

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**KENNEDY, SCHWARTZ & CURE, P.C.**

Employer

- and -

Case No. 2-RC-22718

**NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS  
(NOLSW), UAW, LOAL 2320, AFL-CIO**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Audrey Eveillard, a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

The sole issue litigated at the hearing concerned whether the Petitioner should be disqualified from representing certain employees employed by the Employer. As discussed below, the Employer contends that the particular nature of its business operations creates an overlapping of jurisdictions among the Employer, its employees and the Petitioner, such that severe conflicts of interest would arise if the Employer's employees were to be represented by the Petitioner. The Petitioner, to the contrary, contends that the Employer's assertion of conflict is speculative and that the record fails to establish that the Petitioner should be disqualified to represent the employees of the Employer. As

discussed, and for the reasons set forth below, I have concluded that the Employer has failed to meet its burden to establish that the Petitioner should be disqualified. The record fails to demonstrate that there are either actual or potential conflicts of interest sufficient to deny employees of their statutory right to select whether or not they wish to be represented by the Petitioner.

Upon the entire record in this proceeding,<sup>1</sup> it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.<sup>2</sup>

2. The parties stipulated and I find that Kennedy Schwartz & Cure, P.C., the Employer herein, with its principal place of business located at 113 University Place, New York, New York, is a professional corporation engaged

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<sup>1</sup> The briefs, filed by Counsel to the Employer and the Petitioner, have been carefully considered.

<sup>2</sup> At the hearing, the Employer sought to present the testimony of an expert witness relating to the asserted conflict between membership in the Petitioner and the ethical rules governing attorney conduct. The Petitioner objected to such testimony, arguing that it was not relevant, and would be unduly speculative. The Hearing Officer sustained the Petitioner's objection and the Employer requested special permission to appeal her ruling. The Employer argued that the witness would testify that UAW representation would violate certain canons of ethics promulgated by the New York State Bar Association to regulate the conduct of attorneys. In particular, the Employer asserted that UAW membership would violate EC 5-13, governing attorneys' membership in labor organizations; EC 5-21, pertaining to the influence of third parties, DR 5-101(A) prohibiting personal conflicts of interest and Canon 9 prohibiting even the appearance of impropriety. In response, the Petitioner argued that these matters are enforced by the Bar and the courts and not by the NLRB; that the employer has failed to articulate any connection between the ethical responsibilities of attorneys and the asserted "competitive disadvantage" under which it would be placed should its employees become members of the Petitioner; that the Petitioner is not in direct competition with the Employer and that while the Employer is free to argue the ethical implications of union membership, the introduction of testimony regarding hypothetical future situations was not appropriate. The Acting Regional Director granted the Employer's request for special permission to appeal the Hearing Officer's ruling, but denied the appeal. The grounds for this ruling include the fact that, inasmuch as the Employer had failed to give the Petitioner notice of its intent to call an expert witness, a delay in the proceedings would be warranted to afford the Petitioner the opportunity to rebut such testimony. In view of the fact that the proffered testimony related solely to possible or hypothetical situations rather than any actual or imminent conflict, it was concluded that the probative value of such testimony was minimal, at best, and did not justify further delay of these proceedings. Although the testimony of the expert witness was not allowed, the Employer was not precluded from advancing those arguments relating to the applicability of the ethical rules governing attorney conduct to the instant case, and their arguments in this regard have been given due consideration.

primarily in the practice of labor law. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$250,000, and purchases goods and supplies valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that National Organization of Legal Services Workers (NOLSW), Local 2320, UAW, AFL-CIO, the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Employer contends that due to the particular nature of its business, and the Petitioner's affiliation with the UAW, the Petitioner should be disqualified from representing its employees. The Employer cites to specific examples of conflicts between various labor organizations that are represented by the Employer and local union constituent members of the UAW, and also points to certain circumstances under which the potential for such conflicts may arise. The Employer contends that these conflicts will have various repercussions, including an adverse effect on its clients, or potential clients, and will place it at a competitive disadvantage due to actual or perceived conflicts of interest, the potential for the Petitioner's representation of its employees to become an issue in internal union disputes among clients and the fact that its attorneys will be placed in an untenable position where they may be obliged to choose between the professional and ethical obligations owed to clients and the

duty of loyalty owed to the Petitioner. The Petitioner, to the contrary, argues that any potential adverse business impact upon the Employer is not a relevant consideration. The Petitioner also points to the fact that there already exist jurisdictional and other sorts of conflicts among labor organizations represented by the Employer and such conflicts do not disqualify the Employer from representing these clients. The Petitioner argues that there is no conflict of interest between the presence of a union representing associate attorneys and the presence of other union clients within a firm. Inasmuch as conflicts of interest may arise, these matters implicate the duties and responsibilities of attorneys, not the union seeking to represent them, and should be dealt with on a case-by-case basis.

