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BEFORE THE SUBCOMMITTEE ON HEALTH, EMPLOYMENT,

LABOR AND PENSIONS

UNITED STATES HOUSE OF REPRESENTATIVES

Hearing entitled "The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice."

APRIL 27, 2016

I appreciate the opportunity to appear before the Subcommittee and express my views on the Department of Labor's Final Rule on the Interpretation of the Advice Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"). 81 Fed. Reg. 15924-16051 (March 24, 2016) ("Rule" or "Persuader Rule").

I am a shareholder in the law firm of Sherman, Dunn, Cohen, Leifer & Yellig, P.C. in Washington, D.C., and I am appearing today in my individual capacity. My firm's practice is dedicated exclusively to representing labor unions and their affiliated organizations. We represent unions across a wide array of industries, including construction, public utilities, telecommunications, manufacturing, broadcasting, government contracting, professional sports, as well as building security. Our clients include international offices of large labor organizations, as well as small local unions.

I have been a member of the bar since 1994, first in Ohio and then in the District of Columbia. My entire career has been spent as a labor lawyer, and I have always focused my practice on the representation of labor unions. I have been a member of the American

Bar Association ("ABA") since 1994, and am a member of its Section on Labor and Employment Law, as well as its Section on Litigation.

My testimony will focus on the following:

(1) The Rule is a rule of transparency that closes a massive loophole that has left workers in the dark with respect to indirect persuader activity.

(2) Labor consultants do not merely give advice, but instead craft the game plan and call the plays for anti-union election campaigns.

(3) Labor organizations already have broad transparency obligations under the LMRDA and report much more than that which is required of employers and consultants under the Rule.

(4) The Rule does not interfere with the attorney-client privilege and is consistent with the Model Rules of Professional Conduct governing attorneys' ethical obligations.

(5) The Rule does not violate the free speech rights of any entity that must report.

I. The Statute and the Rule

The Persuader Rule is a transparency rule. It does not limit or prohibit the activities of labor consultants, but instead ensures that, consistent with the LMRDA, indirect persuader activity is reported and transparent. As Justice Brandeis famously said, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67, and n. 80 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)); *see also Master Printers of America v. Donovan*, 751 F.2d 700, 707-08 (D.C. Cir. 1984) (upholding constitutionality of Section 203(b) of the LMRDA).

In a typical anti-union campaign run by a labor consultant, the consultant will prepare: written campaign materials; scripts for supervisory personnel to use when talking to employees; anti-union videos; and speeches for upper-level management to deliver in

closed door captive audience meetings that employees are required to attend. Among the common tactics used by consultants is to have the employer's supervisors portray the company as "a family" from the top executive down to the lowest level employee, and assert that the union is an outside third-party interloper seeking to disrupt the family's harmonious relationship. The labor consultant may also design a campaign that claims that if the employees choose union representation, the employer would incur increased costs, damaging its ability to compete. These types of activities and claims are a routine part of the consultant's anti-union campaign playbook.

The Persuader Rule will, consistent with the intent of the LMRDA, make transparent the consultant's relationship. Employees may learn that the employer has, for example, itself retained a "third-party" to orchestrate its campaign and that perhaps the message from the employees' supervisors is not a reflection of the supervisors' views, but instead is being directed by that third-party. Moreover, the Persuader Rule will enable employees to evaluate an employer's claim of the alleged costs associated with union representation against the employer's expenditures to retain a consultant to persuade employees to vote against union representation. In short, the transparency mandated by the Rule will enable employees to make a more informed choice. The Rule will ensure that workers are no longer kept in the dark about their employers' use of anti-union consultants, making the title of today's hearing – "the Administration's attack on . . . worker free choice," particularly Orwellian.

Congress enacted the LMRDA in 1959 "to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers

and representatives . . . ." 29 U.S.C. § 401. In Title II of the LMRDA, Congress set forth reporting and transparency requirements for labor organizations, union officers, employees of unions, employers, and labor relations consultants. The Persuader Rule concerns the disclosure requirements set forth in Title II for employers and consultants.

