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## Comment

### EMPLOYEE SOLICITATION RIGHTS IN THE HEALTH-CARE INDUSTRY—A PROPOSAL FOR CHANGE

#### I. INTRODUCTION

The National Labor Relations Act (Act),<sup>1</sup> which comprehensively regulates the relations between employers and employees, was amended in 1974 to extend its protections<sup>2</sup> to employees in the nonprofit health-care field.<sup>3</sup> The scope of these protections with respect to solicitation rights<sup>4</sup> of employees has since been considered by the National Labor Relations Board (Board),<sup>5</sup> several federal courts of appeals,<sup>6</sup> and the United States Supreme Court.<sup>7</sup> Despite the considerable expenditure of time and energy by the Board and the judiciary, very little in the area of employee solicitation rights in the health-care field can be considered firmly settled.<sup>8</sup>

This comment will explore in detail the development of the well-settled guidelines regarding employee solicitation in the industrial setting,<sup>9</sup> and the confusing application of these guidelines to situations involving the non-

1. 29 U.S.C. §§ 151-169 (1976).

2. The dual purpose of the Act is to protect the employees' right to take concerted action as provided for in the Act, and to substitute collective bargaining for economic warfare as a means of securing satisfactory wages and working conditions. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). For a general discussion of the numerous protections of the Act, see R. GORMAN, *BASIC TEXT ON LABOR LAW* (1976).

3. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395, § 1(a) (amending 29 U.S.C. § 152). Originally, the Act had exempted from the definition of employer "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." The 1974 Amendments removed this exemption. For legislative history and a detailed analysis of the 1974 Amendments to the Act, see Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act*, 70 NW. U.L. REV. 202 (1975).

4. The term "solicitation" refers to the situation where an employee seeks to inform a fellow employee about, or urge a fellow employee to join, a labor organization. For a discussion of employee solicitation, see R. GORMAN, *supra* note 2, at 179.

5. For a discussion of Board decisions involving employee solicitation rights in the health-care industry, see notes 57-81 and accompanying text *infra*.

6. For a discussion of federal appellate court decisions involving employee solicitation rights in the health-care industry, see notes 83-179 and accompanying text *infra*.

7. For a discussion of Supreme Court decisions involving employee solicitation rights in the health-care industry, see notes 88-179 and accompanying text *infra*.

8. See Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235, 291-97 (1975). For a discussion of the uncertain state of labor law in this area, see notes 54-179 and accompanying text *infra*.

9. For a discussion of the industrial setting guidelines for employee solicitation, see notes 22-53 and accompanying text *infra*.

profit health-care industry.<sup>10</sup> It will demonstrate that the cause for much of this confusion is the Board's carryover of its approach to solicitation in the industrial setting<sup>11</sup> to the very different setting of a hospital or similar health-care institution.<sup>12</sup> This comment will also show that, in recent years, courts have added to this confusion by stating that they are applying the industrial setting guidelines<sup>13</sup> to the health-care field, while actually creating a separate body of law for solicitation problems in that setting.<sup>14</sup>

Next, this comment will demonstrate the rationality of applying the "retail store exception"<sup>15</sup> to cafeterias and gift shops located in health-care facilities.<sup>16</sup> This idea has been summarily rejected by the Board<sup>17</sup> and by some members of the Supreme Court,<sup>18</sup> but has been accepted by other members of the Court<sup>19</sup> as well as by a number of federal appellate court judges.<sup>20</sup>

Lastly, this comment will focus upon a suggested analytical approach to the problem of employee solicitation rights in health-care settings. This solution views the availability or nonavailability of alternative methods of reaching health-care employees as the most important factor in determining the extent of employees' solicitation rights.<sup>21</sup>

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10. For a discussion of the application of the Board's industrial setting employee solicitation guidelines to the health-care setting, see notes 54-179 and accompanying text *infra*.

11. For a discussion of the Board's approach to the problem in industrial settings, see notes 22-53 and accompanying text *infra*.

12. The scope of the term "health-care institution" as used in the 1974 Amendments to the Act is defined as follows: "The term 'health-care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged persons." 29 U.S.C. § 152(14) (1976).

13. For a discussion of various courts' purported application of the industry guidelines on employee solicitation in the health-care situation, see notes 54-179 and accompanying text *infra*.

14. See notes 208-15 and accompanying text *infra*.

15. For a discussion of the "retail store" exception, see notes 48-53 and accompanying text *infra*.

16. For a discussion of the "retail store exception" as it might apply in the health-care setting, see notes 216-33 and accompanying text *infra*.

17. See *Beth Israel Hospital v. NLRB*, 223 N.L.R.B. 1193 (1976). For a discussion of the Board's decision in *Beth Israel*, see notes 113-17 and accompanying text *infra*.

18. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505-07 (1978). For a discussion of *Beth Israel*, see notes 88-136 and accompanying text *infra*.

19. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 513 (1978) (Powell, J., concurring). Justices Burger and Rehnquist joined in Justice Powell's concurring opinion. *Id.* at 508 (Powell, J., concurring). See also *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Blackmun, J., concurring). For a discussion of *Baptist Hospital*, see notes 137-67 and accompanying text *infra*.

20. See *St. John's Hosp. & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368, 1375 & n.7 (10th Cir. 1977). See also *Baylor Univ. Medical Center v. NLRB*, 662 F.2d 56, 57-58 (D.C. Cir. 1981).

21. For a discussion focusing on alternative methods of access to employees as a

## II. GUIDELINES REGARDING EMPLOYEE SOLICITATION IN THE INDUSTRIAL CONTEXT

The analysis which follows will focus upon the propriety of extending the Board's accepted rules of solicitation<sup>22</sup> in industrial settings to similar situations involving health-care institutions.<sup>23</sup> In order to properly analyze this question, however, it is first necessary to thoroughly understand the solicitation guidelines that have been developed relating to industrial employers.

Section 7 of the Act provides that all employees covered by the Act are guaranteed the right to organize and bargain collectively with their employers.<sup>24</sup> Furthermore, section 8(a)(1) makes it an unfair labor practice for any employer covered by the Act to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."<sup>25</sup> Thus, in the most general sense, when a union solicits membership on an employer's premises during working hours and the employer attempts to ban or hinder this activity, in most instances such conduct will constitute an unfair labor practice.<sup>26</sup>

### A. *The Republic Aviation Presumption*

The landmark case involving industrial solicitation rights is *Republic Aviation Corp. v. NLRB*.<sup>27</sup> There, the employer, Republic Aviation Corp. (Republic), was a rapidly expanding manufacturer of military aircraft.<sup>28</sup> Long before any union organizational efforts had commenced, Republic instituted a company rule banning all forms of solicitation, whether conducted during working hours or during break times.<sup>29</sup> After having been warned that he could be disciplined for violating Republic's broad no-solicitation rule, an employee persisted in soliciting his fellow workers during lunch breaks and

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possible solution to the health-care solicitation problem, see notes 234-38 and accompanying text *infra*.

22. For a discussion of the Board's solicitation guidelines, see notes 23-53 and accompanying text *infra*.

23. For a discussion of the Board's approach to solicitation problems in the health-care industry, see notes 54-66 and accompanying text *infra*.

24. Section 7 of the Act provides as follows:

[E]mployees 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 right to refrain from any or all of 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 section 158(a)(3) of this title.

29 U.S.C. § 157 (1976).

25. *Id.* § 158(a)(1).

26. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

27. 324 U.S. 793 (1945).

28. *Id.* at 794.

29. *Id.* at 795. The text of the rule involved in *Republic Aviation* was quite brief: "Soliciting of any type cannot be permitted in the factory or offices." *Id.*

was dismissed.<sup>30</sup> In deciding the case, the Board attempted to strike a balance between the interests of the employer of maintaining discipline and maximizing work efficiency, and the interests of the employees who sought to exercise their guaranteed right to organize.<sup>31</sup> It applied a presumption, first articulated in *Peyton Packing Co.*,<sup>32</sup> that absent special circumstances, a broad rule banning solicitation by employees during nonworking time is invalid.<sup>33</sup> This presumption was specifically approved when *Republic Aviation* reached the Supreme Court, and hence, became known as the "*Republic Aviation* presumption of invalidity."<sup>34</sup> This standard has become the starting point from which the law regarding employee solicitation rights has evolved. The effect of this presumption was to place upon the employer the burden of proving that special circumstances existed which made a broad no-solicitation rule necessary in order to maintain satisfactory levels of production or discipline.<sup>35</sup> Upon such a showing, the promulgation of a broad rule, such as the one involved in *Republic Aviation*, would be justifiable since the employer's interest in safety and efficiency would be viewed as outweighing the employee's organizational rights.<sup>36</sup>

#### B. *Special Circumstances Sufficient to Rebut the Presumption of Invalidity*

Cases elucidating the "special circumstances" sufficient to rebut the *Republic Aviation* presumption have been rare.<sup>37</sup> However, such special circumstances were found present in *McDonnell Douglas Corp. v. NLRB*.<sup>38</sup> The employer in *McDonnell Douglas* banned solicitation by off-duty employees in nonwork areas at all times except for a "reasonable" period of time before their shifts began and after they had ended.<sup>39</sup> The employer's purported

30. *Id.* The employee engaged in union solicitation by passing out union application cards to his fellow employees. *Id.* This was done on his own time only, during lunch periods at the plant. *Id.*

31. See *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1192-96 (1943).

32. 49 N.L.R.B. 828 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

33. See *id.* at 843-44.

34. See R. GORMAN, *supra* note 2, at 179-81.

35. See 324 U.S. at 793. For a discussion of the special circumstances which could be held to overcome the presumption, see notes 38-53 and accompanying text *infra*.

