to Forget*, THE AMERICAN LAWYER, Aug. 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202432587499> (reporting, among other things, that eighty-three percent of respondents to the 2009 American Lawyer annual survey of midlevel associates reported medium or high anxiety about losing their jobs).

⁸ See Rachel Brietman, *supra* note 7; Ross Todd, *Fading Away*, THE AMERICAN LAWYER, August 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202432587424> ("In a year filled with disappointment, how the bad news was delivered and how departures were characterized mattered.")

⁹ David Lat, *Will Work for Dinner at Nobu*, THE NEW YORK OBSERVER, January 22, 2008, available at <http://www.observer.com/2008/will-work-dinner-nobu> (quoting a laid-off Cadwalader associate as saying, "I thought I was being called in for my year-end review. . . . I totally wasn't expecting it.")

¹⁰ E.g., David Lat, *supra* note 9 (reporting that associates at Cadwalader became suspicious when the firm's executive director and head of Associate Development and Recruitment reserved an entire floor of conference rooms); David Lat & Elie Mystal, *National Layoff Watch: Latham & Watkins Is Going For It*, ABOVE THE LAW, Feb. 25, 2009, http://abovethelaw.com/2009/02/nationwide_layoff_watch_latham_1.php (predicting layoffs at Latham & Watkins when associates noticed that conference rooms were reserved for Friday, February 27th in the firm's New York, Chicago, Washington, D.C., Los Angeles, and San Francisco offices). Latham & Watkins later laid off 190 associates and 250 nonlegal staff, including paralegals, across many of its US offices on Friday, February 27, 2009. Richard Lloyd, *Latham to Cut 190 Associates, 250 Staff*, THE AMLAW DAILY, Feb. 27, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/02/official-latham-to-cut-190-associates-250-staff-.html>.

driven, noting that nobody seemed to know what factors went into the decision-making process.¹¹

Given the current legal market and the secrecy surrounding employment decisions in many of the nation's top law firms, this Note imagines the formation of private attorney labor unions as a possible solution. Part I briefly discusses the National Labor Relations Act of 1935, the primary piece of legislation that governs employees' right to organize and collectively bargain, focusing primarily on who is covered with particular attention placed on the inclusion of professional employees. Part II introduces an understanding of white collar professionals as a distinct economic class, highlighting, specifically, its similarities and differences with traditional blue-collar workers. This part then uses this understanding of white collar professionals to describe and justify the white collar unionization movement, while also noting the formation of unions in other professional industries. Proceeding upon the understanding that private law attorneys, as white collar professionals, possess a legitimate interest in organizing, Part III identifies and responds to common objections to the formation of attorney labor unions. Finally, Part IV suggests that current conditions are ripe for the creation of private attorney labor unions and addresses the practical considerations associated with forming such unions.

I. THE LEGISLATION GOVERNING THE RIGHT TO ORGANIZE AND COLLECTIVELY BARGAIN

¹¹ Ross Todd, *supra* note 8. The article explains:

So what did associates perceive as bad firm conduct? Most were skeptical—hostile, even—about cuts that firms labeled as purely performance-related. The downturn left most firms with less work and lower-than-normal attrition. So to most associates, layoffs were understandable. But sending exiting colleagues into a terrible economy while tarnished with poor performance reviews drew associates' ire.

Id. In the wake of impending layoffs, one associate, who was later laid off from Pillsbury Winthrop Shaw Pittman LLP described the firm atmosphere as “tense”, remarking that “[p]eople tried to get clarification as to what would be taken into consideration in layoff decisions.” Drew Combs, *A Different Sort of Lawyer*, THE AMERICAN LAWYER, August 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202432565393>.

This part provides a brief overview of the National Labor Relations Act of 1935 (“NLRA”). It first situates the Act historically, noting its role as part of an overall national policy to ensure economic stability and growth. It then explores the evolution of the types of employees to which the NLRA applies, specifically focusing on the inclusion of professional employees and the extent to which Congress contemplated the Act’s application to attorneys.

A. *The National Labor Relations Act of 1935: The Wagner Act*

The paramount legislation that governs the rights of employees to unionize and collectively bargain is the National Labor Relations Act (“the NLRA” or “the Act”) of 1935, also known as the Wagner Act. It encourages “the practice and procedure of collective bargaining” and protects “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment.”¹² However, the NLRA situated these employees’ rights not as an end, but as a means to promote economic stability and growth.¹³

Introduced in 1934, during the Great Depression, the NLRA sought to prevent the “burdening or obstruct[ion of] commerce” by equalizing the organization and bargaining powers between employees and employers.¹⁴ When introducing the bill on the Senate floor, Senator Robert Wagner, stated:

This [economic] situation cannot be remedied by new codes or by general exhortations. It can be remedied only when there is genuine cooperation between employers and employees, on a basis of equal bargaining power. The only road to this goal is the free and unhampered development of real employee organizations and their complete recognition. . . . It should be guaranteed by

¹² National Labor Relations (Wagner) Act, § 1, 29 U.S.C. § 151 (2006).

¹³ Senator Wagner, in a speech that was reprinted in the Senate record upon introduction of the NLRA, stated: “If we intend to achieve the fundamental reforms of the new deal Our efforts should be directed, first toward providing the worker with an income sufficient for comfortable living, and then toward assuring him an equitable share in our national wealth.” 78 Cong. Rec. 3678 (1934) (statement by Sen. Wagner), *supra* note 1, at 19.

¹⁴ NLRA, § 1, 29 U.S.C. § 151; *see* 78 Cong. Rec. 3443 (1934) (statement by Sen. Wagner), *supra* note 1, at 15.

enactment of the new legislation which is being proposed today.¹⁵

This sentiment is captured in the introductory section of the NLRA, which specifically acknowledges the importance of the equality between employees and employers to national economic stability and growth:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.¹⁶

Thus, the NLRA should be viewed not only as the legal crystallization of the United States' labor policy, but also the fundamental means by which our government based its economic recovery plan and ensured future economic stability and growth.¹⁷

In order to accomplish these greater goals, the NLRA provided that employees shall have the right to self-organization, collective bargaining, and other concerted activities.¹⁸ But these

¹⁵ 78 Cong. Rec. 3443 (statement of Sen. Wagner), *supra* note 1, at 15.

¹⁶ NLRA, § 1, 29 U.S.C. § 151.

¹⁷ 78 Cong. Rec. 3443–44 (1934) (statement of Sen. Wagner), *supra* note 1, 15–18; *see generally* AMERICAN BAR ASSOCIATION, THE FIRST SIXTY YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD 1935-1965, available at http://www.nlr.gov/publications/history/the_first_60_years.aspx (explaining the purpose and history behind the NLRA). President Theodore Roosevelt, upon signing the bill in 1935, stated:

By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife.

79 Cong. Rec. 10720 (1935), *reprinted in* 2 NRLB, Legislative History of the National Labor Relations Act, 1935, at 3269 (1949).

¹⁸ NLRA, § 7, 29 U.S.C. § 157. The entire section provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

rights were limited to only those the NLRA defined as employees.¹⁹ The NLRA first limited its application to private-sector employees by excluding the United States and any state from the definition of employer.²⁰ Second, the NLRA defined employee as “any employee” except any individual “employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.”²¹ Notably, the NLRA, as originally passed, did not distinguish between professional and non-professional employees.²²

B. *The Labor Management Relations Act of 1947: The Taft-Hartley Amendments*

In 1947, Congress passed the Labor Management Relations Act (“the LMRA”), also known as the Taft-Hartley Act, which amended portions of the NLRA. One significant amendment was the addition of a definition for a professional employee. Section 2(12) of the NLRA provides that a professional employee is

(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 high 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; or

right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 8(a)(3).