### **The Employer's Operations**

The Employer is a professional corporation engaged in the practice of law, employing approximately nine staff attorneys and seven non-professional clerical employees. Its client base consists primarily of labor organizations and union benefit funds, and includes unions representing public sector employees, employees of various not-for-profit agencies, garment industry employees, manufacturing and retail employees, transportation workers, electrical employees, public-sector university professors, medical interns and residents and attorneys. The Employer provides a wide range of legal services, including the design and implementation of union organizing campaigns, the negotiation of labor agreements, the prosecution of arbitrations, various types of litigation and the representation of unions in connection with internal union matters.

### **The Petitioner and its Affiliations**

The Petitioner is one of many constituent local members of the United Automobile Aerospace and Agricultural Implement Workers of America (the UAW). The Petitioner represents approximately 3,000 legal workers, consisting of attorneys and paralegal specialists, in 30 states. According to the UAW's official web site, it represents employees in the automotive, aerospace and defense, and heavy truck, farm and heavy equipment industries. The UAW's membership additionally includes various technical, office and professional workers including telecommunications and news media employees, technical employees, graduate students, writers, artists and attorneys, as well as public-sector employees. Union dues paid by UAW members are apportioned, with 38% remaining with the local union, 30% going to a UAW strike fund and 32% going to the UAW International. In the event the strike fund retains over \$500 million in assets, the local union and the International are each apportioned a higher percentage of employee dues.

The International body of the UAW has a Constitution, adopted in July 2002, setting forth the rights, duties and obligations of the Union and its members. Although the Employer generally points to the preamble and those sections outlining the obligations of members as being sources of potential conflict for employees, the Employer has cited no specific provision or obligation in support of this contention. The Constitution contains procedural protections for members charged with violating its provisions or engaging in conduct

unbecoming a member. Union decisions can also be appealed to an independent public review board.

The Employer additionally points to the fact that UAW members participating in a strike are eligible to be compensated from the International's strike fund.<sup>3</sup> The Employer also contends that the receipt of such compensation could create an ethical dilemma for the attorneys employed by the Employer. In this vein, the Employer additionally argues that employees might be asked to support UAW organizing drives involving rival union clients of the Employer. Other asserted areas of potential conflict are discussed below.

**Asserted Conflicts between the Employer's Clients and the UAW**

The Employer presented evidence of conflicts that have occurred between certain of its clients and UAW affiliates. For example, one of the labor organizations currently represented by the Employer, includes District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO, Local 215 (DC 1707). The record establishes that on October 30, 2001, the Regional Director, Region 2 issued an Decision and Order Clarifying Unit in Case No. 2-UC-566. This matter involved a unit clarification petition, filed by UAW Local 2110, to clarify certain job classifications then represented by DC 1707 into an existing bargaining unit represented by Local 2110. Thus, DC 1707 was involved in litigation with this UAW local regarding the unit placement of certain employees. It is not clear from the record whether the Employer represented DC 1707 in connection with this litigation.

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<sup>3</sup> The Petitioner does not maintain a strike fund.

The record also establishes that the Employer represents SEIU Local 1957, a union which was successfully involved in organizing interns and residents at Boston Medical Center. On behalf of this client, the Employer filed an amicus brief before the Board supporting the position taken by Local 1957 in connection with its organizing campaigns among graduate students at Columbia University and Brown University.<sup>4</sup> The Employer contends that, in the future, it is possible that the unions may take differing positions regarding the employee status of the other union's constituents.

The building where the Employer's offices are located is owned by a corporation that, in turn, is owned by one of the Employer's clients. As it happens, the Petitioner is one of several other tenants in that office building. According to Employer partner Thomas Murray, a dispute arose one recent summer due to problems with the air conditioning. The Petitioner was one of the tenants who complained to the owner about the situation. The Employer asserts that this landlord-tenant relationship is a continuing source of potential conflict between the Petitioner and its client.

