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Employment & Labor Committee

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September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5609
Washington, DC 20210

Re: RIN 1215-AB79 and 1245-AA03/Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption

Dear Mr. Davis:

The Association of Corporate Counsel,[1] and its Employment and Labor Law Committee,[2] appreciates the opportunity to comment on the Department's proposed re-interpretation of the "Advice" exemption and strongly urges the Department to resist undermining the attorney-client relationship by confirming the settled understanding of the last 50 years that the Labor-Management Reporting and Disclosure Act ("LMRDA") does not require the disclosure of advice between counsel and client.

The Department's proposed rule will have a profound impact on an ACC member's relationship with outside counsel whenever engaged for labor relations service or advice. ACC has been passionate about, and will resist with all means at its disposal, infringements upon the attorney-client relationship, privileges that attach to it and all ethical obligations which arise as a result of such engagements with counsel. Therefore, we submit these comments which we urge the Department to review with the utmost of care.

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[1] The Association of Corporate Counsel ("ACC") is the professional association for attorneys employed in the legal departments of corporations and private sector organizations worldwide. ACC has more than 28,000 members in over 75 countries, employed by over 10,000 organizations. Its members bring to these important issues the unique views of in-house counsel. As such, its membership speaks not only for in-house counsel, but also for the interests of their client organizations and the stakeholders who will be affected by the Department of Labor's ("the Department") proposed actions.

[2] The ACC Employment and Labor Law Committee is one of the largest of the ACC's committees, with approximately 5,400 attorney members, many of whom are responsible for the labor law function of the employers which must comply with the National Labor Relations Act ("Act" or "NLRA").

The simplest test for determining whether the attorney-client relationship and its associated privileges have been undermined is to ask: will a client with legitimate interests be less likely to retain counsel due to the fear that others will learn of confidential information? Here, the answer is very straightforward: yes. And the danger of this outcome cannot be highlighted enough—without adequate legal counsel, the minefields of contemporary labor law will become significant traps for the unwary.

After examining the record of the McClellan hearings, the legislative history of the statute, the conference committee report, cases decided under the LMRDA, the Department's own internal compliance manual, numerous state ethical rules and opinions, cases interpreting the common law attorney-client privilege and related law review articles and other treatises, ACC concludes:

1. The Department's proposed new interpretation is directly contrary to an attorney's ethical obligations in maintaining client confidences;

2. The proposed reporting of information sought by the Department will often invade the attorney-client privilege and compromise counsel's ethical obligations;

3. If the Department implements the new rule as proposed, the ability of in-house attorneys to discuss labor relation services, broadly defined, with outside counsel, will be compromised;

4. The LMRDA was never intended to impose the consequences as stated above for the result would alter centuries of understanding as to the nature "... of a legitimate attorney-client relationship." (LMRDA, Section 204);

5. The Department's suggested change in the meaning of the word "advice" essentially removes the exemption currently afforded for "advice" from the statute;

6. Given the Department's long-standing analysis and interpretation of how the LMRDA should be understood and enforced, it has a significant burden to explain why its predecessors for over half a century have been "wrong"; and

7. The Notice of Proposed Rulemaking ("NPRM") should be revoked and the Department should continue with the enforcement principles embraced over the last 50 years by both Democratic and Republican administrations.

COMMENTS ON SPECIFIC AREAS OF CONCERN

A. The Proposed Rule Infringes upon the Attorney-Client Relationship

It is not debatable that: "An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty."[3] While there are a number of objectionable elements in the Department of Labor's NPRM,[4] the proposed rule's infringement upon the relationship between the attorney and client is among the most profound.

The proposed rule would force attorneys to breach their ethical obligations by disclosing confidential client information, and will require the disclosure of information protected by the attorney-client privilege. The legislative history reveals that the Congress clearly did not intend the LMRDA's reporting obligations to apply to attorneys acting "in the course of a legitimate attorney-client relationship."

1. The Congress Protected the Attorney-Client Relationship with Section 204

Congress chose to exempt from reporting that information which was encompassed by the traditional rules governing the attorney-client privilege and the exceptions to them. In addition, Congress acted more broadly to protect the sanctity of the attorney-client relationship:

> SEC. 204. Nothing contained in this Act 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 Act **any information** which was lawfully communicated to such attorney by any of his clients in the course of a legitimate **attorney-client relationship** (emphasis added).

Along with the legislative history that is discussed in greater detail below, this statutory language makes clear that the proposed rule creates an irreconcilable conflict with the ethical obligations imposed upon attorneys and with the attorney-client privilege.