Section 203 broadly requires employers and labor relations consultants to report on "any agreement or arrangement . . . pursuant to which [the consultant] undertakes activities where an object thereof, directly ***or indirectly***, is to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively." 29 U.S.C. §§ 433(a)(4) and (b)(1) (emphasis added). At the same time, Section 203(c) also states that this broad reporting requirement does not 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 . . . ." 29 U.S.C. § 433(c). Section 203 is "something less than a model of statutory clarity." *Wirz v. Fowler*, 372 F.2d 315, 325 (5th Cir. 1966). Therefore, it is the Department of Labor's responsibility to reasonably interpret the advice exemption.

The Department of Labor's prior interpretation of the advice exemption ignored the statute's requirement that not only direct, but also indirect, persuader activity must be subject to transparency and reported. The prior interpretation exempted from reporting any type of activity by the labor consultant, so long as the consultant had no direct contact with employees. 81 Fed. Reg. at 15933. That loophole resulted in vast underreporting of persuader activities, and did not go unnoticed by the consultant community.

> The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti-union consultants do, have always done. Yet, I never filed with [the Department of Labor] in my life, and few union busters do . . . As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor which collects the [LMRDA] reports.

MARTIN JAY LEVITT (WITH TERRY CONROW), CONFESSIONS OF A UNION BUSTER 41-42 (New York: Crown Publishers, Inc. 1993); 81 Fed Reg. at 15933.

The Persuader Rule closes that loophole and interprets the advice exemption in a manner that ensures that, while a consultant's advice remains exempt from reporting, that consultant's indirect persuader activity is transparent. The Rule relies on the plain meaning of the term "advice" and exempts from reporting the giving of advice, *i.e.*, an oral or written recommendation regarding a decision or course of conduct.[1] Therefore, for example, the Rule is clear that "an attorney or labor relations consultant does not need to report . . . when he counsels a business about its plans to undertake a particular action or course of action, advises the business about its legal vulnerabilities and how to minimize those vulnerabilities, identifies unsettled areas of the law, and represents the business in any disputes and negotiations that may arise." 81 Fed. Reg. at 15926.

Critics of the Rule who claim that it will force employers to report virtually all contact with advisors on union-related issues, or who assert that the Rule will deter small

[1] Merriam-Webster Dictionary (on-line), defining "advice" as "recommendation regarding a decision or course of conduct." http://merriam-webster.com/dictionary/advice (accessed April 22, 2016).

businesses from seeking help to navigate labor laws, must not have read the Rule. The Persuader Rule could not be clearer: neither an employer nor a consultant need report when a consultant or attorney advises the employer on the employer's plans to take a course of conduct, including advice about labor laws. Any claim that the Persuader Rule, for example, will make it harder for small business owners to obtain advice about the legal rules governing labor relations, therefore, is simply mistaken.

Where, however, labor consultants or attorneys cross over and "manage or direct the business's campaign to sway workers against choosing a union – that must be reported." 81 Fed. Reg. at 15926. The Rule and the revised reporting forms provide clear instructions and examples with respect to what constitutes reportable persuader activity and what does not. For example, if an attorney confines him or herself to the traditional role of providing advice and counsel, or represents the employer in litigation, that attorney need not file a report under the Rule. If, however, the attorney chooses not only to provide legal counsel, but also to serve as a labor consultant by "developing and implementing the company's anti-union strategy and campaign tactics," that attorney has chosen not just to engage in the traditional practice of law, but also to provide the same services as non-lawyer labor consultants. In so doing, the attorney has the same reporting obligation as a consultant. 81 Fed. Reg. at 15931; John Logan, *The Union Avoidance Industry in the U.S.A.*, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 651, 658-61 (2006) (describing the growth of law firms engaging in persuader activities that had often been performed exclusively by consultants); *see also Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1216

(6th Cir. 1985) (explaining that only when an attorney chooses to cross "the boundary between law and persuasion, [is he] subject to extensive reporting requirements").[2]

II. The Anti-Union Consultant Industry

I have represented unions in connection with numerous representation election cases. Those cases obviously involve union organizing campaigns. In my experience, employers in those campaigns often hire professional consultants to persuade their employees not to choose union representation. In promulgating the Rule, the Department of Labor relied on numerous academic studies to find that employers use such consultants in 71% to 87% of union organizing campaigns. 81 Fed. Reg. at 15933 and n. 10. As the Rule notes, however, employees often do not know that a third-party has been retained to orchestrate a non-union campaign. *Id.* at 15926. Nevertheless, in my practical experience, the evidence of the use of anti-union consultants in most union campaigns is overwhelming.