Id.

¹⁹ See NLRA, § 2, 29 U.S.C. § 152.

²⁰ See NLRA, § 2(2), 29 U.S.C. § 152(2) (excluding “the United States . . . or any State or political subdivision thereof” from the definition of employer, and thus, their employees from coverage under the NLRA); see also Laura Midwood & Amy Vitacco, Note, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations*, 18 HOFSTRA LAB. & EMP. L.J. 299, 299 (2000).

²¹ NLRA, § 2(3), 29 U.S.C. § 152(3).

²² Midwood & Vitacco, *supra* note 20, at 301.

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) or paragraph (a) and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).²³

In amending the NLRA to include this definition, Congress recognized a distinction between professional and non-professional employees while also explicitly ensuring that professional employees were covered under the Act.²⁴ In fact, Congress intended this definition to “cover[] such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants.”²⁵ Moreover, the Report of the Senate Committee on Labor and Public Welfare noted:

When Congress passed the National Labor Relations Act, it recognized that community of interests among members of a skilled craft might be quite different from those of unskilled employees in mass-production industry. Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community interest in maintaining certain professional standards

Under the committee bill, the Board is required to afford such groups an opportunity to vote in a separate unit to ascertain

²³ NLRA, § 2(12), 29 U.S.C. § 152(12).

²⁴ See NLRA, § 2(12), 29 U.S.C. § 152(12); 93 Cong. Rec. 3952 (1947) (statement of Sen. Taft), *reprinted in 2* NLRB, Legislative History of the Labor Management Relations Act of 1947, at 1009 (1948); Midwood & Vitacco, *supra* note 20, at 301. Senator Taft specifically stated, in regards to the application of the NLRA to professional employees:

Professional employees are defined to be those who are strictly professional, men with highly specialized professional qualification, who may, if they desire vote themselves out of a plant unit and establish a special union for professional employees. Such a union would have the protection of the Wagner Act. . . . It would mean that the Board could not include professional employees with nonprofessional employees if the majority of the professional employees in a plant did not desire to be in the general union.

93 Cong. Rec. 3952 (1947) (statement of Sen. Taft), *supra*, at 1009.

²⁵ H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).

whether or not they wish to have a bargaining representative of their own.²⁶

Thus, the inclusion of professional employees in the NLRA reflects a recognition that (1) professional employees may have different labor interests than non-professional employees, (2) the right of employees to organize and collectively bargain extends to professional employees despite these different interests, and (3) the exercise of independent discretion or judgment in one's employment is not a *per se* barrier to NLRA coverage.²⁷

At the same time, however, the Taft-Hartley Act amended the NLRA's definition of employee to explicitly exclude supervisors, thus denying coverage to any employee found to be a supervisor under the statutory definition.²⁸ A supervisor is defined as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.²⁹

In justifying this amendment, Congress expressed concern about the conflict of interest that would arise if a supervisor, who typically works to further the interest of his or her employer, was expected to act with a union against that employer interest.³⁰ Accordingly, while the Taft-

²⁶ S. Rep. No. 105, 80th Cong., 1st Sess. 11 (1947).

²⁷ See NLRA, § 2(12), 29 U.S.C. § 152(12); S. Rep. No. 105, 80th Cong., 1st Sess. 11 (1947); 93 Cong. Rec. 3952 (1947) (statement of Sen. Taft), *supra* note 24, at 1009.

²⁸ NLRA, § 2(3), 29 U.S.C. § 152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor").

²⁹ NLRA, § 2(11), 29 U.S.C. § 152(11) (emphasis added).

³⁰ 93 Cong. Rec. A2010 (1947) (statement of Congressman Meade), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 868–69 (1948). Congressman Meade remarked:

By definition, the new Board would be prohibited from setting up a union to represent supervisory employees.

This section of the bill is an example of the old adage, "One cannot serve two masters." It would be an utterly impossible position in which to place a man—he would be paid by his employer but he [is] expected to go along with the union of

Hartley Amendments ensured that the NLRA explicitly covered professional employees, they also limited coverage by excluding supervisors.³¹ In effect, these particular amendments create a tension between professional employees, who are statutorily allowed to organize, and supervisors, who are often professional employees, but are barred by statute from unionizing. This tension will be discussed further in Part III, *infra*.

II. THE WHITE COLLAR PROFESSIONAL AND THE WHITE COLLAR UNIONIZATION MOVEMENT

“[The white collar man] is more often pitiful than tragic, as he is seen collectively, fighting impersonal inflation, living out in slow misery his yearning for the quick American climb. He is pushed by forces beyond his control, pulled into movements he does not understand; he gets into situations in which his is the most helpless position. The white collar man is the hero as victim, the small creature who is acted upon but who does not act, who works along unnoticed in somebody’s office or store, never talking loud, never talking back, never taking a stand.”

— C. Wright Mills, Sociologist (1951)³²

Given that Congress explicitly allows professional employees to organize and collectively bargain, this part explores why such activities would be appealing to white collar professionals. It begins with an exploration into the white collar worker, specifically the white collar professional, as a distinct economic class. It identifies three characteristics that serve to highlight the similarities and differences between this new class of workers and blue-collar workers. Lastly, it introduces the white collar unionization movement, drawing upon the characteristics of the white collar professional to describe its initial impetus and argue for its

which he was a member. I am convinced the committee acted wisely in prohibiting unionization of foremen or supervisors.

Id.

³¹ See NLRA, § 2(11)–(12), 29 U.S.C. § 152(11)–(12).

³² C. WRIGHT MILLS, WHITE COLLAR: THE AMERICAN MIDDLE CLASS xii (1956).

continuation. It will also touch briefly on the history of white collar unionization in the United States and identify existing white collar unions.

A. *The White Collar Professional*

On a definitional level, the white collar occupation group is broken into four main sections: professional, technical, and kindred workers; managers, officials, and proprietors, except farm; clerical and kindred workers; and sale workers.³³ For our purposes, one should note that the category of professional white collar workers consists of “lawyers, engineers, doctors, and teachers” as well as “technicians . . . airline pilots, professional nurses (but not practical nurses), and those employed as entertainers”.³⁴ Common among these professionals is the requirement of “specialized, systematic, and often lengthy training.”³⁵ As of 2006, there were almost thirty million white collar professions in the United States, with a projection that the number would reach nearly thirty-five million by 2016, almost twenty-one percent of the labor force.³⁶

On a broader level, however, white collar workers are a distinct category of laborers that came to symbolize twentieth-century existence.³⁷ C. Wright Mills, a sociologist, conducted the most extensive study of white collar workers, and noted, “they are a new cast of actors, performing the major routines of twentieth-century society”.³⁸ Specifically, white collar professionals are distinguishable from blue-collar workers in their education and occupational duties, but are also remarkably similar to them because of an increased dependence on employers

³³ Everett M. Kassalow, *White-Collar Unionism in the United States*, in *WHITE-COLLAR TRADE UNIONS* 305, 310 (Adolf Sturmthal ed., 1966).

³⁴ Kassalow, *supra* note 33, at 312.

³⁵ MILLS, *supra* note 32, at 112.

³⁶ Bureau of Labor Statistics, U.S. Dep’t of Labor, *Table III-1*, in *Occupational Projections and Training Data, 2008–09 Ed.*, http://www.bls.gov/emp/optd/optdtabiii_1.pdf (last visited Nov. 15, 2009).