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[3] Edna S. Epstein, The Attorney-Client Privilege and the Work Product Doctrine (5th Ed. 2007), p. 5.

[4] The other objectionable elements include the following: the proposed rule overturns nearly 50 years of consistent interpretation of the advice exemption upon which the management community has relied, the proposed rule is utterly inconsistent with the statutory language and the clear intent of Congress, and the proposed rule has the effect of "interpreting" the advice exemption out of the statute, a result which is beyond the Department's authority, as it would require Congress to amend the statute.

2. The Proposed Rule Would Force Attorneys to Breach their Ethical Obligations by Disclosing Confidential Client Information

a. Professional Rules Enacted in Every State Prohibit an Attorney from Revealing "a Confidence or Secret of his Client"

It is axiomatic that for an attorney to effectively represent a client, the attorney must have a complete understanding of all facts and other information that may be relevant to the representation. This information, if made public, may at the very least be embarrassing and, of even greater significance, detrimental to the client's interests. In order to promote the candid exchange of information between a client and attorney so that effective representation is assured, the client must be totally secure in the fact that the information shared with the attorney will not, under any circumstances, be revealed by the attorney without the client's express consent.

If an attorney can be forced to reveal confidential client information, those who have the fundamental right to legal counsel will either completely forgo that right or compromise it by being required to provide incomplete information to counsel rather than risk detrimental disclosure. In either case, a client's fundamental right to effective representation by counsel will be severely compromised, if not completely destroyed.

It is for these reasons that the various states and governmental entities charged with the admission of attorneys to practice law and to monitor their ability to continue in their profession developed rules of ethics. There is perhaps no more basic rule than the one that prevents disclosure of client confidential information without the express consent of the client.

The Model Rules of Professional Conduct (MRPC), created by the American Bar Association (ABA), are a set of rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers practicing in the United States. Forty-nine states and the District of Columbia have adopted the MRPC, including Rule 1.6, which governs the mandatory obligations of attorneys to maintain the confidentiality of client information. In relevant part, MRPC Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (6) to comply with other law or a court order.

Comments to MPRC Rule 1.6 state that "in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation," and that the

confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rule 1.6 was designed to encourage clients to trust their attorneys and to be candid with them.[5] Rule 1.6 goes beyond the traditional attorney-client privilege and its exceptions and prevents the disclosure of information that is neither privileged nor work product.[6]

As such, "a lawyer's duty of confidentiality prevents her from revealing a client's identity, or facts that a client communicates to her, even though the attorney-client privilege and work product immunity do not protect them."[7] Commentators have noted that in the many jurisdictions that have adopted Model Rule 1.6, a lawyer's duty of confidentiality attaches "not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."[8]

California, the one state that has not adopted the MRPC, has its own rules of professional conduct regarding confidential client information. California's Business and Professions Code Section 6068(f) states that: "It is the duty of an attorney ... to maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets of his or her client." Commentators have claimed that as compared to other states, California's Rule 6068 is the strictest approach to an attorney's duty of confidentiality.[9]

The overriding importance of protecting client confidences or secrets is evident from the fact that the entire United States, the 49 states and the District of Columbia, that have adopted MRPC Rule 1.6, and California with its stricter Rule 6068, have enacted rules protecting client confidences and ensuring the right to effective representation by severely restricting an attorney's ability to reveal confidential client information without first obtaining the client's informed consent.

The application of the Department's proposed rule and its far-reaching reporting requirements impacting attorne ys contravenes the public policy promoting candid and open conversations between client and attorney and undermines the fundamental right to effective legal representation. This new rule will create an immediate and irreconcilable conflict between the proposed rule's requirements and lawyers' important obligations to states' ethics and confidentiality rules.

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[5] Douglas R. Richmond, The Attorney Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era, available at: http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16057.
[6] Id.
[7] Id.
[8] Id.
[9] See Fred C. Zacharias, "Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?," 6 Geo. J. Legal Ethics 903, (1993); Roger C. Cramton, "California Practicum: Proposed Legislation Concerning a Lawyer's Duty of Confidentiality," 22 Pepp. L. Rev. 1467 (1995); Fred C. Zacharias, "Privilege and Confidentiality in California," 28 U.C. Davis L. Rev. 367 (Winter 1995).

b. The Identity of the Client, the Fact of Representation and the Fees Paid are Protected as Client Confidences or Secrets