The Employer currently represents the Professional Staff Congress, (PSC) which represents certain public-sector employees. According to Murray, at some point in the past, the PSC and the UAW both sought to represent a bargaining unit of employees employed by The Research Foundation, an organization which

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<sup>4</sup> The brief was in support of the position that graduate teaching and research assistants are employees under the Act.

is affiliated with the City University of New York.<sup>5</sup> Julie Kushner, the New York Sub-Regional Director for the UAW Region 9A, testifying on behalf of the Petitioner, testified that this dispute did not involve the Petitioner. Kushner additionally testified that the UAW and the PSC have worked out an arrangement so as to avoid future disputes of this nature and to work cooperatively with one another to further the interests of the employees in question.

**Asserted Areas of Potential Conflict**

In addition to the above examples of disputes that have arisen between clients represented by the Employer and various UAW locals, Murray testified as to other potential areas of conflict as well. Murray stated that the potential impact of unionization upon the firm's representation of clients could become an issue in connection with internal union elections, or dissident movements within a union. According to Murray, a question could be raised as to whether the Employer is providing the best representation possible in the event its employees are represented by a union with whom a client is having, or may have, a dispute. By way of example, Murray pointed to the fact that client DC 1707 represents the support staff employees of the NAACP Legal Defense Fund. In the event the attorneys of the Defense Fund decided to organize, there would be potential competition between the Petitioner and the client relating to the representation of these attorneys.

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<sup>5</sup> Murray was not directly involved in this matter and, in fact, the Employer did not represent the PSC at the time of this litigation. As Murray recounted his understanding of the dispute, the case involved the question of whether the Employer was a public employer exempt from the Board's jurisdiction. If so, the PSC claimed that the employees in question should be accreted to an existing bargaining unit, rather than being separately organized by the UAW, who also claimed to represent the employees in question.

In addition, the Employer contends that its attorneys may be asked to give opinions as to whether to initiate unfair labor practice charges, or other legal proceedings, on behalf of labor organizations that may be competitors of the UAW. In such circumstances, it is contended, attorneys will be placed in the untenable position of violating the ethical duties owed to their clients and the duty of loyalty owed to their union and may have to act against their own personal interests insofar as any monetary obligations arising out of such charges or other proceedings would be satisfied by the dues of union members.

In its brief, the Employer additionally asserts that an attorney member of the bargaining unit would have an ethical obligation to reveal information about ongoing or potential organizing drives learned at union meetings to the Employer's clients. This would similarly subject the attorney to an intolerable conflict of interest. It is also urged that attorney affiliation with the UAW would, as far as ethical considerations are concerned, essentially place that union in the position of being the primary client of the Employer. As the Employer would not have the option of severing its affiliation with the UAW, it would have to cease representation of the client whose interests are adverse.<sup>6</sup>

On the issue of potential conflict, Murray conceded during cross-examination, that clients of the Employer could have, and actually have had, conflicts among themselves, and that the same questions of favoritism and conflict of interest could arise. By way of example, the Employer represents certain local unions affiliated with District Council 37 (DC 37), as well as the

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<sup>6</sup> Other than a general reference to certain provisions of the Lawyer's Code of Professional Responsibility, discussed below, the Employer has cited no authority in support of the foregoing assertions.

Transport Workers Union Local 100 (Local 100). At one point, DC 37 and Local 100 were involved in a dispute with each other. In that situation, the Employer actually represented only one of the labor organizations in connection with the dispute. In this regard, Murray acknowledged that there is an organizational difference between local unions, mid-level bodies, such as district councils and umbrella organizations, such as international unions. In addition, Murray testified that union members may bring claims and law suits against their unions. On occasion, the Employer has represented such members and then has come to represent the union that has been sued.

**The Code of Professional Responsibility**

The Employer points to four sections of the New York State Bar Association's Lawyer's Code of Professional Responsibility which, it asserts, are implicated in the instant matter. EC 5-13 provides, in its entirety:

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

The Employer acknowledges that under this provision an attorney may belong to a labor organization, generally. The Employer asserts, however, that as a competitor and adversary of the Employer's clients, the UAW would have an interest in "prescribing, directing or suggesting" how the lawyer should act, and that the attorney would be subject to sanctions for failing to follow such prescriptions.