No matter the industry, the geographic region, or the size of the employer, the anti-union materials used in organizing campaigns undoubtedly make the same assertions, sometimes using identical language. For example, in almost all anti-union campaigns employers disseminate professionally produced materials in writing, via video, or through supervisor's statements: (i) warning employees not to sign union authorization cards; (ii)

[2] Although the LMRDA includes criminal penalties if an employer, consultant, or union fails to file a report required under Title II of the LMRDA, a criminal penalty can only be imposed if the failure to file is "willful." 29 U.S.C. § 439; *United States v. Ottley*, 509 F.2d 667, 673 (2d Cir. 1975) (mere negligence is not enough to impose criminal liability for violating Title II of the LMRDA).

portraying the employer as a family, and stating that as such, the employer has "an open door policy" for its employees; (iii) asserting that the union is a "third-party" that will unduly disrupt the family and come between the employer and its employees; (iv) contending that the union is a "business"; (v) warning about strikes; (vi) stating that collective bargaining cannot force the employer to make any concessions; and (vii) claiming that the union will bring increased costs that will impede the employer's ability to compete.

Throughout the campaign, employers hold "captive audience" meetings at which employee attendance is mandatory and at which these messages are disseminated through scripted speeches and/or videos. Finally, approximately 24-hours prior to the election,[3] the employer inevitably holds a captive audience meeting at which it asks its employees "for another chance" and carefully implies that it will correct any problems that have led the employees to seek union representation.

During these campaigns, unidentified strangers are seen by employees shuttling in and out of meetings with management officials and first-line supervisors. Rarely, if ever, however, do these consultants meet with employees face-to-face. Instead, front-line supervisors the distribute professionally produced pamphlets, fliers, videos and other materials, all of which very clearly are for the purpose of persuading employees to reject union representation.

[3] Under the National Labor Relations Act, an employer's captive audience meetings must cease 24-hours prior to the election. *Peerless Plywood*, 107 NLRB 427 (1963).

This campaign, "often formulaic in design," is no accident. *See* 81 Fed. Reg. at 15926. Instead, it is the product of an industry that has grown in size, and which in 1990 was estimated to produce revenues of $200 million a year. John Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA since the 1970s*, 33 INDUSTRIAL RELATIONS JOURNAL 197, 198 (2002).

A simple internet search using terms like "union avoidance" or "union consultant" wields a sea of businesses and law firms offering to provide services to employers that are faced with a request by their employees for union representation. Consultants boast about their "win rates" and one – Labor Relations Institute, Inc. – even offers a "guaranteed winner" proclaiming "YOU DON'T WIN, YOU DON'T PAY!" Another – Adams Nash Haskell & Sheridan – advertises on its website, "[w]hen employees begin to organize, it strikes fear into the heart of any organization. The good news? You have a powerful labor relations team of experienced union avoidance consultants in your corner." Adams Nash also proclaims at "95% win rate." Barnes & Thornburg LLP, a self-proclaimed "firm of more than 600 legal professionals throughout 13 offices" advertises on its web page that it provides "union avoidance" services and employers need not worry when "[a] union flyer was posted on one of your facility's employee bulletin board [sic] last night" because "we will get you through this." Another large law firm – Reed Smith – advertises that it "helps craft a strong drive against unionization."

The Burke Group, a consultant firm that Professor John Logan discussed at length in *The Union Avoidance Industry in the United States*, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS at 655-58, advertises that it creates "custom campaign websites," offers "union

organizing response planning" and will "audit, train, coach, counsel and support the employees and employer during a union's campaign process." PTI Labor Research offers to create a wide array of campaign materials, including "campaign specific" vote no posters, paycheck stuffers, hats and t-shirts.

