Statement

By

Wm. T. (Bill) Robinson III
Attorney at Law
Member, Frost Brown Todd LLC

President (2011-12)
American Bar Association

Before the
Subcommittee on Health, Employment, Labor and Pensions
House Education and the Workforce Committee

April 27, 2016

Hearing on

The Department of Labor New Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of "Advice" Exemption

7310 Turfway Road | Suite 210 | Florence, KY 41042-1374 | 859.817.5900 | **frostbrowntodd.com**
Offices in Indiana, Kentucky, Ohio, Pennsylvania, Tennessee, Texas, Virginia and West Virginia

Introduction.

Good morning Chairman Roe, Ranking Member Polis, and distinguished members of this Subcommittee. Thank you for this opportunity to testify before you on a subject of such great importance to the Rule of Law in this country. It is a privilege for me to express for your consideration my intense concerns over the Department of Labor's new Rule redefining what attorney communications constitute "advice" to their clients within the meaning of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982).

I am Bill Robinson. From September 1, 2011 through August 31, 2012, I had the honor and privilege of serving as President of the American Bar Association. I want to make it clear, however, that in this Statement, I speak only for myself and not for the ABA. Many bar associations across the nation have also spoken out in opposition to the new Rule. I provide a list of those bar associations in **Attachment A** to these comments.

As you know, the Department of Labor first issued an earlier version of the new Rule that is the subject of this Hearing, on June 21, 2011. At that time, the ABA very carefully studied the Rule as proposed and concluded that the Rule would undermine fundamental legal and ethical principles that have made the American judicial system the gold standard for the administration of justice throughout the world. Although the Department has now made some minor, cosmetic changes to the Rule as originally proposed, the new Rule still retains the provisions of its original version that were of such great concern to the American Bar Association in 2011.

On September 21, 2011, as President of the American Bar Association, I wrote to the Department of Labor on behalf of the ABA. I have provided to you a copy of that letter as **Attachment B** to these comments. That letter explains why the ABA reacted publicly with such "serious concerns" about the Rule in September, 2011. That letter at the time, reflected ABA policy going back to 1959 and still represents ABA policy to this day with regard to the importance of client-attorney confidentiality as the cornerstone of the Rule of Law.

As you know, a member of your Subcommittee, Representative Bradley Byrne, has already introduced a resolution under the Congressional Review Act (H.J.Res.87) that would reverse the new DOL Rule due to a variety of legal and public policy objections to the new Rule. Moreover, litigation has been filed in at least three federal courts across the country challenging the legality of the new Rule on many legal grounds. I am not, myself, an expert on administrative law or labor law. Nor do I offer expertise in labor-management relations. I am here primarily because of the new Rule's destructive impact upon the confidential relationship between attorneys and their clients that is so essential to the American system of justice. I, therefore, focus this Statement primarily on the new Rule's attack on client attorney confidentiality in labor relations matters.

From my perspective, the new Rule is not a labor-management matter. I am not here to choose sides in a labor dispute. What is before this Subcommittee is essentially an attorney-client matter involving the essential ingredient for effective legal advice - i.e., client attorney confidentiality - to assure compliance with the law and avoidance of non-compliance. I speak as an individual attorney in my 45th year of law practice with knowledge of the ABA's Model Rules of Professional Conduct. The confidentiality of attorney client communications ensures that the citizens of the

United States, including the corporate managers of businesses, large and small, have the effective assistance, guidance and needed advice of counsel. Without the effective, confidential advice of legal counsel, our system of justice would fail to effectively serve our society and respect for the Rule of Law would melt away. This has been true throughout the history of the United States. It remains true today.

"Confidentiality of Information" Required by Rules of Professional Conduct and the Law.

Client confidential communications with their lawyer are protected by the ethical rules applicable to lawyers. The American Bar Association adopted the Model Rules of Professional Conduct in 1983. Those rules have served as models for the lawyer ethics rules of most states today. Similar rules requiring lawyers to maintain clients' confidences were set forth in the Model Code of Professional Responsibility adopted by the ABA in 1969 and the Canons of Professional Ethics adopted by the ABA in 1908. Model Rule 1.6 prohibits lawyers from revealing any information relating to the representation of a client, unless the client gives informed consent, or certain narrow exceptions exist. In adopting the rule, the ABA House of Delegates recognized that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." ABA Model Rule of Professional Conduct 1.6, cmt. 2.