³⁷ MILLS, *supra* note 32, at ix (“it is to this white-collar world that one must look for much that is characteristic of twentieth-century existence.”).

³⁸ *Id.*

as more and more white collar professionals move into salaried positions.³⁹ The resulting quasi-independent nature of the white collar professional's work led to the identification of three seemingly contradictory characteristics inherent to this new class of workers: (1) increased employment dependence despite being highly skilled, (2) continued identification with management, and (3) a strong belief in individual advancement. It is these three characteristics that led scholars to speculate about the growth in white collar unionization.

1. New Dependence

Because white collar professionals, particularly doctors and lawyers, have shifted toward salaried positions, these once independent professionals are now increasingly dependent on their employers.⁴⁰ Mills observed:

Most professionals are now salaried employees and fitted into the new hierarchical organizations of educated skill and service; intensive and narrow specialization has replaced self-cultivation and wide knowledge; assistants and sub-professionals perform routine, although often intricate, tasks, while successful professional men become more and more the managerial type. So decisive have such shifts been, in some areas, that it is as if rationality itself had been expropriated from the individual and been located, as a new form of brain power, in the ingenious bureaucracy itself.⁴¹

In other words, while old professionals used to “hang a shingle”, the new white collar professional sacrificed this independence to become part of what Mills terms the “managerial demiurge”—“attached to institutions” but never fully becoming “autonomous professionals themselves.”⁴² This shift culminated in a new dependency in the workplace, resulting in

³⁹ *Id.* at 112.

⁴⁰ *See id.* at x (“In the established professions, the doctor, lawyer, engineer, once was free and named on his own shingle; in the new white collar world, the salaried specialists of the clinic, the junior partners in the law factory, the captive engineers of the corporation have begun to challenge free professional leadership.”).

⁴¹ *Id.* at 112.

⁴² *See MILLS, supra* note 32, at 114. Mills observed:

Most of the old professionals have long been free practitioners; most of the new ones have from their beginning been salaried employees. But the old

professionals that no longer determined their own work or practice.⁴³ As a result, these white collar professionals occupy a hybrid position that maintains some of the entrepreneurship of the old professional yet is subjected to the bureaucracy and dependency that normally characterizes blue collar workers.⁴⁴

When this hybrid situation is applied to lawyers, Mills paints a painfully accurate portrayal of contemporary associate life. He first sets up a dichotomy in which he compares the lawyers of the nineteenth-century, who were “agent[s] of the law, handling the general interests of society”, with those of the twentieth-century, for whom “the public has become . . . an object of profit rather than of obligation.”⁴⁵ This shift in focus has thus led to a fundamental change in the practice of law, giving rise to large law firms which transforms the lawyer from “a consultant and counselor to large business” to “its servant, its champion, its ready apologist”.⁴⁶

professions, such as medicine and law, have also been invaded by the managerial demiurge and surrounded by sub-professionals and assistants. The other practitioner’s office is thus supplanted by the medical clinic and the law factory, while newer professions and skills, such as engineering and advertising, are directly involved in the new social organizations of salaried brain power.

Id. at 113. Particularly, Mills noted that “[l]aw partners give their less challenging tasks to clerks and salaried associates”, concluding that “[i]n practically every profession, the managerial demiurge works to build ingenious bureaucracies of intellectual skills.” *Id.* at 114.

⁴³ *Id.* at 114–15. Mills writes:

[P]rofessional men and women have become dependent upon the new technical machinery and upon the great institutions within whose routines the machines are located. They work in some department, under some kind of manager; while their salaries are often high, they are salaries, and the conditions of their work are laid down by rule. What they work on is determined by others, even as they determine how a host of sub-professionals assistants will work. Thus they themselves become part of the managerial demiurge.

Id. at 114.

⁴⁴ *See id.* at 115.

⁴⁵ *See id.* at 121–22.

⁴⁶ *See id.* at 122–23. Mills also observed:

The function of the law has been to shape the legal framework for the new economy of the big corporation, with the split ownership and control and the increased monopoly of economic power.

. . . .

Consequently, the modern corporation has led the lawyer to erect a legal framework for the managerial demiurge.⁴⁷

The result is essentially a “law factory”, where partners oversee salaried associates, ensuring that “production lines and organization run smoothly”.⁴⁸ In turn, associates “work for only one important client or on one type of problem” and “like a mechanic in a big auto repair shop, [each salaried lawyer] is required to account for his time, in order that fees may be assigned to given cases and the practice kept moving.”⁴⁹ This change in the practice of law and working conditions situates these white collar professionals closer to their blue collar brethren than the old independent professionals.⁵⁰

2. Identification with Management

Despite the white collar professionals’ new dependence on their employer for work, they surprisingly maintain a close identification with management.⁵¹ This may be because of the

In fulfilling his function the successful lawyer has created his office in the image of the corporations he has come to serve and defend. Because of the increased load of the law business and the concentration of successful practice, the law office has grown in size beyond anything dreamed of by the nineteenth-century solicitor. Such centralization of legal talent, in order that it may bear more closely upon the central functions of the law, means that many individual practitioners are kept on the fringes, while other become salaried agents of those who are at the top. As the new business system becomes specialized, with distinct sections and particular legal problems of its own, so do lawyers become experts in distinct sections and particular problems, pushing the interest of these sections rather than standing outside the business system and serving a law which co-ordinates the parts of a society.

Id. at 122.

⁴⁷ MILLS, *supra* note 32, at 123.

⁴⁸ *See id.* at 123, 124.

⁴⁹ *Id.* at 124.

⁵⁰ *See* Kassalow, *supra* note 33, at 306 (“Under these conditions the special individual characteristics of white-collar work tend to disappear and more of it becomes routinized and bureaucratized.”); MILLS, *supra* note 32, at 301 (“Whatever their aspirations, white-collar people have been pushed by twentieth-century facts toward the wage-worker kind of organized economic life.”).

⁵¹ *See* Kassalow, *supra* note 33, at 306; MILLS, *supra* note 32, at 305.

similarities between the white collar professional and his employer in terms of work and education.⁵² Mills observed:

[T]he technological and educational similarity of white-collar work to the work of the boss; the physical nearness to him; the prestige borrowed from him; the rejection of wage-worker types of organization for prestige reasons; the greater privileges and securities; the hope of ascent—all these, when they exist, predispose the white-collar employee to identify with the boss.⁵³

In other words, the white collar professional believes that the shared similarities translate into shared interests.⁵⁴ This belief, however, may not be well-placed:

White collar people may be part of management, like they say, but management is a lot of things, not all of them managing. You carry authority, but you are not its source. . . . [Y]ou are a link in the chains of commands, . . . which bind together the men who make decisions and the men who make things; without you the managerial demiurge could not be. . . . You are closer to management than the wage-workers are, but yours is seldom the last decision.⁵⁵

Nevertheless, there remains a loyalty to management despite the contemporary working conditions that characterize white collar occupations.⁵⁶

3. Belief in Personal Advancement

Lastly, the white collar professional retains a strong belief in personal advancement partly because of his identification with management. Due to the nature of a white collar professional's work and higher education, the white collar professional, unlike the blue collar worker, possesses aspirations that "often take the form of a desire of 'getting ahead'" as opposed

⁵² See MILLS, *supra* note 32, at 305.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ *Id.* at 80.

