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PROFITING FROM UNFAIR LABOR PRACTICES: A PROPOSAL TO REGULATE MANAGEMENT REPRESENTATIVES

Terry A. Bethel*

I. INTRODUCTION

Recently, much attention has been devoted to consultants and attorneys who represent management in labor relations matters. Often assailed by the labor movement as "union busters," and their activities have come under increased scrutiny by the press, the Congress, and, to a lesser extent, the courts and the National Labor Relations Board (NLRB or Board).¹ Publications ranging from union house organs² to the Wall Street Journal³ have made note of the increase in psychological warfare in the battle between labor and management for the sympathies of the workers. In 1979 and 1980, Congress held six days of hearings devoted largely to the activities of consultants and attorneys who help management resist union organizational efforts or uproot unions already in place.⁴ The NLRB, the government's first line enforcer of the right of employees to organize into unions and bargain collectively with their employers, has recognized that a problem may exist,

* Associate Professor of Law, Indiana University-Bloomington. The author wishes to express his appreciation to Professor Julius Getman, Yale Law School, and Dean George Schatzki, University of Connecticut School of Law, each of whom read an earlier draft of this article and offered helpful comments. The author also acknowledges, with thanks, the research assistance of two Indiana University law students, Lauren Robel, J.D. '83 and John Polley, J.D. '84.

² See, e.g., Report on Union Busters RUB Sheet, a monthly newsletter published by the National Organizing Coordinating Committee of the AFL-CIO.
but has eschewed its ability to rectify it under existing law.\(^5\)

For all the hubbub, however, little hard data exists concerning the extent of activities of those who have been called the “new Pinkertons.”\(^6\) No one doubts that representation of management in labor matters by both consultants and attorneys is a big business. Many, indeed, feel that it is a booming industry. What is known about the numbers of those involved would appear to prove the point.\(^7\) Whatever their numbers, much less is known about what consultants actually do. Union leaders have charged that once the organizational campaign begins, management consultants effectively take over the operation of the enterprise, and that all other activity becomes secondary.\(^8\) The same leaders also charge that, once in place, the consultants establish an armed camp in which the employer’s supervisors become the primary weapon, spreading fear and distrust among the employees.\(^9\) For their part, the consultants deny such allegations and assert that they merely assist employers in their legal right to resist unionization.\(^10\)

Given the perceived spread of consultant activities, and the result-

\(^{5}\) See e.g., 4 Hearings, supra note 4, at 18-28 (testimony of William A. Lubbers, NLRB General Counsel). Although Mr. Lubbers expressed concern about unlawful consultant conduct and a willingness to combat it, id. at 18-19, he also acknowledged the difficulty of discovering or proving such activities, id. at 20, 25.

\(^{6}\) See Chernow, supra note 3. See also 1 Hearings, supra note 4, at 112 (statement of Nancy Mills) (“Today’s Pinkertons are three-piece-suited lawyers with briefcases stuffed with psychological armaments.”).

\(^{7}\) There are no figures indicating the precise numbers of firms or individuals involved in management representation. In the 1979-1980 Oversight Hearings, Robert A. Georgine, President of the Building and Construction Trades Department of the AFL-CIO, claimed that more than 1,000 firms and 1,500 individuals were involved in such representation, and that most of them had emerged since 1970. 1 Hearings, supra note 4, at 410. Georgine did not cite the source of his figures. In addition to union testimony, a prominent consultant estimated that his industry had experienced “a tenfold growth in the past 10 years.” 3 id. at 112 (testimony of Herbert G. Melnick, Chairman of the Board, Modern Management, Inc.). See also 4 id. at 2 (testimony of Assistant Sec. of Labor William Hobgood, characterizing consulting as a “growth industry”); REPORT, supra note 4, at 26-29.

\(^{8}\) See, e.g., 1 Hearings, supra note 4, at 59 (testimony of Alan Kistler, Director of Organization and Field Services, AFL-CIO). See also REPORT, supra note 4, at 32, and citations contained therein.

\(^{9}\) See e.g., 1 Hearings, supra note 4, at 110-11 (testimony of Nancy Mills). As to the use of supervisors, see id. at 28-29 (prepared statement of Alan Kistler); 3 id. at 156, 160-66 (prepared statement of Robert L. Muchlenkamp).

\(^{10}\) For example, Fred Long, Chairman of the Board of a consulting firm named West Coast Industrial Relations Association, has characterized his firm as similar to a doctor whose job is to “determine what ails a company in its relationship with employees and to cure it.” 3 id. at 305. Long also asserted that his firm “strives to improve the status of employees whenever and wherever we can.” Id. at 306. In the same hearings, Herbert G. Melnick, Chairman of the Board of Modern Management, Inc., a Chicago-based consulting firm, said that his organization’s “primary function is one of advising and consulting with management in order to assist in establishing and maintaining good management-employee practices.” Id. at 75. Melnick also testified that, in a union organizing drive, management should get employee support only when it deserves it, adding that “[o]ur function is to help an employer deserve the employee’s support.” Id. at 76.
ing inability of the labor movement to cope effectively with sophisticated and expensive psychological campaigns, labor leaders and some members of Congress have called for increased examination and regulation of labor consultant activity. The dominant theme has been for increased enforcement of the reporting requirements of the Labor Management Reporting and Disclosure Act (LMRDA).

This article will not question the conclusion, urged by other commentators and supported by labor, that increased enforcement of the LMRDA will help unions compete against consultant-led campaigns. Even if that conclusion is valid, however, disclosure of consulting activity will do little to stem one of the most troublesome aspects of so-called "union busting": employer participation in illegal campaign tactics, sometimes with the encouragement or assistance of consultants.

Although there is no reason to believe that most management advisors counsel unlawful conduct, there is evidence which suggests that significant numbers do. This article will argue that illegal campaigning and other unlawful interference pose a serious threat to the right of employees to make their own decisions about union representation. It will explain how employers take advantage of their own lawlessness in campaigns against the union and describe the role that consultants and attorneys play in the process. It will conclude that neither traditional NLRB remedies aimed at employers nor federal reporting requirements aimed at consultants are sufficient to protect employee rights. Instead, the article will propose direct NLRB action against attorneys and consultants who violate the law or who counsel and encourage others to do so.

11 Although detailed data concerning the amounts received by consultants is not available, during the 1979 Hearings, one witness introduced a memorandum from the Massachusetts Rate Setting Commission purporting to show that from 1973 to 1976, six hospitals in Massachusetts had paid $256,892 to Modern Management, Inc. The memo stated that since its audit techniques relied on samplings, the figure did "not represent the full penetration of [Modern Management] in the industry." 1 id. at 103-04.

12 Most of the testimony of union witnesses at the 1979-1980 Hearings urged greater governmental regulation of consultant activities. See, e.g., 1 id. at 32 (Kistler testimony); id. at 410 (Georgine testimony). As to congressional concern, see REPORT, supra note 4, at 43-45.

13 29 U.S.C. §§ 401-531 (1982). As to calls for reform, see, e.g., 1 Hearings, supra note 4, at 35 (Kistler testimony). See also REPORT, supra note 4, at 45, (a majority of the subcommittee encouraging the Department of Labor to "undertake a thorough re-examination of the employer and consultant reporting and disclosure provisions").

II. Narrowing the Issue

A. What Is a Union Buster?

At least one obstacle to significant regulatory reform of the problems caused by consultants is labor's inability to convince the Board (or Congress) that serious abuse exists. Despite labor's persistent outcry, the Board seldom has addressed the matter directly and, on those occasions when consultant activities have been at issue, has been loathe to find fault or impose sanctions.\(^\text{15}\) Part of the Board's hesitancy may be the labor movement's willingness to cry "wolf" too often. An example is labor's unfortunate labeling of virtually any management representative as a "union buster." An AFL-CIO publication entitled "Peddling the 'Union-Free' Guarantee," for example, claims:

Thousands of lawyers and other individuals are involved on a daily basis in advising and participating in the process of union busting. In the fifteen years the AFL-CIO organizing department has been keeping card files on lawyers involved in NLRB campaigns, more than 800 different lawyers and firms have participated or represented management in organizing campaigns.\(^\text{16}\)

The problem might be one of definition. If furnishing advice to employers faced with a union organizing drive or representing employers in NLRB proceedings constitutes "union busting," then the AFL-CIO's assertion is correct—thousands of lawyers and consultants are involved. The term "union-buster," however, suggests a person who does more than render advice about campaign tactics or advocates a cause in an administrative hearing. Historically, it has provoked the image of club-swinging hooligans, hired by management to beat sense into (or hell out of) union adherents.\(^\text{17}\) Few would suggest that today's consultants either engage in or counsel such activity.

There is evidence, however, that some of today's consultants and attorneys approach unionization with a zeal comparable to that displayed by yesterday's Pinkertons.\(^\text{18}\) The battle today, however, is for the employees' minds instead of their scalps. Even so, there is no evidence that all attorneys and consultants engage in or counsel conduct that is unlawful or that seriously jeopardizes employee rights. What the labor movement has been unable, or unwilling, to do is distinguish between those advisors who are involved in improper activities and those who are aggressive and effective, but within the law.

\(^{15}\) See infra text accompanying notes 100-22.
\(^{16}\) McDonald & Wilson, Peddling the 'Union-Free' Guarantee, AFL-CIO AM. FEDERATIONIST (1979)(copy on file with author).
\(^{17}\) R. Boyer & H. Morais, LABOR'S UNTOLD STORY (3d ed. 1977); C. Larrow, HARRY BRIDGES (1972); C. Wood & H. Coleman, DON'T TREAD ON ME (1928). See also 1 Hearings, supra note 4, at 189 (statement of J.C. Turner, President of International Union of Operating Engineers).
\(^{18}\) See supra text accompanying notes 6-10. See also REPORT, supra note 4, at 29-38.
Despite the propaganda efforts of organized labor, it is clear that management representatives have an important role to play and that most are not deserving of condemnation for activities on behalf of their clients. Although the choice to unionize or not is clearly one for employees alone, the labor movement, in its passion to point out abuses, often overlooks the statutory right of employers to express opinions about the decisions that employees will make.\footnote{Section 8(c) of the National Labor Relations Act, as amended, provides: “The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c) (1982). Sometimes referred to as the employer free speech provision, section 8(c) was added by the Taft-Hartley Amendments of 1947 in response to NLRB decisions that had denied to employers the right to express opinions about unionization. \textit{See}, e.g., \textit{NLRB v. Federbush Co.}, 121 F.2d 954 (2d Cir. 1941); \textit{I NLRB ANN. REP.} 64 (1937). \textit{But see NLRB v. Virginia Elec. & Power Co.}, 314 U.S. 469 (1941). For the legislative history of section 8(c), see \textit{H.R. REP. NO. 510, 80th Cong., 1st Sess.} 45 (1947), \textit{reprinted in} \textit{1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947}, at 549 (1948) (“The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination.”).} Equally ignored is the fact that not all employers are corporate giants with in-house legal or personnel expertise. Most collective bargaining relationships are established in units with about fifty employees.\footnote{For example, in the fiscal year 1977, the average number of employees voting in elections was 53. More than 70% of the elections were conducted in units of fewer than 50 employees. \textit{42 NLRB ANN. REP.}, 20, 306 (1977). In fiscal 1978, the average was 51 with more than 70% of the elections in units under 43 \textit{NLRB ANN. REP.} 16,278 (1978); in fiscal 1979, the average was 63 with nearly 70% in units under 44 \textit{NLRB ANN. REP.} 18,310 (1979); in fiscal 1980, the average was 56, with approximately 70% in units; and in fiscal 1981, the average was 52, with approximately 70% in units under 46 \textit{NLRB ANN. REP.} 18,220 (1981).} Despite the efforts of the labor movement to paint itself as the decided underdog, small employers often face experienced and efficient union organizers financed by a large international union. It is not surprising that such employers turn to attorneys and consultants in order to understand their rights and protect their interests.\footnote{\textit{See} \textit{1 Hearings, supra} note 4, at 26 (Kistler testimony) (“A few very large firms can maintain in-house the kind of expert ability needed. Others need outside assistance.”). It is also clear that the representation of consultants and attorneys often proves valuable. In Kimball Tire Co., 240 N.L.R.B. 343 (1979), for example, attorney-consultant Fred Long of West Coast Industrial Relations Association, a firm often targeted by unions, \textit{see infra} note 72, advised an employer not to lay off employees during the campaign, advice which the employer ignored. Also, in \textit{Presto Casting Co.}, 262 N.L.R.B. 346 (1982), Long took the place of an associate who had not gotten along with a union representative, and provided practical and lawful advice about good faith negotiation. Without the benefit of such expertise, an employer acting out of ignorance might infringe on employee’s section 7 rights.} These advisors, however, are not “union-busters” merely because they represent management.

The type of sophisticated psychological campaigns described at the recent congressional hearings might not epitomize employee free
choice, but they are at least a step forward from the persuasion by force of the 1930s and 1940s. Rather than complain about the effectiveness of these employer campaigns, the unions might develop their own strategies to meet them. Surely, a movement that has become so adept at propagandizing its own virtues can devise a more effective counter-strategy than its current campaign of foot stomping and name calling. Instead of condemning all management representatives, the unions' call for increased regulation should focus on those who bend or break the law. The rest might be neutralized merely by turning their own tactics against them.

B. The Advantages of Law Breaking

Concluding that the labor movement has overstated the number of management advisors engaged in improper activity does not minimize the problem. Rather, it highlights the dominant issue of disregard for the law and misuse of NLRB processes. As the case reports demonstrate, employers do not flout the law merely to express their disapproval of unions. They can, and do, use lawlessness to their considerable advantage.

Section 7 of the National Labor Relations Act (NLRA or Act) establishes the right of employees to organize, join labor unions and bargain collectively with their employer.25 Those rights are protected through the prohibition of several employer and union unfair labor practices. Thus, section 8(a)(1) prohibits employer interference with,

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22 See, e.g., 1 Hearings, supra note 4, at 101-120 (testimony of Nancy Mills, a union organizer at St. Elizabeth's Hospital, and Joana Lira, an employee of St. Elizabeth's).

23 See supra note 17.

24 In a Mother Jones article, for example, the author describes how a union anticipated and exploited the campaign strategy of Modern Management at Boston University. Chernow, supra note 3, at 52.

In addition, in a recent colloquium in New York, John Oshinuski, a staff member of the United Steelworkers Union, said: “After all, the management consulting companies are only turning around our very weapons for their own use. There’s nothing original in what they’re doing. They have adopted our procedures, refined them, put them in the hands of psychologists and sold them at a high price.” The Labor Movement at the Crossroads, The Challenges of Organizing, 11 N.Y.U. Rev. L. & Soc. CHANGE 57, 79 (1983). During the same conference, Professor Julius Getman spoke about the inadequacies of union propaganda in organizing campaigns:

The union campaigns that I have studied have tended to be as formalistic as the employer’s campaign. There is a heavy reliance on literature that people do not read. I studied one election where the union simply crossed out the name of another group of employees to whom they were sending their message, and wrote, “Dear Employee of ... .” It seems to me that this is not atypical. It was a crude demonstration of one union’s lack of personal involvement with the employee; good union organizers do receive better responses.

Id. at 74.

25 29 U.S.C. § 157 (1982). Section 7 provides, in pertinent part, that “[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.”
restraint of, or coercion of section 7 rights,26 section 8(a)(3) bans employer discrimination against employee union activity,27 and section 8(a)(5) mandates that, once an employee representative is chosen, the employer must bargain in good faith.28 Actual enforcement of the Act, however, is not as impressive as the bold statement of rights in section 7 or the array of weapons in section 8. Employers are often able to use the Act's cumbersome and time-consuming administrative and judicial proceedings to their advantage. They can also openly defy the law and reap not punishment but reward.

Perhaps the best example of the advantages of law-breaking is the discharge of a union adherent during a union organizing drive. Although the Act expressly bans discrimination in retaliation for union activity, such action is thought by many to be the most effective weapon against unionization.29 The theory is that by demonstrating the depth of its opposition to the union and the lengths to which it will go to oppose it, the employer is able to chill the organizational rights of the other employees. Even if a section 8(a)(3) charge is ultimately sustained (after several months),30 the employer's maximum exposure is an order to cease and desist from the unlawful conduct, post NLRB notices, and give back pay to the aggrieved employee.31 The Board has

26 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [section 7]."

27 Id. § 158(a)(3). Section 8(a)(3) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

28 Id. § 158(a)(5). Section 8(a)(5) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees." Section 8(d) of the Act, id. § 158(d), defines the employer's obligation to bargain collectively as:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .


30 See, e.g., id. at 150 n.19. The writer chronicled the discriminatory discharge of several employees and the Board's delay in issuing complaints and holding a hearing. Because of the seemingly interminable delays in the unfair labor practice proceedings, the Union was finally forced to file a complaint in federal district court that demanded an injunction of further postponements.

31 The Board's remedial power is set forth in section 10(c) of the Act, 29 U.S.C. § 160(c) (1982), which provides in pertinent part:

If . . . the Board shall be of the opinion that any person . . . has engaged in . . . [an] unfair labor practice, then the Board . . . shall issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act] . . . .
no enforcement power, however, and the court of appeals often will not enforce its order for a year or more.\textsuperscript{32} In one extreme example, a case was settled after twenty-four years of litigation.\textsuperscript{33} Moreover, the back pay order is subject to mitigation for any earnings received by the employee after the unlawful discharge, sometimes virtually negating the effect of the award.\textsuperscript{34}

For a few thousand dollars in backpay and legal fees, then, employers are able to thwart employee rights to organize. Even if the costs are more substantial, employers seem willing to run the risk, especially considering the perceived costliness of collective bargaining and the resulting loss of managerial freedom.\textsuperscript{35} An apt example is the case of one of the country's most notorious antilabor outlaws, J.P. Stevens and Company, whose back pay liability at one point stood at a reported 1.3 million dollars. The sum seems substantial until compared to the more

\textsuperscript{32} E.g., St. Francis Fed'n of Nurses v. NLRB, 729 F.2d 844 (D.C. Cir. 1984), enforcing 263 N.L.R.B. 834 (1982).

\textsuperscript{33} This protracted litigation spawned the famous case of Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965). The dispute arose from the termination of operations at a plant in November, 1956, two months after the Textile Workers had won a representation election. Id. at 266. Six years after the plant closing, the Board rendered its first decision respecting the employer's liability in Darlington Mfg. Co., 139 N.L.R.B. 241 (1962). This six year period was consumed by administrative hearings, and exceptions to the procedures used therein, to determine the proper-party defendant. Id. at 241-42. The court of appeals denied enforcement of the Board's order, Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963), and the Supreme Court reversed in part and remanded for further findings, 380 U.S. 263 (1965). Eleven years after the plant closing, the Board affirmed its 1962 decision and order. Darlington Mfg. Co., 165 N.L.R.B. 1074 (1967). This time around, the court of appeals enforced the Board's order, Darlington Mfg. Co. v. NLRB, 397 F.2d 760 (4th Cir. 1968), and the Supreme Court denied certiorari, 393 U.S. 1023 (1969).