The Employer additionally points to EC 5-21,<sup>7</sup> and asserts that the UAW would be in a position to assert “strong economic, political and social pressures” upon the Employer’s attorneys through (1) the imposition of sanctions; (2) the availability of strike benefits and (3) social and political pressure to be loyal to union brothers and sisters.

The Employer contends that an attorney’s membership in the Petitioner would also contravene the provisions of DR 5-101(A),<sup>8</sup> which governs conflicts between the interests of lawyers and their clients. According to the Employer, this disciplinary rule would compel an attorney to share information about UAW politics, goals and strategies with clients and, conversely, inform the UAW about clients’ organizational or bargaining plans should there be any actual or apparent conflict with the UAW’s plans. The Employer additionally points to Canon 9, which provides that “[a] lawyer should avoid even the appearance of professional impropriety.” The Employer asserts that membership in the UAW would create such an appearance.

The Petitioner notes that EC 5-13 allows attorneys to be members of unions. It further points to the fact that even assuming any collective-bargaining

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<sup>7</sup> EC 5-21: The obligation of a lawyer to exercise professional judgment solely on behalf of the client requires that he disregard the desires of others that might impair the lawyer’s free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressure upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to the client; and if the lawyer or the client believes that the effectiveness of the representation has or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

<sup>8</sup> DR 5-101(A): A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the lawyer’s interests.

agreement negotiated were to contain a union security clause, the law does not permit a requirement that represented employees actually maintain membership in their union as long as they pay dues or the equivalent.<sup>9</sup> Ellen Wallace, President of the Petitioner, testified that there is no policy of Local 2320 to instruct an attorney member to take any particular position with respect to a client, and that this has not happened to her knowledge. She further testified that the Petitioner would not ask an attorney member to violate the canons of ethics governing attorney conduct. She also testified, however, that she has not studied these canons since being admitted to the bar. The Petitioner further points to the fact that the Employer's representation of clients with potentially adverse interests are also subject to the provisions of the Lawyer's Code of Professional Responsibility, in particular EC 5-14 through EC 5-20, and that such a potential exists in any law firm, and may also serve to create the appearance of impropriety in this context, as well.

### **Positions of the Parties**

The Employer advances three arguments in support of its position that the Petitioner should be disqualified. First, the Employer argues that the Petitioner is in direct competition with the Employer's clients and therefore is disqualified from representing the employees of the Employer. The Employer additionally argues that the Employer's attorneys would have an intolerable conflict of interest caused by their dual loyalties to their clients and the Petitioner, as well as under the Lawyer's Code of Professional Responsibility. The Employer further contends

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<sup>9</sup> *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

that the Employer's clients and the UAW has and will in the future likely seek the same bargaining units, causing a conflict of interest for employees.

The Petitioner contends that the Employer's assertions that unionization will place it at a competitive disadvantage are time-worn arguments which have been rejected by the Board and are not sufficient to disqualify the Petitioner. The Petitioner contends that an asserted or potential conflict between a union and an employer is not an appropriate ground for disqualification and that the focus must be on the union's ability to represent employees, not on any potential impact on the employer's business concerns. Similarly, possible conflicts of interest between the Petitioner and the Employer's clients are not related to the issue of whether the Petitioner will be a vigorous advocate for employees, and should be treated in a manner similar to those situations where the Employer represents various labor organizations who may have jurisdictional or other conflicts. Finally, the Petitioner contends that speculation about whether attorneys who are union members would be more or less likely to breach their ethical obligations is not related to the question of whether there is an innate danger that the Petitioner's alleged conflict of interest would interfere with the collective-bargaining process.

### **Analysis and Conclusions**

#### **Conflict of Interest**

In support of its position that the Petitioner should be disqualified from representing the employees sought herein, the Employer relies primarily upon *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). In *Bausch & Lomb*, supra,

the petitioning union operated an optical business that was in direct competition with the employer whose employees it sought to represent in collective bargaining. The disqualification of the petitioner was based upon the latent danger that the union might bargain not for the benefit of unit employees, but for the protection and enhancement of its own business interests. In the instant case, the Employer claims neither that the Petitioner is in direct competition with it nor that the Petitioner would somehow be compromised in its ability to fully represent its employees. It asserts rather, that actual or perceived conflicts of interest between the Petitioner and its clients or on the part of its union-represented employees may have an adverse impact on the firm's client base, and thus, place the Employer at a competitive disadvantage. As the Employer argues in its brief:

If the Petitioner were certified as the bargaining representative in the instant case, its role would be expanded beyond impact on so-called mandatory bargaining subjects, and it would be injected into matters infringing upon the interests of [the Employer's] labor union client. The presence of Petitioner would, of necessity, become part of any representation [the Employer] undertook on behalf of its clients.