⁵⁶ See *id.* at 305. Mills also observed that there may be "fear and even hatred of the boss", and that this "loyalty to management" could simply be an "insecure cover-up for fear of reprisal." *Id.*

to “getting by”.⁵⁷ As a result, the white collar professional focuses on “upward orientation” and “fair channels of promotion” rather than relying on organizing.⁵⁸

In sum, these three characteristics demonstrate the complexity of the white collar professional and the inherent tensions that exist when considering whether to unionize. On the one hand, the white collar professionals are no longer independent workers—they increasingly rely on employers for their work, leaving them in less control of their working conditions much like blue-collar workers. Unionization, thus, is the obvious solution to gain back control. On the other hand, the similarities white collar professionals share with their employers, including education, responsibilities, and duties, create a sense of shared interests, whether or not this is true. This sense coupled with the white collar professional’s belief in advancement—that is, his desire and belief that, one day, he too could become the employer—decreases the likelihood of unionization since the creation of a union would place him directly adverse to his employer, thus impeding his ability to advance. Despite this tension, however, there have been many successful attempts to unionize white collar professionals.

B. *The White Collar Unionization Movement*

In 1957, the number of white collar workers in the United States surpassed that of blue collar workers.⁵⁹ This marked a genuine shift in the labor market, and as the number of white collar workers continued to grow rapidly, many scholars, in the following decades, were left to speculate about these new workers and their impact on the national labor movement.⁶⁰ As a

⁵⁷ See Kassalow, *supra* note 33, at 306 (“the manual worker is more often likely to be content with ‘getting by’”).

⁵⁸ See *id.*

⁵⁹ *Id.*; see also MARK MCCOLLOCH, WHITE COLLAR WORKERS IN TRANSITION 3 (1983) (“By the late 1950’s, [white collar workers] outnumbered production workers for the first time.”). Kassalow also notes that “[t]he United States is the first country in the world in which manual or blue-collar workers have ceased to be the largest single occupational groups of the labor force. They have been displaced . . . by white-collar workers.” *Id.* at 305.

⁶⁰ MCCOLLOCH, *supra* note 60, at 3. Kassalow, in particular, noted that the increase in white collar workers corresponded with the decline in union membership. Everett M. Kassalow, *Unionization of White-Collar Workers*, in LABOR IN A CHANGING AMERICA 158, 159 (William Haber ed., 1966).

result, many hypothesized that the increase in the number of white collar workers, the nature of the workers themselves, and other social, economic and technological shifts would eventually lead to greater white collar unionization.⁶¹

Although the call for greater white collar unionization peaked in the 1970s, this did not mark the beginning of white collar unions.⁶² In fact, white collar unions date back to the late nineteenth-century and the early twentieth-century with the railroad, government, and entertainment being the historical centers.⁶³ In addition, during the 1940s and 1960s, several professional associations transformed into collective bargaining agents for their members.⁶⁴ Today, there are numerous unions for white collar professionals, including but not limited to doctors, nurses, musicians, actors, accountants, writers, and teachers.⁶⁵

The impetus for the white collar unionization movement arose from several factors. First, the increase in the numbers of white collar workers contributed greatly to the movement. With the decline of blue collar workers, who traditionally formed the base of the labor movement, the growing number of white collar workers placed pressure on the labor movement to adapt in order to survive.⁶⁶ In addition, the labor history of the United States, with its dependence on group

⁶¹ See Kassalow, *supra* note 33, at 305; C. WRIGHT MILLS, *WHITE COLLAR: THE AMERICAN MIDDLE CLASS* 301–02 (1956).

⁶² See MCCOLLOCH, *supra* note 60, at 3; MILLS, *supra* note 32, at 302–03. For a general discussion of the beginnings of white collar unionism and identification of early white collar unions, please see Kassalow, *supra* note 33, at 318–29.

⁶³ See Kassalow, *supra* note 60, at 163 (“[S]ignificant union organization among postal employees, railway clerks, retail clerks and a few other white-collar groups goes back many decades. Musicians, actors, artists, airline pilots, and journalists have also been well unionized for years.”); Kassalow, *supra* note 33, at 318 (“Notable among the early white-collar organizations at the end of the nineteenth and in the early twentieth century were those of the government postal employees, the retail clerks, and the railway clerks.”); MILLS, *supra* note 32, at 303.

⁶⁴ Kassalow, *supra* note 33, at 351–53 (describing how the American Nurses Association and the National Education Associations for years opposed unionization and collective bargaining, but later modified themselves to become collective bargaining agents).

⁶⁵ See generally Unions of the AFL-CIO, <http://www.aflcio.org/aboutus/unions/> (a complete list of all unions affiliated with the AFL-CIO).

⁶⁶ See Kassalow, *supra* note 60, at 159 (“The American labor movement, much like labor movements in other industrial nations, has always based itself primarily on manual workers, and it is now confronted with the fact that its base is eroding.”).

bargaining, suggested that an economic group as large as white collar workers would eventually seek its own channels of representation and influence.⁶⁷ Second, the working conditions of white collar workers may create an incentive to unionize.⁶⁸ As described earlier, the current conditions of the white collar workers' employment have changed drastically from those of the old professional so that they now closely mirror those of the blue collar worker.⁶⁹ The resulting bureaucracy and dependency leads to "a specific kind of job dissatisfaction—the feeling that as an individual he cannot get ahead in his work."⁷⁰ This ultimately creates "the job factor that predisposes the white collar employee to go pro-union."⁷¹ Lastly, the fact that white collar workers are not immune from layoffs or salary cuts gives further incentive to unionization.⁷² For instance, during the Great Depression, white collar workers faced unemployment just like blue

⁶⁷ Kassalow, *supra* note 60, at 162–63. Kassalow opined:

I am quite convinced that one way or another these "new millions" in American economic life will demand and establish their own channels of representation and influence. In a society which is increasingly characterized by group bargaining and by group consultation on the part of government, no major economic group will long be without its organization form and channel.

Id.

⁶⁸ See MILLS, *supra* note 32, at 304–05. Mills observed:

Objective circumstances of the work situation influence the white-collar employees' psychology when they are confronted with the idea of joining a union. By and large, these are not different from those affecting the organizability of wage-workers, and include: strategic position in the technological or marketing processes of an industry, which conditions bargaining power; unfair treatment by employers, which creates a high state of grievance; a helpful legal framework, which protects the right to organize; a profitable business but one in which labor costs form a small proportion of the cost of production, which means that higher wages will not severely affect total costs; relative permanency of employment and of labor force, so that organization may be stable.

Id.

⁶⁹ See discussion *supra* Part A.1.

⁷⁰ MILLS, *supra* note 32, at 307.

⁷¹ *Id.*

⁷² See Jürgen Kocka, *White Collar Workers in America 1980–1940*, at 218 (Maura Kealey, trans. 1980).

collared workers. A description of the circumstances faced then by white collar workers is astoundingly similar to those faced now by current private law attorneys:

During the depression unemployment was a common occurrence for white collar workers in industry as well as in commerce, though they were not as hard hit as industrial blue collar workers. Even if they kept their jobs, however, the hours of office of technical employees were often reduced when business was slow; their wages were docked accordingly. Many firms also attempted to cut down their office costs by more closely supervising white collar workers, which further reduced the small privileges and freedoms that separated the office from the factory floor. . . . White collar employees were also adversely affected by cutbacks in company welfare policies: stock and profit sharing plans, subsidized housing, savings banks, cafeterias and paid vacations were often eliminated, and there were fewer recreational and educational offerings.⁷³

This uncertainty provides further motivation for white collar workers to act collectively to create more stable working conditions.⁷⁴

III. OBJECTIONS TO PRIVATE ATTORNEYS ORGANIZING AND RESPONSES

Given the growing similarities between the working conditions of the white collar professional and the traditional blue-collar worker, it is not difficult to imagine a continuation of the white collar unionization movement. In particular, the impact of the economic downturn on “Biglaw” may lead many associates to consider unionizing.⁷⁵

Generally speaking, private attorneys maintain the same legal rights to organize and collectively bargain as other employees.⁷⁶ In fact, the National Labor Relations Board (“the NLRB” or “the Board”) has asserted jurisdiction over law firms with a gross revenue of

⁷³ *Id.* at 218–19 (Maura Kealey, trans. 1980).