Litigation continued to determine to whom and in what amounts back pay was due. In Deer- ing Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977), the court held that the parent corporation, Deering Milliken, was entitled to inspect certain agency documents that were in the possession of the General Counsel. Because inspection was demanded pursuant to the Freedom of Information Act, Deering Milliken was also awarded reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E) (1982). Id. at 1138. The case was settled in December 1980 by payment of $5,000,000 to the former employees and their heirs. For a former union attorney's comments on Darlington, see Eames, \textit{The History of the Litigation of Darlington as an Exercise in Administrative Procedure}, 5 U. Tol. L. Rev. 595 (1974).

\textsuperscript{34} See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197-200 (1941), in which the Court held that in fashioning backpay remedies the Board must deduct the amounts earned by the discharg- ees and the amounts that could have been earned in substantially equivalent employment. Because dilatory reinstatement was encouraged by the cumulative, mitigative effects of more lucrative employment that was found several months after the illegal discharge, the Board in F.W. Woolworth Co., 90 N.L.R.B. 289 (1950), limited the offsetting effect of wages from such employment to the annual quarter in which such wages were earned.

than twelve million dollars that a mere one cent per hour wage increase would have cost over the same period.\textsuperscript{36}

In addition to discriminatory discharge, the Board regulates other aspects of an organizational campaign. Its most pervasive, and most controversial, regulation is of the content of the propaganda sent to employees by both management and unions during the campaign. Although a 1976 study questions the effectiveness of any campaign propaganda (as well as the effect of certain other unlawful campaign practices),\(^{37}\) it is likely that few employer representatives concur with its findings.\(^{38}\) And, if one is to believe their testimony, union leaders are also convinced that employees are swayed by coercive employer propaganda.\(^{39}\)

Whatever the effect of coercive propaganda, the NLRB continues, with court enforcement, to regulate it either as an unfair labor practice under section 8(a)(1) or through the election process itself.\(^{40}\) The Board also regulates other campaign practices, such as employer surveillance of employee concerted activity,\(^{41}\) interrogation concerning union activity,\(^ {42}\) and the granting of benefits with the purpose of affecting employees' decisions.

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\(^{37}\) See J. Getman, S. Goldberg & J. Herman, *Union Representation Elections: Law and Reality* (1976). [hereinafter cited as *J. Getman Study*]. In brief, the Getman study sought to determine whether certain unlawful campaign practices had more of an effect on voters than lawful campaign practices. Based on their data, the authors concluded that unlawful campaigning was no more persuasive, at least in part because employees do not pay attention to the content of campaign propaganda. *Id.* at 109.

The Getman study produced considerable debate among both practitioners and scholars. The authors replied in Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 Mich. L. Rev. 564 (1981), which also includes citations to the criticism, *Id.* at 567 nn.16-24.

\(^{38}\) There has been no empirical evaluation of management advisor's response to the Getman study. However, those representatives continue to counsel extensive propaganda campaigns. See, e.g., R. Lewis & W. Krupman, *Winning NLRB Elections: Management's Strategy and Preventive Programs* 69-80 (2d ed. 1979). One prominent management attorney (and former NLRB chairman) concluded that the study was not an indictment of all employer propaganda, but alerted employers to listen to employees and campaign on the issues important to them. See Miller, *The Getman, Goldberg, and Herman Questions*, 28 Stan. L. Rev. 1163, 1163-68 (1976).

\(^{39}\) Much of the testimony at the 1979-1980 Hearings concerning activities of management consultants included reference to their psychological campaigns, through either written or oral propaganda. See, e.g., 1 Hearings, supra note 4, at 40-100 (Kistler statement); *Id.* at 101-20 (Mills statement); *Id.* at 190 (Schlossberg statement); *Id.* at 408 (Georgine statement); *Id.* at 636 (Winpinsinger statement). For the views of a lawyer-academician who questions the Getman study, see Eames, *An Analysis of the Union Voting Study From a Trade-Unionist's Point of View*, 28 Stan. L. Rev. 1181 (1976).

\(^{40}\) Even if employer (or union) campaign conduct does not constitute an unfair labor practice, the Board sometimes sets aside an election and orders a new one because of a violation of the laboratory conditions surrounding the election. See R. Gorman, *Basic Text on Labor Law Unionization and Collective Bargaining* 47 (1976). See also General Shoe Corp., 77 N.L.R.B. 124 (1948).


\(^{42}\) E.g., Maywood Inc., 251 N.L.R.B. at 985. See also R. Gorman, *supra* note 40, at 173-78.
ing the outcome of elections.\(^43\) The standard Board remedy for all of these violations is an order to cease and desist from the unlawful conduct. In addition, if an election results in an employer victory, the Board will set it aside the election and order a new one.\(^44\) Some employers apparently believe, however, that these unlawful campaign tactics are worth the risk. Without them, they believe that they will certainly lose; with them, they might prevail.\(^45\) Even if the election is set aside, an employer's chances of winning a re-run election are far superior to those of winning an initial election.\(^46\) Thus, the initial unfair campaign can pay important benefits even in a subsequent "clean" election.\(^47\)

Employers are equally effective at frustrating employee rights once the union has gained representative status. The more egregious offenses include closing all or part of a unionized plant and moving to a more hospitable labor relations environment\(^48\) and engaging in "surface" bargaining with the hope that employees will become dissatisfied

\(^{43}\) E.g., NLRB v. Exchange Parts Co., 375 U.S. 405, 408-09 (1964).

\(^{44}\) E.g., Wackenhut Corp. v. NLRB, 666 F.2d 464, 466 (11th Cir. 1982). See also R. Gorman, supra note 40, at 52-53.

\(^{45}\) For one of the boldest statements of this belief, see Transcript of a Tape Recording of a Seminar Conducted by Fred Long, Chairman of the Board, West Coast Industrial Relations Association (1980) (a California-based consulting firm) (recording made surreptitiously) (on file with author):

> If you got a clearcut victory you play it clean. If it is close, you may be playing the peripheries of the law. And if it is not close, you are going to get crucified. You got to remember you only lose once. What happens if you violate the law? The probability is you will never get caught. If you do get caught, the worst thing that can happen to you is you get a second election and the employer wins 96% of those second elections. So the odds are with you.

See also Axelrod, supra note 29.

\(^{46}\) See, e.g., 42 NLRB ANN. REP. 292, 294 (1977). Tables 11E and 13 indicate that in 1977 employers won 68.2% of rerun elections while winning only 54% of all elections; in 1978 the employer won 67.4% of rerun elections and 54% of all elections, 43 NLRB ANN. REP. 264, 266 (1978); in 1979 the employer won 68.2% of rerun elections and 55% of all elections, 44 NLRB ANN. REP. 294, 297 (1979); in 1980, the employer won nearly 76% of rerun elections and 54.3% of all elections, 45 NLRB ANN. REP. 267, 270 (1980); in 1981 the employer won 70.3% of rerun elections and 56.9% of all elections, 46 NLRB ANN. REP. 202, 204 (1981). See also Pollitt, NLRB Re-Run Elections: A Study, 41 N.C.L. REV. 209 (1963) (discussed by the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575, 611 n.31 (1969)).

\(^{47}\) Employers do not, however, have a complete license to violate the Act. In addition to cease and desist orders and other remedies, the Board holds as its trump card the possibility of issuing a bargaining order to dissipate the effects of the employer's unlawful conduct. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). See also R. Gorman, supra note 40, at 93-104. Although such orders are not routinely issued, their possibility might dissuade some particularly egregious employer conduct, especially since the Board's criteria for bargaining orders are not well articulated. For judicial criticism of the Board's approach, see NLRB v. General Stencils, Inc., 438 F.2d 894, 901-05 (2d Cir. 1971).

\(^{48}\) These so-called "runaway shop" cases are aptly demonstrated by Local 57, ILGWU v. NLRB (Garwin Corp.), 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967), where the court enforced a Board order that the employer violated section 8(a)(3) by moving its operations from New York to Miami in order to avoid bargaining with the union.
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with the union's progress and decertify it.\textsuperscript{49} Again, NLRB remedies have proven ineffective against those who are determined to break the law. The Board seldom orders employers to reopen closed plants and, even when it does, only rarely has its orders been enforced by the courts of appeals.\textsuperscript{50} The federal policy favoring nonintervention by the government in private negotiations often frustrates Board efforts to remedy employer surface bargaining. For example, the Board has only limited ability to weigh the substantive content of proposals in order to determine requisite good faith and has no power to order employers to make, or agree to, particular proposals.\textsuperscript{51}

Another significant difficulty with the use of traditional NLRB

\textsuperscript{49} See, e.g., 1 Hearings, supra note 4, at 291-94 (Robert H. Fox statement); id. at 294-314 (Lloyd Laudermil statement). The Act authorizes employees to file decertification petitions whenever the incumbent union "is no longer a representative." 29 U.S.C. § 159c(1)(A)(ii) (1982). Although both the statute and NLRB decisions prohibit employer initiated decertification efforts, see, e.g., Consolidated Rebuilders, Inc., 171 N.L.R.B. 1415 (1968), coaching decertification has become a favorite topic of consultants. See, e.g., 1 Hearings, supra note 4, at 315 (reprint of T. YEISER, HOW TO DECERTIFY A UNION (1979)); id. at 45-46 (reprint of advertisement for course entitled "Deunionizing," offered by Attorney Francis T. Coleman and the University of Baltimore School of Business); id. at 51-52 (reprint of advertisement for course entitled "The Process of Decertification"); Martino, Decertification Through Employer Free Speech, 1 ADELPRIA L. REV. 1 (1982). Although employee self-help in the form of a strike may be a possible response to employer surface bargaining, it might also actually aid the employer's cause. Thus, the employer might hire permanent replacements for the strikers, further undermining the union's support. See, e.g., NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).


The Board has expressed reluctance to order the resumption of operations, especially in cases where the closing of operations was for nondiscriminatory reasons, and where machinery has been removed or plant facilities are otherwise not available . . . . A similar reluctance has been expressed where the change was a major one entailing a substantial withdrawal of capital investment, where the remaining operation bears little relationship to the discontinued operation, or where other practical considerations weigh against the restoration of the status quo ante . . . . However, in other cases where . . . there is strong evidence that a discriminatory motive brought about the change of operations, and the change itself consists for the most part, of shift of work from unit employees to others without a substantial physical change in operations, the Board has ordered a resumption of operations. Thecourts, however, are often more restrained than the Board. See NLRB v. R & H Masonry Supply, Inc., 627 F.2d 1013, 1014-15 (9th Cir. 1980); NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 831-32 (7th Cir. 1976); NLRB v. American Mfg. Co., 351 F.2d 74, 80-81 (5th Cir. 1965). But see Florida-Texas Freight, Inc., 203 N.L.R.B. 509, enforced mem., 489 F.2d 1275 (6th Cir. 1974).

\textsuperscript{51} See, e.g., H.K. Porter Co. v. NLRB, 397 U.S. 99, 102-09 (1970); NLRB v. American Ins. Co., 343 U.S. 395, 404 (1952). See also section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982) (providing that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession").

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processes to dissuade blatant law breakers is the nature of the Board’s authority. Its powers are remedial, not punitive. The Board’s orders, moreover, are not self-executing, but are enforced on petition to the federal courts of appeals, a costly and time-consuming process. The theory of the Board’s remedial power appears to be that those adjudged guilty of misdeeds will not only remedy the harm caused by the unfair labor practice, but will respect the regulatory agency’s order to cease and desist from further unlawful activity. The system, then, is premised on a respect for both the law and the administrative process. It is ill-equipped to deal with those employers who see the law only as an impediment to their ultimate objective of defeating the union and who utilize the delay inherent in the administrative proceedings to accomplish that end.

The only serious effort to strengthen the Board’s authority came in the ill-fated Labor Law Reform Act of 1978. That legislation would have allowed the Board to combat discriminatory discharges by doubling back pay awards and would have remedied surface bargaining by providing a “make whole” formula designed to remove the incentive to delay or otherwise frustrate the bargaining process. Both measures died in a Senate filibuster. There have been no legislative attempts to

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52 In Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-11 (1940), the Supreme Court said:

The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor Practices to be crimes . . . . [The Board’s remedies] relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

See also NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826, 830 (7th Cir. 1976) (“In line with the Act’s essentially remedial rather than penal purpose, Board orders may not be punitive or confiscatory and must be reasonably adapted to the situation that calls for redress.”).

53 Section 10(e) of the Act, 29 U.S.C. § 160(e) (1982), provides that the Board has the power to petition the court of appeals for enforcement of its orders. Section 10(f), id. § 160(f), allows “[a]ny person aggrieved by a final order of the Board” to seek review in the court of appeals. In its 1981 Annual Report, the Board reported that it was involved in more litigation than any other federal administrative agency and that the average time for disposition of court proceedings during the fiscal year was 149 days. 46 NLRB ANN. REP. 23 (1981).

54 See, e.g., J. ATELSON, supra note 36, at 310-12. In that work, the authors identify and criticize traditional arguments supporting non-coercive remedies. One such argument “rests on a suggestion that the law creates a moral code or set of ground rules that the parties follow because they must work together.” Id. at 312.

55 The frustration that the government has experienced in dealing with frequent offenders is reflected in the Second Circuit opinion in NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2nd Cir. 1977), cert. denied, 434 U.S. 1064 (1978), the eighteenth federal court proceeding against the company. See supra note 36. Considering a contempt order against Stevens, the court noted that the company had been adjudged in contempt twice before, saying that “[t]his case . . . raises grave doubts about the ability of the courts to make the provisions of the federal labor law work in the face of persistent violations.” Id. at 25-26.


58 After five weeks of filibuster and the inability of the Act’s proponents to garner the necessary votes for closure, the Senate unanimously consented to recommit the bill to committee, where
increase the Board's remedial power since 1978, despite increased criticism of its ability to deal with persistent lawbreakers.59

C. The Role of the Advisor

Much of the focus today is diverted away from the employer who actually commits the unfair labor practice and toward the consultant or attorney who counsels the employer. Perhaps more than in any other area of the law, labor relations counselors are expected to do more than merely give legal advice or provide technical expertise. As one commentator has said, "when labor or management retain a labor lawyer they are not simply seeking technical legal counsel in the classic, neutral sense. Rather, they are seeking a comrade, a fellow warrior, a true landsman in the basic socio-economic class struggle between labor and management."60 The fact that few lawyers or consultants serve both sides of the conflict further demonstrates the depth of commitment expected to the cause. Although little hard data exists, most labor law professionals would acknowledge that management and labor share few counselors.

The proliferation of labor consultants combined with what labor perceives as a stiffening of employer attitudes about employee organizing and concerted activity has caused many to speculate that this employer backbone is the result of consultant activity.61 Although consultants appear more modest about their accomplishments, there seems little doubt that a primary purpose of consultants is to protect employers against union organizing efforts or otherwise provide a so-called "union free environment."62 The sticking point is the methods they employ. The available evidence shows consultants stoutly defending their role in the employer-union conflict and professing their respect for, and adherence to, the law.63 Labor just as vigorously protests the unlawful practices allegedly fostered by consultants.64 The actual extent of labor consultant involvement in either campaigns or unlawful

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59 See, e.g., Bernstein, supra note 14, at 3.
61 See, e.g., Bernstein, supra note 14, at 3 ("The modern day 'labor relations consultant' is an important force in the recent upsurge of sophisticated anti-union activity."). See also 1 Hearings, supra note 4, at 40-41 (Kistler statement); id. at 102 (Mills statement); id. at 189 (Turner statement).
62 See, e.g., id. at 26 & n.1 (Kistler statement) (describing the goal of employers as a "union free environment" and asserting that the National Association of Manufacturers created an entity called Council on Union Free Environment).
63 See, e.g., id. at 74-118 (statement of Herbert G. Melnick, Chairman of the Board of Modern Management, Inc.). See also supra note 10.
64 See supra note 61.
campaign practices is not known. What is known is that some employers are willing to violate the law, through discharge or other forms of intimidation, in order to defeat a union. It is also known that at least some of those, perhaps most, utilize the services of a management consultant or management attorney. Those facts do not, however, establish that the consultant or attorney counselled or was otherwise involved in the unlawful activity. Part of the difficulty is the failure of the Board's General Counsel to prosecute vigorously even those consultants who have clearly engaged in unlawful activities. Since prosecutions often center only on the effect of employer conduct, there is little occasion to investigate the employer's motivation or the role played by the consultant. The matter is further complicated by the labor movement's branding as "union busting" even those employer counter-measures that clearly do not violate the Act, though they might be effective in dissuading potential union members.

Despite the absence of much empirical data, the cases support two observations: first, that consultants often have advised or encouraged their management clients to fight unionization through unlawful means or have participated themselves in illegal activity on behalf of their cli-

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65 Among the interesting findings of a recent empirical study is that employers who are represented by consultants are more likely to engage in unlawful discriminatory conduct than those who are not. Cooper, Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court’s Gissel Decision, 79 Nw. U.L. Rev. 87, 126 (1984).

66 The NLRB does not maintain any record of consultant or attorney involvement in union organizational campaigns. 4 Hearings, supra note 4, at 23 (testimony of William A. Lubbers, General Counsel, NLRB). Nor does the Department of Labor maintain reliable figures since few management representatives report under the Labor Management Relations and Disclosure Act, 29 U.S.C. §§ 401-532 (1982). See Bernstein, supra note 14, at 11-41. However, the AFL-CIO estimates that lawyers and consultants plan strategy and influence workers directly in two-thirds of all NLRB elections. 1 Hearings, supra note 4, at 33 (Kistler statement).

67 See infra text accompanying notes 105-22.

68 For example, in the typical section 8(a)(1) violation, the Board is concerned only with whether the effect of the employer's action has been to interfere with, coerce or restrain employees in the exercise of their section 7 rights. Indeed, it is not even necessary to demonstrate that particular employees were coerced—only that the employer's activity would tend to coerce employees. See, e.g., R. Gorman, supra note 40, at 132-33. Even in section 8(a)(3) cases where proof of unlawful discrimination is thought to compel consideration of the employer's motive, the General Counsel's burden is merely to establish a prima facie showing that union activity was a motivating factor in the employer's conduct. The burden then shifts to the employer to justify its action by establishing that its action would have been the same even in the absence of employee protected activity. See NLRB v. Transportation Mgt. Corp., 103 S. Ct. 2469 (1983); Wright Line, 251 N.L.R.B. 1083, 1087 (1980) enforcement granted, 662 F.2d 899 (1st Cir. 1981). Although motive remains an element in most section 8(a)(3) cases, but see NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), shifting the burden to the employer to explain its conduct reduces the General Counsel's need to explore and prove motive. For the motive requirement in section 8(a)(3) generally, see Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. Chi. L. Rev. 735 (1965).
Regulating Management Representatives


Since attorneys and consultants have not often been charged individually as a result of their activities, it is difficult to find cases that detail, or even report their activities. Many of the above cases were located conducting a Lexis computer search, using the consultants’ names as key words. Such a technique is obviously inefficient. First, there is no exhaustive list of either management attorneys or consultants, thus making any such search random at best. Second, Lexis will locate a case only if the consultant’s name appears therein, thereby excluding those cases in which a consultant may have engaged in questionable conduct, but was not named by either the A.L.J. or the Board. Finally, Lexis files will only search back to 1972.