Several Bar Associations have issued formal ethics opinions holding that confidential information about a client including the identity of a client, the fact of representation, and the fees paid as part of that representation are all the type of "confidential" information as defined by their states' rules of ethics.[10] Such information generally may not be revealed by the attorney without first obtaining the client's consent. Contrary to these rulings, the proposed rule would require attorneys to routinely disclose the identity of clients, the fact and subject matter of representation and the fees paid as part of that representation, without regard to the client's desire for confidentiality. A number of State Bar Associations have already addressed, in formal Ethics Opinions, issues similar to those raised by the proposed rule. Specifically, these Ethics Opinions address the ethical implications involved in mandating that attorneys comply with federal regulations requiring the attorney to disclose "confidential" information about clients on public government forms. At issue in these Ethics Opinions was Section 6050I of the Internal Revenue Code of 1986 and IRS Form 8300.

Section 6050I of the IRS code requires that any person engaged in a trade or business who receives cash in excess of $10,000 in a single transaction or in related transactions must file an IRS Form 8300. In relevant part, Form 8300 requires the filer to indicate the identity of the individual from whom the cash was received, the name of the business receiving the cash, the amount of cash paid and the nature of the transaction.

Therefore, attorneys receiving cash payment for legal services in excess of $10,000 would, under the IRS rule, be required to reveal the identity of clients, the amount of fees paid and, of course, the fact that the client was represented and the nature of the representation. Since Section 6050I was enacted, a number of attorneys have refused to complete Form 8300, citing their ethical obligation to preserve client confidences. These attorneys have turned to various State Bar Association ethics committees for guidance. The State Bar Associations that have been presented with the issue have unanimously held that if an attorney were to reveal such confidential information about a client without first obtaining the client's informed consent, the disclosure would constitute a violation of the state's Rule against revealing client confidences.

For example, the Florida Bar Association held that an attorney concerned about revealing a client's identity, the fact and nature of representation and fees for representation, but who was required to complete IRS Form 8300, "should initially decline to provide the requested confidential and/or privileged information, absent client consent, when the attorney files the form." If the attorney is then served with a facially sufficient summons, the attorney must determine whether any privilege applies and assert such privilege if it exists. If a court

[10] California, Florida, Washington, Massachusetts, Illinois, New York, Georgia, Connecticut, Washington DC, and Texas.

subsequently finds that the asserted privilege does not apply and orders the attorney to provide the information, the attorney may then appeal the court's order. Finally, the Bar Association cautioned attorneys that "any reasonable doubt about the applicability of a privilege (or other legally recognized reason for noncompliance) should be resolved in favor of the client."[11]

Similarly, the Massachusetts Bar Association held that "it is unquestionably the case that a client's identity may be a confidence or secret within the meaning of [the state's rule regarding confidential information]." The Bar Association advised attorneys that where a client does not consent to an attorney revealing confidential information such as the client's identity, the fact and nature of the representation and the fees paid, and the attorney has any doubt about the lawfulness of the government regulation requiring disclosure, then "the lawyer should continue to resist disclosure of the client's identity, and should require DOJ to obtain a court order mandating disclosure."[12]

The Massachusetts Bar Association opinion notes that an attorney may have doubts about the lawfulness of the government regulation requiring disclosure because "there is no Supreme Court holding that Section 6050I's disclosure obligations override the lawyer's obligations under [the state's rule regarding confidential information]." The same void in the law exists here; there is no Supreme Court holding that the LMRDA's reporting requirements override the attorney's obligations under state ethics and confidentiality rules, nor should there be. Indeed, we demonstrate below that the Congress did not intend the LMRDA reporting obligations to apply to attorneys acting "in the course of a legitimate attorney-client relationship."[13]

The Washington State Bar Association cited Rule 1.6 for the proposition that an attorney should not reveal client "secrets," a broadly defined term used to refer to any "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely detrimental to the client." The Bar Association determined that a lawyer "must not disclose to the Treasury Department, through the filing of IRS Form 8300 or otherwise, any information pertinent to the client's identity when the client has not given informed consent to the disclosure, unless disclosure is otherwise permitted under [the state's rule on confidential information.]"