The Employer further argues that "where the law firm represents union clients in direct competition with the petitioning union and the mandatory client disclosure must be made, the harm to the firm's ability to compete becomes manifest and disqualification of the Petitioner must be directed."

In *Garrison Nursing Home*, 293 NLRB 122 (1989),<sup>10</sup> the Board restated the principles with respect to when a conflict of interest will preclude a union from representing employees in a given unit:

The Board has long held that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. The employer bears the burden of showing that such a conflict of interest exists and that burden is a heavy one: 'There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.' (citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984)).

Based upon the record before me, I cannot conclude that *Bausch & Lomb* is controlling, as the Employer contends. As the Board has noted, "[t]raditionally, the Board has concerned itself only with those conflicts of interest which tend to impair a labor organization's ability to single-mindedly pursue its employees' best interests. Thus, the Board has, from time to time, refused to certify a union as a bargaining representative where the union's business or other involvement makes it potentially responsive to interests other than those of the employees whom it represents." *American Arbitration Association*, 225 NLRB 291 (1976). Moreover, as noted, the danger of conflict must be "clear and present." A plan to engage in an activity that might be competitive and even disqualifying is not sufficient. The plans must have materialized. *Alanis Airport Services*, 316 NLRB 1233 (1995); *IFS Virgin Island Food Service*, 215 NLRB 174 (1974).

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<sup>10</sup> In this case, the Board found that disqualification was appropriate where a personal financial relationship was found to exist between executives of the union and the employer whose employees the union sought to represent.

As the Employer notes, the Board has held that the “principles underlying the conflict of interest doctrine are not limited to a factual situation where the employer and the union are in the same business.” *St. Johns Hospital and Health Center*, 264 NLRB 990, 992 (1982). However, there must be evidence that a union’s business activities interfere with its “single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent.” *Bausch & Lomb*, supra at 1559. Thus, in *St. John’s Hospital*, supra, relied upon by the Employer, the Board found the union to be disqualified where it operated a nurse registry service which relied, in significant part, upon recommendations from health care facilities including the employer, and had referred nurses to positions at the employer’s hospital. The union conceded that it viewed the employer as a customer. In such an instance, the Board concluded that the relationship of the two entities was “something less than arms-length.” 264 NLRB at 992.

The Board has not, however, been willing extend this rationale to situations where there is no conflict of interest directly implicating the petitioner’s ability to “single-mindedly” represent employees. For example, the Board has held that investment of union pension funds in a competitor of the employer does not disqualify the petitioner from acting as bargaining representative. *David Buttrick Co.*, 167 NLRB 438 (1967). The Board has also acknowledged the distinction between the interests of a local union and its international affiliate. For example, the Board has held that loans by a pension fund of the local union’s international affiliate to a competitor of the employer did not disqualify the local

where it, and not the international, controlled dealings with the employer. *H.P. Hood & Sons*, 167 NLRB 437 (1967) and 182 NLRB 194 (1970).

In *American Arbitration Association*, supra, the petitioner sought to represent a unit consisting of tribunal administrators and clerical employees. The petitioner and the employer were not direct competitors of each other, but the employer argued, as does the Employer herein, that the petitioner should be disqualified because unionization of its employees would create various conflicts of interest. Both the petitioner, and the larger organization with which it was affiliated, were members of the employer, and eligible to sit on its board of directors. The employer also argued that union representation would create a conflict of interest among its employees in those arbitrations which involved the petitioner or other locals affiliated with the International. The employer contended that union membership might create a divided loyalty among employees which would cause them to breach their duty of fairly and impartially administering arbitrations. The Board rejected the contention that any asserted or potential conflict of interest between the petitioner and the employer would interfere with employees' sense of loyalty and fairness: "We are . . . unwilling to presume that union representation will in any way interfere with the Association employees' strict adherence to the highest principles of confidentiality and trust." 225 NLRB at 291. The Board additionally rejected a related argument, a corollary to one advanced by the Employer herein, that unionization might cause the public to perceive the employer as not being impartial and that such a perception would

encourage employers and unions from utilizing the employer's services, calling such an assertion "pure conjecture." *Id.*