In addition to the cases cited above, many cases exist in which an employer was found guilty of unfair labor practices and an attorney or consultant was somehow involved. These cases, however, do not detail the extent of the consultant’s involvement, if any, in the unlawful conduct. See, e.g., NLRB v. Lehigh Lumber, 94 Lab. Cas. (CCH) ¶ 13,574 (3d Cir. 1982) (attorney served as chief negotiator in case in which employer was found in contempt for violation of NLRB bargaining order). See also Maietta Contracting, 265 N.L.R.B. 1279 (1982) (attorney bargaining for em-
plete or major responsibility for management's campaign against the union. In the latter case, whether encouraged by consultants or not,

employer found guilty of section 8(a)(5) violation, as well as other unfair labor practices); Parkview Nursing Center II Corp., 260 N.L.R.B. 243 (1982) (Rayford Blankenship, Consultant); Vore Cinema Corp. 254 N.L.R.B. 1288 (1981) (same); Humana Corp., 254 N.L.R.B. 1377 (1981) (charges filed against WCIRA, but case settled before trial); Columbia Bldg. Materials, 239 N.L.R.B. 1342 (1979) (Fred Long, WCIRA, attorney-consultant); Ohio City Mfg., Inc., 238 N.L.R.B. 965 (1978) (Rayford Blankenship, consultant); Pease Co., 237 N.L.R.B. 1069 (1978) (attorney Carl Becker, chief negotiator for an employer who “entered into and continued contract negotiations with the union with a closed mind, having determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the union and would force the union to strike” in order to force decertification); Indio Community Hosp., 225 N.L.R.B. 129, 136 (1976) (consultant Fred Long referred to by ALJ as the one who “orchestrat[ed] the anti-union campaign”); Clear Lake Hosp., 223 N.L.R.B. 1 (1976) (Fred Long, WCIRA, consultant and attorney); GTE Automatic Elec., 204 N.L.R.B. 716, 739 (1973) (consultant John Sheridan represented what the ALJ referred to as a “recidivist” employer who had a “proclivity to engage in long-range and carefully planned unfair labor practices which go to the very heart of the Act”); San Luis Obispo County and N. Santa Barbara County Restaurant & Tavern Ass'n, 196 N.L.R.B. 1082, 1084, 1087 (1972) (section 8(a)(5) violation for unlawfully withdrawing recognition from the union after the hiring of consultant E.J. Gund and Associates. The A.L.J. suggested that the employer had hired Gund because of his reputation for successfully ridding restaurant employees of unions).

In addition to the reported cases, there are at least some other indications of management representatives' willingness to misuse the law to resist unions. Some of the references are anecdotal. Thus, many of the union witnesses at the 1979-1980 Hearings, supra note 4, testified as to their experiences with consultants. E.g., supra notes 8, 9 & 61. See also The Labor Movement at the Crossroads, The Strengths and Weaknesses of Compulsory Unionism, 11 N.Y.U. Rev. L. & Soc. Change, 29 40 (1982-1983). Professor Eilene Silverstein commented that: “All of my students who are looking for jobs in the labor field tell me, union busting is the single growth industry. That's the place where there are labor law jobs.” This author's experiences are quite similar. For example, a management attorney once patiently explained that he had refused to hire a student because he had expressed reluctance to advise employers to discharge union adherents. “Why don't you teach them what the world is really like,” the lawyer said. For an account in the popular press, see Brill, supra note 3, at 17, in which lawyer Whiteford Blakeney is reported to have told J.P. Stevens Company officials: “You do what you think you have to do, and I'll hold off that damned labor board if they come after you.”

Management seminars and publications provide additional evidence that management representatives sometimes encourage law breaking. The best example is a surreptitiously-made tape recording of a speech made by Fred Long, Chairman of West Coast Industrial Relations Association, in which he allegedly advised management representatives to backdate memoranda in order to grant wage increases and not to worry about the possibility of perjury since “there is no such thing as perjury in a Labor Board proceeding.” 1 Hearings, supra note 4, at 205. 212. Replying to the charges, Long denied any wrongdoing in a statement reprinted at 3 id. at 283.

Advice also comes in other forms. The author has received, and has available, a slide presentation entitled “Union Organizing Game,” prepared by Labor Relations Associates, Inc. The material is intended as a training program for supervisors. Although most of the instruction offered is lawful, the author was struck by the tone of the presentation, and its obvious intention to make supervisors fear the prospect of unionization. Even though supervisors are constantly admonished not to spy on employees, the slide presentation encourages them to obtain information to report to management.

70 The best example of consultant control over management activities is found in St. Francis Hospital, 263 N.L.R.B. 834 (1982), discussed infra text accompanying notes 100-61. As in those instances involving the possibility of unlawful conduct or advice, supra note 69, it is often difficult to discover from the case reports the extent of a consultant's control over the campaign. The
unfair labor practices do occur. In either case, General Counsel prosecutions and NLRB remedies center on employers. Although there are a few cases in which consultants or attorneys proven to have engaged in unlawful activity have been the subject of Board action, in the ordinary case the Board's enforcement efforts ignore the consultant, even if the consultant's unlawful conduct was both overt and serious.

In Westminster Community Hospital, for example, attorney-consultant Fred Long, from the well known consulting firm of West Coast Industrial Relations Association (WCIRA), addressed a group of employees during a decertification campaign. Long threatened the employees by telling them that if they voted to retain the union he would limit the size of their wage increase and that he would negotiate a "lousy" contract and shove it down their throats and into other portions of their anatomy. Long's conduct resulted in a finding of unfair labor practices against the employer. Neither Long nor the consulting firm was named as a respondent. Similarly, in BLK Steel, consultants from WCIRA were involved in particularly egregious conduct. Consultants threatened employees with discharge, solicited grievances, threatened loss of benefits, predicted that adverse consequences would follow unionization, attributed a loss of business to the union, Board has concentrated primarily on employers, who are liable on an agency theory. See infra text accompanying notes 89-99. Nonetheless, there are cases in addition to St. Francis which demonstrate consultant control. See, e.g., Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974), enforcing 199 N.L.R.B. 250 (1972) (Gladys Selvin, consultant, exercised significant control over employer's response to the union organizational effort); Catalina Yachts, 250 N.L.R.B. 283 (1980); Maine Medical Center, 248 N.L.R.B. 707 (1980) (no unfair labor practices were found, although the ALJ noted that the consulting firm of Modern Management Methods, Inc., had been hired "to plan and conduct a massive anti-union campaign in respondent's behalf and to advise respondent's supervisors how they could aid in disseminating respondent's anti-union message ... within the confines of the law); Plastic Film Prods., 238 N.L.R.B. at 143 (A.L.J. found that consultant Rayford Blankenship "planned respondent's anti-union campaign"); Indio Community Hosp., 225 N.L.R.B. at 136 (consultant Fred Long referred to as having "orchestrated" the anti-union campaign); GTE Lenkurt, Inc., 204 N.L.R.B. at 928 (personnel manager testified that the consultant Sheridan and Associates had taken over the union resistance campaign to such an extent that he "voided [himself] from that area"); Monroe Auto Equip. Co., 153 N.L.R.B. 912 (1965) (consultant alleged to have planned strategy of discharging union activists in order to delay election and coerce employees); National Welders, Inc., 132 N.L.R.B. at 667 ("as the campaign progressed [the consultant] appears to have assumed more direction of the company's quest for information").

71 221 N.L.R.B. 185 (1975), enforced mem., 96 L.R.R.M. (BNA) 3240 (9th Cir. 1977).
72 Both Long and the activities of WCIRA were the subject of inquiry in the 1978-1980 Hearings. See, e.g., 1 Hearings, supra note 4, at 194-202 (statement of Joel Smith), which includes a transcript of a tape recording of a seminar conducted by Long on July 28, 1976, as well as certain literature accompanying Long's presentation. Id. at 203-90. Long himself also testified at the Hearings. 3 Id. at 304.
73 221 N.L.R.B. at 190.
74 Id. at 186.
threatened to close the plant, interrogated an employee with respect to his union sympathies, promised the same employee a benefit if the union lost the election, and, ultimately, paid that employee $60 in order to influence his vote. A consultant also instructed a supervisor to interrogate an employee. Despite the extensive involvement of WCIRA in the campaign and its agents' commission of unfair labor practices, the consulting firm was not named as a party respondent. Instead, the employer was found liable for the acts of WCIRA.

Certainly, an employer should be liable for the actions of its agents during the course of an organizing campaign. This is true whether the agents are regularly employed, such as supervisors, or are independent contractors, such as consultants or attorneys. The Act itself defines an employer in section 2(3) as including "any person acting as an agent of an employer, directly or indirectly." The theory is obvious: employers should not be able to escape the consequences of the activity they sponsor, whether committed by them or by others in their interest. Indeed, the Act makes clear that the employer is responsible for actions taken in its behalf, whether or not specifically authorized. Thus, section 2(13) provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." The controversial question, however, is not whether the employer should be responsible for the acts of its consultant-agents, but whether those consultants should share that liability in their own right.

Despite the Board's reluctance to proceed against them, there exist no strong reasons of law or policy to exempt lawbreaking consultants from responsibility for their conduct. Although management consultants and attorneys clearly are not responsible for all employer violations, the cases demonstrate that these representatives often provide the impetus for, and indeed participate in unlawful anti-union campaigns. In a significant number of cases, consultants have at least shared in the responsibility for violations of employee rights. Moreover, the law as

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76 Id. at 1347, 1352.
77 Id. at 1349.
78 Id.
79 Id. at 1352-53.
80 The term "independent contractor" is used in contrast with "servant." The RESTATEMENT (SECOND) OF AGENCY § 2(3) (1957), states that an independent contractor "may or may not be an agent." See also W. SEAVEY, AGENCY §8 (1964) ("For agency purposes, any one who acts for, or contracts with, the principal other than as a servant, is an independent contractor. . . . Included in the group of independent contractors who are agents are attorneys . . . and other similar persons who conduct transactions for the principal.")
82 See infra note 138 and accompanying text.
currently administered furnishes incentives for them to do just that. As already noted, remedial orders against employers are of limited effect and, even when enforced, often do not deny to employers the gain achieved by their unlawful conduct. Since the consultant who encouraged, planned, and even participated in the campaign is usually ignored by the Board, he is free to act largely without fear of direct sanction. The only threat is to the consultant’s client, but even then any unfair labor practice liability will be of slight discomfort compared to the advantage gained from the unlawful campaign. The only consequences to the consultant are a substantial fee, the admiration and recommendation of his client, and the knowledge that his tactics have worked and can be used again in campaigns for other clients.

The Board’s reluctance to prosecute does not alone account for the growth of the consultant industry. Its quiescence, however, has no doubt encouraged some consultants to manipulate Board processes and otherwise disregard the law. The inevitable result has been an increase in employer resistance to unionization and a surge of questionable campaign tactics. Prosecuting consultants and attorneys who break the law or advise others to do so will not eliminate employer unfair labor practices, but such increased regulation can remove some of the impetus and opportunity for employers to violate employee rights. Rather than speculate about the unfavorable effects of such prosecutions while paying lip service to the interests of employees and unions, the Board should acknowledge that unlawful conduct on the part of management representatives poses a serious threat to the purposes and policies of the Act and take action against the offenders.

III. THE THEORIES OF LIABILITY

Merely recognizing the problems posed by management consultants does not give the Board license to proceed against them. Board sanctions are effected only through unfair labor practice proceedings, and such offenses can be committed only by “employers.” In order for the Board to proceed against lawbreaking consultants, then, it must bring them within the Act’s definition of employer. Even though such counselors do not stand in an employment relationship with the employees whose rights are violated, both the statute and prior Board decisions furnish an adequate theoretical basis for treating consultants and attorneys as employers, subject to the unfair labor practice jurisdiction of the National Labor Relations Board. As the following discus-

84 See infra notes 185-89 and accompanying text.
85 Section 8(a) of the Act provides that “[i]t shall be an unfair labor practice for an employer” to commit the acts prohibited by subsections (1) through (5). 29 U.S.C. § 158(a) (1982) (emphasis added.) “Employer” is defined in section 2(2). See supra text accompanying note 81. Unions, too, can commit unfair labor practices, see 29 U.S.C. § 158(b) (1982), but it is unlikely that a management representative could meet the Act’s definition of “labor organization.” See id. § 152(5).
sion demonstrates, consultants can achieve employer status either because they are agents, because they exercise significant control over the campaign, or because they independently satisfy the definition of "employer" and violate the rights of their clients' employees.

A. Liability Under Agency Theory

Any attempt to require that attorneys or consultants share in the unfair labor practice liability of their clients must take account of the various roles played by such representatives. Typically, one might expect attorneys and consultants to fill an advisory role, helping the employer plan a resistance strategy and giving advice, both legal and practical, about certain employer action. Strictly speaking, such advisors are not agents for purposes of unfair labor practice liability since they have not been authorized to act on behalf of the employer, but are merely paid for advice. Consultants and attorneys can, however, serve in an agency relationship. It is not uncommon, for example, for attorneys or consultants to give speeches to employees, interrogate employees, or serve as spokespersons in collective bargaining. Their authority to act for the employer may be even more extensive. In one recent case, the General Counsel alleged that a consultant assumed virtually complete responsibility for planning and implementing the employer's resistance to a union organization effort. Although the administrative law judge found evidence of extensive involvement by the consultant, he declined to recommend unfair labor practice responsibility, reasoning that at most, the consultant had merely advised the employer, who retained ultimate responsibility for the campaign.

A consultant's employer status is most easily established in those cases that clearly demonstrate an agency relationship. Section 2(2) of the Act provides that "the term 'employer' includes any person acting as an agent of the employer." Thus, those who act as agents not only bind their principals but also, for purposes of the Board's jurisdiction, become employers themselves, amenable to the unfair labor practice provisions of the Act. Although Board action against such agents can hardly be described as aggressive, it has, on occasion, issued remedial orders against consultants and attorneys who have acted in direct contact with employees on behalf of client-employers. Sometimes, the order names the consultant, not as an employer in its own right, but merely as an agent of the employer. In *Meyer's Stamping and Manufacturing Co.*, for example, consultant Rayford Blankenship repeat-

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86 See infra text accompanying notes 161-70.
88 Id. at 849.
edly threatened employees with closure of the business\textsuperscript{91} and interrogated a number of employees.\textsuperscript{92} In addition, there were other unfair labor practices that were not directly attributable to Blankenship.\textsuperscript{93} The Board's order ran against Meyer's Stamping and Manufacturing, as well as its "officers, agents, successors, and assigns."\textsuperscript{94} However, as part of the affirmative action ordered by the Board, Blankenship was required to sign the notice that was to be posted for employees.\textsuperscript{95} Blankenship's liability, then, was limited to his status as an agent of the employer.

The Board has treated agents as employers in their own right, however. The most frequently cited examples are several cases involving the near-legendary Gladys Selvin, a California based consultant.\textsuperscript{96} In \textit{West Coast Liquidators and Mrs. Selvin,}\textsuperscript{97} Selvin was named separately as a respondent because of her outrageous delaying tactics during collective bargaining.\textsuperscript{98} The Board ordered her to cease and desist

\begin{footnotesize}
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    \item \textsuperscript{91} The Board found that, among other things, Blankenship told the employees "that the Company was operating in the 'red;' that [the owner] could sell the business and live off the interest; that the Company could close its doors, and there would be no work for anyone; and that if business continued to fail there would be more layoffs." \textit{Id.} at 1322. For a more detailed account of Blankenship's activities, see \textit{id.} at 1329-30.
    \item \textsuperscript{92} \textit{Id.} at 1331.
    \item \textsuperscript{93} The Board found that the employer discriminatorily laid off employees in violation of section 8(a)(3). \textit{Id.} at 1322-24.
    \item \textsuperscript{94} \textit{Id.} at 1324.
    \item \textsuperscript{95} \textit{Id.} at 1334.
    \item \textsuperscript{96} In addition to \textit{West Coast}, Ms. Selvin was involved in at least 10 other cases decided by the Board: Shelly & Anderson Furniture & Mfg. Co., 199 N.L.R.B. 250 (1972), \textit{enforced}, 497 F.2d 1200 (9th Cir. 1974); Chalk Metal Co., 197 N.L.R.B. 1133 (1972); Inter-Polymer Indus., 196 N.L.R.B. 729 (1972), \textit{petition denied}, 480 F.2d 631 (9th Cir. 1973); West Coast Casket Co., 192 N.L.R.B. 624 (1971), \textit{enforced in pert. part}, 469 F.2d 871 (9th Cir. 1972); KFYM Broadcasting Co., 183 N.L.R.B. 1187 (1970); Sir James, Inc., 183 N.L.R.B. 256 (1970), \textit{enforced}, 446 F.2d 570 (9th Cir. 1971); Architectural Fiberglass, 165 N.L.R.B. 238 (1967); Duro Fittings Co., 130 N.L.R.B. 653 (1961); California Girl, Inc., 129 N.L.R.B. 209 (1966); and Duro Fittings Co., 121 N.L.R.B. 377 (1958).
    \item \textsuperscript{97} 205 N.L.R.B. 512, \textit{enforced}, 527 F.2d 1273 (9th Cir. 1973).
    \item \textsuperscript{98} Ms. Selvin's actions in \textit{West Coast} were typical of those in other cases. Selvin represented West Coast in contract negotiations. \textit{Id.} at 513. As was not unusual, she conducted negotiations in her apartment. \textit{See}, e.g., West Coast Casket, 192 N.L.R.B. at 632-33. Ms. Selvin arrived late, frequently reminisced or otherwise changed the subject so that no more than 45 minutes of actual negotiation occurred in any of the three bargaining sessions, refused to furnish information, summarily rejected most union proposals, never presented any counterproposals, and refused to meet between November 17 and January because she was expecting company for Thanksgiving. She did, however, approve a clause that read, in its entirety: "The company and the Union acting by their duly authorized representatives agree as follows." She also told the union that, for the previous 10 to 12 years, none of her clients had signed a contract. West Coast Liqs. and Mrs. Selvin,
\end{itemize}
\end{footnotesize}
from unlawful activities, not only in her relationship with the respondent employer, but "when she is an agent . . . for any other employer subject to the jurisdiction of the National Labor Relations Board." Selvin's status as an employer subject to Board jurisdiction, then, was the result of her agency relationship with her client.

B. Liability Through Control

Although the Board has proceeded directly against consultants on a few occasions, it has refused to venture beyond the agency theory applied in the Selvin cases, despite the recent urgings of its General Counsel. In *St. Francis Hospital*, the employer hired the well-known management consulting firm of Modern Management, Inc. (popularly known as 2M) to direct its response to a union organizational effort. The administrative law judge found that the hospital repeatedly had violated section 8(a)(1) by engaging in "an intensive, high pressured, systematic antiunion campaign" replete with frequent unlawful interrogation by supervisors, threats of reprisal, and promises of benefits.