The Bar Association further advised lawyers that "if a summons is served upon a lawyer, the lawyer must continue to decline to disclose confidential client information except in compliance with the state's rule on confidential information." If the government then seeks enforcement of the summons through the federal courts, the lawyer must respond properly and litigate fully the issue of disclosure, and raise all non-frivolous claims that the information is protected from disclosure by lawyer-client privilege or other applicable law. If an attorney is

[11] Florida Bar Association, Ethics Op. 92-5 (1993).
[12] Massachusetts Bar Association, Ethics Op. 94-7 (1994).
[13] See Section C.2.

ordered by a judge to disclose the information, then, and only then, may the attorney do so without violating his/her ethical obligations.[14]

The District of Columbia Bar Association, in addressing the Form 8300 issue, found that "whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' subject to the protections accorded by the other provisions of Canon 4." Thus, even if the IRS issued a summons compelling the attorney to reveal the information, the attorney should resist disclosure "until either the consent of the client is obtained or the firm has exhausted available avenues of appeal with respect to the summons" ... and "only after the firm is ordered by a court to disclose the names of its clients may it do so." The Bar Association noted that, under the present state of the law, "substantial good faith arguments exist as to whether ... Congress intended the statute to override traditional lawyer client confidentiality." Therefore, the Bar Association advised that until the questions regarding the coverage of Section 6050I were resolved definitively by the courts, a firm may not ethically disclose the name of its client on Form 8300 without the client's consent."[15]

While the above Ethics Opinions deal with a different federal regulation and government form than those at issue here, the opinions address identical ethical issues – the question whether an attorney may properly disclose a client's confidential information without the client's informed consent. Pursuant to both the IRS rule and the proposed Department rule, the information would be disclosed on a form that would be filed with the government and made available to the public.

The opinions are clear: state rules of professional responsibility prohibit attorneys from revealing client confidences or secrets, including the identity of the client, the fees paid and the fact and nature of the representation. The opinions of State Bar Associations advise attorneys that they must not disclose such information to the government until the client gives informed consent or until a final court order compels the attorney to reveal such information. We are aware of no State Bar Association that has reached a different conclusion on this issue.

A number of the opinions also advise attorneys that, in the event a final court order compels the disclosure of such information, the attorney must explain all appeal options to the client and pursue all possible appeals if requested by the client.[16]

There is no question that attorneys considering their obligations under the Department's proposed rule will be confronted by the same kinds of ethical dilemmas discussed

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[14] Washington State Bar Association, Ethics Op. 194 (1997)
[15] District of Columbia Bar Association, Ethics Op. 214 (1990).
[16] See e.g. Washington State Bar Association, Ethics Op. 194 (1997); Florida Bar Association, Ethics Op. 92-5 (1993); District of Columbia Bar Association, Ethics Op. 214 (1990).

in these Ethical Opinions. As previously stated, the Congress did not intend the LMRDA reporting obligations to apply to attorneys acting "in the course of a legitimate attorney-client relationship."[17] If the reporting requirements were not intended to apply to such attorneys, then Congress could not have intended the statute to override traditional lawyer client confidentiality. Moreover, at least one of the opinions advises that if an attorney has a good faith doubt as to "whether Congress intended the statute to override traditional lawyer client confidentiality," the attorney should resist disclosure until that specific issue is "resolved definitively by the courts.[18]" Simply stated, disclosure as contemplated by the proposed rule is, and should be, prohibited.

Moreover, the Department's rule creates an even greater dilemma for the attorney. The statute under which the proposed rule is promulgated provides not only for civil enforcement, where at least disclosure could be judicially challenged, but also contains concurrent criminal sanctions for non-compliance. The criminal sanctions are independent of civil enforcement and successful civil enforcement is not a condition precedent to the government seeking criminal sanctions. Under the proposed rule, an attorney is given the unacceptable choice to reveal confidential information and face ethical sanctions, including loss of livelihood, or decline to reveal confidential information and risk loss of freedom. Such a radical "choice" was never contemplated under the LMRDA – at least not until the Department launched its reinterpretation of more than 50 years of settled understanding.

c. An Attorney May Face Ethical Sanctions for Disclosing Confidential Client Information by Filing the Reports Required by the Proposed Rule

The proposed rule will put attorneys at increased risk of discipline based on violations of state rules of professional conduct. This risk will apply to the representation of clients for whom the attorney has performed no "persuasive activities." A good example involves a client that just settled a lengthy, unpleasant and very public discrimination case based upon alleged race, age and gender discrimination. The client asks the attorney to review its workplace policies in the interest of avoiding future discrimination claims. The attorney recommends, subject to client acceptance or rejection, numerous changes to its current practices and provides draft policy language to the client. These policies are intended to be disseminated by the client and conceivably may indirectly have some persuasive effect on employees to choose not to be represented by a union for purposes of collective bargaining. The Proposed Form LM-20 (and thus the proposed rule) would require the attorney to disclose the name of the client, the "terms and conditions" of the retention arrangement and the fact that the attorney was retained for the purpose of "developing personnel policies and practices."