⁷⁴ See Kassalow, *supra* note 60, 162–63; KOCKA, *supra* note 72, at 219.

⁷⁵ In fact, the impetus for this article was a conversation this author had with a junior associate at a prominent San Francisco law firm. “There is no reason to believe that attorneys would be less interested in joining unions than the American workforce in general.” Mitchell H. Rubinstein, *Attorney Labor Unions*, N.Y. ST. B.J., Jan. 2007, at 23 n.1.

⁷⁶ See Rubinstein, *supra* note 75, at 23.

\$250,000 since 1977.⁷⁷ Since employees in law firms, including attorneys, are subject to the National Labor Relations Act, discussed *supra*, employers of private attorneys may argue that attorneys are excluded from organizing because they are confidential employees, supervisory employees, or managerial employees. They may also argue that attorneys cannot unionize because legal ethics will hinder collective bargaining efforts. This part will address each of these objections.

A. The Confidential Employee Exclusion

The Board has excluded from the definition of employee “confidential employees”.⁷⁸ Here, confidential employees does not refer to the nature of the employee’s work—that is, the confidential nature of an attorney’s work; rather, it refers to those who are “involved in internal confidential labor relations matters with respect to their employer.”⁷⁹ Thus, in order to be considered a confidential employee, the employee must “in the regular course of [her] duties, have access to confidential data bearing directly upon the employees’ labor relations.”⁸⁰

The rationale for this exclusion is that management should not be required to handle labor relations matters through an employee who is represented by the union because of the risk that the employee will have advance access to the company’s position regarding negotiations and other matters.⁸¹ However, mere access to confidential information regarding labor relations is

⁷⁷ *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977).

⁷⁸ *E.g.*, *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981); *Intermountain Rural Elec. Assoc.*, 277 N.L.R.B. 1 (1985); *In Re Ford Motor Co.*, 66 N.L.R.B. 1317 (1946).

⁷⁹ Rubinstein, *supra* note 75, at 23.

⁸⁰ *Ford Motor Co.*, 66 N.L.R.B. at 1322.

⁸¹ *Hendricks*, 454 U.S. at 179. The Supreme Court recognized:

Management should not be required to handle labor relations matters through employees who are represented by the union which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany’s position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.

Id.

insufficient to confer confidential status upon an employee.⁸² As a result, the Board developed the “labor nexus” test, which the Supreme Court approved in *N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, to determine which employees are confidential.⁸³ The test asks whether the employee “assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.”⁸⁴ In this way, the test focuses not on the *access* an employee has to confidential labor management information, but whether the employee *works in a confidential capacity with a person* “who exercise[s] managerial authority in labor relations.”⁸⁵ As the Board stated:

Under [the labor nexus test] it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.⁸⁶

The determination of whether an employee is a confidential employee is often the subject of litigation and will necessarily be fact-specific. In general, however, most attorneys in private law firms are not involved with the labor management of the firms for which they work and thus, will not meet the labor nexus test. Consequently, most private attorneys will not be prevented from organizing based upon the exclusion for confidential employees.

B. *The Supervisory Employee Exclusion*

The greatest obstacle to private attorney unionization is probably the statutory exclusion of supervisors, discussed *supra*. Given that even the lowliest junior associate in a private law

⁸² *Id.* at 189 (“the Board has never followed a practice of depriving all employees who have access to confidential business information from the full panoply of rights afforded by the Act”).

⁸³ *See id.*

⁸⁴ *Id.* at 173.

⁸⁵ Rubinstein, *supra* note 75, at 24.

⁸⁶ *Intermountain Rural*, 277 N.L.R.B. at 4.

firm is entrusted with supervising secretaries, paralegals, and other support staff, associates may be considered “supervisors” under the NLRA, thus excluding them from unionizing efforts.

The rationale for excluding supervisors from organizing rests with Congress’s primary intent “to protect ‘laborers’ and ‘workers’ whose right to organize and bargain collectively had not been recognized by industry”, whereas “there was no similar history with respect to foremen, managers, superintendents, or vice presidents.”⁸⁷ Congress further noted that attempts to unionize supervisors “hurt productivity, increased the accident rate, upset the balance of power in collective bargaining, and tended to blur the line between management and labor.”⁸⁸ Congress also found that “unionization of supervisors had deprived employers of the loyal representations to which they were entitled.”⁸⁹ In sum, Congress was “concerned . . . with the welfare of ‘workers’ and ‘wage earners’, not of the boss.”⁹⁰

The burden of proving supervisory status falls on the party claiming that the employee is a supervisor, which is usually the employer.⁹¹ However, not every “order giver” is a supervisor.⁹² The NLRA defines supervisor as:

[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effective 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.⁹³

⁸⁷ See *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 279 (1974).

⁸⁸ *Id.* at 281.

⁸⁹ *Id.*

⁹⁰ *Id.* at 282.

⁹¹ *N.L.R.B. v. Ky. River Cmty. Care*, 532 U.S. 706, 710–12 (2001).

⁹² See *King Broad. Co.*, 329 N.L.R.B. 378, 381 (1999) (“Thus, it is well established that merely having the authority to assign work does not establish statutory supervisory authority. Further, not every act of assignment constitutes statutory supervisory authority”); see also Rubinstein, *supra* note 75, at 24 & n.17.

⁹³ NLRA, § 2(11), 29 U.S.C. § 152(11).

Consequently, the Supreme Court, in *N.L.R.B. v. Health Care & Retirement Corp.*, described the test for determining whether an employee is a supervisor as follows:

[T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require “the use of independent judgment”? Third, does the employee hold the authority “in the interest of the employer?”⁹⁴

Importantly, an employee need only engage in one of the twelve listed activities in order to achieve supervisory status.⁹⁵ However, any of these actions must be done with “independent judgment” in order to satisfy the test.⁹⁶

In the case of attorneys seeking to organize, distinguishing “independent judgment” from “professional judgment” is particularly difficult.⁹⁷ The Supreme Court addressed this difficulty when deciding *N.L.R.B. v. Kentucky River Community Care, Inc.*. There, the Supreme Court was asked to consider whether the exercise of “ordinary professional or technical judgment in directing less-skilled employees” constituted the use of “independent judgment” for the purposes of satisfying the test for supervisory status.⁹⁸ Rejecting the “categorical exclusion” of professional judgment from the understanding of “independent judgment”, the Court found that “a supervisor’s judgment [did not cease] to be ‘independent judgment’ because it depended upon

⁹⁴ 511 U.S. 571, 574 (1994).

⁹⁵ *E.g.*, *Fred Meyer Alaska, Inc.*, 334 N.L.R.B. 646, 649 (2001) (“To meet this definition, a person needs to possess only one of the specific criteria listed”); *King Broad. Co.*, 329 N.L.R.B. at 381 (“Section 2(11) is to be read in the disjunctive, and the ‘possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.’”).

⁹⁶ *King Broad. Co.*, 329 N.L.R.B. at 381 (“As with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11).”).