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205 *N.L.R.B.* at 513-15. The administrative law judge concluded: "It is . . . clear . . . that Mrs. Selvin lacked sufficient knowledge of the Employer's operations to engage in meaningful collective bargaining." *Id.* at 515.

99 *Id.* at 516. For a further discussion of this broad or blanket order, see infra note 208.

100 263 *N.L.R.B.* 834 (1982).

101 *Id.* at 836 n.12. Modern Management received considerable attention at the 1979-1980 Hearings. See, e.g., *1 Hearings*, supra note 4, at 108-112 (Mills statement); *id.* at 423-25 (Georgine statement); *3 id.* at 4 (Donlon statement); *id.* at 7 (Hammil statement); *id.* at 172 (Muehlenkamp statement).

Representatives of Modern Management also testified. *Id.* at 74-118 (Melnick statement). Modern Management has undergone several name changes. It is also known as Modern Management Methods, Melnick, McKeon & Mickus, Inc., or 3M. *Id.* at 95-96 (letter from Richard Huston, Acting Director, Office of Labor Management Standards Enforcement, Labor Management Services Administration, U.S. Department of Labor, (April 3, 1980)). One witness at the 1979-1980 Hearings suggested that 3M should stand for "medieval management methods." *3 Hearings*, supra note 4, at 177 (Muehlenkamp statement).

102 *St. Francis Hosp.*, 263 *N.L.R.B.* at 844. While disagreeing with some specific findings of the administrative law judge and, in particular, his finding that the campaign in its entirety violated section 8(a)(1), the Board sustained the recommended bargaining order, concluding: "From the very day that the Union filed its election petition with the Board's Regional Office, the Hospital embarked on a course of retaliatory unfair labor practices." *Id.* at 836.

On or about June 19, 1979, the Wisconsin Federation of Nurses and Health Professionals (FNHP) instituted its organizational campaign. By soliciting signatures to FNHP membership cards, the FNHP had, by August 17, obtained a card majority. *Id.* at 839. On August 23, 1979, the FNHP petitioned for an election that was subsequently set for October 26 of that year. Also in August, 1979, St. Francis Hospital contracted for the services of 2M. At that time, the chairman of the board and the president of St. Francis introduced 2M's representatives to the hospital's administrative and supervisory personnel. *Id.* at 847. By early September, four of 2M's representatives had established offices within the hospital and were using the hospital's support resources, including secretaries. *Id.*

Once 2M had established on-location offices, it took nearly full control of the dealings of supervisory and administrative personnel with rank and file nurses. *Id.* at 848. Throughout the
The hospital was held responsible for each unfair labor practice. In addition, the General Counsel contended that 2M should share responsibility for most of the unfair labor practices because it "was responsible for and controlled the antiunion campaign" and therefore was at least a "co-principal and/or co-manager" of the campaign. Since there was no evidence presented that 2M had dealt with employees itself, the issue was whether the unlawful acts committed by St. Francis's supervisors could somehow be attributed to 2M, thus subjecting it to unfair labor practice liability as an "employer" under the NLRA.

The initial charge against 2M alleged liability, in part, because the consulting firm had acted as an agent of the hospital. The Regional Director dismissed the charge, noting that 2M had not been given "complete authority" to act for the hospital. A complaint was filed, period of time before the election, 2M called and conducted morning meetings with small groups of supervisors wherein: (1) supervisors were directed to discuss the campaign with individual employees; (2) antiunion literature was given to supervisors for dissemination among the employees; (3) supervisors were directed to report back the nature of individual employees' responses; and (4) the general shape of the antiunion campaign was formulated. Significantly, no hospital personnel took any part in the direction of the hospital's antiunion campaign and, in fact, such personnel affirmatively referred questions about the campaign to 2M representatives. During the weeks immediately preceding the October 26 election, 2M's morning meetings with supervisory personnel became daily events. St. Francis' supervisory personnel committed numerous unfair labor practices while under the direction of 2M, including instances of coercive interrogation, threats, and promises of benefits. Interrogations of employers following 2M's morning meetings were so widespread that one employee testified:

It got to be that you knew that they were going to go to the meetings in the mornings and you knew that at some time during the day you were going to be approached and they would take you aside and you know, give you the same kind of (anti-union) talk.

Promises of benefit and threats of reprisal from supervisors were equally pervasive. Several supervisors told staff nurses that the recently hired hospital administrator would remedy the problems which were the basis of the employees' desire to organize. Threats of reprisal ranged from several incidents of supervisors telling nurses that the channels of communications between them would be impeded, to intimations that terms of employment would be worse if the union won the election.

The foregoing was set against a background of a coercive wage increase two weeks prior to the election. Moreover, the Board adopted the administrative law judge's conclusion that St. Francis's refusal to allow employees to attend professional development seminars conducted by the unions violated the Act.

Notwithstanding the frequency of the 2M morning meetings with supervisors and the finding that the supervisors' interrogation of employees was "calculated to interfere with the employee's freedom of choice," the judge found that there was "no evidence that [2M had] advised its client to violate the Act."
however, when the General Counsel abandoned allegations of agency and proceeded on what the administrative law judge called "a totally new theory."\textsuperscript{106} Apparently bowing to the Regional Director's agency determination, the General Counsel contended that 2M had become an employer, not as an agent, but by virtue of its control over the campaign.\textsuperscript{107}

The administrative law judge's findings with respect to 2M's authority and conduct parallels union allegations of 2M actions in other cases.\textsuperscript{108} The administrative law judge found that the bulk of the antiunion effort was carried out by supervisors, none of whom had any prior experience in such an endeavor.\textsuperscript{109} Instead, they relied on the consultant's advice and received no direction from hospital administrators other than to follow the instructions of 2M, which, the administrative law judge said, had almost complete control of the campaign:

Through its advice and instructions Respondent 2M effectively directed the campaign and established the tactics to be used by the supervisors. It appears that Respondent St. Francis gave Respondent 2M practically full control of the antiunion campaign. Respondent 2M representatives called the meetings, passed out the literature, and shaped the strategy of the entire campaign from offices on the hospital premises.\textsuperscript{110} Despite the significant involvement of 2M in the planning and conduct of the campaign, the administrative law judge declined to recommend unfair labor practice liability, finding that the consultant had done nothing more than offer "advice and instructions."\textsuperscript{111} The Board itself ignored the issue, other than to observe in a footnote that the hospital had hired 2M "to conduct its antiunion campaign."\textsuperscript{112} The D.C. Circuit enforced the Board's order without extensive discussion of the issues raised by the consultant.\textsuperscript{113}

\textsuperscript{106} \textit{Id.} at 847.
\textsuperscript{107} In addition to the A.L.J.'s description of the General Counsel's theory, see also \textit{Quarterly Report of the General Counsel}, January 12, 1982, at 6.
\textsuperscript{108} See \textit{supra} note 101 (testimony of witnesses).
\textsuperscript{109} \textit{St. Francis Hosp.}, 263 N.L.R.B. at 848.
\textsuperscript{109} \textit{Id.} at 848.
\textsuperscript{111} \textit{Id.} at 849.
\textsuperscript{112} \textit{Id.} at 836 n.12.
\textsuperscript{113} The D.C. Circuit's opinion enforcing \textit{St. Francis} is devoted primarily to a review of the Board's unfair labor practice findings and its bargaining order remedy. See \textit{St. Francis Fed'n of Nurses v. NLRB}, 729 F.2d 844 (D.C. Cir. 1984). The court's treatment of the involvement and potential liability of 2M is cursory at best. See \textit{id.} at 857-58. The court agreed with the NLRB's findings that 2M directed the antiunion campaign, that supervisors were the principal means through which the campaign was implemented, and that the hospital had instructed the supervisors to heed 2M's advice and instructions. 2M escaped liability, however, because the court found substantial evidence supporting the Board's conclusion that 2M did not counsel unlawful conduct. \textit{Id.} at 858.

Although the court's failure to sanction 2M is disappointing, its opinion is not that significant. The court seemed most concerned with the lack of evidence pointing to direct participation in wrongdoing and with the General Counsel's failure to establish (or even allege) an agency rela-
Although the General Counsel did not proceed on an agency theory, the administrative law judge seemed most persuaded by the lack of a common law agency relationship. Thus, he emphasized that ultimate responsibility should be borne by the hospital since it, not the consultant, controlled the employment of the supervisors: the supervisors followed the instructions of 2M only because they were directed to do so by the hospital, and any discipline for failing to follow orders would be imposed by the hospital, not the consultant.\textsuperscript{114} In short, the administrative law judge decided that there was not sufficient proof of consultant control over supervisor employment to find that 2M was the hospital's agent in its dealing with them. Nor was any such relationship established with respect to authority over employees, since the evidence failed to demonstrate any incidents of direct employee contact.\textsuperscript{115}

As demonstrated above, there is little difficulty in finding agency when a consultant acts on behalf of the employer, having direct contact with employees or employee representatives. In \textit{St. Francis} 2M urged, with apparent agreement from both the administrative law judge and the General Counsel, that such contact is essential to an agency relationship. It virtually ignored the control theory, noting only that the hospital retained "ultimate authority." \textit{Id.} As argued elsewhere in this Article, the fact that the hospital remained ultimately responsible for its employees should not be dispositive when a consultant controls the campaign. The General Counsel's focus on the control or agency issues, rather than on his co-principal theory, might have yielded different results. In any event, the D.C. Circuit's opinion means nothing more than that the Board's findings were supported by substantial evidence, \textit{see} 29 U.S.C. § 160(e) (1982), and that its interpretation of the Act was reasonable. \textit{See, e.g., NLRB v. City Disposal Sys., Inc., 52 U.S.L.W. 4360, 4362 (U.S. Mar. 20, 1984)}, (citation omitted) in which the Supreme Court addressed the role of the courts in reviewing NLRB decisions:

\begin{quote}
We have often reaffirmed that the task of defining the scope of § 7 "is for the Board to perform in the first instance..." and... a reasonable construction by the Board is entitled to considerable deference... The question for decision today is thus narrowed to whether the Board's application of § 7 [to the facts at issue] is reasonable.
\end{quote}

Neither the Board's own opinions nor courts of appeals opinions enforcing their orders preclude a change in position by the Board. In \textit{NLRB v. Weingarten, Inc.}, 420 U.S. 251 (1975), for example, the Supreme Court specifically addressed the Board's ability to change an interpretation of the Act that had been accepted by courts of appeals:

\begin{quote}
We agree that its earlier precedents do not impair the validity of the Board's construction... The use by an administrative agency of the evolitional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking... The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.
\end{quote}
\textit{Id.} at 265-66.

Moreover, the Board has often rejected the interpretations of the National Labor Relations Act found in courts of appeals opinions. \textit{See, e.g., St. Agnes Medical Center, 247 N.L.R.B. 1101, 1102 n.3 (1980)} ("We respectfully disagree with [the Third Circuit] and adhere to our view until such time as the Supreme Court has passed on the matter."); \textit{Construction, Bldg. Materials & Miscellaneous Drivers, Local No. 83, 243 N.L.R.B. 328, 330 n.8 (1979)} ("We respectfully disagree with the Tenth Circuit's holding and adhere to the position we expressed [in other cases] until such time as the Supreme Court has passed on the question.").

\textsuperscript{114} \textit{St. Francis Hosp.}, 263 N.L.R.B. at 849-50.

\textsuperscript{115} \textit{Id.} at 848-49.
tionship. Indeed, cases cited by 2M in its brief represent instances in which consultants acted in direct contact with employees on behalf of the employers and were found to be agents.\textsuperscript{116} In each case the agents were deemed "employers" as a result of the agency relationship and found guilty of unfair labor practices in their own right. Those cases, however, do not establish that direct contact with employees is essential to the creation of an agency relationship.\textsuperscript{117}

There clearly was no consultant contact with employees in \textit{St. Francis}. Moreover, a principal in the firm testified before a Congressional committee that his firm does not interact for employers with their employees.\textsuperscript{118} Unions, too, have complained that 2M's methods often make it difficult even to discover its participation in the campaign. They allege that 2M stays in the background, seldom surfacing, but anonymously controlling the employer's response to the organizational effort.\textsuperscript{119} Although 2M's presence was known to the St. Francis employees (indeed, its continued presence was used as a threat against them),\textsuperscript{120} the consultant's other activities would seem to bear out the labor movement's frequent allegations against the firm. Thus, 2M planned, and through hospital supervisors implemented, an aggressive, sometimes unlawful, strategy to defeat the union. Although there was no evidence that 2M counselled unlawful activity, it controlled a campaign that produced such conduct and, in one instance at least, condoned unlawful interrogation.\textsuperscript{121} Furthermore, while 2M may not have

\textsuperscript{116} See \textit{id.} at 848. The cases cited by 2M were National Welders Supply Co., 132 N.L.R.B. 660 (1961) and Sierra Academy of Aeronautics, 182 N.L.R.B. 546 (1970). In \textit{National Welders}, the employer hired a consulting firm named Lee Associates to assist in its campaign against the union. The consultant unlawfully interrogated both employees and applicants for employment in a campaign described by the administrative law judge as "calculated to uncover all that was to be learned of the union's progress." National Welders Supply Co., 132 N.L.R.B. at 667-68, 671. In \textit{Sierra Academy}, a consultant unlawfully promised benefits during meetings with employees, and conspired to prevent an employee from voting in an NLRB election. Sierra Academy of Aeronautics, 182 N.L.R.B. at 548-49. In both cases the consultants' liability stemmed from their agency relationship to the employer, and, in both cases it is clear that the consultants had personal contact with the employees.

\textsuperscript{117} That issue, in fact, was not before the Board in either case. In \textit{Sierra Academy}, the General Counsel had contended that the consultant violated the Act by advising the employer to commit an unfair labor practice. The administrative law judge avoided deciding whether such conduct was unlawful (which may have involved questions of agency) by finding that the allegation was supported only by uncorroborated hearsay. Sierra Academy of Aeronautics, 182 N.L.R.B. at 552 & n.13. For a more thorough discussion of the liability of a consultant for giving unlawful advice, see \textit{infra} text accompanying notes 161-70.

\textsuperscript{118} See 3 \textit{Hearings, supra} note 4, at 76 (Melnick testimony) ("We meet only with members of management. All our contacts are limited exclusively to management representatives.").

\textsuperscript{119} See, e.g., 3 \textit{id.} at 111 (Mills statement); \textit{id.} at 177 (Muehlenkamp statement) ("For the most part . . . consultants are seen only as out-of-state license plates parked in the executive lot."); 1 \textit{id.} at 636 (Winpensinger statement).

\textsuperscript{120} St. Francis Hosp., 263 N.L.R.B. at 842.

\textsuperscript{121} \textit{id.} at 842. The administrative law judge found that a supervisor interrogated employees about their union sympathies and reported her findings to 2M, whose representatives did not
counselled lawbreaking in this particular campaign, the case reports demonstrate that consultants are not always so restrained.\textsuperscript{122}

Despite the reticence of the administrative law judge and the General Counsel, it is possible to reach consultants in cases like \textit{St. Francis} under an agency theory. Prior to 1947, the Act defined an employer to include those who act “in the interest of the employer.”\textsuperscript{123} This broad definition sometimes bound the employer to actions of supervisors or even outsiders, even though “the employer had not authorized what was said or done, and in many cases even had prohibited it.”\textsuperscript{124} It also contrasted conspicuously with provisions in the Norris-LaGuardia Act that established union liability only if the conduct of an agent was authorized or ratified by the union.\textsuperscript{125} In order to limit employer exposure and provide equitable treatment against both employers and unions, the 1947 amendments removed the “interest” language and substituted the current provision that “employer” includes those acting as agents. In addition, Congress added section 2(13) to the NLRA, which was intended to adopt common law agency principles.\textsuperscript{126}

The amendments, then, were not aimed at cases like \textit{St. Francis}, where the consultant was hired and authorized to act by the employer. Though the amendments protect employers against liability for some of the actions of outsiders,\textsuperscript{127} there was no officious intermeddling in \textit{St. Francis}.

\textsuperscript{122} See \textit{supra} note 69.


\textsuperscript{124} See \textit{H.R. REP. No. 245, 80th Cong., 1st Sess. 11 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 302 (1948).}


\textsuperscript{126} The House Report stated:

\begin{quote}

The bill, by defining as an ‘employer’ ‘any person acting as an agent of an employer’ makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions.
\end{quote}

H.R. Rep. No. 245, supra note 124, at 11 (emphasis in original). With respect to section 2(13), the Conference Report says that “both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency” \textit{CONF. REP. No. 510, 80th Cong., 1st Sess. 36 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 540 (1948).}

\textsuperscript{127} There is, however, no requirement that the employer expressly authorize the outsider’s conduct. \textit{See, e.g., Lake Butler Apparel Co., 158 N.L.R.B. 863 (1966), enforced in pert. part., 392 F.2d 76 (5th Cir. 1968), in which the administrative law judge wrote:}

\begin{quote}

[T]he principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as an agent in a given manner will be implied whenever the conduct of the principal is such to show that he actually intended to confer that authority.
\end{quote}

\textit{Id.} at 873. \textit{See also} Henry I. Siegal Co., 172 N.L.R.B. 825, 839 (1968) (“even under technical common law rules, agency through ratification, knowledgeable acceptance or retention of [benefits] . . . or through failure to disavow are firmly recognized”); Dean Industries, 162 N.L.R.B. 1078, 1092 (1967).
Francis. Rather, the employer invited 2M into its dispute with the union. It should not matter that 2M had no direct contact with employees. St. Francis essentially entrusted 2M with the operation of a part of its business: it gave 2M virtually complete authority to plan and implement the antiunion campaign. At least for that purpose, 2M assumed control over the activities of St. Francis’s supervisors. Indeed, it appears that 2M instructions even took precedence over other supervisory activities.\(^{128}\) 2M, then, became St. Francis's agent for purposes of the antiunion campaign. It need not have had, as the Regional Director believed, “complete authority” to speak for the employer in “all situations” involving the union. That is, it need not have contacted the employees itself. Nor was it necessary that St. Francis supervise 2M’s methods. The fact that St. Francis turned over significant control to 2M and advised its supervisors to follow 2M’s instructions should be enough to establish that 2M was the agent of St. Francis for the purposes of planning and controlling the campaign.\(^{129}\)

Within the scope of that agency relationship, 2M had the authority to use, and in fact used, St. Francis’s supervisors to implement its campaign. The General Counsel used that authority to advance the novel theory that 2M was a coemployer of the supervisors, thus satisfying the requirement of employer status for purposes of unfair labor practice liability. The same facts, however, also lead to liability under an agency analysis. Since 2M was acting within the scope of its authority in directing the activities of the supervisors, 2M was the agent of St. Francis for that purpose and the supervisors were, in turn, not the employees, but the agents of 2M. That is, the unfair labor practices committed by the supervisors were attributable to 2M, their principal for purposes of the campaign. 2M, then, is amenable to the unfair labor practice procedures of the Act because St. Francis’s agency relationship with 2M qualifies 2M as an “employer,” and, as an employer, the unlawful acts of the supervisors are attributable to it.\(^{130}\)

This is the case even if 2M were not authorized to direct unfair labor practices by the supervisors and in fact did not do so. 2M exercised almost complete control over the campaign activities of the supervisors, who were instructed by their employer to follow 2M’s directives. For purposes of the Act (and for common law agency principles), it does not matter that the supervisors were not authorized to violate the

\(^{128}\) For example, the administrative law judge noted that 2M representatives had authority to call nurse-supervisors to meetings “without the approval of any of Respondent St. Francis’ officials.” St. Francis Hosp., 263 N.L.R.B. at 848.