The Department has given notice of its intent to make changes to Form LM-21. If the Department proposes a new Form LM-21 that is consistent with the Department's overly

[17] See Section C.2., infra.
[18] District of Columbia Bar Association, Ethics Op. 214 (1990).

broad interpretation of the statutory reporting requirements embodied in the current Form LM-21, the Department will incorrectly take the position that the reporting requirement for the client in the example above would trigger reporting not only for that client but for all clients for whom the attorney or law firm performed "labor relations advice or services regardless of the purposes of the advice or services" during the reporting period.

The term "labor relations advice or services" is not defined in the statute. The term is broadly defined in the Department's current, albeit outdated, Interpretive Manual, Section 269.520. There, among other things, advice "on the various federal and state laws bearing on the employer employee relationship" meets the definition and is reportable.

Thus, the proposed rule will create a legal dilemma for attorneys, as they will face the impossible choice described above for dozens or hundreds of clients, including those for whom traditional labor law is not at all an issue. The proposed rule, by virtually eliminating the "advice exemption" and expanding the reporting requirement, will dramatically increase the number of scenarios in which the reporting requirement is in conflict with the attorney's obligation to maintain client confidences or secrets.

d. The Proposed Rule Will Create Unnecessary Conflicts of Interest

The proposed rule will create unnecessary conflicts of interest. For example, a client may ask its attorney whether their arrangement is reportable. Both the client and the attorney have potential reporting obligations and both face civil and possibly criminal penalties for failing to file the required forms.

The attorney may explain that the nature of the retention is for advice and, therefore, is exempt from reporting. Is the attorney then obligated to disclose that there exists a potential conflict of interest since, if the attorney's retention by the client is reportable, the attorney and law firm will be obligated to disclose the identity and fees paid by all other clients for whom they performed "labor relations advice or services" during the reporting period?[19]

Is the attorney obligated to advise the client to consult with other counsel regarding any possible reporting requirement? What if the client concludes that the arrangement is reportable and insists that the attorney file the required forms? Must the attorney and law firm subordinate the rights of dozens or hundreds of other clients to its obligation to the current client, even if the other clients retained the attorney or law firm solely for non-reportable services such as areas that are not even close to traditional labor law, e.g., unemployment insurance, workers compensation, OSHA, FLSA, FMLA, etc. The attorney is caught on the horns of this dilemma and will be forced to grapple with these questions – and resolve them individually with all

[19] As noted above, this assumes that when the Department proposes a new Form LM-21, it will be consistent with the requirements of the current Form LM-21 with regard to reporting "all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services."

potentially affected clients – each year. This may also mean in-house counsel will be limited in its selection of preferred counsel to try to avoid all the conflicts just described.

3. The Proposed Rule May Require the Disclosure of Attorney-Client Privileged Information in Addition to Breaching the Broad State Ethical Confidentiality Considerations

The attorney-client privilege serves as the backbone of the "sacrosanct confidential relationship between lawyer and client." The privilege has been recognized in common law and by the Supreme Court for centuries. See Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communication between client and attorney is founded upon necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); see also United States v. Zolin, 491 U.S. 554, 562 (1989); Fed. R. Evid. 501.

Recently, many courts have defined the privilege by reference to a 1950 district court decision, stating that the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client;
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> (2) the person to whom the communication was made (a) is a member of the bar or court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
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> (3) the communication related to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purposed of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
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> (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); see also In re Sunrise Sec. Litig., 130 F.R.D. 560, 595 (E.D. Pa. 1989); In re Grand Jury Investigation, 599 F.2d 1224, 1233 (3d. Cir. 1979). Confidential communications from client to attorney and attorney to client are privileged. See Fisher v. United States, 425 U.S. 391, 403 (1976); see also Byrd v. State, 929 S.W.2d 151, 154 (Ark. 1996); Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co., 730 A.2d 51, 60 (Conn. 1999); Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 137-38 (Del. Super. Ct. 1997); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995); Rent Control Bd. v. Praught, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); Palmer v. Farmers Ins. Exch., 861 P.2d 895, 906 (Mont. 1993); Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002).