Client attorney confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship." *Id.* The rule of confidentiality is important not only for clients and their lawyers, but for society as a whole. Protecting communications between lawyers and their clients encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.* Only if a lawyer has complete and candid information from a client is the lawyer able "to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." *Id.*

The Model Rules of Professional Responsibility, Rule1.6, protects as confidential, communications between a lawyer and a client. Moreover, in litigation and other contested proceedings, all communications between lawyer and client enjoy privileged confidentiality. Those rules of client-attorney confidentiality are a matter of ethical responsibility. The privilege of client attorney confidentiality associated with litigation is essential to the proper functioning of the American legal system. They ensure that clients can obtain the advice they need to fulfill their legal obligations. The best interests of clients, not lawyers, are the overriding concern and focus at stake here.

Historically, the attorney-client confidentiality and privilege has deep roots in Anglo-American law. The privilege is first mentioned in the English case *Berd v. Lovelace*, which was decided in 1577—thirty years before the settlement of Jamestown. 21 Eng. Rep. 33 (1577). The doctrine of confidentiality continued to develop and, in the nineteenth century, an English court held that "[t]he first duty of an attorney is to keep the secrets of his clients." *Taylor v. Blacklaw*, 132 Eng. Rep. 401, 406 (C.P. 1836). The attorney-client privilege is also well established in American law. The Supreme Court has recognized that "[t]he attorney-client privilege '[i]s the oldest of the privileges for confidential communications.'" *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Attorney-client confidentiality and privilege continues to be a vital doctrine in American law not simply because of its deep roots in our legal system, but also because it ensures the proper functioning of our system of justice. As our Supreme Court has explained, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The American legal system preserves the confidentiality of client communications because without confidentiality, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Attorney-client confidentiality is more about the client that about the lawyer. The client's need to receive confidential advice about what not to do, is an essential aspect of effective legal advice.

The New Rule Will Undermine the Confidential Attorney-Client Relationship.

For over 50 years, the Department of Labor has interpreted Section 203(c) of the Act, 29 U.S.C. § 433(c), generally referred to as the "Advice Exemption," as excluding from regulation under the Act all communication between attorneys and their employer-clients. **The Act's regulation** and public exposure **of attorney communications** on the subject of labor relations **arose only where a lawyer communicated directly to the client's employees**. The Department of Labor announced this interpretation of the Advice Exemption during the administration of President John F. Kennedy. Senator Kennedy had co-sponsored the Act including the Advice Exemption.

The Kennedy Administration's understanding of the Advice Exemption faithfully follows the language and purpose of Section 203(c) of the Act itself, which plainly states:

> Nothing in this Section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his **giving or agreeing to give advice to such employer** or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c) (emphasis added.). The new Rule however, will effectively strike from the Advice Exemption its most fundamental, essential provision: namely, confidentiality for an attorney's advice to an employer client concerning the employer's labor relations. Through this means, the new Rule would essentially nullify and render meaningless the statutory "Advice Exemption" that Congress expressly included within Section 203 of the Labor-Management Reporting and Disclosure Act. It would set a trap for attorneys whose responsibility it is to advise members of an entire class of clients – every person and business creating jobs in America.

The new Rule will comprehensively circumvent and effectively undermine the Advice Exemption by imposing a limitation on the very purpose and scope of attorney client legal advice that for over 50 years has qualified for the statutory Advice Exemption. **The new Rule** is so broad and ambiguous that it, in effect, **will administratively erase the statutory Advice Exemption**. No longer will a **bright line** make clear who is in compliance and who is in violation. And in the face

of any charge brought for alleged violation of the new Rule, a defense would require disclosure of confidential client attorney communications in order to mount a defense.

Under the new Rule, otherwise legal advice in compliance with the statue itself, will now actually trigger administrative disclosure under the LMRDA ...even though that advice is offered only to the attorney's client … in all instances where the advice of the lawyer furthers the employer client's "object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions concerning his or her representation or collective bargaining rights." I'm quoting directly from the "Instructions for Form LM-20," attached to the Proposed Rule. Form LM-20 is one of two forms that the Proposed Rule would require attorneys to complete and file with the Department of Labor, as a means for the DOL to review and regulate attorney client advice and communications.