\(^{129}\) See, e.g., W. Seavey, supra note 80, at 2 (“Agency deals with the rules applicable to the legal relations which arise when two persons agree that one is to act for the benefit of the other in accordance with the other’s directions.”). 2M was authorized to act for St. Francis in combating the threat of union organization. While it is true that St. Francis did not supervise the day to day activities of 2M, it retained the right to control (or terminate) 2M’s conduct.

\(^{130}\) See W. Seavey, supra note 80, at 2.
law. Apparent authority is the key. Employers regularly are held liable for the unauthorized conduct of supervisor-agents. The same liability should be imposed on a consultant-agent who controls the campaign, directs the supervisors, helps create the environment that led to the unfair labor practices and, finally, benefits from their commission. Additionally, in St. Francis, the administrative law judge found that the consultant knew about the unfair labor practices and condoned them.

It is true that the relationship asserted here lacks the direct contact present in typical Board findings of agency. The situation in St. Francis does not differ greatly, however, from cases in which an agent appoints a subagent and agrees to be primarily responsible for the subagent’s conduct. The primary difference here is that the employer, in effect, appointed the subagent in the personage of the supervisors. The consultant, however, not only agreed to use the supervisors, but as the Congressional Hearings revealed, would not have accepted employment under any other condition. In that case, both the agent and the principal should be bound by the acts of the supervisors.

The question of 2M’s status as agent arises in a context quite unlike that which provoked the 1947 amendments. The concern then was to limit the liability of employers for certain unauthorized acts of others by attributing such acts to the employer only on agency principles. In the case of 2M, however, the question is not so much if the acts can be attributed to the employer, but whether the perpetrator itself can be considered an employer for purposes of section 8 of the Act. In

131 See, e.g., Lake Butler Apparel Co., 158 N.L.R.B. at 873:

Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority. Also a principal may be responsible for the act of his agent... even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question.

See also International Longshoremen’s & Warehousemen’s Union, CIO, 79 N.L.R.B. 1487, 1509 (1948) (Board construed the 1947 amendment with respect to agency and concluded: “It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.”); H. REUSCHEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 96 (1979) (“Where there is a finding of apparent authority a principal may be held liable for unauthorized acts done on his behalf.”). The Restatement (Second) of Agency § 8 (1958) defines “apparent authority” as “[t]he power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons.” In St. Francis, the manifestation of 2M's authority was made to the supervisors, who were ordered to follow the instructions of 2M. St. Francis Hosp., 263 N.L.R.B. at 834.

132 See, e.g., R. GORMAN, supra note 40, at 134-35.

133 The Restatement (Second) of Agency § 5(1) (1958) states that “[a] subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for his principal, but for whose conduct the agent agrees with the principal to be primarily responsible.”

134 This interpretation is consistent with that of the Restatement: “The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he is at fault in appointing, supervising, or cooperating with them.” Id. § 358(1) (emphasis added).
making that decision, both the NLRB and the courts have said that strict principles of agency are not required under sections 2(2) and 2(13). In *St. Francis* there is no occasion to consider whether the hospital is responsible for the unfair labor practices. Nearly all of the unlawful acts were committed by hospital supervisors within the scope of their employment, and they clearly are attributable to St. Francis. The only question is whether unfair labor practice liability can extend not only to the employer, but also to the consultant who planned and controlled the campaign. In a somewhat different setting, the Supreme Court has held that questions of agency under the NLRA are to be construed liberally, not with regard to "technical concepts," but in light of "clear legislative policy." Although the legislature has not spoken with respect to liability for consultants, sound public policy dictates that those who are responsible for violating the law should share in the liability created by their unlawful acts. In a case like *St. Francis*, use of the word "agent" in the definition of employer should not provide a shield to one as integrally involved in an unlawful campaign as was 2M.

C. *The Independent Employer Theory*

In addition to agency, there is another, even more compelling, theory upon which consultants qualify as employers. The Board has recognized that the "employer" who commits an unfair labor practice need not, in all instances, be the employer of the employees whose rights are violated. As already indicated, the definition of employer is not particularly illuminating and is devoted primarily to a pronouncement that the term includes certain persons (namely, agents) and excludes certain others (for example, government agencies). The definition of employee is somewhat more helpful. Section 2(3) provides that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." In addition, section 2(9) defines labor dispute as including "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating . . . or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."
Regulating Management Representatives

Using these broad definitions, the Board often has assessed liability against employers who interfere with employee rights, even though there is no master-servant relationship between the parties.

In one well-known case, for example, the Board, finding support from the Supreme Court, upheld a section 8(a)(1) violation against a shopping center owner, Hudgens, who threatened to have the picketing employees of a tenant arrested for trespassing.\textsuperscript{140} The Board reasoned that Hudgens was an employer engaged in commerce within the meaning of the Act, was therefore subject to NLRB jurisdiction, and had violated section 8(a)(1) by interfering with the protected rights of employees.\textsuperscript{141} On review, the Court said:

Section 8(a)(1) makes it an unfair labor practice for "an employer" to "restrain, or coerce employees" in the exercise of their section 7 rights. While Hudgens was not the employer of the employees involved in this case, it seems undisputed that he was an employer engaged in commerce within the meaning of [the Act]. The Board has held that a statutory "employer" may violate Sec. 8(a)(1) with respect to employees other than his own.\textsuperscript{142}

In \textit{St. Francis}, the General Counsel urged a similar theory of lia-

\textsuperscript{140} In Scott Hudgens, 192 N.L.R.B. 671 (1971), the Board said that the owner's threats violated section 8(a)(1). The Supreme Court granted certiorari, Hudgens v. NLRB, 424 U.S. 507 (1976), because of the constitutional issue raised by a private citizen forbidding speech in an area open to the general public. See also Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). In Hudgens v. NLRB, 424 U.S. at 520-21, the Court overruled \textit{Logan Valley} and held that, despite the public character of the property, the first amendment had no role to play in Hudgens's actions against the picketers. However, the Court went on to say that even though Hudgens's action did not violate the employees' constitutional rights, it might violate their section 7 rights. The Court remanded the case to the Board, with guidance about how to accommodate both Hudgens's and the employees' interests under section 8(a)(1). \textit{Id.} at 521-23. On remand, the Board applied the criteria set forth by the Court and found Hudgens in violation of section 8(a)(1). 230 N.L.R.B. 414 (1977).

\textsuperscript{141} Scott Hudgens, 192 N.L.R.B. at 672.

\textsuperscript{142} In observing that the Board had held employers liable for unfair labor practice committed against other employees, the Supreme Court cited Austin Company, 101 N.L.R.B. 1257 (1952). In that case, a general contractor cancelled a contract with the Pinkerton Company because the guards it supplied were not union members. Austin claimed that it could not violate section 8(a)(3) with respect to any but its own employees. The Board said:

[T]he statute, read literally, precludes any employer from discriminating with respect to any employee, for Section 8(a)(3) does not limit its prohibitions to acts of any employer \textit{vis-a-vis} his own employees. Significantly, other sections of the Act do limit their company to employees of a particular employer. Thus, Section 8(a)(5) makes it an unfair labor practice for an employer 'to refuse to bargain collectively with the representative of \textit{his} employees' . . . . The statutory language therefore clearly manifests a congressional intent not to delimit the scope of Section 8(a)(3) in the manner urged here by Respondent Austin.

\textit{Id.} at 1258-59.

The Board said that on the facts before it, it was unnecessary to "delineate the extent of the area" in which an employer could violate the Act without a direct employment relationship. \textit{Id.} at 1259. Therefore, it did not adopt the "broad rationale" of the trial examiner, who had said:

In establishing a broad national policy in respect to employer-employee relationships, as set forth in Sections 7 and 8 of the Act, Congress proscribed the imposition of employment conditions which encourage or discourage membership in labor organizations. One who
bility, reasoning that 2M, independent of any relationship with a client, was an employer subject to the jurisdiction of the Board and, through its control over the campaign, had violated the organizational rights of St. Francis employees. The administrative law judge rejected the theory, however, holding that an independent employer can violate the rights of employees other than his own only if that employer has control over the rights alleged to have been violated or directs the commission of the unfair labor practice. Although the administrative law judge found that 2M condoned the unlawful action of the supervisors, there was neither proof nor even an allegation that it had directed the unlawful acts. Moreover, the administrative law judge determined that 2M was a mere advisor to St. Francis and had no power of its own to interfere with employee rights. Thus, citing Fabric Services, Inc. (where an independent employer interfered with an employee's section 7 rights by ordering him off the property for wearing a union insignia) and Scott Hudgens (where the independent employer abridged the section 7 right to picket by threatening arrest), the administrative law judge found no basis for assessing liability against 2M as an independent employer. That is, the administrative law judge found that 2M could become an "employer" for purposes of the Act only if it occupied an agency relationship to St. Francis.

On the basis of his own findings, there is no reason to question the administrative law judge's conclusions that 2M did not direct the unlawful acts of the supervisors and did not possess the same ability to

finds that his opportunities to work at his trade are circumscribed because he belongs or fails to belong to a particular labor organization has, of course, suffered a discrimination and it would seem to follow that the one responsible for the discrimination, if he be amenable to the Act, has violated its provisions. To hold otherwise would limit the usefulness of the Act and to that extent defeat its purposes. Little more than a recital of the statutory objective coupled with Board and Court interpretations is needed to convince that Congress intended all those within the reach of the jurisdiction conferred upon the Board to conform to the Act's provisions and all those within the definition of employee to receive the protection that the Act affords. By apt language the force of the Act is not limited to those situations arising between an employee and his employer.

Id. at 1266.

143 St. Francis Hosp., 263 N.L.R.B. at 848. The status of 2M as an "employer" for purposes of the Act was apparently not contested. Although the Board has jurisdiction "to prevent any person from engaging in any unfair labor practice . . . affecting commerce," 29 U.S.C. § 160(a) (1982), it has never exercised all its jurisdiction. The Board exercises discretion by only asserting jurisdiction over employers who meet a certain dollar amount of business in interstate commerce. For example, the Board will assert jurisdiction over a non-retail business if it has a gross annual outflow or inflow of at least $50,000, a standard that a consulting firm such as 2M no doubt could meet. For a discussion of the Board's discretionary jurisdiction, see R. Gorman, supra note 40, at 22-26. Since 1977, the Board has asserted jurisdiction over law firms grossing at least $250,000 per year. See Foley, Hoag & Etion, 229 N.L.R.B. 456 (1977).

144 St. Francis Hosp., 263 N.L.R.B. at 849.

145 Id. at 850.

146 Id. at 848-49.

147 190 N.L.R.B. 540 (1971).

148 See supra note 140.
interfere with section 7 rights as did the employers in Hudgens or Fabric, who could deny the employees of other employers access to their property. Nonetheless, the administrative law judge's reading of prior Board opinions is much too narrow. Although it is true that an independent employer can violate the Act if it directs the commission of an unfair labor practice or controls the rights at issue, Fabric does not say, as the administrative law judge held, that those are the only instances in which liability can be found.

A review of NLRB actions in other cases is necessary to clarify the issue. In Dews Construction Corp., for example, a contractor hired a painting subcontractor who had only two employees. The contractor had informed the subcontractor that the job was to be "non-union" and, when he learned that both of the subcontractor's employees had attended a union meeting, directed the subcontractor to lay off one of them. As a result of this clearly discriminatory action, both the subcontractor and the general contractor were found guilty of violating section 8(a)(3).

In short, the general contractor's control over the subcontractor gave it the power to direct the discriminatory discharge, and the Board assessed liability because the general clearly was responsible for the unlawful conduct.

In Fabric Services, a telephone company employee wearing a pen holder emblazoned with a union motto was ordered off the premises of a textile concern, Fabric. Although Fabric was an employer subject to the jurisdiction of the Board, it defended against the 8(a)(1) charge by alleging that it could violate the Act only with respect to its own employees. The administrative law judge's opinion, adopted by the Board, reviewed prior cases and questioned whether or not an independent employer could violate section 8(a)(3) with respect to employees other than its own, since discrimination can only be "accomplished (or rectified) by the one who has actual and ultimate control of the hire, tenure, or terms and conditions of employment of the employees affected thereby." Whatever the accuracy of that statement, the administrative law judge had no trouble assessing lia-

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150 Id. at 182.
151 Id. at 183.
152 Id. at 182 n.4.
153 Fabric Servs., Inc., 190 N.L.R.B. at 541.
154 Id. at 542.
155 See infra text accompanying notes 158-60.
bility against Fabric under section 8(a)(1). He noted that while the absence of a "proximate employer-employee relationship" could be relevant to the ability of an employer to restrain, interfere, or coerce, Fabric's ability to limit access to its property gave it control over the exercise of this section 7 right. Thus, its direction either to remove the union insignia or to leave "constituted a direct interference with and restraint of [the employee's] protected right."156

These two cases demonstrate the typical situation in which the Board has assessed unfair labor practice liability against independent employers.157 In Fabric, as in Scott Hudgens, the independent employer, by virtue of control over its property, had control over the rights alleged to have been violated. In Dews, the independent employer had sufficient control over another employer to direct the commission of an unlawful act. Generalizing from these cases, the administrative law judge in St. Francis concluded that there could be no violation by an independent employer absent facts establishing either control over employee rights or power to direct the unlawful conduct. This conclusion, however, ignores the basic policy served by Dews and Fabric.

As noted above, the primary importance of the contractor's ability to direct the discriminatory discharge in Dews was to establish the responsibility of the general contractor for the infringement of employee rights. Similarly, in Fabric, the employer's control over its property emphasized its responsibility for the violation of section 7 rights. In both cases it is clear that the Board, as a matter of policy, wanted to assess liability against the employers who had caused an unfair labor practice.158 In both Dews and Fabric the immediate employers were also adjudged liable.159 If the Board's sole interest was providing a remedy to the aggrieved employee, liability against the independent employers would not have been necessary. The Board, then, must have been motivated to act on the basis of fault.

Once it is acknowledged that the power to direct action or control rights is important merely as a way of fixing responsibility for unlawful conduct, it is possible to understand how a labor consultant, as an independent employer, can share liability under the same theory. There is obviously little difficulty if a consultant is given authority to discharge employees and otherwise control their terms or conditions of

156 Fabric Servs., Inc., 190 N.L.R.B. at 542.
158 The policy is even more apparent in Georgia Pacific. During a strike, Georgia Pacific directed one subcontractor to discharge a striking employee. In assessing liability against Georgia Pacific, the administrative law judge said that "the testimony is clear that Georgia Pacific was responsible for the discharge." Georgia Pacific Corp., 221 N.L.R.B. at 986. Although it is clear that Georgia Pacific had the power to order the discharge, the administrative law judge used that fact to emphasize the company's responsibility for the section 8(a)(3) violation.
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employment or to direct supervisors to do so. Unfair labor practice liability in those cases involves little, if any, extension of the theory of *Dews* and *Fabric*: the consultant is at fault and therefore responsible for the violation. In a case like *St. Francis*, however, liability should attach even if there is no evidence of authority to act directly against employees or to direct others to do so.

In *St. Francis*, the administrative law judge found that 2M had "practically full control" over the campaign. That campaign, as the Board itself observed, "was marked by numerous unfair labor practices." Even if 2M did not plan that conduct, section 8(a)(1) does not require such deliberate action. It is enough that the campaign had the effect of coercing, interfering with, or restraining employees in the exercise of their rights. Assessing liability against 2M recognizes that those who plan and implement a campaign that produces such intimidation should be held accountable for the consequences. It is true, as the administrative law judge found, that St. Francis hired 2M for advice and instruction in its campaign against the union. It is also true that the hospital, as the direct employer of those employees whose rights were violated, bears responsibility for the campaign and is guilty of unfair labor practices. The consultant, however, is also guilty. Although 2M may have been a less direct cause of the unlawful conduct than were the independent employers in *Dews* and *Fabric*, it was no less at fault: 2M controlled the campaign, exercising almost exclusive control over the supervisors and condoning their unlawful behavior. 2M should be held responsible for the unfair labor practices that occurred in the environment it created. It is no answer to conclude that St. Francis bears ultimate responsibility because it chose to accept 2M's advice. St. Francis certainly is liable. But at least part of the fault, and in this case perhaps most, was 2M's. Recognizing 2M's employer status for purposes of these unfair labor practices would impose liability on those responsible for the harm, just as the Board did in *Dews* and *Fabric*.

D. The Problem of Unlawful Advice: Liability as Aider and Abettor

In *St. Francis*, the administrative law judge chose, erroneously, to characterize the consultant-client relationship as only advisory. Though that conclusion is not warranted by the facts, it does raise a significant issue: whether the National Labor Relations Board can assess unfair labor practice liability against an attorney or consultant who knowingly advises a client to violate the Act, but who neither participates in the violation himself nor exercises significant control over the campaign. As the administrative law judge acknowledged in *St. Francis*, the Board has never decided this issue.161

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160 *St. Francis Hosp.*, 263 N.L.R.B. at 834.
161 *Id.* at 849. The General Counsel had raised the issue previously. Thus, in *Sierra Academy*
As with the other cases discussed above, such an advisor can violate section 8 only if he qualifies as an "employer." As previously demonstrated, both the statute and NLRB decisions have made "employer" determinations on the basis of fault. Thus, the statute creates employers out of agents in order to bind them personally for the harm they cause. Similarly, the independent employer theory used in Fabric and Dews proceeds on the basis of fault. The same principle should guide the Board in cases against advisors. The advisor who knowingly counsels unlawful activity should share in the responsibility for the results.