I have attached an addendum to these written remarks consisting of pages from the websites of eight firms: (1) Labor Relations Institute, (2) the Burke Group, (3) PTI Labor Research, (4) Adams Nash Haskell & Sheridan, (5) Barnes & Thornburg, (6) the Weissman Group, (7) Chessboard Consulting, and (8) Reed Smith, from which the excerpts above were recently taken. A search of the Department of Labor's on-line public disclosure room reveals only a tiny handful of LM-20 persuader reports filed by any of those firms. The on-line public disclosure room does not contain any reports from five of the firms; only one from Chessboard Consulting that was filed in 2007; a handful from the Burke Group, the most recent of which was filed in 2011; and a small handful from Labor Relations Institute, the most recent of which were filed in 2013. Each of those few reports concerned face-to-face persuader activity. No reports were filed for indirect activity. As the Department of Labor exhaustively outlined in the Rule, 81 Fed. Reg. at 15931-34, the prior interpretation of the advice exemption resulted in the consultant reporting requirements being a "virtual dead letter." *Id.* at 15934 (quoting *Subcommittee on Labor-Management Relations, H. Comm. On Education and Labor, Pressures in Today's Workplace* (Comm. Print 1980) at 27. The Persuader Rule revives that dead letter and ensures that peaceful and stable labor-management relations are promoted through transparency.

III. Union Transparency Requirements

Section 203(b) of the LMRDA requires consultants who, pursuant to an agreement or arrangement with an employer, engage in persuader activities, and employers who make such agreements or arrangements, to report their relationship and agreements. The LMRDA does not require identical reporting if a consultant is retained by a labor organization as part of that union's efforts to organize a company. Critics of the Rule claim this is unfair. Such criticism is completely misplaced because unions have extensive reporting requirements under a different provision of the LMRDA – Section 201, 29 U.S.C. §431. For example, among other reports, unions much file extensive annual reports. The Form LM-2 report is the annual report that must be filed by unions that have receipts of $250,000 or more. It requires those unions to provide detailed and itemized information concerning each disbursement to any person or entity of $5,000 or more, as well as all disbursements to any person or entity to whom $5,000 or more is disbursed in any fiscal year. In addition, the union report requires unions to disclose salaries and disbursements for all of its officers and employees. Further, the reporting on the union report must be organized and disclosed by functional category, including representational activities that concern organizing or collective bargaining. These reports often consume hundreds of pages, compared to the revised four-page LM-10 form for employers, and the two-page LM-20 form for consultants that must be filed under the Persuader Rule if an employer retains a consultant to perform direct or indirect persuader activity.

Thus, unions already report much more than that which may be required by consultants and employers under the Rule. For example, payments to counsel for the union must be reported if they total $5,000 or more, irrespective of whether those payments are for persuader activities, or for providing traditional legal advice. Moreover, those payments must be disclosed even if counsel's advice has nothing to do with an organizing campaign or collective bargaining. Further, the salaries of union officers and union organizers must be reported by their union. The Persuader Rule does not require an employer that retains a consultant to report the salaries of the employer's executives, let alone those of the first-line supervisors who often carry out the consultant's anti-union game plan. Moreover, the Department of Labor's On-line Public Disclosure Room not only makes unions' reports searchable, but entities that receive payments from any union may be searched by payee so that, for example, one can see the amounts paid to, and the clients for which, union attorneys perform services of any type.

In my experience, just as it is inevitable that a third-party labor consultant will prepare materials for employers to give to their employees referring to the union as an outside "third party," so too will those consultants prepare campaign materials based on the union's reports that must be filed with the Department of Labor. I have seen several fliers referring, for example, to the salaries paid to union officials – information the consultant obtains from the union's reports.

Indeed, the use of unions' reports has long been part and parcel of the consultant playbook. Martin Jay Levitt explained that the LMRDA's reporting requirements imposed on unions are a great asset to labor consultants.

> "Wow. Union busters couldn't have asked for a bigger break. For the first time, detailed, timely information on the inner working and finances of unions and labor leaders would be available to consultants and attorneys for the price of a photocopy. Thank you Congress."

CONFESSIONS OF A UNION BUSTER at 41. Mr. Levitt also explained that he had easily avoided any reporting.

> "[O]ur anti-union activities were carried out in backstage secrecy; meanwhile we gleefully showcased every detail of union finances that could be twisted into implications of impropriety or incompetence."

Id. at 42.

The relevant point is not that consultants should be prohibited from using the reports filed by unions under the LMRDA. Union financial reports play a role in furthering the LMRDA's goal of promoting union self-government. The reporting scheme designed by Congress in Title II of the LMRDA, however, was not meant to be a one-way proposition. In promulgating the LMRDA, Congress recognized that:

> "[I]f unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees . . . ."