36. For a discussion of cases where the employer's interests did outweigh those of the employees, see notes 37-53 and accompanying text *infra*.

37. See Feheley, *supra* note 8, at 291-92. Feheley gives examples of justifications for broad no-solicitation and/or distribution rules. *Id.* These justifications include keeping the premises clean and orderly, maintaining discipline, maintaining production levels, preventing accidents, preventing the creation of a hostile working environment and avoiding detrimental effects upon the employer's business resulting from organizational efforts. *Id.*

38. 472 F.2d 539 (8th Cir. 1973).

39. *Id.* at 542. The company's rule on solicitation was, in pertinent part, as follows:

*By employees*

Employees are permitted to engage in word of mouth solicitation (for mem-

justifications for its rule were (1) that a broad rule was necessary due to the unusually large number of employees working at the plant,<sup>40</sup> (2) the large amount of non-work space present on the plant grounds,<sup>41</sup> and, most important, (3) the fact that much of the employer's production involved military matters classified as secret by the federal government.<sup>42</sup> The Board applied the customary presumption of invalidity as set out in *Republic Aviation*,<sup>43</sup> and found that the evidence offered by McDonnell Douglas did not amount to special circumstances sufficient to rebut the presumption.<sup>44</sup>

The Eighth Circuit, however, denied enforcement and remanded, stating that the Board had failed to give sufficient weight to the employer's evidence concerning the security risks involved,<sup>45</sup> and found that the Board had merely paid lip-service to the balancing called for by *Republic Aviation*.<sup>46</sup> The court thus necessarily implied that security considerations might sometimes amount to special circumstances sufficient to rebut the *Republic Aviation* presumption of invalidity.<sup>47</sup>

### 1. *The Retail Store Exception*

The most common illustration of special circumstances which are sufficient to rebut the *Republic Aviation* presumption is the so-called "retail store exception" that was first articulated in *May Department Stores Co.*<sup>48</sup> There, the employer, a St. Louis department store chain, issued a broad ban on all forms of solicitation at any time and in *any area* of the store, unless prior

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bership, signatures, etc.), either in or outside their work areas, so long as this is done during non-working times.

*By non-employees \**

Non-employees are not permitted to engage in solicitation anywhere on company premises at any time.

\*NOTE: Employees are not allowed on company premises except during their scheduled working hours and a reasonable period before and after those hours. At other times, they are to be treated as non-employees.

*Id.* It was the treatment of employees soliciting on the premises other than during break times and a reasonable time before and after their work hours as nonemployees that was challenged as violative of the Act. *Id.*

40. *Id.* at 541.

41. *Id.*

42. *Id.*

43. For a discussion of the *Republic Aviation* presumption of invalidity, see notes 27-36 and accompanying text *supra*.

44. *McDonnell Douglas Corp. and Technical Employees of Aerospace Mfrs.*, 194 N.L.R.B. 514 (1971).

45. 472 F.2d at 545-46.

46. For a discussion of the balancing called for by *Republic Aviation*, see notes 27-36 and accompanying text *supra*.

47. 472 F.2d at 545-46. On remand, the Board reappraised the facts on the record in light of the Eighth Circuit's opinion and found that McDonnell Douglas had shown sufficient justification for the rule in question due to the need for special security. *McDonnell Douglas Corp. and Technical Employees of Aerospace Mfrs.*, 204 N.L.R.B. 1110 (1973). The Board therefore dismissed the complaint. *Id.*

48. 59 N.L.R.B. 976 (1944).

written permission from the company had been obtained.<sup>49</sup> The Board applied the *Republic Aviation* presumption<sup>50</sup> and found this broad rule invalid but "only as it prohibit[ed] union solicitation *off the* selling floor during non-working hours."<sup>51</sup> The Board found that as to solicitation *on* the selling floor, the rule was valid, indicating that the factor which tipped the balance in the employer's favor was the potential for disruption of the employer's business.<sup>52</sup> Therefore, whenever an employer in a retail industry promulgates a broad no-solicitation rule applicable to all customer access areas, the rule will be presumptively valid absent a showing of discriminatory application.<sup>53</sup>

### III. EMPLOYEE SOLICITATION PROBLEMS IN THE HEALTH-CARE FIELD

#### A. *Pre-Amendment Decisions*

As noted above, before it was amended in 1974, the Act did not apply to nonprofit hospitals.<sup>54</sup> Nevertheless, the Board had faced the problem of solicitation in the health-care industry in cases involving profit-making institutions prior to the amendments.<sup>55</sup> However, no clear standard evolved from a trilogy of Board decisions.<sup>56</sup>

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49. *Id.* at 1004 (intermediate report of hearing examiner). The company circulated a bulletin directed to all company employees which stated as follows:

Your attention is directed to a long-standing policy of this company with references to solicitation of our employees.

No one, whether an employee or non-employee of this company, shall solicit for, nor shall any employee purchase insurance, periodicals, magazines, merchandise from outside sources or tickets; prizes for churches or lodges; punch boards or raffles; or memberships in societies, lodges or organizations of any kind.

Where employees desire to solicit for funeral flowers, wedding gifts, sickness or accident benefits, Christmas presents or presents of any kind, in short, collections of any amount however small, or for any purpose however deserving, they must first obtain written permission.

It is not the intention of the Management to interfere with any voluntary expressions of good-will on the part of any of our co-workers for other co-workers. Permission therefore, will be granted in every case where no imposition or hardship will result. We shall, however, view with severity any omission to secure written permission, as stated.

Please make this notice known to every employee in your department as indicated by each employee's signature hereon, and return to the Superintendent's office.

*Id.*

50. For a discussion of the *Republic Aviation* presumption, see notes 27-36 and accompanying text *supra*.

51. 59 N.L.R.B. at 981. (Emphasis added).

52. *Id.*

53. *Id.* For circumstances which could lead to a finding of discriminatory application, see R. GORMAN, *supra* note 2, at 179-94.

54. See note 3 *supra*.

55. For a discussion of health-care solicitation problems in pre-1974 cases involving profit-making institutions, see notes 57-66 and accompanying text *supra*.

56. The lack of a clear standard from these decisions was noted by the Supreme

The first of those decisions, *Summit Nursing & Convalescent Home, Inc.*,<sup>57</sup> involved a broad no-solicitation rule which had been promulgated in response to a union organizing campaign.<sup>58</sup> Upon a challenge by two nurses who had been disciplined for violating the rule, the Board found the rule presumptively invalid on its face, and overturned the finding of the trial examiner that the special circumstances of a health-care setting necessitated the allowance of a broader rule.<sup>59</sup> In *Guyan Valley Hospital, Inc.*,<sup>60</sup> decided the same year as *Summit Nursing Home*, the Board accepted the trial examiner's finding that, even if the broad rule<sup>61</sup> were presumptively invalid, the fact that it was enforced in a hospital and not a plant amounted to special circumstances which justified the broad rule.<sup>62</sup> The trial examiner in *Guyan Valley Hospital* had noted that hearing pro-union or anti-union discussions might upset patients, and stated that the hospital need not wait for the ill-effects of such discussions to manifest themselves before implementing a more restrictive employee solicitation rule.<sup>63</sup> In the last of the three cases, *Bellaire General Hospital*,<sup>64</sup> the Board unanimously found that a broad rule<sup>65</sup> promulgated by the hospital violated section 8(a)(3) of the Act.<sup>66</sup>

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Court in *Beth Israel Hosp. v. NLRB*, 437 U.S. 493, 494 (1976). For a discussion of *Beth Israel*, see notes 88-136 and accompanying text *infra*.

57. 196 N.L.R.B. 769 (1972).

58. The rule stated as follows:

In order to give our undivided attention to the job of caring for our patients, no employee shall engage in solicitation for any cause or distribute literature of any kind during an employee's working time at any place in the home. No employee should engage in solicitation of distribution of literature at any time in the patient or public area within the home, or in the nurses' stations. No employee shall distribute literature for any cause in working areas of the home at any time.

*Id.* at 769.

59. *Id.* at 769-70.

60. 198 N.L.R.B. 107 (1972).

61. The rule in *Guyan Valley Hospital* stated that "[t]here is to be no soliciting in working areas, during working hours of the hospital." *Id.* at 111.

