May 16, 2016

Hon. John Kline
Chairman
Committee on Education and the Workforce
Washington, DC 20515

Hon. Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
Washington, DC 20515

Dear Honorable Members Kline and Scott:

We write as members of law school faculties with research and teaching experience in Legal Ethics, Constitutional Law and Labor Law to address attorney-client confidentiality concerns that have been raised by members of the legal community to the Department of Labor's (DOL's) Final "Persuader" Rule ("Final Rule" or "Persuader Rule"). The Final Rule implements the disclosure requirements of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) by requiring employers and their hired labor relations consultants to report their agreements under which the consultants agree to, directly or indirectly, persuade employees regarding how they exercise their rights to organize and bargain collectively. For the reasons discussed below, we believe that the reporting regime contemplated by the LMRDA as amended, can coexist comfortably within the lawyer's obligations under the American Bar Association's Model Rules of Professional Conduct (herein, "M.R." or "Model Rules").

<u>The DOL's Persuader Rule Does Not Require Reporting of Arrangements where an Attorney Agrees to Exclusively Provide Legal Advice to Clients.</u>

The LMRDA's reporting regime has always accommodated attorneys' professional responsibility concerns when attorney-client communications were potentially subject to disclosure. For example, it is undisputed that Section 204 of the LMRDA expressly exempts the reporting of any "information which was lawfully communicated to such attorney by any of his clients." 29 U.S.C. § 434 (2012). Further, several circuit courts of appeal have seen no conflict between LMRDA's reporting requirements and the attorney-client privilege.[1]

[1] *See, e.g., Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) (upholding LMRDA's reporting requirements for attorneys engaged in persuader activity and noting that, "[i]n general, the fact of legal consultation or employment, clients' identities, attorneys' fees, and the scope and nature of employment are not deemed privileged"); *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), rev'd in part on other grounds, *Price v. Wirtz*, 412 F.2d 647 (1969) (same); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965) (same) .

The DOL's Final Rule is Consistent with the Model Rules of Professional Conduct.

There is no conflict between the LMRDA's regulatory regime administered by the DOL and the ethical responsibilities of lawyers. In the comment of the American Bar Association, filed with the DOL on September 21, 2011, the ABA argued that the proposed Persuader Rule was inconsistent with Model Rule 1.6 which prevents attorneys from disclosing confidential information. Even when an attorney engages in persuader activities and must report those activities under the Final Rule, however, there is no conflict between the Persuader Rule and legal ethics rules because the current version of the Model Rules contains several possible exceptions to the attorney's ethical duty of confidentiality. The language of ABA Model Rule 1.6(a) is broad in terms of the material possibly covered by the attorney's ethical duty of confidentiality, as it applies to all "information relating to the representation of a client." M.R. 1.6(a). For decades, though, the ABA has gradually added exceptions to the confidentiality rule.

Indeed, current Model Rule 1.6(b)(6) was added to the rules in 2002, and protects attorneys from discipline if they disclose certain client information to comply "with other law or court order." M.R. 1.6(b)(6). Therefore, the Model Rule clearly contemplates the disclosure of confidential information to comply with a law such as the LMRDA. To date, forty-nine states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules.[2]

There are many other laws that require certain disclosures by attorneys when they engage in certain activities on behalf of a client, including the Lobbying Disclosure Act (LDA) of 1995. Lobbying disclosure reports require much of the same information as on the forms that are at issue here, including the names of clients and payments. Both lawyers and non-lawyers alike are subject to the reporting requirements of the LDA, which has never been successfully challenged in over 20 years in effect. There are numerous other examples of similar reporting regimes that have been enacted over the last several decades, with little evidence that attorneys are being chilled from fulfilling their duties to clients.

Conclusion

In sum, we believe the Department of Labor has not placed attorneys who engage in persuader activity between a labor law rock and a legal ethics hard place. Please let us know if you have any questions or concerns for us.

[Signatures to follow on next page: Titles and affiliations are for identification purposes only.]

[2] The State Bar of California has not adopted the ABA Model Rules, but the "other law" exception is also in the California Rules of Professional Conduct. *See* CRPC 3-100 n.2 (attorney may not reveal information "except as authorized or required by, the State Bar Act, these rules, *or other law*") (emphasis added). The California courts have followed the ABA rules in numerous instances. *See*, *e.g.*, Cho v. Superior Court, 39 Cal. App. 4th 113 (1995); Goldberg v. Warner/Chappell Music, 125 Cal. App. 4th 752 (2005).

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