81 Fed. Reg. at 15934 (quoting S. Rep. 187 at 39-40, 1 LMRDA Leg. Hist. at 435-46).

IV. The Persuader Rule does not Require Attorneys to Breach the Attorney-Client Privilege or Their Broader Ethical Duties

The Persuader Rule modifies and narrows the advice exemption, and thus makes transparent a wider array of persuader activity. The scope of the information that is required to be reported once the reporting obligation is triggered, however, is not changed substantively by the Rule. Revised Form LM-20, which is required to be filed by a

persuader within 30 days of entering into an agreement or arrangement with an employer to conduct persuader services, requires attorneys engaged in persuader activity to report (1) the client's identity; (2) the nature of the fee arrangement; and (3) a description of the nature of the services agreed to be performed. If the attorney provides legal advice, in addition to persuader services, the attorney need only note that portion of services as "legal services." 81 Fed. Reg. at 16050-51, 16046. [4] The persuader must also attach a copy of its agreement with the employer for which it is providing persuader services. Those elements have long been required on Form LM-20, and have withstood legal challenges.

Section 204 of the LMRDA provides that the Act's reporting requirements shall not be construed to require an attorney to report information subject to the attorney-client privilege.[5] In enacting §204, Congress sought "to accord the same protection as that

[4] The Form LM-21 is an annual report that must be filed by consultants that engage in persuader activity. In other words, if a Form LM-20 activity report must be filed by a consultant, that consultant must also file an LM-21 annual report. On the annual report, the consultant must report all receipts from employers in connection with labor relations advice or services regardless of the purpose of the advice or services. The Persuader Rule did not address or change the LM-21 annual report requirements. Nevertheless, on April 13, 2016, the Department of Labor issued a non-enforcement policy pursuant to which it will not enforce the requirement that consultants' report on the LM-21 annual report their receipts from employers and their disbursements to their officers, employees, contractors or vendors.

[5] Section 204 states: "Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of an attorney-client relationship." 29 U.S.C. § 434.

provided by the common-law attorney-client privilege." *Humphreys*, 755 F.2d at 1219 (6th Cir. 1985).

The attorney-client privilege broadly protects from disclosure communications between an attorney and his or her client. *E.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The scope of the privilege is not, however, without limitations. It is well-settled that, with limited exceptions that do not apply here, the existence of an attorney-client relationship, the identity of an attorney's client, the terms of a fee arrangement, and the details regarding the scope and nature of the attorney-client relationship, are not subject to the privilege. *E.g., United States v. Kingston*, 971 F.2d 481, 491 n.5 (10th Cir. 1992) (noting that testimony by an attorney concerning the client's identity and the source of legal fees would not constitute a violation of the privilege); *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9th Cir. 1987) (holding that information regarding a fee arrangement was not privileged); *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 247-48 (2d Cir.) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986) (explaining that the Second Circuit has "consistently held" that client identity and fee information are not privileged); *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981) (explaining that the attorney-client relationship and the dates on which services were performed are not privileged); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y. 1979) (explaining that the purpose for which a lawyer was retained is not protected from disclosure by the attorney-client privilege).

It is not surprising, therefore, that courts have long held that the information required on the Form LM-20 consultant activity report – which the proposed rule does not

substantively modify – is not protected by the attorney-client privilege. In *Humphreys*, 755 F.2d at 1219, for example, the Sixth Circuit held that, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." Accord *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969).

The elements to be reporting under the Rule are similar to those required under Internal Revenue Code Section 6050-1 when an attorney is paid more than $10,000 in cash by a client. Revenue Code 6050-1 states that, "[a]ny person . . . engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" must file a return specified as IRS Form 8300. 26 U.S.C. § 6050-I.

Form 8300 requires the filer to provide the name, address, date of birth, taxpayer identification number, and occupation, profession, or business of the individual from whom the cash was received. *See* IRS Form 8300, available at https://www.irs.gov/pub/irs-pdf/f8300.pdf (last visited April 21, 2016). The form also requires the filer to provide a description of the transaction, including a specific description of any services provided. *Id.* Finally, the filer must verify the identity of the person from whom the cash was received. *Id.*

Section 6050-I's reporting requirements apply to attorneys, and legislative and judicial efforts to exempt attorneys from the reporting requirement have failed. For example, Congress has rejected efforts by, among others, the ABA to amend the law to exempt attorneys. *See* Ellen S. Podger, *Form 8300: The Demise of Law as a Profession*, 5

GEO. J. LEGAL ETHICS 485, 492 and n.45 (1992). Likewise, in promulgating regulations implementing Section 6050-I, the IRS specifically rejected the argument that attorneys should be excluded from the reporting requirements. 56 Fed. Reg. 57974, 57976 (Nov. 15, 1991).