As indicated earlier, I do not practice labor relations law. Nevertheless, one does not have to be a labor lawyer to recognize that the proposed Rule's regulation of all attorney client communications that contain any "object to persuade" or "affect an employee's decisions" takes away, as a practical matter, the Advice Exemption's most basic protection – the confidentiality of attorney-client communications. Attorneys responsible for representing employers are not law professors opining about hypothetical legal questions. The role of attorneys representing employer clients, like the role of all lawyers, includes the responsibility to advise and assist their clients on how to lawfully achieve the client's lawful goals. Similarly, a labor lawyer's responsibility includes counseling clients against unlawful goals and against unlawful means of pursuing even lawful goals. Few workplace decisions or communications are made in a vacuum without some concern for how employees may react. Thus, from what my labor law partners tell me, whenever a labor lawyer is consulted by management about any proposed workplace action, strategy, issue or communication, one dimension of any management decision that the attorney must consider is whether and how the employer can or possibly would, directly or indirectly, thereby "persuade" employees to react favorably.

The DOL's new Rule focuses much emphasis on employee decisions as to whether to choose union representation. However, neither the DOL, nor anyone else to my knowledge, has suggested that it is either unlawful or unethical for an employer to seek to persuade its employees on the advantages or disadvantages of being represented by a union, or a particular union, provided that the employer pursues this "object to persuade" within lawful bounds as established by the National Labor Relations Act. Employers, small businesses and large corporations alike, must look to their legal counsel to insure they stay within the bounds of the law. It is unrealistic, if not disingenuous, however, to suggest that a labor lawyer can effectively help her/his client pursue this lawful objective by giving "legal advice" divorced from the client's lawful objective.

The scope of the proposed Rule, moreover, extends far beyond union organizing campaigns and even into the entire field of "labor relations." Employees who are not represented by a union are always free to choose union representation. Almost every workplace action or communication can influence this decision in that regard. So, employers (and their lawyers) desirous of avoiding unions are always cognizant of how their management actions and communications may potentially impact this objective. On the other hand, employees represented by a union choose whether to support or oppose their union's collective bargaining proposals, contract administration, handling of grievances, and all other aspects of collective bargaining. Union members express their preference through ratification votes, election of union officers, and at

union meetings. Union officials must listen to the opinions of their members or they are soon replaced. Any employer who seeks harmonious labor relations must take into account how the union and its members will react to workplace actions and communications.

Accordingly, almost every management objective of an employer includes, directly or indirectly, some "object to persuade" employees to support, or at least accept, the employer's actions. A labor lawyer cannot, as a practical matter, divorce her/himself from consideration of how the lawyer's advice furthers or detracts from her/his client's lawful objectives. Less than this is not effective assistance of counsel. In providing advice, a labor lawyer can no more separate legal advice from her/his client's "object to persuade" than a lawyer drafting a Last Will and Testament can separate probate and tax advice from the client's objectives in disposing of his or her property.

The New Rule's Enforcement Will Negate the Confidentiality of Legal Advice on Labor Relations Law, Thus Hurting Legal Compliance.

Especially troubling is the ethical dilemma created by enforcement of the new Rule. How can and will the Department of Labor enforce its new Rule? How can labor relations attorneys defend against accusations by DOL that they have violated the new Rule? There is only one answer. To enforce the new Rule, the Department of Labor will have to inquire into all advice and communications passing between the lawyer and her/his client on the subject of labor relations, and perhaps other employment-related topics.

The DOL will have to examine whether the client asked her/his attorney to consider the relative persuasive impact of two equally lawful courses of action or communication. What was in the lawyer's mind when she/he made a particular recommendation, or prepared, approved, or recommended a change to a particular document? Did the lawyer in any way join in her/his client's "object to persuade" employees to accept the employer's proposals or somehow "affect an employee's decisions" in collective bargaining, or decide for or against union representation? What did the client communicate to the lawyer about the purpose of a particular employment policy, practice, rule, or benefit that the attorney is asked to review? Did the client ask for, and did the lawyer opine about, her/his experience or opinion on whether a particular communication or action under consideration might, directly or indirectly, have any "persuasive" impact upon employees?