62. *Id.*

63. *Id.*

64. 203 N.L.R.B. 1105 (1973).

65. The rule in *Bellaire General Hospital* stated as follows:

The hospital will not permit any type of selling or solicitation within the hospital or on its property without written consent of the Administrator or his delegate, by any third person on any occasion or by employees while off-duty or during working hours, or under any circumstances where it will interfere with the work of others.

This provision does not apply to activity of the Women's Auxiliary or to any firm or individual supplying the needs of the hospital itself. No person shall remain on the premises of the hospital at any time when not on duty, for any purpose.

*Id.* at 1108.

66. *Id.* at 1106.



B. *Post-Amendment Decisions*1. *The Board's Position*

The 1974 Amendment made the Act generally applicable to nonprofit health-care facilities and the Board had its first opportunity to state its position on employee solicitation rights in those facilities in *St. John's Hospital & School of Nursing, Inc.*<sup>67</sup> There, the employer hospital had promulgated a broad no-solicitation rule which banned solicitation by employees for any purpose in all working areas of the hospital as well as in all areas to which patients or visitors had access.<sup>68</sup> After learning that three employees had engaged in a discussion concerning the possibility of unionizing, the hospital reprimanded the employees involved and warned that further such discussions would result in harsher disciplinary measures.<sup>69</sup> The union brought a challenge before the Board, alleging that the hospital's promulgation of the rule constituted an unfair labor practice.<sup>70</sup> The hospital defended its rule on the basis that its concern with providing a tranquil atmosphere justified a broader rule than was allowable in industrial settings.<sup>71</sup> The union argued that a hospital should be treated in the same fashion as any other employer for solicitation purposes,<sup>72</sup> thus calling for the application of the *Republic Aviation* presumption of invalidity subject to rebuttal by a showing of special circumstances.<sup>73</sup>

The Board, in a decision that became typical in this area,<sup>74</sup> recognized that the necessity of a tranquil atmosphere in some areas of the hospital justified the imposition of a somewhat more stringent rule regarding solicitation rights of employees.<sup>75</sup> However, it refused to accept the hospital's con-

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67. 222 N.L.R.B. 1150 (1976).

68. The hospital's no-solicitation rule read as follows:

Except to solicit participation in official hospital employee programs, no employee shall solicit any other employee of the hospital for any purpose during working time or in the working areas of the hospital, or in any areas of the hospital, or in any area to which patients and visitors have access. No employee shall distribute any matter of any kind in any area of the hospital except in nonworking areas where patients and visitors do not have access. At no time shall any employees solicit any patients or visitor for any purpose nor shall any employee distribute any matter to any patients or visitors. This rule will be strictly enforced.

*Id.*

69. *Id.* at 1152-53.

70. *Id.*

71. *Id.* at 1150. The American Hospital Association urged this contention along with St. John's Hospital. *Id.* The argument was based upon the premise that the function of patient care requires that a hospital's rendering of services must be free from any disruption that might result from any kind of solicitation in the public areas of the hospital. *Id.*

72. *Id.*

73. For a discussion of the *Republic Aviation* presumption of invalidity, see notes 27-36 and accompanying text *supra*.

74. For a discussion of other Board decisions on the subject, see notes 83-94 & 143-47 and accompanying text *supra*.

75. 222 N.L.R.B. at 1150.

tention that its broad rule was wholly justified on that basis.<sup>76</sup> The Board held that only "strictly patient care areas" warranted such special consideration.<sup>77</sup> Thus, without expressly saying so, the Board applied the well-settled industrial guidelines regarding employee solicitation rights and found that the need for a tranquil atmosphere in what it termed "strictly patient care areas" amounted to a special circumstance sufficient to rebut the presumption of invalidity.<sup>78</sup>

The Board also briefly expressed its view on the applicability of the so called "retail-store exception"<sup>79</sup> by summarily rejecting the hospital's argument that the exception should apply to the cafeteria and gift shop in the hospital.<sup>80</sup> The Board ordered the protection of solicitation rights in those areas, concluding that the basic function of the hospital was patient care and that the hospital had not shown that its broad no-solicitation rule for all areas was necessary to avoid disruption of that function.<sup>81</sup>

## 2. *A Split in the Courts of Appeals*

The Board's position, as espoused in *St. John's Hospital*, has not been uniformly enforced by the federal appellate courts.<sup>82</sup> The First Circuit<sup>83</sup> and the Seventh Circuit<sup>84</sup> have enforced Board orders protecting employee

76. *Id.*

77. *Id.* The Board explained the distinction between "strictly patient care areas" and other areas of the hospital as follows:

For example, a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind.

*Id.*

78. *Id.*

79. For a discussion of the "retail store exception," see notes 48-53 and accompanying text *supra*. See also R. GORMAN, *supra* note 2, at 181.

80. 222 N.L.R.B. at 1150-51 n.3. In this footnote, the Board opined that the hospital's reliance on *May Department Stores* was misplaced because a hospital's main function is patient care while the main function of a retail establishment is selling merchandise. *Id.* This brief footnote is the only portion of the Board's opinion focusing upon the hospital's contention that its rule was justified under the retail store exception. *Id.*

81. *Id.*

82. For the standard of review in administrative law cases, see the Administrative Procedures Act, 5 U.S.C. § 556 (1976). Generally, the standard of review for an appellate court review of a Board decision requires that the Board's findings of fact must be respected if supported by substantial evidence on the record as a whole. See *id.* The Board's interpretations of specific provisions of the Act are to be given "considerable deference in light of the Board's 'special function of applying the general provisions of the Act to the complexities of industrial life.'" *St. John's Hosp. & School of Nursing v. NLRB*, 557 F.2d 1368, 1371-72 (1977). See also R. GORMAN, *supra* note 2, at 49.

83. See *NLRB v. Beth Israel Hosp.*, 554 F.2d 447 (1st Cir. 1977).

84. *Lutheran Hosp. v. NLRB*, 564 F.2d 208 (7th Cir. 1977).

solicitation rights in hospital cafeterias and coffeeshops. However, the Sixth Circuit,<sup>85</sup> the Tenth Circuit in *St. John's Hospital*<sup>86</sup> and the District of Columbia Circuit<sup>87</sup> have denied enforcement of similar Board orders which pertained to cafeterias as well as to other patient-access areas.

### 3. *The Supreme Court Confronts the Issue*

#### a. *Beth Israel Hospital v. NLRB*

On the basis of this split in the decisions of the federal courts of appeal,<sup>88</sup> the Supreme Court, in 1978, granted certiorari in *Beth Israel Hospital v. NLRB*.<sup>89</sup> The hospital was a large nonprofit hospital which, prior to any union organizational efforts, had instituted a policy of banning solicitation in any area accessible to visitors or patients.<sup>90</sup> The rule effectively allowed solicitation only in certain locker rooms and adjoining restrooms, which were used solely by employees, and prevented solicitation in the hospital cafeteria, "a common gathering room for employees" and a room where fewer than two percent of the patrons were patients.<sup>91</sup> A hospital employee distributed a union newsletter in the cafeteria despite a hospital warning that such conduct violated the hospital's no-solicitation rule and that further solicitation efforts would result in dismissal.<sup>92</sup> The union then charged that the hospital's conduct violated sections 8(a)(1) and 8(a)(3) of the Act.<sup>93</sup>

The Board agreed with the union and held that the hospital's rule violated sections 8(a)(1) and 8(a)(3) of the Act.<sup>94</sup> The First Circuit subse-

85. *NLRB v. Baptist Hosp., Inc.*, 576 F.2d 107 (6th Cir. 1978).

86. *See St. John's Hosp. & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368 (10th Cir. 1977).

87. *Baylor Univ. Medical Center v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978).

88. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 489 n.5 (1978).

89. 437 U.S. 483 (1978).

90. *Id.* at 486-87. The rule imposed by the hospital stated in pertinent part as follows:

There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and distribution of literature to B.I. employees may be done by other B.I. employees, when neither individual is on his or her working time, in employee only areas—employee locker rooms and certain adjacent restrooms. Elsewhere within the Hospital including patient-care and all other work areas, and areas open to the public such as lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation or distribution of literature.

Solicitation or distribution of literature on Hospital property by non-employees is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaign of the United Fund and the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

*Id.*

91. *Id.* at 490.

92. *Id.* at 491-92.

93. *Id.* at 487. For a discussion of §§ 8(a)(1) and 8(a)(3) of the Act, see notes 24-26 and accompanying text *supra*.