Federal courts of appeals have consistently rejected arguments that Form 8300 requires the disclosure of information subject to the attorney-client privilege. *E.g.*, *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-05 (2d Cir. 1991) (holding that Section 6050-I does not conflict with the traditional attorney-client privilege); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995). In doing so, those courts have recognized that "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the [attorney-client] privilege." *Leventhal*, 961 F.2d at 940 (quoting *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982)).

Thus, although the Rule will require more consultants and attorneys to report under Section 203(b) of the Act, the scope of the information to be reported by those consultants and attorneys remains unchanged by the Rule. The information required simply is not protected by the attorney-client privilege.[6]

[6] The Rule recognizes that there may be rare, exceptional circumstances where the disclosure of some information may be privileged. For example, to the extent that an agreement or arrangement between an attorney and an employer may disclose privileged communications, the privileged matters are protected from disclosure. 81 Fed. Reg. at 15995.

Courts also have rejected claims that such information although not protected by the attorney-client privilege, is nevertheless confidential information that cannot be divulged under state bar ethics rules. These state rules require attorneys to maintain client confidences, even if the confidences are not subject to the attorney-client privilege. For example, the ABA *Model Rules of Professional Conduct* provide in Rule 1.6 that "[a] lawyer shall not reveal information relating to representation of a client . . . ." This prohibition, while broader than the attorney-client privilege, is not applicable with respect to the Persuader Rule. Very simply, where disclosure is required by federal law, the Rule 1.6 restrictions do not apply. The Rule, therefore, is completely consistent with state bar ethics rules that may govern attorneys that engage in persuader activity.

Rule 1.6(b)(6) provides, "[a] lawyer may reveal information relating the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or a court order." Therefore, where disclosure is required by federal law, courts have consistently held that Rule 1.6 does not shield attorneys from reporting requirements.

In *United States v. Monnat*, 853 F.Supp. 1304 (D.Kan. 1994), for example, the court considered whether an attorney could be compelled to comply with the reporting requirements mandated by Internal Revenue Code Section 6050-I, discussed above. The court referred the matter to the court's Committee on Attorney Conduct, which concluded that "[a] lawyer does not act unethically by complying with Section 6050-I or an order of the court directing compliance because he is permitted under Rule 1.6(b) to disclose otherwise confidential information when he reasonably believes disclosure is required by

law or order of court." *Id.* at 1809. Likewise, in *Blackman*, 72 F.3d at 1424, the court ruled that attorneys are not exempt from Section 6050-I's reporting requirement, explaining that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements[.]" (quoting *United States v. Sindel*, 53 F.3d 574, 577 (8th Cir. 1995)). The courts have, therefore, consistently found that Section 6050-I's reporting requirements do not contravene state ethics rules such as Model Rule 1.6.

The LMRDA is another such federal law, and compliance with its reporting requirements is not at all inconsistent with Model Rule 1.6. Nothing in the Act indicates that Congress intended that state ethics rules should protect from disclosure the information that must be reported by employers and consultants. Indeed, the opposite is true. The legislative history of the LMRDA reveals convincingly that such protections for attorneys were considered and rejected.

The House version of LMRDA Section 204 adopted almost verbatim a proposal from the ABA and would have protected from disclosure "any information which is confidential" between an attorney and client, "including but not limited to the existence of the relationship of attorney and client, the financial details thereof, or any information obtained, advice given, or activities carried on by the attorney within the scope of the legitimate practice of law." H.R. 8342, 86th Cong., 2d Sess. § 204 (1959), U.S. Cong. & Admin. News 1959, p. 2318. In conference, however, Congress rejected that language, enacting the much narrower protection afforded by Section 204, which Congress intended "to accord the same protection as that provided by the common-law attorney-client

privilege." *Humphreys*, 755 F.2d at 1219; *see* discussion in the Rule at 81 Fed. Reg. at 15992-98. Thus, for the purpose of Model Rule 1.6 and similar state ethics laws, the LMRDA does not contravene those laws, nor require an attorney who engages in persuader activity to face the Hobson's choice of complying with the LMRDA but not his or her state ethics rules.