The breadth of the proposed Rule opens up to public and administrative disclosure and scrutiny virtually every confidential, attorney-client communication with management on the subject of labor relations since virtually every attorney client communication about labor-relations *could* involve the lawyer in her/his client's "object to persuade" the client's employees or somehow "affect an employee's decisions." Will the genuine risk and potential that client communications will have to be disclosed to the Department of Labor restrict and compromise what some clients will disclose to their attorneys? Of course it will. Will this cause some employers to risk proceeding with some actions or communications without the benefit of legal counsel? Only the naïve would suggest otherwise. The result will be far less compliance, and less rule of law.

The employers most effected will be the many, many small businesses that provide the largest share of jobs in the United States. Large corporations may be able to turn to their own in-house legal departments for legal advice on labor relations issues. As employees of their client, in-house

counsel are not subject to proposed Rule. The large corporations that they advise trigger no reporting requirement when they consult their in-house counsel, and face to risk that their confidential communications with their in-house lawyer will have to be disclosed to the Department of Labor.

Small businesses, on the other hand, will have no such option. Their dilemma will be to either act without legal advice, or take the risk that any legal question they ask, and any action they disclose, to their outside legal counsel will ultimately have to be disclosed to the Department of Labor. In short, the right of small business to receive confidential legal advice on labor relations matters will be gone.

Conclusion

The ends of justice and the Rule of Law are never well-served when lawyers and their clients cannot communicate with full candor and complete confidence in the confidentiality of their communications. The new DOL administrative Rule undermines, in the reality of every day labor relations, the critically important confidentiality that is the *sine qua non* of effective attorney-client communications. Moreover, if the new Rule stands, there is little reason to assume that other governmental agencies, at the federal or state level, will not similarly infringe upon the confidentiality of attorney-client communications with arguments similar to those advanced in support of this new DOL Rule.

Could not law enforcement agencies argue that they could better identify and suppress criminal activity if criminal defense attorneys had to report the identity of their clients and the amount of fees paid whenever an attorney is consulted with a particular lawful, but disfavored, "object" in view? Under other circumstances, and perhaps under future administrations, the precedent set by this new DOL Rule not only may, but is likely to, yield consequences unforeseen and unforeseeable today.

What is certain now is that this new DOL Rule will comprehensively undermine and effectively erase the time-honored purpose and historically protected value of attorney client confidentiality. Attorney client confidentiality has been recognized and respected for over 50 years under the MLRDA. Attorney client confidentiality has been consistently upheld "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

This new DOL administrative Rule must be defeated. The new Rule must not be allowed to wipe out the statutory Advice Exemption that Congress expressly, purposefully and explicitly included in Section 203 of the Labor Management Reporting and Disclosure Act. As mentioned earlier, a Joint Resolution that would defeat the new DOL Rule now at issue before this Subcommittee has already been introduced in the House of Representatives by Congressman Byrne. Your support and vote for H.J.Res.87 and for all other legislative efforts to defeat this new DOL Rule is respectfully requested. The Rule of Law in labor relations matters hangs in the balance.

Thank you again for this opportunity to address you on this very important subject. It is an honor and a privilege for me to be called as a witness before this Subcommittee.

Exhibit A

BAR ASSOCIATIONS OPPOSING THE DEPARTMENT OF LABOR PROPOSED RULE NARROWING THE "ADVICE" EXEMPTION TO THE "PERSUADER ACTIVITIES" RULE

National and Specialty Bar Associations:

American Bar Association

Association of Corporate Counsel

Ohio Management Lawyers Association

State and Local Bar Associations:

State Bar of Arizona

Broome County (NY) Bar Association

Cleveland (OH) Metropolitan Bar Association

The Florida Bar

State Bar of Georgia

Illinois State Bar Association

State Bar of Michigan

The Missouri Bar

The Mississippi Bar

Nebraska State Bar Association

Ohio State Bar Association

Peoria County (IL) Bar Association

South Carolina Bar

Tennessee Bar Association

Westchester County (NY) Bar Association

The West Virginia State Bar

Exhibit B

Wm. T. (Bill) Robinson III
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
abapresident@americanbar.org

Defending Liberty
Pursuing Justice

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations & Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, D.C. 20210

Re: Department of Labor Proposed Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption; RIN 1215-AB79 and 1245-AA03, 76 Fed. Reg. 36178 (June 21, 2011)

Dear Mr. Davis:

On behalf of the American Bar Association ("ABA"), I write to express our serious concerns over the above-referenced proposed rule (the "Proposed Rule") that would substantially narrow the U.S. Department of Labor's ("Department") longstanding interpretation of what lawyer activities constitute "advice" to employer clients and hence are exempt from the extensive reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982). By expressing concerns over the Proposed Rule and urging the Department to reconsider, the ABA is not taking sides on a union-versus-management dispute, but rather is defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients.