Such considerations of fault have motived courts to extend liability to third parties in other areas. In criminal law, for example, aiders and abettors are punished along with those who actually commit the crime. The Restatement of Torts declares that one may be liable for harm to a third person from the tortious acts of another if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." This latter definition has been particularly persuasive in the area of securities regulation. In assessing liability against third parties as aiders and abettors, the courts have generally required: (1) that some other party committed an independent law violation; (2) that the aider and abettor knowingly and substantially assisted the conduct that constituted the violation; and (3) that the aider and abettor knew that his role was part of an improper activity. In addition to borrowing torts principles, courts have been guided by the underlying policy of protect...
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...ing investors against unlawful schemes. Thus, in *Brennan v. Midwestern United Life Insurance Co.*,\(^{165}\) the court sustained a cause of action against a corporation for aiding and abetting the illegal activity of a brokerage firm: "Violations of this rule should be 'fashioned case by case as particular facts dictate.' "\(^{166}\) None of these requirements, used successfully by the courts in securities regulation, would pose a substantial obstacle to assessing liability under an aider and abettor theory against a labor consultant who counsels unlawful conduct.\(^{167}\)

Liability is proposed here only in those cases in which an employer has committed an unfair labor practice, acting on the advice or instructions of an advisor who knew, or should have known, that the proposed action was unlawful. In some cases, the unfair labor practice might occur solely at the urging of the advisor. Even if he merely suggests the unlawful course of conduct, however, he has played an integral role in the violation and should share the responsibility. In such cases the Board should, just as the court did in *Brennan*, interpret the statute flexibly so as to implement its purposes and policies. The Board has already recognized, through cases like *Dews* and *Fabric*, that one policy of the Act is to prosecute those responsible for unlawful conduct. Its enforcement effort should be no less vigorous where the unlawful conduct stems directly from advice given by an attorney or consultant. At least for purposes of that unfair practice, no harm is done to the statute by considering such advisors to be "employers" amenable to the jurisdiction of the Board.

Advisors can be expected to argue that Board action against them for counseling unfair labor practices is unfair in view of the instability of many NLRB decisions. Any student of the Board must concede that NLRB decisions are often too vague and its actions often too fickle for counselors to act with great confidence.\(^{168}\) However, the likelihood of

\(^{165}\) 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970).

\(^{166}\) Id. at 155 (quoting *Kohler v. Kohler Co.*, 319 F.2d 634, 637-38 (7th Cir. 1963)).

\(^{167}\) At least one court has recognized the possibility of assessing unfair labor practice liability against a lawyer who "purposely [aids] the employer in contravening the statute." *NLRB v. Guild Indus. Mfg. Corp.*, 321 F.2d 108, 112 (5th Cir. 1963). For a more detailed discussion of *Guild*, see infra note 185.

\(^{168}\) The Board seldom uses its administrative rulemaking power, preferring instead to make policy through adjudication. *See Bernstein, The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571 (1970); *Peck, The Atrophied Rule-Making Powers of the National Labor Relation Board*, 70 Yale L.J. 729 (1961). Board policy made through adjudication reflects the composition of the panel at any given time, leading to occasional, and sometimes frequent, changes in position. The best example is the Board's practice of screening campaign propaganda for misrepresentation. The rule of Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962), which allowed such review was reversed by the Board in *Shopping Kart Food Mkt.*, 228 N.L.R.B. 1311 (1977). Following a change in the composition of the Board, *Shopping Kart* was overruled in favor of the Hollywood Ceramics position a little more than a year later in *General Knit*, 239 N.L.R.B. 619 (1978). With yet another change in membership, however, the Board overruled *General Knit* in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), which
abuse is limited by the narrow reach of the proposal. There should be no liability for an advisor who, in good faith, counsels activity that later turns out to violate the Act. In addition, advisors are not expected to be seers and are obviously not responsible for the Board's frequent changes in position. The proposal intends to reach only those attorneys and consultants who knowingly counsel or participate in unlawful activity or who do so without a reasonable good faith belief in its legality. To that extent, the range of liability for the advisor is considerably narrower than for employers, who can violate some sections of the Act notwithstanding a lack of intent to do so and notwithstanding a good faith intent not to do so.169

No one pretends that advising employers about the vagaries of the National Labor Relations Act is easy. It is the difficulty of the task that has spawned much attorney and consultant activity. The difficulty of giving legal advice, however, should not be a shield. This article does not suggest that the Board look over the shoulders of advisors; it suggests only that the Board pursue those who knowingly misuse the law.170

announced a return to the Shopping Kart standard. For an interesting commentary on the Board's use of the Getman study, supra note 37, in these shifts of policy, see Goldberg, Getman, & Brett, supra note 37.

As of this writing, the Board's composition and actions indicate that more such changes may be forthcoming. During the past several years, the Board has experienced considerable turnover and often has had fewer than the maximum number of members. Indeed, the Board today has only four members. In addition, two longtime members, John Fanning, who was appointed in 1957, and Howard Jenkins, who served 20 years, are gone. Both were perceived as sympathetic to labor. The new appointees—Chairman Donald Dotson, Robert Hunter, and Particia Díaz Dennis—are generally thought to be more conservative. The Board already has announced that it will reconsider the holding in Milwaukee Spring Div., 265 N.L.R.B. No. 28 (1982), made while Fanning and Jenkins were still on the Board, that restricted the ability of employers to transfer work from unionized to nonunionized workplaces. For a report on the oral argument heard by the Board, see 1 Lab. Rel. Rep. 206 (1983).

169 Under section 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), for example, the Board is concerned with the effect of employer conduct on section 7 rights and often finds violations notwithstanding a lack of intent to harm the rights of employees. See R. Gorman, supra note 40, at 132-34 (if the effect of employer conduct would be to coerce or restrain a "reasonable employee," a section 8(a)(1) violation would occur regardless of employer intent and without proof that any particular employees was in fact coerced or restrained). An employer can also violate section 8(a)(2), 29 U.S.C. § 158(a)(2) (1982), by recognizing a minority union, even if the employer honestly believes that the union has majority status. See International Garment Workers v. Labor Board, 366 U.S. 731 (1961). In some cases, the General Counsel does not need to prove motive to establish unlawful discrimination under section 8(a)(3), 29 U.S.C. § 158(a)(3) (1982). See NLRB v. Great Dane Trailers, 388 U.S. 26 (1967).

170 A recent Note devoted to the narrow question of whether a consultant commits an unfair labor practice by rendering unlawful advice premises liability on a different theory. Note, The Liability of Labor Relations Consultants for Advising Unfair Labor Practices, 97 Harv. L. Rev. 529 (1983). The student author offers an "unlawful instruction" theory, based on agency principles rather than the consultant's control over the campaign. Id. at 538-40. Indeed, the author accepted without criticism the Board's decision in St. Francis, id. at 538, thereby ignoring the difficult prob-
E. Scope of the Charges

Most charges filed against consultants allege violations of section 8(a)(1). Since consultants themselves have no bargaining obligation enforceable under section 8(a)(5), and since they may not have the power to discriminate among employees, their actions usually are alleged merely to interfere with, restrain, or coerce employee rights. In the Fabric case, the administrative law judge seemed to indicate that section 8(a)(1) provided the only relief against consultants. Despite his hesitancy, however, consultants or attorneys should bear responsibility for the 8(a)(3) and 8(a)(5) violations they cause.

The administrative law judge's confusion in Fabric stemmed from a line of earlier cases primarily involving union unfair labor practices. For example, in Malbaff Landscape Construction Co., a union picketed a general contractor for using a nonunion subcontractor. The general thereupon fired the subcontractor. The issue was whether the union had violated section 8(b)(2) by causing the general, "an employer," to discriminate against the nonunion employees of the subcontractor, in violation of section 8(a)(e). Noting that the general had not acted directly against any employees, but merely had terminated his relationship with the subcontractor, the Board said that an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees. While . . . there may be employer discrimination against employer, we find no justification in the Act . . . for concluding that it was the purpose of Congress under Section 8(a)(3) to protect employers as well as employees from employer discrimination.

The Malbaff rationale proved persuasive to the administrative law
judge in *Fabric*, where the employer contended that it could not violate section 8(a)(3) with respect to any employees other than its own. The administrative law judge concluded from *Malbaff* that "where the relationship between employer A and employer B is an ordinary contractual one, in which B has no substantial control (such as a veto power) over the hire, tenure, or terms of employment of A's employees, B cannot be held liable for an 8(a)(3) violation against A's employees." Thus, he found that section 8(a)(3) provided an "internal justification" for giving a more restrictive meaning to the term "employer" than did 8(a)(1).

Thus, he found that section 8(a)(3) provided an "internal justification" for giving a more restrictive meaning to the term "employer" than did 8(a)(1).

Although the matter is not explained in the opinion, 2M was not charged with the only section 8(a)(3) violation at issue in *St. Francis*. Presumably the General Counsel and the administrative law judge read *Fabric* as negating independent employer responsibility for section 8(a)(3) violations. *Fabric* does not compel any such result, however. Indeed, in *Dews*, decided six years after *Fabric*, the independent employer was found guilty of violating section 8(a)(3). At most *Fabric* means that an employer does not discriminate against another's employees merely because he refuses to do business with the other on account of the union activity of those employees. Acknowledging the force of that decision, however, does no harm to the theory advanced here. The basic thrust of both *Fabric* and *Dews* is that employers should be held responsible when they have the power to effect unfair labor practices, including unlawful discrimination. Although responsibility may be less direct, a consultant who plans and implements an unlawful campaign should be just as accountable for 8(a)(3) violations as for 8(a)(1) violations. In either case, the consultant's control over the campaign, and the resulting consequences to the employees, have rendered him responsible for its result.

While section 8(a)(3) presents no significant difficulty in finding liability against independent employers, section 8(a)(5) does. Thus, section 2(3) says that "employees" for purposes of the Act are not lim-

prospective between the employers involved." *Id.* at 1031 (emphasis supplied). The opinion also stated that the crucial question was whether or not an employer had the power to act against employees because of their union activity:

It is sufficient that the discriminatee be a member of the working class in general and that the 'employer' be any employer who has any interest, direct or indirect, in the conditions of employment of the discriminatee or has any control, direct or indirect, over the terms of his employment.

*Id.* at 1032.

177 *Fabric Servs., Inc.*, 190 N.L.R.B. at 542.

178 *Id.*

179 The administrative law judge found that the employer violated section 8(a)(3) when, in retaliation for union activity, it refused to pay registration fees and allow time off for certain nurses to attend a seminar. *St. Francis Hosp.*, 263 N.L.R.B. at 845-46.

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...ited to the employees of any particular employer unless the Act "explicitly states otherwise."[181] There is such an explicit statement in section 8(a)(5), which makes it an unfair labor practice for an employer to refuse to bargain "with the representatives of his employees."[182] Thus, even if a consultant is independently an employer subject to the jurisdiction of the Board, he must refuse to bargain with his own, and not his client's, employees in order to violate section 8(a)(5).[183] In the typical case, however, liability can be assessed on another theory. For example, consultants or attorneys often are used as chief negotiators in collective bargaining. In those cases, the consultant's status as an employer stems from his agency relationship to the direct employer. Since the consultant is an agent, he can share equally in section 8(a)(5) liability. In West Coast Liquidators, for example, Gladys Selvin, an employer by virtue of her agency, was found guilty of violating section 8(a)(5).[184]

Moreover, if a consultant does not bargain for the employer, he still might be liable under the broad reach of section 8(a)(1). For example, an employer who unlawfully refuses to bargain in hope of decertifying the union clearly violates section 8(a)(5). If a consultant planned the strategy and assisted in its implementation, his actions constituted the restraint, interference, or coercion with section 7 rights banned by section 8(a)(1). In that case, the consultant should be liable as an independent employer, without regard to his status as an agent.

IV. OBJECTIONS TO REGULATING MANAGEMENT REPRESENTATIVES

A. Discouraging Counsel

One might expect that proposals as far reaching as those made here will encounter serious objection, particularly from management consultants and attorneys. The Board itself has declined the General Counsel's urging to impose sanctions on advisors, reasoning that such orders could interfere with an employer's ability to secure legal advice. In St. Francis, for example, the administrative law judge concluded that assessing such liability would discourage employers from seeking legal counsel, thus perhaps resulting in more, not fewer, unfair labor practices.[185] It was ironic for the administrative law judge to predict that the unfettered use of consultants would lead to cleaner campaigns.

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[182] Id. § 158(a)(5) (emphasis added).
[185] According to the A.L.J.: To hold Respondent 2M liable in these circumstances would constitute a serious intrusion into an employer's right to seek legal advice. In that regard, public policy has encouraged not discouraged obtaining professional assistance. If the General Counsel's theory is adopted, the effect would be to discourage a party from seeking such advice. . . .
since he compared the consultant-led campaign in *St. Francis* to tactics used against prisoners of war.\textsuperscript{186} The point is that the administrative law judge’s initial premise is faulty. If consultants and management attorneys understand that they can share liability for campaigns such as the one waged in *St. Francis*, then they will have an incentive to act more responsibly, both in campaign strategy and in implementation.

There is nothing in *St. Francis*, however, to encourage such responsible conduct. Especially in view of the Board’s limited ability to impose sufficient remedies against employers, this decision signals to consultants that unlawful campaigns might be worth the risk. Barring a bargaining order,\textsuperscript{187} the employer loses little, and the consultant benefits significantly in producing just the result desired by the employer. Indeed, 2M’s claimed success rate in NLRB elections allow it to profit from just such activity, with little fear of government sanction.\textsuperscript{188}

Assessing liability against consultants who exercise substantial control over the antiunion campaign, whether or not they actually direct the unlawful conduct, treats them the same as any other employer. In the typical case, the employer is liable for the unfair labor practices committed by his supervisors or agents, whether or not he directs the acts, authorizes them, or even approves of them. Consultants who effectively take the place of employers in directing the campaign should

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\textsuperscript{186} St. Francis Hosp., 263 N.L.R.B. at 849. The Fifth Circuit advanced a similar argument in NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108 (5th Cir. 1963). In that case, Judge Griffin Bell characterized as “unprecedented” the imposition of unfair labor practice liability on an attorney who had interrogated at least 12 employees. Id. at 111. The court recognized that there were cases in which company agents had shared in such liability. Judge Bell was aghast, however, at the prospect of imposing liability on an attorney:

> We are unaware of any case where a lawyer has been held as a Respondent, as distinguished from holding the company through the conduct of its lawyer as its agent. This is not to say that in a proper case a lawyer could not be held, but it must appear that the lawyer was purposely aiding the employer in contravening the statute, rather than restricting his activity to matters within the scope of and relevant to rights of the employer by way of proceedings pending or imminent.

> The right to counsel before an administrative agency such as the Labor Board, no less than before courts, is a precious right and one to be preserved and given effect. To charge counsel as here, and put him on trial . . . is tantamount to a restraint, intimidatory and coercive in nature.

> Id. at 112. Despite the harshness of the language, the court’s decision did contemplate the possibility that lawyers could be charged “in a proper case.” In *Guild*, however, the court ultimately held that there was no substantial evidence upon which to base a section 8(a)(1) violation, id. at 112, thus giving the case little precedential value for determining what constitutes a “proper case.”

\textsuperscript{187} St. Francis Hosp., 263 N.L.R.B. at 844. The Board expressly did not rely on, and expressly disavowed that characterization. Id. at 834 n.3.

\textsuperscript{188} In a letter submitted to the committee during the 1979-1980 Hearings, 2M claimed that in 1977 it handled 166 cases for employers and lost 11; in 1978 it handled 218 cases and lost 15; and in 1979 it handled 312 and lost 23. 3 *Hearings, supra* note 4, at 125-26. Those figures represent a success rate of about 93%.
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share the same kind of liability. This is not to propose that attorneys or consultants assume such responsibility merely by representing employers who commit unlawful acts on their own. Liability should extend only to those cases in which the consultant has, in effect, supplanted the employer's function by controlling the antiunion campaign, has himself participated in the unlawful act, or has advised or encouraged the employer to do so.

Nothing proposed here would threaten the ability of management to enlist the aid of attorneys or consultants in resisting a union organizational effort. Indeed, some care has been taken to ensure that despite the outcries of the labor movement, lawful aggressive campaigning is beyond the reach of these proposals. The Board, however, should not protect the ability of employers to receive advice that will assist them in circumventing the statute. Holding advisors responsible for their misdeeds deprives no one of anything protected by the policy of the Act.

B. Problems of Proof

Any proposal to sanction consultants and attorneys for their misconduct must take account of the procedures the Board will employ. Two problems immediately become apparent. First, how can the Board accumulate sufficient evidence to proceed against a consultant, particularly in those cases in which the consultant's plan has worked and the client may be unwilling to testify? Second, when the consultant is also an attorney, how does the Board overcome the attorney-client privilege?

These issues are of importance primarily in those cases in which a consultant has stayed in the background, either controlling the campaign, as in St. Francis, or merely advising the employer to violate the law.¹⁸⁹ No particular problems of either proof or privilege surface in cases where the consultant has, through his own actions, violated the law. For example, in collective bargaining cases like Selvin or in cases of unlawful interrogation or threat, either employees or union representatives can testify about the actions of the consultant. Even if the consultant is a lawyer, the attorney-client privilege is not breached when an employee of the client testifies as to unlawful conduct of the attorney, because the client, not the attorney, holds the privilege.¹⁹⁰

Nor is the privilege problem acute in cases of unlawful advice. As a practical matter, it might be difficult for Board investigators to discover that a discriminatory discharge, for example, was the result of an

¹⁸⁹ Indeed, the latter two cases were contemplated as early as the Fifth Circuit's opinion in NLRB v. Guild Indus. Mfg. Corp., 321 F.2d at 112, since in such cases the consultant would be "purposely aiding the employer in contravening the statute."

¹⁹⁰ For a thorough discussion of the complex problem of when and to whom the privilege applies, see J. Weinstein & H. Berger, 2 Weinstein's Evidence ¶ 503(b)(04), 503-41 to 503-56.13 (1982).
attorney's advice.\(^{191}\) If during the investigation, however, a supervisor or manager claims that his action was taken on the advice of counsel, the Board clearly will be able to pursue the inquiry. NLRB decisions recognize that the attorney-client privilege cannot be claimed where the attorney advises his client to violate the law.\(^{192}\) Moreover, in some cases the client will not be reluctant to testify against the consultant. In *Plastic Film Products Corp.*,\(^{193}\) for example, the client was not only willing to testify, but also seemed anxious to explain that his unlawful conduct was not of his own design but it was prompted by Rayford Blankenship, his consultant.\(^{194}\) Blankenship is not an attorney, although he occasionally has been mistaken for one.\(^{195}\) Even if he

\(^{191}\) For example, in *Monroe Auto Equip.*, 153 N.L.R.B. 912, 919 (1965), a consultant was charged with responsibility for the discriminatory discharge of an employee. The charge was dismissed, however, because it depended solely on the uncorroborated hearsay testimony of a former supervisor. *Id.* at 913 n.1, 919. *But see* Sierra Academy of Aeronautics, 182 N.L.R.B. 546 (1970), in which a consultant was charged, inter alia, with conspiring to prevent an employee from voting in an NLRB election. *See supra* note 116. Although the only testimony implicating the consultant was hearsay, the charge was sustained because of corroborating evidence. *Id.* at 549. It is possible, then, to convict consultants of unfair labor practice charges even in the absence of direct evidence of wrongdoing.

\(^{192}\) *See*, e.g., Independent Ass'n of Steel Fabricators, 231 N.L.R.B. 264, 270 n.10 (1977). *See also* C. McCormick, *Evidence* 199 (2d ed. 1972):

Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to a client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. . . . Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud.

\(^{193}\) 238 N.L.R.B. 135 (1978).