⁹⁷ *See id.* at 383 (“We recognize that it is often difficult to separate the exercise of judgment necessary to the performance of an individual’s own job from the supervisory independent judgment of Section 2(11) of the Act, particularly where skilled employees are directing other skilled employees, or professional employees are direction nonprofessional employees.”).

⁹⁸ *See Ky. River*, 532 U.S. at 713.

the supervisor’s professional or technical training or experience.”⁹⁹ Yet, the Court maintained that “[m]any nominally supervisory functions may be performed without the ‘exercis[e] of’ such a degree of ... judgment or discretion ... as would warrant a finding’ of supervisory status under the Act”, noting that “the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.”¹⁰⁰ How this affects the bargaining status of law firm associates remains terribly unclear, but suggests that if an associate’s directions to support staff fall within the orders of a partner, the associate may not rise to the level of statutory supervisory status.¹⁰¹

In 2006, the Board, in *Oakwood Healthcare Inc.*, considered whether charge nurses were supervisors under the NLRA. In deciding the case, the Board attempted to clarify the terms “assign”, “responsibly to direct”, and “independent judgment” as used in the statutory definition of supervisor. These definitional clarifications are particularly important to attorneys that desire to organize because their employers will probably assert that they assign or responsibly direct others with independent judgment in order to exclude them from any bargaining unit.

Regarding the term “assign”, the Board explained that it

refer[red] to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and

⁹⁹ *Id.* at 714, 715.

¹⁰⁰ *Id.* at 714; *see also King Broad. Co.*, 329 N.L.R.B. at 383 (“the authority of an individual employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training, or position is not supervisory authority. In these circumstances, such directions simply are incidental to the employee’s ability to perform their own work.”).

¹⁰¹ *See id.*; *see also King Broad. Co.*, 329 N.L.R.B. at 383. In *King Broadcasting Co.*, the Board found that news producers were not supervisors because “the relationship of the producers to other news department employees is not supervisory, but rather, is one of coworkers involved in separate but sequential functions in the development of a single product.” 329 N.L.R.B. at 383. It could be argued that the relationship between associates and support staff is similar to that of the employees in *King Broadcasting*, in that associates and support staff are merely doing sequential functions with the end goal of creating a single product.

work of an employee are part of his/her terms and conditions of employment.¹⁰²

The Board went further to distinguish the “designation of significant overall duties” from “ad hoc instructions that the employee perform a discrete task”, stating that the NLRA’s use of “assign” referred to the former rather than the latter.¹⁰³

However, in clarifying the term “responsibly to direct”, the Board found that this term did include ad hoc instructions.¹⁰⁴ Asserting that “responsibly to direct” is not limited to “department heads”, the Board stated, “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.”¹⁰⁵ The Board went on to define “responsible”, holding:

For direction to be “responsible”, the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . .

Thus, . . . it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.¹⁰⁶

In other words, for the term “responsibly to direct”, the Board, in order to distinguish between supervisors and non-supervisors, looks not only to the content of the directive (that is, overall

¹⁰² Oakwood Healthcare Inc., 348 N.L.R.B. 686, 689 (2006).

¹⁰³ *Id.* at 689.

¹⁰⁴ *See id.* at 691.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 691–92.

duties versus ad hoc instructions), but also whether the order-giver can be held accountable for failure to perform the directive correctly.¹⁰⁷

Lastly, the Board's decision in *Oakwood* affirmed that any supervisory act must be done with "independent judgment" and further defined the term. It stated, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data" and that "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement."¹⁰⁸ In this way, the Board affirmed the Supreme Court's definition of "independent judgment" in *Kentucky River*.¹⁰⁹ When applying this definition to the terms "assign" and "responsible to direct", the Board did note that "[i]t may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical."¹¹⁰ The Board failed to explain what this exactly means, leaving room for further clarification and development in this area of law.

Since the Board's decision in *Oakwood*, only the Second Circuit has had the opportunity to extensively apply *Oakwood* when deciding whether employees are supervisors under the NLRA. In *N.L.R.B. v. Atlantic Paratrans of N.Y.C.*, the court considered whether dispatchers were supervisors under the NLRA, and thus, not protected.¹¹¹ The court first considered whether

¹⁰⁷ *Oakwood*, 348 N.L.R.B. at 692 ("the concept of accountability creates a clear distinction between those employees whose interest, in directing other employees' tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task.").

¹⁰⁸ *Id.* at 692–93.

¹⁰⁹ See *supra* note 100 and accompanying text.

¹¹⁰ *Oakwood*, 348 N.L.R.B. at 693.

¹¹¹ 300 Fed. Appx. 54, 55 (2d Cir. 2008).

the dispatchers exercised “independent judgment” when assigning drivers to their routes.¹¹² The court observed that many routes were pre-assigned, and to the extent that some routes had to be reassigned, the dispatchers considered factors that were “largely mechanical and geographical; and [did] not rest on considerations of the skill of the drivers.”¹¹³ Consequently, the Second Circuit found “that evaluating and comparing data is not always sufficient [to achieve supervisory status] because it may be routine and clerical in nature,” thus affirming *Oakwood*’s requirement that judgment must be free from outside control or instructions in order to be independent.¹¹⁴

The court then looked at whether the dispatchers could be found to “responsibly to direct” others such that they would face “some adverse consequence . . . if the tasks performed . . . are not performed properly.”¹¹⁵ The court found that there were no instances of dispatchers being warned that they would be disciplined or actually being punished for drivers’ misconduct or their failure to perform their jobs properly.¹¹⁶ Additionally, the court noted that dispatchers had no authority to discipline or recommend discipline for drivers, despite “uncontested” evidence that they write up incidents, testify at disciplinary hearings, and are present when supervisors provide warnings to drivers.¹¹⁷ As a result, the court ruled that the dispatchers simply “give[] information” rather than “effective recommendations”, “which is not sufficient for supervisory authority.”¹¹⁸

Indeed, the Second Circuit’s application of *Oakwood* in *Atlantic* demonstrates that employees who manage others in accordance to set procedures and who play a limited role in the

¹¹² *Id.*

¹¹³ *Id.* at 56.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 57 (quoting *Oakwood*, 348 N.L.R.B. at 691).

¹¹⁶ *Atlantic*, 300 Fed. Appx. at 57.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

discipline of those they allegedly supervise will not be found sufficiently supervisory so that they are excluded from protection. While the supervisory exclusion poses the most significant obstacle to private attorney organizing, the above analysis suggests that the law governing supervisors continues to develop. The greatest concern regarding the attempts to clarify the supervisory exclusion is that the exclusion may eventually swallow the NLRA's application to professional employees.¹¹⁹

Ultimately, some attorneys will be found to be supervisors, but many will not. Like determining which employees are confidential, the inquiry into whether an associate is a supervisor will be fact-specific, and any attorneys interested in organizing will want to examine their situation in accordance with the developing law.¹²⁰

C. The Managerial Employee Exclusion

The final exclusion that an employer may use in order to prevent attorneys from organizing is the managerial exclusion, which was developed by the NLRB and the Supreme Court through case law.¹²¹ However, the rationale for this exclusion rests primarily on Congress's intent "to exclude from the protections of the Act all employees properly classified as 'managerial.'"¹²² Thus, the exclusion acts "[t]o ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."¹²³

¹¹⁹ See *id.* at 699 (dissenting opinion) ("Today's decision threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees. Into that category may fall most professional . . .").

¹²⁰ See Rubinstein, *supra* note 75, at 26.