As more fully explained below, the Department's current broad interpretation of the advice exemption—which excludes lawyers from the Act's "persuader activities" reporting requirements when they merely provide advice or other legal services directly to their employer clients but have no direct contact with the employees—should be retained with respect to lawyers and their employer clients[1] for several important reasons. In particular, we support the current interpretation of the advice exemption and oppose the Department's Proposed Rule to the extent it would apply to lawyers representing employer clients because:

- The Department's longstanding interpretation of the "advice" exemption provides a useful, bright-line rule that is consistent with the actual wording of the statute and Congress' intent,

[1] Although the ABA supports the Department's traditional broad interpretation of the advice exemption with respect to lawyers providing advice and other legal services to their employer clients, the ABA takes no position on the Department's proposed narrowing of the advice exemption as applied to non-lawyer labor consultants providing persuader services to employers. Unlike labor lawyers, non-lawyer labor consultants have no confidential relationship with their employer clients and are not subject to the extensive state court regulation and disciplinary authority that covers all licensed attorneys.

while the new proposed interpretation would essentially nullify the advice exemption contained in the statute and thwart the will of Congress;

- The Department's Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule;

- The Proposed Rule could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel; and

- The scope of the information that the Department's Proposed Rule would require lawyers engaged in direct or indirect persuader activities to disclose encompasses a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor.

To avoid these negative consequences, the ABA urges the Department to preserve its existing, well-established interpretation of the advice exemption under Section 203(c) with respect to lawyers representing employer clients and continue to exempt lawyers from the disclosure requirements of Section 203(b) when they provide advice or other legal services to their employer clients designed to help the employer to lawfully persuade employees as to unionization issues but the lawyers do not directly contact the employees to persuade them regarding these issues.

The Department's Proposed Changes to the "Advice" Exemption

Under Section 203(b) of the LMRDA, employers and labor relations consultants are required to file periodic disclosure forms with the Department describing any agreements or arrangements with employers where the object is directly or indirectly to (1) "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing..." or (2) "supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in connection with an administrative or arbitral proceeding or a criminal or civil judicial proceeding."[2] Section 203(a) imposes a similar reporting requirement on employers that have entered into these agreements or arrangements.[3]

Section 203(c) of the statute, however, contains the following broad "advice" exemption:

> Nothing contained in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer...[4]

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[2] See LMRDA, Section 203(b), 29 U.S.C. § 433(b).
[3] See Section 203(a), 29 U.S.C. § 433(a)(4).
[4] Section 203(c), 29 U.S.C. § 433(c).

In addition, Section 204 of the LMRDA specifically exempts lawyers from having to report "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."[5] The Department has acknowledged that this provision exempts lawyers from disclosing any information protected by the attorney-client privilege and that the provision demonstrates Congress' intent "to afford the attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal counsel and an attorney."[6] Similarly, the courts have found that in adopting Section 204, Congress intended to accord the same degree of privilege as that provided by the common law attorney-client privilege.[7]

Over the years, both the federal courts and the Department have noted that a "tension" exists between the broad coverage provisions of Section 203(b) of the LMRDA requiring disclosure of persuader activities and the Act's broad exemption for "advice."[8] Since at least 1989, however, the Department has broadly interpreted the "advice" exemption under Section 203(c) to generally exclude from the rule's disclosure requirements any advice or materials provided by the lawyer or other consultant to the employer for use in persuading employees, so long as the consultant has no direct contact with the employees.[9] This interpretation had its origins in the Department's previous 1962 interpretation of the rule contained in the so-called "Donahue Memorandum."[10] The Department also has long taken the position that when "a particular consultant activity involves both advice to the employer and persuasion of employees" but the consultant has no direct contact with the employees, the 'advice' exemption controls.[11]

In its Proposed Rule, the Department has proposed major changes to its longstanding interpretation and application of Section 203 that would require lawyers who both provide legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports, even if the lawyer has no direct contact with the employees. These reports, in turn, would require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The lawyers also would be required to report detailed information regarding the *legal fees paid by all of the lawyers' employer clients, and disbursements made by the lawyers, on account of "labor relations advice or services" provided to any employer client, not just those clients who were involved in persuader activities.*