V. The Rule does not Unconstitutionally Infringe on the First Amendment Rights of Consultants or Employers, nor is it Inconsistent with Section 8(c) of the National Labor Relations Act

The Persuader Rule does not outlaw any type of activity engaged in by consultants or employers. It "does not regulate in any way the content of any communications by the consultant or the employer, the nature of such communications, or their timing." 81 Fed. Reg. at 15984.[7] Critics of the Persuader Rule contend that the Rule nevertheless will unconstitutionally chill consultants conduct because a consultant's arrangement or agreement with its client employer will now be transparent. Those arguments have been made to numerous courts and have been rejected in each instance. *Humphreys*, 755 F.2d at 1223 (rejected a law firm's First Amendment challenge to Section 203(b) and citing the numerous courts that had rejected similar challenges). As the Department of Labor explains in detail, the Persuader Rule bears a substantial relation to important governmental

[7] By contrast, the National Labor Relations Act, as interpreted and enforced by the National Labor Relations Board, regulates the conduct of employers and unions, and establishes unfair labor practices for both. Thus, for example, if a consultant engages in persuader activity, the LMRDA only requires disclosure of that arrangement, whereas the NLRA regulates the conduct the persuader can and cannot engage in. *E.g.*, *Exelon Generation*, 347 NLRB 815, 832 (2006) (election set aside due in part to objectionable conduct by the employer's labor consultant).

interests. Indeed, in rejecting a First Amendment challenge to Section 203, the Sixth Circuit held that disclosure by consultants and the employers that retain them is "unquestionably 'substantially' related to the government's compelling interest" in deterring improper activities. *Humphreys*, 755 F.2d at 1222.

The Supreme Court's opinions concerning federal election law also support the Rule. An often overlooked aspect of the Supreme Court's *Citizen United* case is that the Court rejected challenges to federal election law disclosure requirements. In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-71 (2010), Citizens United not only challenged the prohibition on the use of corporate monies to make independent expenditures that expressly advocate for federal candidates, but also challenged certain disclosure requirements under the Bipartisan Campaign Reform Act of 2002 ("BCRA"). At issue was the BCRA's requirement that any person who spends more than $10,000 on electioneering communications within a calendar year must disclose the identity of the person making the expenditure, the amount, the election to which the communication was directed, and the names of certain contributors. 558 U.S. at 366.

The Court rejected the challenge to those disclosure requirements. In doing so, it recognized that, "disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." 558 at 366 (citation and internal quotations omitted). Rather, "disclosure could be justified based on 'providing the electorate with information' about the sources of election-related spending." *Id.* at 367 (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). Thus, the Court concluded, the "First Amendment protects speech; and disclosure permits citizens and

shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 at 371.

The Persuader Rule is fundamentally no different. It is a rule of transparency. It enables the electorate – in this case employees deciding whether to choose union representation – to make informed decisions and give proper weight to persuader messages from their employer. Therefore, any claim that the Rule unconstitutionally interferes with employers or consultants' First Amendment rights is mistaken.

Citizens United and the Supreme Court cases upholding disclosure requirements recognize that, although speech may be protected, it does not mean that it cannot trigger disclosure. The same holds true for speech protected by section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c). That provision states that the expression of "any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." The Persuader Rule does not limit in any manner what an employer may say during a union election campaign. It does not make any employer statement an unfair labor practice. Therefore, it in no way conflicts with Section 8(c) of the National Labor Relations Act. Indeed, the Department of Labor has long held the view that Section 8(c) cannot excuse the reporting required under section 203 of the LMRDA. 29 C.F.R § 405.7. Although Section 8(c) may protect certain employer speech from violating federal labor law, it does mean that such speech cannot be the basis of a transparency requirement. That is particularly true where such transparency leads to a more informed electorate,

which is entirely consistent with the National Labor Relations Act's purpose of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. Section 8(c) of that same law cannot be read to require workers to be kept in the dark about their employers' use of anti-union persuaders.