94. *Beth Israel Hosp.*, 223 N.L.R.B. 1193 (1976).

quently enforced the Board's order, applying the traditional presumption of invalidity and finding that the hospital had failed to produce evidence sufficient to rebut the presumption.<sup>95</sup> When the case reached the Supreme Court, the sole issue remaining was the propriety of the hospital's no-solicitation rule as applied to the cafeteria and coffee shop.<sup>96</sup> After conducting a thorough analysis of the Board's general approach to solicitation problems in industrial settings,<sup>97</sup> the Court denied, in succession, each of the hospital's challenges to the Board's qualified extension of the *Republic Aviation* approach to the hospital setting.<sup>98</sup>

The hospital first argued that the application of the *Republic Aviation* presumption of invalidity<sup>99</sup> to the health-care field was inconsistent with the congressional policy behind the 1974 Amendments to the Act.<sup>100</sup> The hospital contended that the legislative history, taken in conjunction with the language of the amendments, evinced a congressional intent either to prohibit solicitation in the health-care industry entirely, or, in the alternative, to limit solicitation to the extent allowed by the Board at the time the 1974 amendments were enacted.<sup>101</sup> The Court rejected this argument, stating that, while special provisions had been made in the amendments to protect health care institutions against strikes by their employees,<sup>102</sup> comparable provisions were not enacted regarding solicitation.<sup>103</sup> The Court concluded that this distinction manifested a congressional intent to leave to the Board the duty of balancing the conflicting interests of the parties involved<sup>104</sup> in the same fashion as the Board had done in the industrial setting.<sup>105</sup>

Secondly, the hospital argued that any conclusion regarding the possi-

95. *Beth Israel Hosp. v. NLRB*, 554 F.2d 477 (1st Cir. 1977).

96. *See* 437 U.S. at 485-86. Although the Court formally stated the issue in these narrow terms, there is language in the opinion which broadly hints that the decision encompasses more. *See id.* at 489.

97. *Id.* at 491-94.

98. *Id.* at 494-507.

99. For a discussion of the *Republic Aviation* presumption, see notes 27-36 and accompanying text *supra*.

100. 437 U.S. at 496. For a discussion of the legislative history of the 1974 Amendments to the Act, see Vernon, *supra* note 3, at 203-05.

101. 437 U.S. at 496.

102. *Id.* at 496-97 n.12. Section 1(d) of the 1974 Act required, in situations involving health-care institutions, 90 days notice of termination or expiration of a contract, 60 days notice to the Federal Mediation and Conciliation Service (FMCS) and 30 days notice to the FMCS respecting initial contract negotiation disputes arising after recognition of the union. *Id.* at 496 n.12.

In addition, § 1(e) of the 1974 Act required labor organizations to provide 10-day strike notice to both the health-care institution and the FMCS prior to engaging in picketing, strikes, or other concerted refusals to work. *Id.* These provisions provided for a special procedure to be followed in health-care strike situations and the Court found the absence of such special provisions in the Act regarding health-care solicitation dispositive. *Id.*

103. *Id.* at 496-97.

104. *Id.* at 497.

105. *Id.* at 500.

ble disruption of patient care brought about by solicitation efforts in the cafeteria was a medical judgment and, therefore, was beyond the Board's expertise.<sup>106</sup> On this basis, the hospital argued that the Court should engage in a more rigorous review than normally applied in administrative cases.<sup>107</sup> The Court rejected this argument, maintaining that the Board's role is to establish the nation's basic labor policies and that, in fulfilling this role, the Board is continually called upon to make many general labor decisions in areas where it lacks special expertise.<sup>108</sup> Thirdly, the hospital argued that the Board's decision lacked evidentiary support and was irrational.<sup>109</sup> The Court found that under the facts of the case, particularly those that showed that only 1.56% of the cafeteria patrons were patients and that other forms of solicitation had been tolerated, the Board's order was not irrational.<sup>110</sup>

The hospital's final contention was that the retail store exception,<sup>111</sup> which, in the retail industry, allows a ban on all solicitation on the selling floor because of the potential ill effects on customers, should apply in the same fashion to a hospital cafeteria as it does to the dining areas of a public restaurant.<sup>112</sup> The Court observed that the Board had struck a "balance between organizational and employer rights" in formulating the retail store exception.<sup>113</sup> The primary purpose of a restaurant is to serve customers, but, the Court reasoned, the primary purpose of a hospital is to serve the physical and emotional needs of its patients.<sup>114</sup> These needs, the Court concluded, were not served in the cafeteria and therefore, the retail store exception was rejected.<sup>115</sup>

In summary, the Court in *Beth Israel* adopted the Board's approach to solicitation problems in the health-care field as first formulated in *St. John's*

106. *Id.*

107. For a discussion of the general standard of review of Board decisions, see note 82 *supra*.

108. 437 U.S. at 501. The Court stated:

It is true that the Board is not expert in the delivery of health-care services, but neither is it in pharmacology, chemical manufacturing, lumbering, shipping, or any of a host of varied and specialized business enterprises over which the Act confers jurisdiction. But the Board is expert in federal national labor relations policy, and it is in the Board, not petitioner, that the 1974 Amendments vested responsibility for developing that policy in the health-care industry.

*Id.*

109. *Id.* at 501.

110. *Id.* at 501-02. The Court noted that the evidence showed that "patient use of the cafeteria [was] voluntary, random, and infrequent" and that less than 2% of the cafeteria patrons were patients. *Id.* Thus, the Court concluded that the Board's decision contained adequate evidentiary support to withstand an attack on irrationality grounds. *Id.*

111. For a discussion of the retail store exception, see notes 48-53 and accompanying text *supra*.

112. 437 U.S. at 505-06.

113. *Id.* at 506.

114. *Id.* at 505-07.

115. *Id.*

*Hospital*.<sup>116</sup> The Court further held that the Board had given sufficient weight to the hospital's evidence regarding the need for tranquility in the hospital cafeteria and that the court of appeals had not "grossly misapplied" the applicable standards of law in finding the hospital's broad rule violative of the Act.<sup>117</sup> In closing, however, the Court agreed with the First Circuit's observation that the "guidelines are still in flux and are far from self-defining."<sup>118</sup>

Significantly, the Court also noted in its opinion that "[w]hile outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry . . . it may be that the importance of the employer's interest here demands the use of a more finely calibrated scale."<sup>119</sup> While the existence of alternative methods of reaching employees received only brief mention and was not dispositive in *Beth Israel*, later cases would attempt to place more emphasis on the existence of alternative means, citing to the above quote from *Beth Israel*.<sup>120</sup>

In a concurring opinion, Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, took exception to the majority's wholesale rejection of the retail store exception.<sup>121</sup> Justice Blackmun agreed that in this unusual situation, where less than two percent of the cafeteria patrons were patients, the cafeteria more closely resembled a plant cafeteria, and therefore, there was a lack of the special circumstances needed to justify applying the exception.<sup>122</sup> However, Justice Blackmun expressed concern that the Court's holding might be uncritically applied to a more representative hospital cafeteria where a greater number of the patrons were patients and visitors.<sup>123</sup> Such an application, he observed, might take the Court further in the direction of freer solicitation rights than it would have done had a more representative fact pattern been the first to appear before the Court.<sup>124</sup> Finally, Justice Blackmun stressed that a hospital, unlike the typical industrial setting, contributes a unique factor—human suffering—to the typical labor dispute,<sup>125</sup> and concluded that the Board may have lost sight of this distinc-

116. 437 U.S. at 502. For a discussion of the Board's approach as formulated in *St. John's Hospital*, see notes 67-81 and accompanying text *supra*.

117. *Id.* at 507.

118. *Id.* at 507-08 (citing *NLRB v. Beth Israel Hosp.*, 554 F.2d at 481).

119. *Id.* at 505.

120. For a discussion of alternative means of communicating with employees as a factor in determining the extent of allowable employee solicitation, see notes 157-58, 169-79, & 234-38 and accompanying text *infra*.

121. 437 U.S. at 508 (Blackmun, J., concurring).

122. *Id.* at 509 (Blackmun, J., concurring).

123. *Id.*

124. *Id.*

125. *Id.* Justice Blackmun observed that "[h]ospitals, after all, are not factories or mines or assembly plants. They are hospitals where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity. . . ." *Id.*

tion in its preoccupation with resolving the problems between labor and management.<sup>126</sup>

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, filed another concurring opinion.<sup>127</sup> Justice Powell maintained that the difference between industrial establishments, where employees do not generally come in contact with nonemployees during their working hours, and hospitals, where employees constantly mingle with patients and visitors during their workdays, made the *Republic Aviation* presumption inapplicable in hospital settings.<sup>128</sup> Justice Powell further argued that the presence of nonemployees in a hospital cafeteria would justify a broad no-solicitation rule for the same reasons that underlie the retail store exception.<sup>129</sup> Nonetheless, despite these significant disagreements with the majority's reasoning, Justice Powell concurred in the Court's judgment, since he believed that the hospital had failed to produce any evidence of a reasonable possibility that solicitation would cause harm to visitors or patients.<sup>130</sup> However, he warned that *Beth Israel* presented an unusual situation and that most hospitals would be able to produce such evidence.<sup>131</sup>

Despite the comprehensive analysis by the *Beth Israel* Court, many questions remained unanswered concerning the extent to which hospitals and other health-care institutions could ban solicitation.<sup>132</sup> This was primarily the result of the narrow focus of the Court's decision in *Beth Israel*.<sup>133</sup> On its face, the case dealt only with prohibition of solicitation in the hospital cafeteria.<sup>134</sup> Further, there were ambiguities in the majority opinion<sup>135</sup> as well

126. *Id.*

127. *Id.* at 509 (Powell, J., concurring).