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[5] See Section 204, 29 U.S.C. § 434.
[6] See Proposed Rule, 76 Fed. Reg. at 36192.
[7] See, e.g., *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1216-1219 (6th Cir. 1985).
[8] See, e.g., *International Union, UAW v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989). See also generally, Memorandum from Charles Donahue, Solicitor of Labor, to John L. Holcombe, Commissioner, Bureau of Labor-Management Reports (February 19, 1962) ("Donahue Memorandum"); and Memorandum from Mario A. Lauro, Jr., Acting Deputy Assistant Secretary for Labor-Management Standards (March 24, 1989) ("Lauro Memorandum"), Proposed Rule, 76 Fed. Reg. at 36180-36181.
[9] See Lauro Memorandum, cited in the Proposed Rule, 76 Fed. Reg. at 36181.
[10] See Proposed Rule at 36181, referencing the Donahue Memorandum.
[11] Id. at 36191.

The ABA's Concerns Regarding the Department's Proposed Rule

The American Bar Association opposes the Department's proposal to narrow the traditional scope of the "advice" exemption, which would have the effect of requiring many lawyers and their employer clients to report sensitive and confidential client information that has not previously been subject to disclosure[12]. Instead, the ABA urges the Department to retain the current, longstanding interpretation of the exemption with regard to lawyers who provide advice and other legal services directly to employer clients but have no contact with employees, for several important reasons.

1. The Department's longstanding interpretation of the "advice" exemption provides a useful, bright-line rule that is consistent with the actual wording of the statute and Congress' intent, while the new proposed interpretation would essentially nullify the advice exemption contained in the statute and thwart the will of Congress

The Department's longstanding interpretation of the advice exemption is much more consistent with the plain language of the LMRDA and with Congress' intent in adopting the statute than the new interpretation outlined in the Proposed Rule. While the overall purpose of the Act was to require those acting as "persuaders" to publicly disclose these activities, the main purpose of Section 203(c) dealing with "Advisory or Representative Services" was to exempt lawyers who provide legal advice to their employer clients or represent them before a court, administrative agency or arbitration tribunal. As the Sixth Circuit further explained in the case of *Humphreys, Hutcheson and Moseley v. Donovan*,[13] "the majority of courts...[have found] the purpose of Section 203(c) is to clarify what is implicit in Section 203(b)—that attorneys engaged in the usual practice of labor law are not obligated to report under Section 203(b)."[14] Therefore, the key issue in determining whether a lawyer is subject to the Act's reporting requirements is whether the lawyer is acting as a persuader or whether

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[12] For over 50 years, the ABA has opposed measures similar to the Department's Proposed Rule. In 1959, the ABA House of Delegates adopted a formal resolution which provided in pertinent part as follows:

> *Resolved*, That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, including but not limited to the existence of the relationship of attorney and client, the financial details thereof, or any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law...

While the Proposed Rule that is now under consideration is only designed to increase the obligations of *employer-side* labor lawyers—and not *union-side* labor lawyers—to report confidential client information to the Department, the ABA would be equally opposed to any similar future attempt by the Department or any other agency to force union-side lawyers to disclose any confidential client information.

[13] *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985).

[14] Id. at 1215 (agreeing with precedents issued by the 5th and 4th Circuits regarding Congress' intent with respect to Section 203(c) of the LMRDA). Although *Humphreys* Court concluded that the attorney plaintiff in the case, who was making speeches directly to employees urging them to vote against union representation, was acting as a persuader and must file disclosure reports, it added that attorneys engaged in the usual practice of labor law and confining themselves to the activities of Section 203(c) need not report under the statute. Id. at 1216.

the lawyer is providing legal advice or otherwise engaged in the practice of law.[15]

For many years, the Department has distinguished between lawyers who are subject to the Act because they engage in direct persuasion activities—such as personally meeting with, speaking to, or writing to employees in an effort to persuade them regarding labor organization issues—and lawyers who are exempt because they have no direct contact with employees but merely provide advice and other legal services to their employer clients, even if an object of that advice is employee persuasion.[16] At least one federal circuit has approved of this approach as a reasonable and rational interpretation of Congress' intent with respect to the scope of the advice exemption under the Act.[17]

The Department's traditional broad interpretation of the "advice" exemption"—which exempts lawyers who provide legal advice or other legal services *to help their employer clients to persuade employees* but have *no direct contact with employees*—is entirely consistent with the plain wording of the statute and with Congress' intent as explained above. When an employer retains a lawyer to advise and assist the employer in its disputes with its employees, including with regard to helping the employer to persuade employees as to organizational rights, the lawyer will ordinarily be asked to provide legal advice and other legal services to the employer that constitute the practice of law. So long as the lawyer limits his or her activities to providing advice and materials directly to the employer client and does not contact the employees directly, the Department should continue to deem these legal services to be exempt "advice" or "representation" under Section 203(c), and not reportable "persuader activity" under Section 203(b) of the statute.