\(^{194}\) Blankenship had addressed the employees, telling them that the employer could go out of business and could even burn down the plant if he chose. He also interrogated employees and spoke of other companies that had closed after unionization. *Id.* at 143, 144-45. The administrative law judge concluded that Blankenship planned the campaign, characterizing it as an “all-out campaign to frighten the employees.” *Id.* at 143, 146. Ultimately, the employer fired Blankenship, and apologized for his conduct during the campaign. *Id.* at 151-53.

\(^{195}\) In *Ohio City Mfg.*, 238 N.L.R.B. 965, 966 (1978), the administrative law judge referred to Blankenship as “Counsel for Respondent.” Likewise, in *Meyer Stamping & Mfg.*, 237 N.L.R.B. 1322, 1322 (1978), the majority referred to him as respondent’s “labor counsel.”

The author has in his possession a photocopy of a letter dated April 30, 1980, purportedly signed by Blankenship, on which the letterhead is styled:

**BLANKENSHP and WILLIAMS**
**Labor Law Specialists**
**Representing Management in Union Matters, since 1965**

The letter is a solicitation apparently sent to a company that had been charged with an unfair labor practice. It says, among other things, “I am proud to be referred to as one of the 1,500 ‘union busters’ in the entire nation. There can't be a better reference.” The letter also criticizes management's usual practice of calling in lawyers on labor matters: “Most lawyers are unfamiliar with the Taft-Hartley [sic] law.” Although the letter appears ambiguous to the author, Blankenship does not claim in it that he is an attorney. He apparently has made that claim, however, since a story in the *Indianapolis Star* reports that Blankenship has pleaded guilty to the unauthorized practice of law. Interestingly, the newspaper reports that the judge denied a probation department recommendation that Blankenship donate time to youth organizations, saying that youths “don't need 'that kind of exposure.'”
were, however, the privilege belongs to the client, whose voluntary testimony amounts to a waiver.\textsuperscript{196}

When the consultant is an attorney, the most difficult cases are those like \textit{St. Francis}. In that case, officers of the hospital were subpoenaed to testify about the involvement of 2M in the campaign.\textsuperscript{197} There was no problem of attorney-client privilege since 2M representatives were not attorneys.\textsuperscript{198} Had they been attorneys, however, the privilege almost certainly would have been claimed, absent waiver by the hospital. Even so, the privilege should not apply in these situations because the communications are not within its scope. The underlying theory of liability in a case like \textit{St. Francis} is control. That is, the attorney-consultant is not liable as one who has personally violated the Act or given unlawful advice, but, rather, is liable as one able to direct the employer's antiunion campaign. The attorney-client privilege, however, applies only to \textit{legal} advice; attorney-client consultations with respect to \textit{business} advice are not privileged.\textsuperscript{199}

Activities like those undertaken by 2M in \textit{St. Francis} could hardly be characterized as legal advice. First, the consultant did much more than merely advise: it took responsibility, in effect, for a part of the managerial activities of the employer. Moreover, even if 2M's activities could be characterized as mere advice, it was advice about how to run the business. The fact that the attorney may have counselled lawful activities is not relevant here. According to one commentator, "Difficult problems are posed because the average lawyer . . . often mixes legal advice with business, economic and political counsel . . . Unless the communication is designed to meet problems which can be fairly characterized as predominantly legal, the privilege does not apply."\textsuperscript{200}

Even if 2M's representatives at St. Francis Hospital had been attorneys, their activities could not fairly have been characterized as "predominantly legal." They both developed and implemented the antiunion strategy. In so doing, they exercised significant control over the managerial activities of hospital supervisors. They were, in effect, managing that part of the business. Questions designed to expose that control do not violate the attorney-client privilege; they merely establish the nature of the business relationship between the consultant and the employer.

\textsuperscript{196} See C. McCormick, \textit{supra} note 192, at 194-97.
\textsuperscript{197} St. Francis Hosp., 263 N.L.R.B. at 847.
\textsuperscript{198} During the 1979-1980 Hearings, Herbert Melnick, chairman of Modern Management, testified that his firm does not provide legal representation for its clients and that, in fact, "any employer we work for has Labor counsel." 3 \textit{Hearings}, supra note 4, at 79.
\textsuperscript{199} See, e.g., C. McCormick, \textit{supra} note 192, at 180 & n.22 ("where one consults an attorney not as a lawyer but . . . as a business advisor . . . or negotiator . . . the consultation is not professional nor the statement privileged").
\textsuperscript{200} J. Weinstein \& H. Berger, \textit{supra} note 190, at 503-22.
This construction of the privilege not only is in accord with basic doctrine, but also is in keeping with general policy. The attorney-client privilege protects the client. It encourages full disclosure to attorneys in order that they can act "more effectively, justly and expeditiously."

Given that rationale, it is easy to see that the privilege has little application to the problem posed here.

There is no question that the privilege would shield the employer against fishing expeditions by the General Counsel designed to discover employer wrongdoing. In most cases, however, the General Counsel will establish employer liability without reference to any attorney-client consultation. Thus, under section 8(a)(1) the General Counsel likely will be concerned only with the effect of an employer's action, not the communication passing between lawyer and client. Even in the typical 8(a)(3) discriminatory discharges, the General Counsel can establish employer liability without regard to attorney-client conversations. Under the *Wright-Line* test, the General Counsel needs to do little more than establish effect, leaving it to the employer to explain away the inference of unlawful intent. In such cases, it will seldom matter what the attorney has advised, or what the client has said to the attorney, with respect to the employer's liability. To the extent that such communication provides a defense, the client is free to waive it by testifying.

The only real relevance of the attorney-client conference in this context is to establish liability on the part of the attorney, not the client. In theory, the privilege should not apply at all when it is the attorney who is the subject of investigation. Construing the privilege in this fashion, however, no doubt poses some danger to the client. Questions about what a lawyer advised will sometimes reveal what the client had asked, thus circumventing the protection that the privilege is intended to provide. Even so, when it appears that the client has sought advice about how to violate the law, or when an attorney's conduct or the circumstances of a campaign otherwise give the Board reason to investigate, the Board should construe the privilege strictly. The same result follows when the General Counsel seeks to establish attorney control over the campaign. Otherwise, the privilege will operate not to protect

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201 *Id.* at 503-22. *See also* C. McCormick, *supra* note 193, at 192-94.

202 *See supra* note 169.

203 In *Wright Line*, Inc., 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), the Board held that in order to establish a section 8(a)(3) violation, the General Counsel must establish a prima facie case that the employee's protected activity was a "motivating factor" in the employer's decision. *Id.* at 1089. The burden then shifts to the employer to demonstrate that the same action would have been taken "even in the absence of protected conduct." *Id.* Under this test, it seems unlikely that the General Counsel will, or could, introduce direct evidence of motive in order to establish the prima facie case. Instead, as the Board said in *Wright Line*, it is for the employer "to make the proof." *Id.* The Supreme Court recently upheld the *Wright Line* test in *NLRB v. Transportation Mgt. Corp.*, 103 S. Ct. 2469 (1983).
the client, but to shield an attorney from his own wrongdoing, thereby significantly impeding the ability of the Board to insure compliance with the law.

Consultants and attorneys also can be expected to argue that imposing liability on them will create problems even more serious than that of attorney-client privilege. As Plastic Film indicates, employers in some cases are willing to blame their advisors for their transgressions, perhaps seeking to save their own necks by strangling their consultants. In these cases, the Board will have to make the same kinds of credibility determinations that it makes in a host of other proceedings. The problem, however, is that in this type of case the client is testifying against his attorney. Attorneys will object, then, arguing that the possibility of attorney liability will erect a barrier between them and their clients, forcing them to view their clients as potential litigants rather than as trusted confidantes and rendering them unable to provide effective representation.

Although this argument has some emotional appeal, it has little basis in fact. First, most employers lack an incentive to use their consultants as scapegoats, since a finding of advisor liability will have little, if any, effect on their own liability. Employers are legally responsible for their actions in the campaign, regardless of where the plan originated. Second, even if some benefit could be derived by attributing responsibility to the advisor, attorneys and consultants are able to protect themselves by documenting the advice they give. Attorneys in labor relations matters should not enjoy protection superior to that of their colleagues involved in other forms of representation. Although most lawyers do not, and should not, view their clients as potential adversaries, the rash of legal malpractice actions has convinced attorneys to protect themselves in dealings with clients. This does not mean that labor attorneys or consultants need to be unduly conservative or deny vigorous representation to their clients. It simply means that such advisors must make a reasonable assessment of the risk of any proposed management activity and advise the client accordingly. It also means that counselors cannot knowingly plan or participate in unlawful conduct. Finally, it could mean that an advisor will be forced to withdraw his services from an employer who disregards his advice and deliberately pursues an unlawful campaign. Such a re-

204 See, e.g., O'Dea, The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability and Disqualification, 48 GEO. WASH. L. REV. 693 (1980); Rosen, A Reminder to Avoid Malpractice, 86 CASE & COM. 44 (May-June 1981).

205 Indeed, the recent amendments to the Code of Professional Responsibility Model Rules provide for just such a result. Thus, the comment to rule 1.6 provides, in part:

A lawyer may learn that a client intends prospective criminal or fraudulent conduct that does not come within paragraph (b)(1). In such circumstances, the lawyer ordinarily should counsel the client to desist. If the client insists upon pursuing the course of conduct, the lawyer may withdraw. See Rule 1.16(b)(1). If the client insists that the lawyer provide assist-
sult, however, does not deny legal representation to employers. It merely promotes more responsible decision-making on the part of management representatives and puts an end to the current practice of using a confidential relationship to shield unlawful activity.

V. REMEDIES AVAILABLE TO THE BOARD

A. Cease and Desist Orders

The obvious purpose of classifying attorneys and consultants as "employers" is to subject them to the remedial processes of the Board. As already noted, the typical Board remedy is an order directing the offender to cease and desist from further unlawful conduct. In the Gladys Selvin case, West Coast Liquidators,206 the ordinary cease and desist order was broadened to include not only the case at hand, but also her activities on behalf of other clients.207 The imposition of this so-called broad or blanket cease and desist order208 followed a history of involvement in similar unlawful conduct in at least eleven previous cases beginning as early as 1958.209 Despite her notoriety, Selvin was not even named as a party respondent until 1971.210 Then, even though its own case reports detailed the extent of her unlawful activities in other cases, the Board narrowed the broad order recommended by the trial examiner, noting that Selvin previously had not been

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206 205 N.L.R.B. 512 (1973), enforced in part, 527 F.2d 1273 (9th Cir. 1975). For a more detailed description of Selvin's activities, see supra note 98.

207 Selvin was ordered to cease and desist from "[r]efusing to bargain in good faith with any labor organization when she is [an] agent for any employer subject to the jurisdiction of the Board, that has an obligation under the Act to bargain with said labor organization." Id. at 517.

208 A broad order requires that an employer not only cease and desist from the particular unlawful conduct at issue, but also refrain from violating the rights of employees, "in any other manner." See, e.g., Jeffrey Mfg. Div., Dresser Indus., 248 N.L.R.B. 33, 39 n.33 (1980); Hickmott Foods, 242 N.L.R.B. 1357 (1979). A broad order against a union typically requires that it cease and desist not only within the present employment relationship, but that it also not engage in similar conduct with any other entity subject to NLRB jurisdiction. See, e.g., Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, Intern'l Bhd. of Teamsters, Chauffeurs & Helpers of Am. (C & T Trucking Co.), 191 N.L.R.B. 11 (1971) (broad order not warranted).

209 See supra note 96.

210 Selvin was first named as a respondent in West Coast Casket, 192 N.L.R.B. 624, enforced in part, 469 F.2d 871 (9th Cir. 1972). The case is typical of Selvin's actions. Selvin was the sole bargaining representative for the employer. All bargaining sessions were held in her home, which was not even equipped with a conference table, although union representatives were sometimes provided with TV trays. See West Coast Liquidators and Mrs. Gladys Selvin, 205 N.L.R.B. at 513. The trial examiner found that Selvin's bargaining techniques "polarize[d] any hostilities" between the employer and the union and were calculated "to keep the negotiations off balance." West Coast Casket, 192 N.L.R.B. at 636. He also observed that she found "frivolous objections" to some union proposals. Id. at 637.
named as a party respondent and that the circumstances of the case did not warrant a broad order. 211

The Board's usual criterion for imposition of a broad order is a proclivity to violate the Act, demonstrable either through prior Board decisions or the facts of a particular case. 212 In addition, the Supreme Court has said: "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." 213 Thus, both the Board's standard and the Supreme Court's seem to contemplate the possibility of a broad order even without a prior conviction, especially for one with a history as colorful as Gladys Selvin's.

Even if a prior offense is a necessary or desirable condition for imposition of a broad order, however, that does not explain why consultants have not been the subject of individual action more frequently. Although the Board's complaint cannot exceed the scope of the charge, its case-handling manual provides that, should the investigation reveal the possibility of other violations, "[t]he charging party should be given the opportunity to file appropriate amendments." 214 Thus, if the investigation produced evidence of consultant wrongdoing, the Board could notify the charging party (often the union) and most likely obtain a charge naming the consultant as an employer.

Labor has long bemoaned the inadequacy of the Board's remedial power, particularly the cease and desist order, which has been likened to being "slapped on the wrists with a feather." 215 While it may be true that Board processes themselves provide little relief and assure little in the way of deterrence, the federal courts of appeals can provide more protection by not only enforcing the orders, but also securing compliance through contempt powers. 216 Although Board cease and desist or-

211 Id. at 624 n.2. In fact, in West Coast Casket, the trial examiner relied in part on the reported activity of Selvin in three other cases. See id. at 637-39. Moreover, in Miscellaneous Warehousemen, Drivers & Helpers, Local 986 (Tak-Trak, Inc.), 145 N.L.R.B. 1511 (1964), the Board said of Selvin: "her reputation . . . in the field of labor relations is so notorious that one may well question whether any employer desirous of establishing a mutually satisfactory bargaining relationship with his employees' representative would designate her as his negotiator." Id. at 1519. The Board did uphold a Trial Examiner's recommendation of a broad order the following year in Chalk Metal Co., 197 N.L.R.B. 1133 (1972), but the Ninth Circuit refused to enforce that part of the order, 527 F.2d 1273, 1277-78 (1975).

212 See, e.g., Chalk Metal Co., 197 N.L.R.B. at 1133.


214 NLRB CASEHANDLING MANUAL (PART ONE): UNFAIR LABOR PRACTICE PROCEEDINGS (CCH) § 10054.2 (March 1983). See also id. § 10064.5 ("Where ULP not Specified in Charge Uncovered").


216 Although the Board has no enforcement power of its own, section 10(e) of the Act, 29 U.S.C. § 160(e) (1982), authorizes the Board to seek enforcement of its orders in the federal courts
ders may not deter lawbreaking consultants, contempt citations issued by federal appellate courts will capture their attention. Consultants are not likely to engage in unlawful conduct at the risk of substantial fines or imprisonment. And even though these sanctions would not be imposed directly against an offending employer, they may lessen the employer's willingness or opportunity to violate the Act: not only would an employer see the sanctions imposed against the consultant, but, more importantly, a consultant aware of the consequences would be reluctant to counsel unfair practices. If the labor movement's theory that much of the impetus for unlawful activity comes from consultants is correct (and there is evidence to suggest that it is), then dissuading the consultants should have the effect of lessening the number or severity of unfair labor practices.

It should be emphasized that this proposal is neither contrary to the policy of the Act, nor more severe than is necessary to deal with the problem at hand. It is true that Board orders are remedial, not punitive, and that this proposal suggests the possibility of fines and imprisonment as the ultimate sanction. Nonetheless, current NLRB procedure contemplate the possibility of punishment for contempt of NLRB orders. Thus, this proposal does not suggest a new remedy, but merely a new respondent. Moreover, the proposal does not contemplate that such action will be taken against every consultant who counsels unlawful activity. The basic proposal is that these offenders be made parties to the unfair labor practice proceedings and be subjected to Board remedial orders. Persistent or egregious offenders should be subjected to broad orders. Only those offenders who show contempt for the authority of both the agency and the courts would be subjected to punitive action.

B. Refusal to Bargain

Simply subjecting consultants and attorneys to cease and desist or-

of appeal. For an example of a contempt order, sought by petition of the Board, see Stevens XVIII, 563 F.2d 8 (2d Cir.), cert. denied, 434 U.S. 1064 (1977). In this case, both the corporation and supervisory personnel were named as respondents. See also Bartosic & Lanoff, Escalating the Struggle Against Taft-Hartley Contemnors, 39 U. CHI. L. REV. 255 (1972).

In Stevens XVIII, 563 F.2d at 23, the employer was ordered to pay all Board expenses, including salaries, and all court costs, including those of the special master. In addition, the Board proposed a compliance fine of $120,000, plus $5,000 a day for each day of future violation, id. at 25, as well as $1,000 fines and $100 a day against the named supervisors, id. at 25 n.28. The court characterized the fines as an "extremely serious remedy," and deferred action in order to give the respondents another chance to show that the Board's proposals were unrealistic. Id. at 25. Previously, the respondents had merely dismissed the proposals as having "no relationship to reason or present reality." Id. at 22 n.21. In addition, the court said that should these remedies not insure compliance, it was "quite prepared to consider more drastic sanctions both for the company and for the individual respondents." Id. at 26.

See NLRB CASEHANDLING MANUAL (PART THREE): COMPLIANCE PROCEEDINGS (CCH) § 10510.1 (March 17, 1980).
Regulating Management Representatives

ders need not exhaust the remedial effort of the Board. As the Gladys Selvin cases aptly demonstrates, employers sometimes deliberately frustrate the bargaining process, either by refusing to agree to anything of substance, or by prolonging bargaining to the point where it becomes meaningless.  

The NLRB is understandably reluctant to determine that an employer has bargained in bad faith merely from the content of the employer's proposals. The Board recognizes that the philosophy of the Act is one of private agreement, not government-imposed terms. Sometimes, however, the proposals, as well as other conduct of the employer, convince the Board that the employer never intended in good faith to reach an agreement. Those cases are particularly difficult to remedy, since the Board has no power to force the employer to agree to a union proposal or to make a proposal that is acceptable to the union. Board remedies, therefore, are usually limited to an order to cease and desist from bargaining in bad faith and an affirmative order to bargain in good faith in the future. The Board is unable even to compensate employees for lost wages or benefits as a result of the employer's refusal to bargain in good faith.