128. *Id.* at 511 (Powell, J., concurring). He noted that "[t]he rationality found to exist in *Republic Aviation*, and therefore the validity of the presumption, cannot be transferred automatically to other workplaces, for to do so would sever the connection between the presumption and the underlying proof." *Id.*

129. *Id.* at 513 (Powell, J., concurring). Justice Powell continued as follows:

The hospital's function in serving patients, their families, and visitors is much like the retail establishment's function in serving its customers. That a non-profit hospital does not share the profit motive of a retail establishment does not diminish the hospital employer's professional concern for the welfare of those in its care, including not only patients but also their friends and relatives who come to visit.

*Id.*

130. *Id.* at 516-17 (Powell, J., concurring).

131. *Id.* at 517 (Powell, J., concurring).

132. See text accompanying notes 133-36 *infra*.

133. 437 U.S. at 489. The Court noted that of the approximately 2,200 regular hospital employees, many had no access to the areas where employee solicitation was permitted. *Id.* The situation in *Beth Israel* was factually distinct from that which would exist in many health-care facilities, and the Court noted that the cafeteria was a "common gathering room for employees." *Id.* at 490.

134. See text accompanying note 96 *supra*.

135. See 437 U.S. at 483. The majority opinion failed to spell out clearly the significance of the peculiar fact situation to its decision. *Id.* The concurring opinions recognized this failure on the part of the majority. *Id.* at 508 (Blackmun, J., concurring); *Id.* at 509 (Powell, J., concurring). The majority opinion in *Beth Israel* was also

as strong reservations concerning the majority's approach expressed in the concurring opinions.<sup>136</sup>

b. *NLRB v. Baptist Hospital, Inc.*

Only one year after *Beth Israel*, the Supreme Court was confronted with some of the questions that had arisen in the wake of that decision in the case of *NLRB v. Baptist Hospital, Inc.*<sup>137</sup> Baptist Hospital was a large nonprofit hospital with approximately 1,800 employees.<sup>138</sup> Partly in response to union organizational efforts,<sup>139</sup> the hospital promulgated a rule banning solicitation at any time in any area utilized by or accessible to the public.<sup>140</sup> Specifically included within this ban were the cafeteria, lobbies, gift shop, and first floor entrances, in addition to hallways and restrooms on other floors.<sup>141</sup> In response to this rule, charges were filed with the Board on the grounds that the hospital had violated section 8(a)(1) of the Act.<sup>142</sup>

The Board applied the *Republic Aviation* presumption of invalidity and found the hospital's no-solicitation rule unlawful because it applied to all areas, and was not limited to strictly patient care areas.<sup>143</sup> It was only in these latter areas that the Board believed there were special circumstances

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unclear regarding its rationale for rejecting the application of the retail store exception to health-care institutions. *Id.* at 505-07. For a discussion of the Court's response to the retail store exception issue, see notes 111-15 and accompanying text *supra*.

136. For a discussion of the concurring justices' disagreements with the majority opinion, see notes 121-31 and accompanying text *supra*.

137. 442 U.S. 773 (1979).

138. *Id.* at 775.

139. *Id.* The union, Local 150-T, Service Employees Union, AFL-CIO, had begun a campaign to organize the workers at Baptist Hospital in August, 1974. *Id.*

140. *Id.* at 776. The hospital's newly adopted rule read as follows:

No solicitation of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitations of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action.

*Id.*

141. *Id.* at 775-76.

142. *Id.* at 776.

143. *Baptist Hosp., Inc.*, 223 N.L.R.B. 344, 355-58 (1976). The trial examiner's decision, which was adopted as modified by the full Board, acknowledged that patient care is the primary concern of hospitals and that some medical experts sincerely believe that broad solicitation rules such as the one in *Baptist Hospital* are necessary for the patients' well-being. *Id.* at 356. However, this evidence was not found to be dispositive. *Id.* Rather, it presented the very question at issue: whether evidence of this type sufficiently outweighed the employees' guaranteed organizational rights so as to justify such broad rules. *Id.*



present which were sufficient to rebut the presumption.<sup>144</sup> The Sixth Circuit reversed, however, finding that the hospital had overcome the presumption of invalidity<sup>145</sup> through the presentation of medical evidence, thus justifying its broad rule.<sup>146</sup> The testimony presented by the hospital generally showed that there might be ill-effects on the recovery of patients who witnessed union solicitation efforts.<sup>147</sup>

On certiorari, the United States Supreme Court, faced with an inquiry broader than that in *Beth Israel*,<sup>148</sup> decided that the proper resolution of the case lay in a middle ground between the position of the Board<sup>149</sup> and that of the Sixth Circuit.<sup>150</sup> In an opinion written by Justice Powell, the Court agreed with the Sixth Circuit that the testimony offered by medical experts and hospital administrators<sup>151</sup> justified the no-solicitation rule as it applied to the corridors, sitting rooms, and other areas of the hospital above the first floor.<sup>152</sup> As to the cafeteria, lobbies and gift shop, however, the Court concluded that the hospital presented insufficient evidence to rebut the presumption of invalidity and thus found that a complete ban on solicitation in such areas was not warranted.<sup>153</sup> Of critical importance was the fact that the Court did sanction the use of the *Republic Aviation* presumption in a hospital setting,<sup>154</sup> despite expressing at more than one point its discomfort with "a presumption as to hospitals so sweeping that it embraces solicitation in the corridors and sitting rooms on floors occupied by patients."<sup>155</sup>

Echoing a closing comment made in *Beth Israel*,<sup>156</sup> the Court noted that the existence of alternative means of reaching employees for organizational purposes, although not itself dispositive, lent support to permitting a partial ban on solicitation,<sup>157</sup> thus emphasizing a consideration which would be ir-

144. *Id.* at 358.

145. *NLRB v. Baptist Hosp., Inc.*, 576 F.2d 107, 109-11 (6th Cir. 1978).

146. *Id.*

147. *Id.* The hospital's Chief of Medical Staff testified that patients and their families may be disturbed upon seeing that the minds of hospital employees, in whose care patients are entrusted, are on something other than patient care. *Id.* at 109. He further testified that there was a need for a broad no-solicitation rule because even if the patient is not directly affronted, "an event which disturbs the visiting family invariably gets back to the patient." *Id.*

148. 442 U.S. at 782.

149. *See Baptist Hosp., Inc.*, 223 N.L.R.B. 344 (1976). For a discussion of the Board's opinion, see notes 143-44 and accompanying text *supra*.

150. 442 U.S. at 782. The decision of the Court of Appeals was affirmed in part and vacated and remanded in part. *Id.* at 790-91.

151. 442 U.S. at 785-86.

152. *Id.*

153. *Id.* at 786.

154. *See id.*

155. *Id.* at 788.

156. *See* 437 U.S. at 505. For a discussion of *Beth Israel*, see notes 88-136 and accompanying text *supra*.

157. 442 U.S. at 785 (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. at 505). For a discussion of *Beth Israel*, see notes 88-136 and accompanying text *supra*.

relevant in an industrial context.<sup>158</sup>

In a concurring opinion, Justice Blackmun expressed his continued failure to see any rational basis for not applying the retail store exception to a gift shop or cafeteria located in a hospital.<sup>159</sup> Justice Blackmun further noted that the majority's admonition against the blind application of the *Republic Aviation* presumption could not be overemphasized.<sup>160</sup> Similarly, the Chief Justice filed a concurring opinion stating that the application of the *Republic Aviation* presumption of invalidity to a hospital setting was "wholly irrational."<sup>161</sup> He emphasized the difference between a normal industrial setting and a hospital, and maintained that any doubts as to the potential adverse effects on patients should be resolved in favor of the patients.<sup>162</sup> Thus, Chief Justice Burger suggested that, when dealing with a health-care institution, a different analysis should be used, giving greater significance to the nature of the institution as opposed to merely making it a factor in determining whether there are "special circumstances" sufficient to rebut the *Republic Aviation* presumption.<sup>163</sup> Nevertheless, the Chief Justice concurred because he agreed that the Board lacked substantial evidence to support a solicitation ban on the upper floors of the hospital.<sup>164</sup>

In the final concurring opinion, Justice Brennan, joined by Justices White and Marshall,<sup>165</sup> noted that while the majority's opinion did not reject the applicability of the *Republic Aviation* presumption, it did question the appropriateness of applying the presumption to the sitting rooms and corri-

158. For a discussion of the method of analysis in the industrial context, see notes 22-53 and accompanying text *supra*.

159. 442 U.S. at 791 (Blackmun, J., concurring).