The ABA also submits that the Department's traditional broad interpretation of the advice exemption as applied to lawyers representing employer clients provides an appropriate and rational bright-line test that harmonizes the broad coverage of the persuader activities rule in Section 203(b) with the equally broad advice exemption in Section 203(c) far better than the Department's new proposal. Section 203(c) clearly contemplates that at least some of the "advice" that a lawyer provides to the employer client will be designed to help the employer to persuade employees on unionization issues. This is self-evident because if all of the lawyer's advice to the employer client were unrelated to persuader activities, it would not be covered by the statute at all, with or without an advice exemption, and no exemption would be needed.

The Department's current bright-line test—which exempts lawyers from the rule when they provide advice or other legal services to their employer clients that helps *the employer* to persuade employees on unionization issues so long as the lawyer has no direct contact with the employees—preserves the effectiveness of both Section 203(b) and Section 203(c). The current test ensures the vitality of both sections in the statute by exempting those lawyers who only advise their employer clients how the

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[15] As the Sixth Circuit noted in the *Humphreys* case, "Congress recognized that the ordinary practice of labor law does not encompass persuasive activities." Id. at 1216, fn. 9. Similarly, the Fourth Circuit has noted that Congress directed the "persuader" disclosure requirement in the Act to labor consultants, whose work is not necessarily a lawyer's, and that while clients can direct lawyers to perform persuader activities, "for a legal advisor it would be extracurricular." Id.

[16] See footnote 8, *supra.*

[17] See, e.g., *International Union*, 869 F. 2d at 617-619. As the Sixth Circuit notes in footnote 3 of *International Union,* each of the leading federal court decisions cited by the district court merely confirm a lawyer's obligation to report when engaging in direct persuasion activities with employees and do not address the threshold issue, as the Sixth Circuit does, of how to characterize activity not involving direct employee contact that can be viewed as both persuasion and advice.

clients can persuade employees on unionization issues, or who both advise their clients and provide other legal services designed to help the clients persuade employees, while subjecting other lawyers to the statute's disclosure requirements when they engage in direct persuader activities by contacting the employees.

Conversely, if the Department's new proposed interpretation of the advice exemption were adopted and a lawyer who only gives advice to an employer client in connection with the client's persuader activities, or who gives advice and provides other legal services in support of the client's persuader activities, were nonetheless subjected to the Act's disclosure requirements, the advice exception in Section 203(c) would be effectively written out of the statute and the Department's persuader activities rule. The ABA urges the Department to resist such an illogical interpretation that would nullify the advice exception and thereby clearly thwart the will of Congress.

2. The Department's Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA rule

The ABA also is concerned that by requiring lawyers to disclose confidential client information to the government regarding the identity of the client, the nature of the representation, and details concerning legal fees, the Proposed Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule.[18] ABA Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent..." or unless one or more of the narrow exceptions listed in the Rule is present.[19]

The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential.[20] This category of non-privileged, confidential client information includes the identity of the client as well as other information related to the legal

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[18] See ABA Model Rule of Professional Conduct 1.6, and the related commentary, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html
See also Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules, available at http://www.americanbar.org/groups/professional_responsibility/policy.html.

[19] Although ABA Model Rule 1.6(6) allows a lawyer to disclose confidential client information "to comply with other law or a court order," nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government. On the contrary, Section 204 of the statute expressly exempting "information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship" suggests that Congress recognized and sought to protect the ethical duty that lawyers have to protect client confidences.

[20] See, e.g., Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency).; Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret).

representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer. Because the Department's Proposed Rule would require every lawyer who directly or indirectly engages in any persuader-related activities in the course of representing an employer client to disclose the identity of their clients, the nature of the representation, the fees received from the clients and other confidential client information, the proposal is clearly inconsistent with lawyers' existing ethical duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.