Other cases relied upon by the Employer fail to support its contention that the rationale of *Bausch & Lomb* should be extended to cover the circumstances of the instant case. For example, in *Visiting Nurses Association, Inc. Serving Alameda County*, 254 NLRB 49 (1981), the Board found that the union was precluded from representing the employer's employees because the union operated and controlled a registry service which was in direct competition with the registry service operated by the employer. Similarly, in *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971), the intervenor union's business agent had a substantial business interest in a company engaged in promoting and selling certain brand name products to retail outlets, including the employer. The Board held that, although this did not disqualify the union generally from representing employees, it was incompatible with its disinterested representation of the employer's employees. It was held that if the intervenor were to win the election, it should not be certified so long as its business agent remained in that capacity in the employer's geographical area. Thus, in both these cases the facts presented tangible conflicts of interest on the part of the unions that would jeopardize a good-faith collective bargaining relationship with the respective employers.

In *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980), the Board held that an employer violated Section 8(a)(1) and (2) of the Act when it recognized and bargained with a union as the collective-

bargaining representative of its employees when it also served as legal counsel to that union. The ALJ, affirmed by the Board, found that the law firm's role as labor counsel to the union provided it with the ability to influence the union in a broad range of matters, including the make-up of the union's officers, its financial dealings and the legality of its charter and by-laws. As the ALJ wrote:

The Union sits across the bargaining table from its agent, and the Respondent sits across from its principal. The tendency of each to compromise its position based on the view that their agency or business relationship is more important than their separate interests is too great a risk to sanction when applying the Labor Act to their relationship.

250 NLRB at 490.

This case illustrates that the Board's concern lies with a union's ability to provide proper representation to employees, and not the potential to cause economic distress to the Employer. See also *Oregon Teamsters' Security Plan Office*, 119 NLRB 207, 211-12 (1957) (union not competent to bargain with itself concerning the terms of employment of its own employees).

The Employer's concerns regarding how the anticipation of potential conflicts of interest may result in possible consequences to its practice, does not pose the sort of conflict envisioned by *Bausch & Lomb*, supra, and its progeny, which consistently focus on the vigilance with which a petitioning union will enforce the collective-bargaining rights of employees. In the instant case, there is no evidence that the nature of the asserted conflicts between the Petitioner and the Employer's clients will result in any impediment to the Petitioner's ability to represent unit employees. Based upon the foregoing, I find that the Employer has failed to sustain the "considerable burden" it bears in establishing that there is a

“clear and present” danger that the collective bargaining process would be undermined should Petitioner be certified to represent its employees.

### **Ethical Considerations**

The Employer relies upon both the evidence of past conflict and the inherent potential for future conflicts between the Petitioner and its labor union clients. The Employer points to the fact that attorneys may be placed in situations where the conflict between their union membership and their professional duties conflict, or create the appearance of impropriety. The Employer stresses that it is not contending that attorneys should not be represented by labor organizations but, argues rather that, due to the unique circumstances herein, this Petitioner, seeking to represent this particular group of employees, should be disqualified.<sup>11</sup>

In a variety of contexts, the Board has considered whether union representation of employees of law firms create such conflicts so as to deny them representational rights. By and large, the Board has concluded that the potential for such conflicts are not sufficient deny Section 7 rights to such statutory employees.

In *Lumbermen’s Mutual Casualty Co. of Chicago*, 75 NLRB 1132 (1948), the petitioner sought a unit consisting, in part, of attorneys employed by the

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<sup>11</sup> The Employer additionally urges the Board to adopt a rule requiring that unions seeking to represent lawyers and clerical employees in law firms not be affiliated with any labor organization that has a real and present danger of being in organizational and representational conflicts with clients of the firm. In support of this argument, the Employer points to other limits on union representation, in particular those limits imposed by Section 9(b)(3) which bars the Board from certifying a union to represent statutory guards if it is affiliated directly or indirectly with a non-guard union. The Employer also points to the provisions of the FLRA prohibiting employees engaged in administering any provision of law relating to labor-management relations from being represented by a labor organization which represents other individuals to whom such provision applies or which is affiliated directly or indirectly with an organization which represents individuals to whom such provision provides.