160. *Id.* Justice Blackmun referred to footnote 16 of the majority opinion which stated as follows:

The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. . . . In different hospitals, the use and physical layout of such a variety of areas may require varying resolutions of questions about the validity of bans on union solicitation. In addition, outpatient clinics such as the Hospital's emergency room and "shortstay" unit . . . may raise special considerations because of the nature of services rendered to patients there.

In discharging its responsibility for administration of the Act, the Board must frame its rules and administer them with careful attention to the wide variety of activities within the modern hospital.

*Id.* at 789-90 n.16.

161. *Id.* at 792 (Burger, C.J., concurring).

162. *Id.* While the Chief Justice did note his strong disagreement with the approach taken by the majority, he did not fully develop what his version of the proper approach would be. *Id.* The Chief Justice did, however, allude to an example: "A religious choir singing in a hospital chapel may well be desirable but if that interferes with patient care, it cannot be allowed." *Id.* at 791 (Burger, J., concurring).

163. *See id.* at 791-93 (Burger, C.J., concurring).

164. *See id.*

165. *Id.* at 793 (Brennan, J., concurring).

dors occupied by patients.<sup>166</sup> Justice Brennan maintained that the Board's presumption applied as equally to these areas as it did to others, and suggested that the courts should not be second guessing the Board's handling of its "difficult and delicate responsibility."<sup>167</sup>

#### 4. Baylor University Medical Center v. NLRB

The most recent case in the area of solicitation in the health-care industry was *Baylor University Medical Center v. NLRB* (*Baylor III*).<sup>168</sup> After a tortuous sojourn through the federal courts,<sup>169</sup> *Baylor III* came before the Court of Appeals for the District of Columbia Circuit.<sup>170</sup> Baylor University Medical Center, a multi-hospital complex located in Dallas, Texas, promulgated a rule which prohibited union solicitation of employees in areas where such conduct was likely to disturb persons visiting hospital patients.<sup>171</sup> The only issue that remained on this hearing before the Court of Appeals was the propriety of the hospital's rule forbidding union solicitation of employees in the hospital's vending area and cafeteria.<sup>172</sup> On remand from the District of Columbia Circuit's decision in a prior phase of the case,<sup>173</sup> the Board had disapproved the ban as to those areas.<sup>174</sup> The appellate court, however, again remanded the case because it found there was not substantial evidence to support a complete disapproval.<sup>175</sup> The court held that the Board had not given sufficient consideration, *inter alia*, to alternative methods of reaching employees.<sup>176</sup> Thus, in *Baylor III* a court of appeals for the first time

166. *Id.* at 796 (Brennan, J., concurring). Justice Brennan pointed to that part of the majority opinion in which the Court expressed serious doubt about the breadth of the presumption. *Id.* (citing 442 U.S. at 788-89).

167. *Id.* at 796-98 (Brennan, J., concurring).

168. 662 F.2d 56 (D.C. Cir. 1981).

169. *Id.* at 57. For the other attempts at resolving the issues involved, see *Baylor Univ. Medical Center v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978) (*Baylor I*) *vacated in part and remanded*, 439 U.S. 9 (1978), *on remand*, *Baylor Univ. Medical Center v. NLRB*, 593 F.2d 1290 (D.C. Cir. 1979) (*Baylor II*).

170. 662 F.2d at 56.

171. *Id.* at 59. The full text of the rule read as follows:

Solicitation of employees of Baylor University Medical Center by other employees or distribution of literature between employees is prohibited during work time and/or in work areas. The term "work areas" includes patient care floors, hallways, elevators or any other area, such as laboratories, surgery or treatment centers, where any type of service is being administered to or on behalf of patients and also includes any areas where persons visiting patients are likely to be disturbed. Service to our patients and their visitors includes not only primary and acute medical care, but food service and psychological support.

*Id.*

172. *Id.*

173. See *Baylor Univ. Medical Center*, 593 F.2d 1290 (D.C. Cir. 1979). For the prior history of the *Baylor* case, see note 169 *supra*.

174. 247 N.L.R.B. 1323 (1980).

175. See 662 F.2d at 65.

176. *Id.* at 63-65. In supporting its decision to remand, the court of appeals stated, "In non-hospital cases the availability of alternative areas for solicitation is

made the consideration of alternative methods of reaching employees dispositive,<sup>177</sup> and thus completed the development of a trend which had begun in *Beth Israel*,<sup>178</sup> and which had gained added strength in *Baptist Hospital*.<sup>179</sup>

#### IV. ANALYSIS

##### A. *The Republic Aviation Presumption Should Not Be Applied in the Health-Care Setting*

In *Beth Israel*, the hospital argued that the congressional policy underlying the 1974 amendments to the Act<sup>180</sup> precluded the application of the *Republic Aviation* presumption to health-care facilities.<sup>181</sup> The Court properly rejected this argument, stating that nothing in the legislative history of the amendments called for such an approach to resolving problems concerning the section 7 rights of employees.<sup>182</sup> Weighing heavily upon the Court's interpretation of that legislative history was the fact that the amendments contained special notice provisions concerning strikes, but remained silent on the issue of solicitation.<sup>183</sup> The Court thus correctly concluded that in enacting the 1974 amendments, Congress chose to rely upon the Board to determine the appropriate balance of the competing concerns of employers, employees, and patients in the health-care setting.<sup>184</sup> Accepting the Court's analysis of congressional intent, care must be taken to avoid the notion that the Board is given a free hand to determine what the law will be in this area.<sup>185</sup> As will be developed in the analysis which follows, it is the Court's failure to critically analyze the Board's balancing of interests that has resulted in the improper application of the *Republic Aviation* solicitation presumption for the industrial setting to the very different environment found in the health-care industry.<sup>186</sup>

In its landmark decision in *Republic Aviation*, the Supreme Court upheld

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irrelevant to the determination of whether a ban on solicitation is valid. The Supreme Court has recognized, however, that different considerations in the health-care context make proper any inquiry into the availability of alternative areas." *Id.* at 63.

177. *Id.*

178. *See* 437 U.S. at 505. For a discussion of *Beth Israel*, see notes 88-136 and accompanying text *supra*.

179. *See* 442 U.S. at 785. For a discussion of *Baptist Hospital*, see notes 137-67 and accompanying text *supra*.

180. For a discussion of the 1974 Amendments to the Act, see note 3 and accompanying text *supra*.

181. *See* 437 U.S. at 483.

182. *Id.* at 496. For a discussion of this rejection by the *Beth Israel* Court, see notes 99-105 and accompanying text *supra*.

183. 437 U.S. at 497.

184. *See id.*

185. For a discussion of the latitude enjoyed by the Board in this area, see notes 88-167 and accompanying text *supra*.

186. For a discussion of the rationality of applying the presumption in a health-care setting, see notes 187-206 and accompanying text *infra*.

the Board's right to adopt presumptions.<sup>187</sup> However, it limited this right by noting that the validity of a presumption depends upon "the rationality between what is proved and what is inferred."<sup>188</sup> It is submitted that the rationality found to exist between a broad no-solicitation rule and the presumption of invalidity in an industrial setting cannot automatically be transferred to other work-settings, such as those found in health-care institutions. The major distinction between an industrial setting and a hospital or similar health-care institution, where the tentative application of that same presumption has produced sharp criticism,<sup>189</sup> is the need for a tranquil atmosphere. This factor is entirely absent in the usual industrial setting such as the one in *Republic Aviation* itself.<sup>190</sup> The differences in facilities and working conditions between these two settings are sufficiently great that to automatically apply the presumption to the health-care industry would sever the necessary link between the facts proved and the inferences drawn therefrom.<sup>191</sup>

That the application of the *Republic Aviation* presumption of invalidity reached a just result in *Beth Israel* is not disputed herein. However, the result reached was justifiable only because, under the peculiar facts in *Beth Israel*, the cafeteria involved was factually indistinguishable from a typical industrial cafeteria.<sup>192</sup> This will not always be the case, as was pointed out by Justice Blackmun in his concurring opinion in *Beth Israel*, where he expressed concern that *Beth Israel*, with its unusual facts, might be used as precedent for all hospital eating facility cases, and thus might take the Court further towards promoting liberal employee solicitation rights than it would have chosen to go had a more ordinary case been the first to reach it.<sup>193</sup>

The concern expressed by Justice Blackmun is his concurring opinion in *Beth Israel*<sup>194</sup> was borne out by the subsequent decision in *Baptist Hospital*.<sup>195</sup> It is submitted that the problem regarding the *Republic Aviation* presumption to health-care solicitation disputes lies in the Court's blithe application of the presumption, without having first determined whether the rational connection that exists in the industrial setting between the underlying facts and the presumption adopted, is also present in a health-care setting. It is sub-

187. 324 U.S. at 804.

188. *Id.* at 804-05.

189. For a discussion of the criticisms that have followed the presumption's application in the health-care context, see notes 121-31 & 159-67 and accompanying text *supra*.