3. The Proposed Rule could seriously undermine both the confidential client-lawyer relationship and the employers' fundamental right to counsel

The ABA also is concerned that the application of the Proposed Rule to lawyers engaged in the practice of law will undermine both the confidential client-lawyer relationship and employers' fundamental right to counsel. Lawyers for employer companies play a key role in helping these entities and their officials to understand and comply with the applicable law and to act in the entity's best interest. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the company's officers, directors, and other leaders, and the lawyers must be provided with all relevant information necessary to properly represent the entity. In addition, to maintain the trust and confidence of the employer client and provide it with effective legal representation, its lawyers must be able to consult confidentially with the client. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice.

By requiring lawyers to file detailed reports with the Department stating the identity of their employer clients, the nature of the representation and the types of legal tasks performed, and the receipt and disbursement of legal fees whenever the lawyers provide advice or other legal services relating to the clients' persuader activities, the Proposed Rule could chill and seriously undermine the confidential client-lawyer relationship. In addition, by imposing these unfair reporting burdens on both the lawyers and the employer clients they represent, the Proposed Rule could very well discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.

4. The scope of the information that the Department's Proposed Rule would require lawyers engaged in direct or indirect persuader activities to disclose encompasses a great deal of confidential financial information about clients that has no reasonable nexus to the persuader activities that the Act seeks to monitor

Finally, the ABA is concerned with the overly broad scope of the information that the Department's Proposed Rule would require lawyers and law firms who are engaged in direct or indirect persuader activities to disclose on a periodic basis. The Proposed Rule provides that when a lawyer or law firm enters into an agreement with an employer to engage in direct or indirect persuader activities, the lawyer or law firm will be required to fill out both Form LM-20 ("Agreement & Activities Report") and the related Form LM-21 ("Receipts and Disbursements Report"). Form LM-21 then requires all lawyers and law firms engaging in persuader activities to disclose all receipts of any kind received from all employer clients "on account of labor relations advice or services" and disbursements made in connection with such services, not just those receipts and disbursements that are related to

persuader activities.[21]

The scope of this disclosure requirement compels the disclosure of a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. In particular, the proposed disclosure requirement is excessive to the extent it would require lawyers who engage in any direct or indirect persuader activities to report all receipts from and disbursements on behalf of *every employer client* for whom the lawyers performed any "labor relations advice or services," not just those employer clients for whom persuader activities were performed.

No rational governmental purpose is served by this overly broad requirement. By analogy, while law firms and lawyers who lobby Congress on behalf of clients must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying, the Clerk and the Secretary would never presume to require a law firm or lawyer to disclose extensive information regarding all of their other clients to whom they give advice on governmental issues, but for whom they are not registered lobbyists. Moreover, by discouraging lawyers and law firms from agreeing to represent employers, the overly broad financial disclosure requirement in the Proposed Rule also might have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities in response to union organizing campaigns and concerted, protected conduct by employees.

In our view, these required disclosures proposed by the Department are unjustified and inconsistent with a lawyer's existing ethical duties under Model Rule 1.6 (and the related state rules) not to disclose confidential client information absent certain narrow circumstances not present here. Lawyers should not be required, under penalty of perjury, to publicly disclose confidential information regarding such clients who have not even engaged in or requested the persuader activities that the statute seeks to address. The ABA also concurs with the Eighth Circuit Court of Appeals that it is "extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)." *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985)

Conclusion

For all these reasons, the ABA urges the Department to reaffirm its longstanding interpretation of the advice exemption under Section 203(c) of the Act with respect to lawyers engaged in the practice of law and continue to exempt such lawyers and law firms from the disclosure requirements of Section 203(b) when they merely provide advice or other legal services to their employer clients in connection with the employer's persuasion activities and the lawyers have no direct contact with the employees. In addition, for those lawyers and law firms that engage in direct persuader activities and are therefore subject to the disclosure requirements of Section 203(b) under the Department's longstanding interpretation of the rule, the ABA urges the Department to narrow the scope of the information that must be disclosed under Form LM-21 so that disclosure is required only for those

[21] See Instructions for Department of Labor Form LM-21, at pages 3-5.

receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the Proposed Rule or our suggestions for modifying the proposal, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,

Wm. T. (Bill) Robinson III