Recently, however, NLRB remedies in refusal to bargain cases have taken a new twist. In particularly egregious cases, the NLRB has ordered employers to pay the reasonable negotiating expenses of the

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219 In addition to the Selvin cases, supra note 96, see also the J.P. Stevens cases, supra note 36.
220 The reluctance stems from section 8(d), 29 U.S.C. § 158(d) (1982) which defines the obligation to bargain collectively and provides "such obligation does not compel either party to agree to a proposal or require the making of a concession." Even in those instances in which the Board has considered the content of the proposals, the courts of appeals have carefully scrutinized the Board's orders. See, e.g., White v. NLRB, 255 F.2d 564 (5th Cir. 1958). But see Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953). See generally R. GORMAN, supra note 40, at 489-95 (listing instances of the Board finding bad faith from certain proposals).
222 See, e.g., Trustees of Boston Univ., 228 N.L.R.B. 1008, 1010 (1977). The Board's single attempt to order a clause into a contract was struck down by the Supreme Court in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). In declining to enforce the Board's decision ordering the employer to agree to a "check-off" clause, the Court said:

While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108.
223 See generally R. GORMAN, supra note 40, at 532-39 (the Board cannot impose substantive contract terms not agreed upon by the parties, and the Board has not imposed "make whole" remedies, which would require the employer to pay employees what they would have received had the employers not unlawfully delayed bargaining).
The theory seems to be that since the employer never seriously intended to bargain, it should compensate the aggrieved party (the union) for its loss. In some cases, it appears that the consultant either formulated management's strategy or willingly participated in it. In those cases in which consultants or attorneys knowingly engage in dilatory bargaining calculated to deny the right of employees to bargain collectively, the Board, under section 10(c), should order them to share in the liability. If an employer is determined to oust the union, an attorney has much incentive to counsel bad faith bargaining as one technique. The hope is that the employees ultimately will become disenchanted with the union and decertify it. As already demonstrated, NLRB remedies are weak, and courts seem reluctant to enforce orders or issue contempt citations against employers who have actually met with union representatives, although they may have done little more than talk. Knowing that they might share in financial liability would likely deter advisors from counseling such activity. Moreover, attorneys and consultants would undertake a collective bargaining assignment on behalf of a client only in those cases in which it was clear

225 See, e.g., J.P. Stevens & Co., 239 N.L.R.B. 738, 773 (1978), enforcement denied in pert. part and remanded, 623 F.2d 322, 328-30 (4th Cir. 1980) (Board order allowed recovery of litigation expenses for both Board and union and negotiation expenses for the union). See also Memorandum of NLRB General Counsel, I LAB. REL. REP. (BNA) ¶ 9059 (1978): "[I]t will be appropriate in cases where bad faith surface bargaining is to be alleged to seek a remedy requiring reimbursement by respondent of the charging party's bargaining expenses resulting from that unfair labor practice."

In addition to negotiation expenses, there are other cases which allow reimbursement of some or all of the organizational expenses of the union and the legal expenses of both the union and the Board. One such case, American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940), involved a frivolous delay in collective bargaining. Other cases have allowed recovery of expenses as a result of serious employer unfair labor practices in organizational campaigns. See, e.g., NLRB v. Lehigh Lumber Co., 94 Lab. Cas. ¶ 13, 574 (3d Cir. 1982) (contempt citation allowing recovery of NLRB expenses, including attorney salaries); International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974) (revised reimbursement order for Board litigation expenses; affirmed reimbursement order for union litigation expenses). The policy here does not differ greatly from that discussed in the text. Thus, if the consultant directed the unlawful campaign, as in St. Francis, see supra notes 100-22 and accompanying text, or personally participated in the unlawful activity, he should share in the order to pay such expenses. Obviously, in the case of personal participation, the extent of the consultant's liability is a proper matter for the discretion of the Board. In cases like St. Francis, however, where the consultant controlled the entire campaign, he should be held jointly and severally liable.

226 For example, in the Selvin cases, supra note 96, the consultant's tactics were ordinarily the instrumentality used to frustrate negotiations. Indeed, in cases like Pease Co., 237 N.L.R.B. 1069 (1978), where the Board said that the employer entered negotiations with a closed mind with the hope of provoking a strike leading to eventual decertification, it is difficult to understand how the employer's intention could have been carried out without the participation of the attorney who served as negotiator.

227 29 U.S.C. § 160(c) (1982). Section 10(c) provides that, in addition to ordering a respondent to cease and desist from unlawful conduct, the Board also can "take such affirmative action with or without back pay, as will effectuate the policies of the Act." The quoted language is to be liberally construed, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
that management was prepared to comply with its obligation to bargain in good faith.

A similar remedy is available in a related situation. As already noted, employers use the delay inherent in NLRB and judicial proceedings to their advantage, either by delaying elections or by putting off the obligation to bargain. An employer can delay the obligation to bargain for a year or more merely by refusing to comply with an NLRB bargaining order and forcing the Board to obtain judicial enforcement.\textsuperscript{228} Currently, employees are not entitled to back pay for the period consumed by the judicial proceedings in these so-called "technical violations" even though, if the order is enforced, the employer's bargaining obligation dates from the time of the Board's original order.\textsuperscript{229} The same is true even if the employer's refusal to comply was not based on any significant grounds.\textsuperscript{230} Recently, the Board has tried to temper employer enthusiasm for this delay technique by ordering employers to pay the organization expense of the union and the litigation costs of the Board's General Counsel and of the union in those cases where employer objection to NLRB bargaining orders were "frivolous."\textsuperscript{231} Again, the Board should expand the scope of its order to include attorneys or consultants who counsel such activity or engage in it knowing that it was calculated to violate employee rights. That is not to suggest that an employer's representative should pay the legal costs of the Board every time an NLRB bargaining order is enforced by the court of appeals. It is likely, however, that attorneys would be instrumental in planning and implementing unlawful delay of an employer's bargaining obligation that involves misuse of administrative and judicial proceedings. Since such tactics could not be carried on without cooperation of the employer's counsel, they clearly share in breaking the law and should likewise share in the consequences.

\textsuperscript{228} A union that wins an NLRB conducted election becomes the exclusive representative of the employees in the bargaining unit for the "purpose of collective bargaining in respect to rates of pay" and other employment conditions under section 9(a) of the Act, 29 U.S.C. § 159(a) (1982). The certification resulting from that election, however, is not a final order of the Board subject to judicial enforcement. American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940). If the employer refuses to bargain, the Board's sole recourse is to secure relief under the unfair labor practice procedures for a violation of section 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). A bargaining order resulting from that procedure is a final order subject to judicial enforcement under section 10(e), \textit{id.} § 160(e). For a more detailed description of this circuitous procedure, see R. GORMAN, supra note 40, at 59-61. The \textit{St. Francis} case is a good example of the considerable delay that this procedure entails. The Board's order was issued on August 30, 1982, \textit{St. Francis Hosp.}, 263 N.L.R.B. 834 (1982), and was enforced by the D.C. Circuit on March 16, 1984, \textit{St. Francis Hosp.}, 729 F.2d 844 (D.C. Cir. 1984).


\textsuperscript{230} See supra note 229.

C. Restraint on Activities

In addition to these sanctions, a recent federal court decision suggests that more extreme action can be taken against particularly outrageous conduct. In *NLRB v. Lehigh Lumber Co.*, Judge Van Dusen, sitting as Special Master in a contempt proceeding, detailed the unlawful behavior of Louis M. Busch, an attorney hired as negotiator by several companies. Judge Van Dusen concluded that the respondents had violated the Board's order, enforced by the court, to bargain with the union in good faith. Among the sanctions he recommended were orders to pay all NLRB costs, including attorney salaries. In addition, citing *NLRB v. Selvin*, he suggested that the court consider ordering the employers not to use Busch as their negotiator. Although the Third Circuit decided that the other sanctions were sufficient, Judge Van Dusen's proposal has some merit.

As previously noted, employers who seek to delay or frustrate the bargaining process cannot succeed without the cooperation of their negotiator. Since Busch was not a party in *Lehigh*, the case report does not detail his role in planning the employers' unlawful conduct. Nonetheless, Judge Van Dusen's findings graphically detail Busch's outrageous behavior. Clearly, the Board has no business choosing the legal representative of employers. It should not, therefore, order the removal of Busch as attorney. It should, however, on facts as severe as those in *Lehigh* or the *Selvin* cases, order the removal of the chief impediment to the bargaining process. To that extent, the Board would not deny employers the right to secure legal counsel, but would insure that its order to bargain is not ignored. At the very least, individuals like

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233 The Master's report describes in some detail the delaying tactics used by Busch and his client, and other tactics which the Master concluded were "conscious efforts . . . to disrupt bargaining through irritating unfair allegations [that] were not consistent with bargaining in good faith." *Id.* at 2217. Among other things, Busch both offered and rejected proposals without discussion or explanation, refused to tell the union which companies he represented, and, upon continued questioning, "repeated many times in a childish, sing-song voice, 'Stick around you might find out.'" *Id.* at 2216-17. When his dilatory bargaining tactics prompted the union to leave a meeting in protest, "Busch and [Lehigh's president] said in a sarcastic, childish, sing-song voice, 'Please don't leave,' and they clasped their hands in prayer-like fashion." *Id.* at 2217. In addition, at one bargaining session, the president of Lehigh, in the presence of Busch, "repeatedly made faces at the Union members, stuck out his tongue at them, and waved his fingers at them with his thumbs in his ears." *Id.* at 2216.

234 *Id.* at 2221. Judge Van Dusen also recommended that the employers comply with prior orders of the court, bargain with the union in good faith, make no unilateral changes without first negotiating with the union, post certain notices, mail copies of notices to employees, report compliance to the court, and pay compliance fines. *Id.* at 2220-21.

235 *Id.* at 2222.

236 *NLRB v. Lehigh Lumber Co.*, 94 Lab. Cas. (CCH) ¶ 13,574, at 21,153 (3d Cir. 1982). The Court also modified the compliance fines to serve as security for the other orders. *Id.* at 21,153.
Busch and Selvin should be named as party respondents so that they ultimately can be subjected to the contempt powers of the courts.

The Board needs to do more, however, than rely on the contempt sanction. The *Lehigh* case demonstrates the ineffectiveness of that process. The Board’s order to bargain was first issued in July of 1977.237 The Third Circuit entered its contempt order five years later. During that period there had been no good faith negotiations. Not only does the Board lack a way to compensate employees for their financial loss during that period, it is also impossible to repair or even measure the damage done to the union’s status as representative. Indeed, it is this latter factor which could prompt such dilatory bargaining tactics.

Perhaps removing Busch as negotiator would not have remedied the employer’s intransigence. But such action would at least make it harder for employers to hide behind counsel in carrying out their unlawful objectives. It would also serve notice on attorneys and consultants that those who abuse the system are not only subject to remedial action, but also may be excluded from participating in the system.

VI. RELATIONSHIP TO OTHER PROPOSALS

The remedies proposed by this paper are by no means exclusive, either in terms of the narrow problem of dealing effectively with consultants or the broader issue of diminishing the considerable advantage that management has in organizing campaigns. As to the latter, the proposals advanced by the defunct Labor Law Reform Act of 1978238 would have gone a long way toward loosening management’s grip on the minds of the employees.239 Given the current political makeup of both the legislative and executive branches, however, it seems unlikely that that legislation, or any even remotely like it, will be revived in the near future. Indeed, legislative action offers little hope for any significant reform. Although the 1974 amendments did expand the numbers of employees which labor could organize,240 every other significant amendment since 1935 has narrowed, not broadened, labor’s power.241

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239 In addition to providing double back pay, the proposal would have allowed equal access to unions when employers gave a so-called “captive audience” speech, H.R. REP. No. 637, 95th Cong., 2d Sess. 52 (1978), placed time limits on NLRB election processes, id. at 54-55; provided for debarrment from federal contracts in certain instances, id. at 58; and allowed, as remedies, the imposition of double back pay in discharge cases and make whole relief in refusal to bargain cases. *Id.*
One need only remember that the 1978 legislation died during the tenure of a sympathetic president and a "veto proof" Congress.

There are, however, other regulatory steps that could be taken. The one most frequently urged is greater enforcement of management consultant reporting pursuant to the Labor Management Reporting and Disclosure Act (LMRDA), which requires that consultants and attorneys report the nature of certain activity undertaken on behalf of their clients and the money received. Although labor unions have faithfully reported their activities as required by that legislation, compliance by management representatives charitably can be described as insignificant. One prominent study indicated that most management attorneys were not even aware of the law's requirements.

It may well be true, as some commentators have argued, that enforced compliance would significantly aid labor's ability to counter some consultant-inspired campaign tactics. If nothing more, the union would be aware of the presence of a particular representative. Desirable as that result might be, however, it is unlikely to solve the primary problem addressed in this article. Management advisors who are willing to violate the National Labor Relations Act will not be deterred merely because they must report their activities, in general terms, to the Department of Labor. Surely, no one seriously expects that management consultants will admit any more in the reports they draft than they now admit under cross-examination by the Board's General Counsel. Thus, while enforcement of the reporting requirements is to be encouraged and may well prove beneficial, it is not likely to dissuade consultant-inspired unfair labor practices.

A more direct sanction is to bar violators from practice before the National Labor Relations Board. Currently, Board rules permit such action only for misconduct during or related to a hearing. The

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which included outlawing the secondary boycott under section 8(b)(4); and added section 10(e), 29 U.S.C. § 160(1), which obligated the Board to seek injunctions in secondary boycott cases prior to final action by the Board.


243 For detailed descriptions of the reporting requirements, see Bernstein, supra note 14, at 11-41; Craver, supra note 14, at 609-19.

244 See Craver, supra note 14, at 626.

245 See Bernstein, supra note 14, at 50-54.

246 29 C.F.R. § 102.66 (1983) provides in part:

(d)(1) Misconduct at any hearing before a hearing officer or before the regional director or the Board shall be ground for summary exclusion from the hearing. (2) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.
Board has been chary about imposing such sanctions, even in the face of highly questionable conduct.\textsuperscript{247} One commentator has proposed that the Board expand its rule to allow disbarment not only of those who abuse the actual hearings, but also of those who counsel or participate in the commission of unfair labor practices.\textsuperscript{248} The same commentator has also urged more aggressive enforcement of ethical standards by local bar associations or other enforcement agencies.\textsuperscript{249} The threat of exclusion from law practice or NLRB practice, or the possibility of public reprimand, probably would deter unlawful conduct among those attorneys who derive considerable income from such activities. The proposal, however, has a limited reach, since many management consultants are not attorneys, are not subject to the disciplinary jurisdiction of the states, and do not practice before the NLRB. A threat to deprive them of the opportunity to appear before the Board would not deter any unlawful activity. Moreover, even if practitioners were barred from practice before the Board, or even excluded from the practice of law, they could remain "backroom" advisors and still participate in the campaigns themselves. While the disbarment and disciplinary proposals are worthy of adoption, then, it seems clear that they are ill-designed to deter the unlawful activities discussed here. The only sanction likely to reach those practices, absent legislative reform, is increasing the scope of unfair labor practice prosecutions.

\section*{VII. Conclusion}

The NLRA and the administrative processes of the NLRB allow employers to reap considerable advantage by violating the law. In their efforts to remain nonunion, employers can, and do, violate employee rights with little fear of serious consequences. Given the lack of punitive sanction, the Board’s ability to proceed against those who are determined to ignore the statute is quite limited. While employers may not welcome the Board’s remedial measures, they are less severe, from an employer’s viewpoint, than a unionized work force. This Article has not proposed the perfect solution to the problem. Indeed, as long as the statute assumes that employers will respect both the law and the Board’s authority—a doubtful proposition at best—there is little likelihood that the strategy of unlawful resistance will cease.

The proposals advanced here, however, would make unlawful strategies more difficult to implement and, in the process, probably reduce the extent of the problem. Certainly, not all unfair labor prac-

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\item \textsuperscript{247} See, e.g., Maietta Contracting, 265 N.L.R.B. 1279 (1982), in which the Board refused to sanction attorney Joel Keiler despite its finding that he "behaved inappropriately and unprofessionally throughout the hearing," and despite the Board’s recognition that he had engaged in similar behavior in at least two other cases, \textit{id.} at 1280.
\item \textsuperscript{248} See Bernstein, \textit{supra} note 14, at 46-47.
\item \textsuperscript{249} \textit{id.} at 56-62.
\end{itemize}
tices, and not even all elaborately planned campaigns, result from consultant activity. But some employers (and given the small size of the typical bargaining unit, perhaps many) take their lead from experts. As already mentioned, those experts currently have nothing to lose and much to gain by devising and assisting unlawful campaigns. If the Board is to fulfill its obligation to protect employee rights, it must proceed, not only against employers, but against those who plan and participate in their campaigns.

In pursuing that objective the Board can legitimately expect help from other quarters. Thus, the Department of Labor should pursue more vigorous enforcement of the LMRDA. State and local bar associations should be alerted to unlawful conduct on the part of lawyers and take appropriate action. The Board itself should bar persistent violators from its processes. It must, however, do more—it must make lawbreaking consultants and attorneys the target of unfair labor practice prosecution. These combined proposals will not only furnish the regulatory agencies with a record of consultant activity and conduct; they will also both deny lawbreakers a role in the adjudicative process and control their role as backroom advisors.

Anyone experienced in labor relations will quickly recognize that employer representatives will not easily submit to such regulation. Perhaps more than in any other area of legal practice, representing clients in labor relations matters is often a game, albeit for high stakes, in which the opposing factions bluff and maneuver for advantage. If labor law consultants are to be the subject of unfair labor practice proceedings, one might expect them to respond, not by reforming their conduct, but by more effectively disguising it. Given the ingenuity of counsel for both management and labor, that possibility is not easily ignored. Even the process of disguise, however, might render some benefit. For example, many of the cases involve direct participation by management representatives in unlawful conduct. If these proposals curtail that activity for fear of easy detection, they will have accomplished something. In addition, while one should not underestimate the ingenuity of counsel, one must also recognize the capacity of the Board to discern smoke.

If the case reports teach us anything, it is that management representation is big business and that unlawful strategy and advisor domination of campaigns is an important part of that business. Implementing these proposals might prompt representatives to try to continue their current practices by camouflaging their control or hedging their advice. As to the former possibility, the NLRB has considerable experience in discerning real as opposed to purported motives and facts, and will not be easily misled. As to the latter, this Article already has recognized that problems exist in proving unlawful advice. The NLRB, however, should have little difficulty deciding cases in which
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representatives orally counsel unlawful conduct and attempt to cover their tracks by a subsequent neutral writing. If a client who has been the subject of such treatment will testify against the representative, little more than a credibility determination is involved. On the other hand, if these proposals do cause representatives to hedge or "weasel word" their advice, they will, again, have accomplished something. Clients may then recognize that the tendered advice is not without controversy and seek more guidance before following it.

These proposals are not designed to eliminate unfair labor practices, nor, realistically, will they discourage all unlawful activities by management representatives. As long as management has the right or the ability to campaign against unions, and as long as it seeks assistance from outside advisors, the possibility exists that either the law or its processes will be exploited. This Article does not oppose lawful, aggressive campaigning. Nor does it question the need for expert advice or assistance. It does, however, assert that the Board must do more than it has to limit the industry that its neglect has helped to spawn. There is significant evidence that employers are using outside representatives to violate the statute that the National Labor Relations Board exists to enforce. Board action that imposes sanctions on those who counsel lawlessness would not only demonstrate the agency's determination to protect statutory rights, but also likely would reduce both the incentive and the opportunity for employers to violate the law.