190. *See* 324 U.S. 793 (1945).

191. 437 U.S. at 511 (Powell, J., concurring). *See also* 442 U.S. at 792 (Burger, C.J., concurring).

192. *See* 437 U.S. at 489-91. For a discussion of the factual peculiarity of *Beth Israel*, see notes 89-98 & 121-26 and accompanying text *supra*.

193. *Id.* at 508-09 (Blackmun, J., concurring).

194. *Id.* (Blackmun, J., concurring).

195. *See* 442 U.S. at 773. For a discussion of *Baptist Hospital*, see notes 90-110 and accompanying text *supra*.

mitted that such a connection is not present between the hospital setting and this presumption.

While the Court in *Baptist Hospital* again applied the *Republic Aviation* presumption of invalidity in a health-care setting,<sup>196</sup> the number of justices who quarrelled with its applicability dropped from four in *Beth Israel*<sup>197</sup> to two in *Baptist Hospital*.<sup>198</sup> In fact, Justice Powell, who had been at the forefront in *Beth Israel* in condemning the presumption's use in hospital situations,<sup>199</sup> authored the *Baptist Hospital* opinion only a year later.<sup>200</sup> It is submitted that the law of the *Beth Israel* case, formulated under a peculiar fact situation, was incorrectly carried forward and viewed as precedent when the Court decided *Baptist Hospital*. The Court itself seems less than certain about the propriety of applying the *Republic Aviation* presumption in health-care settings. The majority opinion in *Beth Israel* incorporated language from the court of appeals decision in that case, which stated that the Board should stand ready to revise its rulings if future experience would show that, in fact, the well-being of patients was being jeopardized by the current approach.<sup>201</sup> A year later in *Baptist Hospital*, the majority opinion noted that the Board should be mindful of the Court's admonition in *Beth Israel*.<sup>202</sup>

Noting the very tentative nature of the Court's application of the *Republic Aviation* presumption to health-care institutions, Justice Brennan attempted to place the presumption's applicability to such situations upon a firmer footing in a separate concurrence in *Baptist Hospital*.<sup>203</sup> He contended that there was no need to "second-guess" the Board's handling of such a "difficult and delicate" matter.<sup>204</sup> It is respectfully submitted that Justice Brennan's analysis misconstrues the nature of the presumption; it is an issue of law, not one of fact. Where the rational relationship between a presumption and the facts upon which it is based is lacking, the presumption cannot stand. The "delicate" nature of a particular area of law does not lessen nor obviate the essential requirement of this rational relationship.

It must be remembered that to remove the *Republic Aviation* presump-

196. *See id.*

197. *See* 437 U.S. at 483. In *Beth Israel*, Justices Blackmun, Powell, and Rehnquist and Chief Justice Burger went on record against the application of the *Republic Aviation* presumption as the proper method to resolve employee solicitation questions in the health-care field. *Id.*

198. *See* 442 U.S. at 773. In *Baptist Hospital*, only Justices Burger and Blackmun questioned the applicability of the presumption. *Id.* at 791-92 (Blackmun, J. & Burger, C.J., concurring). Even this must be qualified because Justice Blackmun's challenge to the presumption was somewhat less than direct. *See id.* at 791. Chief Justice Burger, in contrast, explained precisely why he felt the presumption had no place in health-care solicitation problems. *Id.*

199. *See* 437 U.S. at 509 (Powell, J., concurring).

200. *See* 442 U.S. 773 (1979).

201. 437 U.S. at 508 (quoting *NLRB v. Beth Israel Hosp.*, 554 F.2d 477, 481 (1st Cir. 1977)).

202. 442 U.S. at 790.

203. *Id.* at 793-97 (Brennan, J., concurring).

204. *Id.* at 797 (Brennan, J., concurring).

tion from the health-care setting does not mean that health-care employees are barred from gaining access to fellow employees for union organizational purposes. Over the course of time, a set of rules must be developed to give health-care unions, as well as employers, standards upon which to base their conduct regarding employee solicitation and no-solicitation rules.<sup>205</sup> However, as things presently stand, the improper application of the *Republic Aviation* industrial standard to the wholly different setting of a health-care facility is producing much uncertainty,<sup>206</sup> as well as overlooking the needs of the hospitals and other health-care institutions in carrying out their primary function of seeing to the physical and emotional needs of their patients.

A final effect of the unwarranted application of the *Republic Aviation* presumption to the health-care settings is that it could weaken the effect of the presumption in the industrial setting, where it has proven so effective over the many years since its inception.<sup>207</sup>

B. *The Republic Aviation Presumption Has Effectively Been Cast Aside in Health-Care Solicitation Cases While Continuing to Receive Lip-Service From the Court*

In *Beth Israel*, the Supreme Court was split five to four in favor of applying the *Republic Aviation* presumption to a health-care facility.<sup>208</sup> As previously noted, the number of justices going on record against the applicability of the presumption only a year later in *Baptist Hospital* dropped from four to two.<sup>209</sup> It is nevertheless submitted that support for the presumption is waning and that the Court in *Baptist Hospital*, while purporting to apply the *Republic Aviation* presumption, has begun the formation of a separate set of guidelines for health-care facilities.<sup>210</sup>

Although the Court continues to formally apply the presumption, the facts of each case are actually being examined from a neutral perspective. While the distinction between allowing special circumstances to rebut an applied presumption and not applying the presumption at all is a very subtle

205. Since the act was only amended in 1974 to include employees in the non-profit health-care field, it is not surprising that clear standards cannot as yet be determined.

206. For a discussion of the argument that uncertainty has followed the application of the presumption to the health-care setting, see notes 208-13 and accompanying text *infra*.

207. In the years since *Republic Aviation* was decided, it has become one of the most cited labor cases and is properly referred to as a landmark Supreme Court case. See, e.g., *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Local 357 International Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 680 (1961); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 109 (1956); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 229 (1948); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95 (1947).

208. For a discussion of the split in *Beth Israel*, see notes 88-136 and accompanying text *supra*.

209. For a discussion of the split in *Baptist Hospital*, see notes 137-67 and accompanying text *supra*.

210. For a discussion of these guidelines, see notes 211-15 and accompanying text *infra*.

one, the fact that it shifts the burden of proof can be determinative in cases where only a small amount of evidence is placed before a tribunal.

In the majority opinion in *Baptist Hospital*, Justice Powell questioned the propriety of extending the *Republic Aviation* presumption to a hospital setting but ultimately upheld the Board's use of the presumption in deciding the case.<sup>211</sup> Further, in resolving the case, the Court in *Baptist Hospital* properly gave great weight to testimony by doctors and hospital administrators that the observation of union solicitation could have an adverse effect upon patients' recoveries.<sup>212</sup> It is submitted that a generous reading of *Baptist Hospital* supports the proposition that the Court may require that such testimony be given conclusive weight by the Board in future cases. Because of the Court's heavy emphasis on medical testimony and the dicta suggesting the presumption's inapplicability in health-care cases,<sup>213</sup> it is suggested that in health-care situations the presumption has effectively been cast aside in favor of an analysis from a more neutral perspective.

The result of the use of a neutral perspective while still purporting to apply the presumption is a total lack of predictability for unions and health-care institutions in framing their solicitation policies.<sup>214</sup> It is submitted that by "covering itself" in this manner, whether intentionally or unintentionally, the Supreme Court has put both labor and management into the position of guessing whether, under the facts of a particular case, the Board and the courts will truly follow the *Republic Aviation* presumption or will examine the facts from a neutral perspective when a health-care institution is involved.<sup>215</sup> To avoid this result, the Board and the Court should formally recognize that the special circumstances have overtaken the rule, making the *Republic Aviation* presumption inapplicable in health-care settings.

C. *If the Presumption Prevails, the Retail Store Exception Should be Applied to Hospital Retail Areas Such as Cafeterias and Gift Shops*

While it is technically correct to say that the *Republic Aviation* presumption of invalidity applies to retail establishments and is rebutted by a showing that patrons on the selling floor could overhear employee solicitation efforts,<sup>216</sup> the simpler approach is to view the retail setting as sufficient to automatically cast aside the presumption without looking to the specific facts of each case.<sup>217</sup> In fact, the presumption of invalidity will not be applied

211. 442 U.S. at 789.

212. *See id.* at 782-85.

213. For a discussion of the dicta, see note 155 and accompanying text *supra*.

214. For a discussion of the unpredictability brought on by the Court's approach, see text accompanying note 215 *infra*.

215. For a discussion of the effect of the presumption upon management and labor, see notes 208-10 and accompanying text *supra*.