¹²¹ See *Bell Aerospace*, 416 U.S. at 275 ("The Wagner Act . . . did not expressly mention the term 'managerial employee'. . . . [H]owever, the Board developed the concept of 'managerial' employee in a series of cases involving the appropriateness of bargaining units.").

¹²² *Id.* at 275; see also *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) ("The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.").

¹²³ *Yeshiva*, 444 U.S. at 687–88.

In *N.L.R.B. v. Bell Aerospace Co. Division of Textron*, the Supreme Court defined managerial employees as “executives who formulate and effectuate management policies by expressing and making operative decisions of their employer.”¹²⁴ Here, the test of whether an employee is managerial is whether “he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.”¹²⁵ In other words, managerial employees are employees, who are aligned with management and have the discretion to act either within or independently of established employer policy.¹²⁶ In order for an employee “to be aligned with management, the employee’s duties must be ‘outside the scope of duties routinely performed by a similarly situated professional.’”¹²⁷ As such, “routine discharge of professional duties” does not confer managerial status upon an employee because these duties do not fall “outside the scope of duties routinely performed by similarly situated professionals.”¹²⁸

Like the other exclusions, making such a determination will be fact-intensive. However, most associates will likely not fall into this exclusion mainly because they have no effect on the management of the law firms that employ them.¹²⁹ As such, they generally cannot be excluded from organizing based on the managerial exclusion.

D. Attorney Professional Responsibilities

Lastly, employers may attempt to prevent attorneys from unionizing by asserting that such organization violates the professional responsibilities of attorneys. This part will discuss

¹²⁴ *Bell Aerospace*, 416 U.S. at 286.

¹²⁵ *Yeshiva*, 444 U.S. at 683.

¹²⁶ *See Yeshiva*, 444 U.S. at 683.

¹²⁷ *Id.* at 690; *Nurses United for Improved Patient Healthcare*, 338 N.L.R.B. 837, 840 (2003).

¹²⁸ *See Yeshiva*, 444 U.S. at 690.

¹²⁹ *See id.* at 690 n.30 (“For this reason, architects and engineers functioning as project captains for work performed by teams of professions are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members.”). This reasoning should apply no differently to private attorneys employed at law firms.

these concerns and address any ethical considerations that may hinder a private attorney's ability to organize.

In 1967, prior to the adoption of the Model Code, the American Bar Association Committee on Ethics and Professional Responsibility determined that salaried, employee-attorneys may join a union that is limited to other lawyers who are employed by the same employer for the purpose of negotiating wages, hours, and working conditions.¹³⁰ The Committee, however, found that “such a lawyer would not have the right to strike, to withhold services for any reasons, to divulge confidences or engage in any other activities . . . which would violate any Canon [of Ethics].”¹³¹ The Committee also stated that lawyers interested in unionizing should not join any union with non-attorneys.¹³²

After the Model Code was adopted, the Committee once again addressed the ethical concern of attorneys forming or joining unions. In Informal Opinion 1325, the Committee wrote that “[t]he Code of Professional Responsibility contain[ed] no Disciplinary Rule that specifically prohibits membership by lawyers in unions or associations representing lawyers”, noting specifically that “lawyers are not forbidden per se to belong to unions, whether or not the union membership is limited to lawyers.”¹³³ The Committee then pointed to provision EC 5-13 in the Code of Professional Responsibility as providing “ethical guidance”.¹³⁴ EC 5-13 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

¹³⁰ ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 986 (1967).

¹³¹ *Id.* (stating also that “strikes, picketing, boycotts and any type of withholding of services (including the non-passage of picket lines) should be expressly prohibited.”).

¹³² *Id.*

¹³³ ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975).

¹³⁴ *Id.*

organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.¹³⁵

The Committee acknowledged that while EC 5-13 “mentions no Disciplinary Rule specifically”, the primary concern is that unionized lawyer may “be confronted by a choice between acquiescing or assisting in certain union activities and violating certain Disciplinary Rules” such as neglecting a legal matter, intentionally failing to carry out an employment contract with a client, or intentionally prejudicing or damaging one’s client.¹³⁶ But the Committee went on to note that, in some instances, participating in union activities may cause an attorney to neglect her duties, but this is not necessary the case in every circumstance.¹³⁷ In fact, it specifically observed, “participation in a strike might be no more disruptive of the performance of legal work than taking a two week's vacation might be.”¹³⁸ Ultimately, the Committee found that it would be “idle speculation” to determine which other Disciplinary Rules may be violated if a lawyer participated in union activities. The Committee simply stated:

Lawyers who are union members are required, the same as all other lawyers, to comply with all Disciplinary Rules at all times; and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one’s professional obligations, but should be vigilant at all times to safeguard one’s fidelity to employer free from outside influences.¹³⁹

Consequently, the Board has routinely dismissed arguments that the professional responsibilities of lawyers prevent them from unionizing.¹⁴⁰

IV. IMAGINING A PRIVATE ATTORNEY UNION

¹³⁵ Model Code of Prof’l Responsibility EC 5-13 (1983).

¹³⁶ ABA Comm. on Ethics and Prof’l Responsibility, *supra* note 125.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.,* Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977).

Given the absence of a complete bar to private attorney unionization, this part endeavors to lay out, generally, how a private attorneys union may be formed and address the practical concerns such unions may encounter. This section is by no means thorough, and should be considered a starting point rather than a how-to guide.

A. General Procedure for Establishing Representation

Like any other employees that wish to form a union for the purpose of collective bargaining, attorneys will have to follow the typical statutory procedure.¹⁴¹ Generally, attorneys interested in unionizing will have to submit to the Board an election petition and a “showing of interest,” which must come from thirty percent of the employees in the bargaining unit.¹⁴² This is normally designated by signed authorization cards.¹⁴³ Afterwards, a regional field examiner or attorney will investigate the petition.¹⁴⁴ A hearing will then be conducted in order to create a full record as to jurisdiction, appropriate unit, representation and timeliness, and the hearing officer will then forward a report summarizing and analyzing the issues to the regional director.¹⁴⁵ The regional director will then make a decision as to the disputed matters, and either orders elections or dismisses the petition.¹⁴⁶

B. The Bargaining Unit

Given the procedure explained above, determining the bargaining unit will be crucial to ensuring the success of attorneys that want to unionize. Generally, the Board looks for “an

¹⁴¹ This author assumes that employers of private attorneys will not voluntarily acknowledge the existence of a bargaining unit and recognize a union as the representative for employees in that unit. This seems to be a fair assumption given that almost all employers challenge their employees unionizing efforts. As such, the procedure laid out in this section will assume no voluntary recognition.

¹⁴² ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 55 (2d ed. 2004); *see also* NLRA, § 9, 29 U.S.C. § 159; 29 C.F.R. 101.18(a).

¹⁴³ GORMAN & FINKIN, *supra* note 134, at 55.

¹⁴⁴ *Id.* at 56.

¹⁴⁵ *Id.* at 56–57.