employer, an enterprise engaged in the business of issuing casualty insurance policies. A regular and frequent occurrence in the course of this enterprise was settling and litigating claims arising under the insurance. The Employer posited several arguments as to why the attorneys should not be included in any unit, among them that membership in a labor organization would violate the canons of ethics. The Employer pointed to the fact that attorneys were “officers of the court” and holders of a “public trust.” The Board rejected these arguments: “In our opinion the fact that the attorneys sought herein are, like all attorneys, officers of the court and fiduciaries, is not a sufficient basis for denying them the benefits of the Act. Attorneys, in general, including the Employer’s attorneys, are subject to various rules of conduct prescribed by the courts . . . In this situation, the statutory objectives, including the right to collective bargaining, may be achieved despite any limitations imposed upon attorneys by virtue of their status as officers of the court.” 75 NLRB at 1136-37.

In *Foley Hoag and Eliot*, 229 NLRB 456, 458 (1977), which changed long-standing policy and asserted jurisdiction over law firms generally, the Board also made clear that in doing so it had fully considered the possibility of ethical conflicts which might arise when attorneys, or other employees of a law firm, are union members as well:

Chairman Fanning and Members Jenkins and Penello are aware, no less than Members Murphy and Walther, of the privileged and confidential relationship which exists between an attorney and his or her client but would not, based on the mere speculation that in certain unusual situations self-organization of a law firm’s staff employees may in some way conflict with that relationship, treat law firm employees differently than they would treat any other group of employees

covered under the National Labor Relations Act.

229 NLRB at 458 n.12. <sup>12</sup>

As noted above, the Employer contends that due to the particular nature of its enterprise, an exception to the general rule is warranted. In *Stroock & Stroock & Levan*, 253 NLRB 447 (1980), the employer therein contended that, because of its active practice in labor relations matters, and other corporate and commercial areas which encompassed labor considerations, an exemption under the rule of *Foley, Hoag & Eliot* was appropriate. Specifically, the employer argued that representation of its clerical and support staff by the petitioner would inevitably lead to damaging leaks of client confidences and thereby have a detrimental effect on its practice. The Board found that the Employer had not met its burden to justify departure from “the general principle that law firms’ employees will not be treated differently from other groups of employees.” 253 NLRB at 449. An additional argument made in that case, similar to one raised herein, is that the petitioner in question was unsuited to represent its employees due to its affiliation with an international union of general jurisdiction. This argument was rejected by the Board. *Id.*

The Board has had occasion to examine the areas of potential conflict between union membership and the fiduciary and other duties owed to

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<sup>12</sup> Contrary to the Employer’s suggestion, the Board did not mandate a “case by case” approach with respect to the employees of law firms other than the sort that would be appropriate in any other situation involving statutory employees. Members Murphy and Walther advocated a “case by case” approach in determining appropriate bargaining units insofar as they took the position that under certain circumstances attorneys and their employees could be deemed to be acting as “confidential employees,” because they had a role in formulating the labor relations policies of their clients. The Board subsequently held that employees of law firms were not “confidential employees” on this basis. See *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 NLRB 450 (1980).

employers and their clients in other contexts, as well. For example, in *Dun & Bradstreet*, 240 NLRB 162 (1979), the petitioner sought to represent credit reporters. The employer argued that union representation would involve its reporters in an irreconcilable conflict of interest and division of loyalties thereby compromising the confidentiality of information and sources, an absolute prerequisite to its business. The employer argued that, should its employees be accorded representational rights, its ability to assure the confidentiality of the information it collected would be diminished, and there would be a corresponding decrease in the number of firms willing to provide such information, for fear that such information would fall into the hands of a union. The Board rejected these arguments, enunciating the principle that “union membership is not incompatible with an employee’s duty of loyalty owed to his or her employer, even when the duty involves a responsibility to maintain confidentiality.” 240 NLRB at 162 (citing *Foley, Hoag & Eliot*, supra.)