216. For a discussion of the rationale behind the retail store exception, see R. GORMAN, *supra* note 2, at 181.

217. For a discussion of the retail store exception, see notes 48-53 and accompanying text *supra*.



once an employer establishes the requirements for the retail store exception.<sup>218</sup> Thus, an employer in a retail store solicitation dispute will not be required to produce evidence that his broad no-solicitation rule is necessary "in order to maintain production or discipline"<sup>219</sup> as would be required of his industrial counterpart in an otherwise similar dispute.<sup>220</sup> The Court has recognized that the potential disruption of the employer's business resulting from patrons being exposed to employee solicitation efforts calls for striking the balance in this manner.<sup>221</sup>

In *Beth Israel*, the Court refused to apply the retail store exception, giving the issue very little consideration.<sup>222</sup> The Court noted that the "primary purpose" of a hospital differs from that of a retail establishment, and therefore rejected the invitation to apply the retail exception to the hospital cafeteria.<sup>223</sup> It is submitted, however, that the Court failed to properly analyze the cases which have developed this exception to the *Republic Aviation* presumption of invalidity.<sup>224</sup> It is submitted that the Court, having decided to apply the *Republic Aviation* presumption, should have also applied the retail store exception, notwithstanding the fact that the "primary purpose" of a hospital is to provide for the well-being of its patients. The fault in the *Beth Israel* majority's "primary purpose" distinction was exposed by Justice Powell in his concurring opinion.<sup>225</sup> As he pointed out, the Board has applied the retail store exception to public restaurants located on the premises of retail stores despite the fact that the primary selling function of the stores does not take place in those restaurants.<sup>226</sup> In the same way that a cafeteria in a large department store supplements the store's overall operation, the primary purpose of which is selling merchandise, the cafeteria and gift shop in a hospital supplement its overall operation, the primary purpose of which is patient care. Therefore, it is submitted that there is no justifiable reason for divergent applications of the retail store exception in these two settings. Prior to the Supreme Court's decision in *Beth Israel*, this logic had been accepted by some lower federal courts.<sup>227</sup> It is submitted that these decisions evince the proper approach.

218. See R. GORMAN, *supra* note 2, at 179-81.

219. *Id.*

220. See *McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539 (8th Cir. 1973). For a discussion of *McDonnell Douglas*, see notes 38-47 and accompanying text *supra*.

221. 437 U.S. at 506-07.

222. *Id.*

223. *Id.*

224. For a discussion of the Court's analysis, see notes 111-15 and accompanying text *supra*.

225. 437 U.S. at 509 (Powell, J., concurring).

226. *Id.* at 513 (citing *McDonalds Corp.*, 205 N.L.R.B. 404 (1973); *Goldblatt Bros. Inc.*, 77 N.L.R.B. 1262 (1949)).

227. See *Baylor Univ. Medical Center v. NLRB*, 578 F.2d 351, 357-61 (1978); *St. John's Hosp. & School of Nursing*, 557 F.2d 1368, 1375 (1977).

Aside from the faulty "primary purpose" distinction,<sup>228</sup> the majority opinion in *Beth Israel* reveals no logical basis for refusing to apply the retail store exception to hospital cafeterias and gift shops. Further, the Court, in deciding *Baptist Hospital* one year later, completely failed to focus upon the retail store exception.<sup>229</sup> Two of the justices recognized this error in the Court's logic, and refused to allow it to pass unchallenged.<sup>230</sup>

It was previously suggested that, while the Court purports to apply the *Republic Aviation* presumption in health-care settings, it has actually been analyzing the facts of each particular case from a much more neutral perspective.<sup>231</sup> The result of this approach is to allow hospitals to promulgate broader no-solicitation rules where patients and visitors are potentially exposed to union solicitation efforts.<sup>232</sup> It is submitted that while the Court thus seems to give the hospital greater control over its employees, it undermines this generosity by refusing to allow the application of the retail store exception in hospital cafeterias and gift shops.<sup>233</sup> While this may appear to strike the appropriate balance between the union's right of access to the employees and the hospital's concern for the well-being of its patients, it is submitted that it is not an acceptable method for solving the delicate problem of employee solicitations in the health-care field.

#### D. *A Suggested Approach to Handling Employee Solicitation Problems in The Health-Care Field*

When confronted with the guaranteed organizational rights of employees protected by the Act on the one hand, and the delicate issue of proper hospital patient care on the other, it is apparent that striking the appropriate balance between these sometimes conflicting aims is naturally a very difficult task. To err in the usual industrial setting on the side of freer solicitation rights is to hamper productivity and discipline, which are no doubt serious concerns. However, to err in the health-care setting on the side of freer solicitation is to impede the physical and emotional recovery of human beings. This is certainly a more serious matter and deserves greater weight in the balancing of interests.

The Board and the courts have arguably reached the appropriate result in each particular case by following the approach that seems to be set forth

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228. For a discussion of the Court's "primary purpose" reasoning, see note 114 and accompanying text *supra*.

229. 442 U.S. at 777.

230. *Id.* at 791 (Blackmun, J., concurring).

231. For a discussion of the approach the Court seems to be taking while purporting to apply the *Republic Aviation* presumption, see notes 208-15 and accompanying text *supra*.

232. For a discussion of the result of the present approach, see notes 88-167 and accompanying text *supra*.

233. For a discussion of the Court's approach regarding the retail store exception, see notes 111-15 and accompanying text *supra*.

in *Baptist Hospital*.<sup>234</sup> In every case, a health-care facility could produce testimony of doctors and administrators that solicitation in any area to which patients or visitors are exposed will adversely affect the recovery of patients.<sup>235</sup> Depending on how far the Board will go in honoring this testimony, it could justify limiting or allowing solicitation in any disputed area. However, as has been argued, this approach to solving health-care solicitation cases is unacceptable due to the unpredictability it brings about from the perspective of both labor and management.

A more viable alternative exists. When first confronted with the difficult issue of employee solicitation in the health-care field, the Supreme Court, in *Beth Israel*, suggested that while the availability of alternative means of reaching the employees is not a factor in resolving industrial employee solicitation cases, this factor gains in importance when the more substantial interests of a health-care setting are involved.<sup>236</sup> This dicta received added strength in *Baptist Hospital*, where it was quoted approvingly by the majority opinion.<sup>237</sup> Finally, the *Baylor III* decision by the District of Columbia Circuit recognized the strength and logic of this dicta and relied heavily upon the alternative means analysis in confronting the solicitation issue.<sup>238</sup>

Under an "alternative means" analysis, the Board, when confronted with a solicitation problem in a health-care setting, should first look to whether the health-care facility imposing a no-solicitation rule in patient/visitor access areas has provided areas where all employees could be reached regularly by other employees for union organizational or solicitation purposes. Such areas could include locker rooms, lounges, employee parking areas or employee-only cafeterias. If the facility could produce evidence that it had provided such alternative areas, the facility's evidence that solicitation in other areas of the hospital could have an adverse effect upon patient care should be given conclusive weight. On the other hand, should the facility be unable to provide such alternative means of access to employees for organizational purposes, the facility's evidence of patient care disruption should be viewed as only a factor and, at that, even more skeptically—as a possible ruse intended to hamper union organizational efforts. The existence of alternative means of reaching employees should not be conclusive in a determination of the hospital's intent in promulgating a broad no-solicitation rule, but would be a strong factor in the analysis, and, perhaps over the course of time, could form the basis for a presumption that when such alternatives

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234. For a discussion of the *Baptist Hospital* approach, see notes 137-67 and accompanying text *supra*.

235. For a discussion of the medical testimony involved in health-care solicitation disputes, see notes 145-54 and accompanying text *supra*.

236. See 437 U.S. at 505. For a discussion of alternative means in *Beth Israel*, see notes 119-20 and accompanying text *supra*.

237. See 442 U.S. at 785. For a discussion of alternative means in *Baptist Hospital*, see notes 157-58 and accompanying text *supra*.

238. See 662 F.2d 56 (D.C. Cir. 1981). For a discussion of alternative means in *Baylor III*, see notes 168-79 and accompanying text *supra*.

exist, a ban on solicitation in other areas is valid. Adoption of such a standard would put health-care facilities on notice that, should they desire to successfully ban solicitation in patient/visitor access areas, they must provide alternative areas for employees to be reached for organizational purposes.

#### V. CONCLUSION

It has been suggested herein that the current approach to employee solicitation disputes in the health-care industry has resulted in unpredictability for both labor and management in approaching and resolving the issue of employee solicitation.<sup>239</sup> It is submitted that an analysis which focuses upon the availability of alternative means of access to employees provides a better resolution of the health-care solicitation problem than does the current approach taken by the Board and the Supreme Court.<sup>240</sup> It is not suggested that this approach will resolve all solicitation problems in the health-care area. For instance, the issue of what alternatives will amount to "adequate alternatives" is one that remains to be defined. It is suggested, however, that for purposes of injecting predictability and logic into the law, the approach suggested above would result in a sorely needed change in the Board's approach to health-care solicitation disputes.

*Michael A. Curley*

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239. For a discussion of the unpredictability brought about by the current approach, see notes 208-15 and accompanying text *supra*.

240. For a discussion of the proposed approach to health-care solicitation disputes, see notes 234-38 and accompanying text *supra*.