¹⁴⁶ *Id.* at 57.

employee group which is united by *community of interest*.”¹⁴⁷ In other words, the bargaining unit should “neither embrace[] employees [who have] a substantial conflict of economic interest nor omit[] employees sharing a unity of economic interest with other employees in the bargaining . . . constituency.”¹⁴⁸

Because of this “community of interest” standard, attorneys will want to think carefully about those they wish to include in their union. First, because each law firm has a different internal employee structure, with some variation across offices, private attorneys will probably want to organize by law firm, and in some instances, by office. Second, attorneys should probably avoid joining existing unions created by support staff and paralegals. Instead, they should create their own attorney-only union.¹⁴⁹ This will ensure that the “community of interest” standard is met and help avoid any ethical issues. Lastly, organizing attorneys will want to be cognizant of the statutory and judicially created exceptions to the definition of employee in the NLRA. For example, while many new associates and junior associates may not fall into the supervisory exclusion, mid-level and senior associates may well be excluded from organizing and bargaining because of their increased responsibilities.¹⁵⁰

¹⁴⁷ GORMAN & FINKIN, *supra* note 134, at 87. The Board may also consider the following factors:

- (1) similarity in the scale and manner of determining earnings;
- (2) similarity in employment benefits, hours or work and other terms and conditions of employment;
- (3) similarity in the kind of work performed;
- (4) similarity in the qualifications, skills and training of the employees;
- (5) frequency of contact or interchange among the employees;
- (6) geographic proximity;
- (7) continuity or integration of production processes;
- (8) common supervision and determination of labor-relations policy;
- (9) relationship to the administrative organization of the employer;
- (10) history of collective bargaining;
- (11) desires of the affected employees;
- (12) extent of union organization.

Id. at 87–88.

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, N.L.R.B. v. Wayne Cty. Neighborhood Legal Servs., 229 N.L.R.B. 1023, 1024 (1977) (finding all attorneys constituted a appropriate bargaining unit, excluding paralegals, secretaries, law students, and investigators).

¹⁵⁰ *See id.* (finding also that supervisory attorneys should be excluded from the bargaining unit).

C. Scope of Collective Bargaining

The original version of the NLRA did not specifically define the scope of collective bargaining. However, with the addition of the Taft-Hartley Amendments, the Act now requires that employers and representatives of the employees meet and confer “in good faith with respect to wages, hours, and other terms and conditions of employments.”¹⁵¹ In addition, there may be “areas of special concern to white collar workers.”¹⁵² These areas may include “better vacations and sick leave plans” and “more interest in insurance and stock-sharing programs.”¹⁵³ Indeed, blue-collar worker unions have normally bargained for issues such as better vacation and sick leave.¹⁵⁴ Ultimately, there is no reason to think that there will be significant differences between the agreements negotiated by white collar groups and those negotiated by blue-collar groups.¹⁵⁵

D. Concerted Activities

For many, the right to strike is fundamental to those that unionize. In fact, the right to organize may have little significant absent the ability to strike.¹⁵⁶ As explained previously, engaging in a strike may pose particular ethical considerations for unionizing attorneys.¹⁵⁷ In addition, striking may be particularly difficult in light of the Supreme Court’s decision in *FTC v. Superior Court Trial Lawyers Association*. There, the Court held that a strike by court-appointed attorneys violated federal antitrust laws.¹⁵⁸ Specifically, it found that the attorneys’ efforts to obtain higher wages through “concerted refusal” was the “essence of ‘price-fixing,’” thus

¹⁵¹ NLRA, § 8(d), 29 U.S.C. § 158(d).

¹⁵² Kassalow, *supra* note 33, at 362.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Midwood & Vitacco, *supra* note 20, at 322.

¹⁵⁷ *See* Part III.D.

¹⁵⁸ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 422 (1990).

violating section 5 of the Federal Trade Commission Act.¹⁵⁹ Whether this case will reach beyond court-appointed attorneys remains unclear.

Assuming, however, that an attorney strike may raise anti-trust concerns, there may be other ways for attorneys to engage in other concerted activities or, at the very least, modify their strike practices. For example, attorneys could provide advanced notice of their intent to strike, similar to the statutory requirement for organized healthcare professionals.¹⁶⁰ Additionally, a private attorney union could voluntarily adopt a no-strike policy, and embrace some form of arbitration to ensure that a resolution is reached when there is an impasse in bargaining.¹⁶¹ For instance, some professional unions, including nurses and engineers, have adopted strong positions against strikes, and interest arbitration has been used for police officers and firefighters as an alternative to striking.¹⁶² Interest arbitration, specifically, allows employers and employees to resort to an independent mediator, who, based on a fact-finding examination, issues a report resolving any disputes that cannot be settled during bargaining.¹⁶³ In fact, interest arbitration has been included in the Employee Free Choice Act, a proposed bill that would amend the NLRA in order to streamline the union certification process.¹⁶⁴ In the end, there remain viable strategies to allow attorneys to engage in concerted activities, despite the concerns surrounding the ability of private attorneys to strike.

CONCLUSION

Indeed, current conditions may be ripe for private attorney unionizing. The present economic climate coupled with the legal industry's massive layoffs and compensation

¹⁵⁹ *Id.* at 423. For a greater discussion of this case, please see Midwood & Vitacco, *supra* note 20, at 322–25.

¹⁶⁰ See NLRA, § 8(g), 29 U.S.C. § 158(g).

¹⁶¹ See Kassalow, *supra* note 33, at 363; Midwood & Vitacco, *supra* note 20, at 329–30.

¹⁶² See Kassalow, *supra* note 33, at 363; Midwood & Vitacco, *supra* note 20, at 329.

¹⁶³ See Midwood & Vitacco, *supra* note 20, at 330; JACKSON LEWIS LLP, MANDATORY FIRST CONTRACT INTEREST ARBITRATION (2008), <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1511>.

¹⁶⁴ S. 560, 111th Cong. § 3 (2009); H.R. 1409, 111th Cong. § 3 (2009); JACKSON LEWIS LLP, *supra* note 135.

restructuring has left private attorneys just as vulnerable as their blue-collar brethren.¹⁶⁵ And it is this type of job uncertainty that makes the prospect of organization appealing.¹⁶⁶ In fact, the Employee Free Choice Act (“EFCA”), a bill that is pending in both the Senate and the House of Representatives, would make organizing especially attractive to white collar workers because it would streamline the lengthy election process.¹⁶⁷ President Barack Obama has already publicly stated his support for the bill.¹⁶⁸

Just as the NLRA provided answers at the time of the Great Depression, it may now hold answers for those who have found the legal industry’s response to the Great Recession unsatisfying. As law firms continue to adjust to a new economic reality, associates should be asking themselves whether they are willing to risk living through another 2009 with all its uncertainties and unpredictability. Indeed, associates may want to consider the words Senator Robert Wagner spoke when introducing the NLRA to the Senate:

The time has come to ask: Where are we progressing? Are we content to return to the uneven prosperity of the nineteen twenties, with its poverty, its uncertainty, and its seeds of recurrent depressions? Or are we prepared to lay the solid foundations for a saner and happier mode of economic life?¹⁶⁹

Today, the questions are no different, but now, the answers depend on associates.

¹⁶⁵ James Kelleher, *White-collar Blues Play Well With U.S. Labor Unions*, REUTERS, Jan. 29, 2009, <http://www.reuters.com/article/idUSTRE50R6MU20090128>.

¹⁶⁶ *Id.* Quoting Harley Sheiken, a professor at the University of California, Berkeley, the article observes:

There's something new in the air. . . . There is a sense that white-collar workers have become the blue-collar workers of the 21st century in terms of job security, wages and benefits. That's certainly how they're treated. And if you're treated like a blue-collar worker, you may respond like a blue-collar worker and seek to protect benefits and maintain some job security.

Id.

¹⁶⁷ See S. 560; H.R. 1409; Kelleher, *supra* note 157 (“[i]f the more low-key, petition-like approach allowed under the proposed EFCA passes, this ‘would be much more suited for (white-collar) tastes’”).

¹⁶⁸ Kelleher, *supra* note 157.

¹⁶⁹ 78 Cong. Rec. 3678 (1934) (statement by Sen. Wagner), *supra* note 1, at 18.