In the instant case, the Employer has failed to present evidence of an actual conflict between the Petitioner and any of its clients. Contrary to the Employer’s assertions, the provisions of the UAW Constitution fail to establish any specific, overriding obligation to support the activities of any other local union, such that members of the Petitioner would be obliged to take positions contrary to the interests of their clients, their employer, the Lawyer’s Code of Professional Responsibility or their ethical duties generally to maintain good standing in the Union. Conversely, the Employer has pointed to no specific constitutional obligation on the part of the Petitioner that would compromise its

ability to represent the interests of the employees in the unit. There is no evidence that the UAW could compel any attorney member to take a specific position with respect to the representation of any of his or her clients, or that it ever has. The arguments which have been presented relating to the possibility for potential conflicts between the Employer's clients and UAW affiliates are, at best, speculative and not grounded in any current situation faced by either the Petitioner or the Employer. In this regard, they can hardly be said to constitute a "clear and present" danger to the collective-bargaining process. Any attorney may, from time to time, find that his or her professional and ethical responsibilities are in conflict, or potential conflict, with that attorney's personal or pecuniary interests. Similarly, it is not uncommon for attorneys to be faced with situations where their clients are in conflict with either each other or other clients of their employer. It is up to those attorneys, and their employers, to make decisions regarding disclosure and other matters related to client representation consistent with their fiduciary duties, their duties as officers of the court and the requirements of the Lawyer's Code of Professional Responsibility. As is apparent from the foregoing, the Board has held that the neither the anticipation of future possible conflicts of interest or the argument that union representation might lead to a breach of fiduciary or other duties is a sufficient basis on which to deny statutory employees their Section 7 rights.

Thus, I cannot conclude that the record supports a departure from the general rule that employees of law firms are entitled to be treated as any other group of employees covered under the National Labor Relations Act and the

“strong public policy favoring the free choice of a bargaining agent by employees.” *Garrison Nursing Home*, supra. Any potential for conflict of interest or compromise of professional ethics inherent in union membership can be considered by employees as they decide to vote for or against union representation. As the Board has held: “[w]e find that the employees are in the best position to decide if representation by the Petitioner will serve their interests and will make that decision by casting their ballots for or against the Petitioner in the representation election.” *CMT, Inc.*, 333 NLRB No. 151 (2001). For the foregoing reasons, I do not find that the record supports a determination that the Employer has met its burden of establishing that the Petitioner should be disqualified from representing the employees herein. Thus, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The Petition seeks an election in a unit of comprised of: all full-time and regular part-time employees, including attorneys, secretaries, legal assistants, receptionists and bookkeepers employed by the employer, excluding all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act. Although the parties agree that the petitioned-for unit is appropriate for the purposes of collective bargaining, they also additionally concur that the attorneys in the petitioned for unit are professional employees. Thus, as professional employees, the attorneys should be given an opportunity to vote on whether they wish to be included in the

petitioned-for unit, or wish to be represented in a separate unit. In light of the foregoing, I therefore find that the following constitutes units that are appropriate for the purposes of collective bargaining:

**UNIT A (Professional Unit)**

Included: All full-time and regular part-time attorneys employed by the Employer.

Excluded: All non-professional employees set forth in Unit B below, and all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act.

**UNIT B (Non-Professional Unit)**

Included: All full-time and regular part-time employees, including secretaries, legal assistants, receptionists and bookkeepers employed by the Employer.

Excluded: All professional employees as set forth in Unit A above and all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act.

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time <sup>13</sup> and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>14</sup> Eligible to vote are those in the unit who were

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<sup>13</sup> Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25<sup>th</sup> and 30<sup>th</sup> day after the date of this Decision.

<sup>14</sup> Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20 of the Board's Rules, requires that the Employer notify the Regional Office at least

employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>15</sup>

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five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

<sup>15</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **June 27, 2003**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Those employees who are in Unit A (Professional Unit) will be furnished a ballot containing the following questions:

Do you wish to be included in the same unit as non-professional employees for the purposes of collective bargaining? (“Yes” or “No”)

Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

Those employees who are in Unit B (Non-Professional Unit) will be furnished a ballot containing the following question:

Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

If a majority of employees in Unit A vote “Yes” to the first question, indicating a choice to be included in the overall unit with the non-professional employees, the professional employees will be so included. The ballots of the professional employees will then be counted with the ballots of the non-professional voting group to decide the representative of the entire unit. If, however, a majority of the professional employees in Unit A do not vote for inclusion, these employees will not be included in the non-professional employee

unit and their votes on the second question will be separately counted to decide whether they wish to be represented in a professional unit. <sup>16</sup>

Dated at New York, New York  
June 20, 2003

(s) **Celeste J. Mattina**  
Celeste J. Mattina  
Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Room 3614  
New York, New York 10278

Code: 339-7575  
385-5050  
355-2260

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<sup>16</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **July 7, 2003**.