The proposed rule threatens the sanctity of the confidential relationship between the attorney and client and the attorney-client privilege. It would require the attorney to disclose the existence and nature of a client relationship where the attorney possibly has not even taken any public action on behalf of the client and the very existence and nature of the relationship between the attorney and client is a well-guarded confidentiality because disclosure of those matters would disclose the nature of the advice sought. It also would require the attorney to disclose the nature of confidential communications between attorney and client and the nature of advice rendered to his client.

a. The Agreement Between Attorney and Client and the Identity of the Client May be Protected by the Attorney-Client Privilege in the Context of Labor Relations "Advice"

The agreement between a client and its attorney is protected by the attorney-client privilege if it might "reveal the motive of the client in seeking representation." Avgoustis v. Shinseki, 639 F.3d 1340, 1345 (Fed. Cir. 2011), citing Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992). When an agreement reveals the purpose behind the retention, it is privileged and cannot be disclosed.

Clients often retain attorneys, and labor and employment attorneys in particular, solely to provide advice as opposed to representation in court. During the course of this relationship, the attorney might not perform any public or non-confidential duties on behalf of his client. For instance, a client may retain an attorney to review its employment policies and practices or give advice, subject to client acceptance or rejection, on how the employer can become an "employer of choice" in its industry or geographic area. There may be a number of reasons that a client wants to keep the nature of the attorney's work and advice – and even the fact that an attorney has been retained to give advice on such matters – confidential. Requiring an attorney to disclose the identity of these clients would reveal the relationship and, at the very least, the advice sought, which the client believed would remain confidential and, therefore, privileged.[20] Under the proposed rule, this disclosure could arise in at least two scenarios.

First, an attorney is retained to advise a client after several employees complained to the human resources manager about being approached at home by union organizers. The attorney reviews and revises draft communications prepared by the client. The attorney deletes language, subject to client acceptance or rejection, that would be deemed unlawful, and suggests lawful language that makes the same point. In doing so, the lawyer analyzes the law and recommends language that is lawful but also makes recommendations on language more likely to be effective in communicating the point; that is, the language recommended by the attorney's review is both lawful and more effectively persuasive than the language originally prepared by the client. Under the proposed rule, this would not be deemed advice but rather persuasive

[20] As discussed in Section A.2., supra, the disclosure of this information also violates an attorney's ethical obligations.

activity and reportable. Thus, the attorney would be required to disclose the identity of the client and the nature of the retention and fees, even though the attorney did not communicate directly with any employees or, for that matter, take any public position on behalf of the client.

Second, an attorney with a firm that is nationally recognized as an expert in sexual harassment law is retained by Client A to give advice on a sensitive matter involving complaints by unionized employees about their supervisor. The attorney has no public role but advises management and the Board of Directors on how they should handle the matter to minimize or eliminate the possibility of legal liability. This would not be deemed persuasive activity under the proposed rule, and it would not be reportable.

However, assume the law firm involved with representing Client A has another attorney who was retained in the same reporting period to prepare or revise, subject to client acceptance or rejection, Client B's communications about home visits by union organizers. The firm under the proposed rule must now report the identity of Client A and the fees paid for giving advice on the sensitive sexual harassment situation. This entails disclosure of the privileged fact of the attorney-client relationship with Client A which, given the firm's national reputation, would "reveal the motive of the client in seeking representation."[21]

In both scenarios, the proposed rule would require disclosures that would violate ethical confidentiality obligations and the attorney-client privilege. However, the second scenario involves an even more indefensible breach of the privilege because Client A never sought representation on any matters relevant to LMRDA reporting. This example illustrates how the proposed rule will expand the number of scenarios in which the reporting requirement is in conflict with the attorney-client privilege for clients covered by the present advice exemption and for clients who received advice not only unrelated to persuasive activity but unrelated in any way to traditional labor law.

b. The Subject Matter of Representation May Be Protected by the Attorney-Client Privilege in the Context of Labor Relations "Advice"

As a general proposition, a client's ultimate motive for litigation or for retention of an attorney is privileged. In re Grand Jury Witness (Salas and Waxman), 695 F.2d 359, 361-62 (9th Cir. 1982). As the Ninth Circuit has explained, the "general purpose of the work performed [by attorneys is] usually not protected from disclosure by the attorney-client privilege...but correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege." Clarke

[21] For the purposes of this example, it is assumed that the Department takes the position that the law firm would have to report fees paid and the fact of retention for not only Clients A and B, but for all other clients for which labor relations advice and services were provided within the reporting period, even if services involving persuader activity or traditional labor law were neither requested nor performed. We do not agree that such a broad interpretation of the reporting requirement is correct.

v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992). Similarly, the Fourth Circuit recognizes that employer records are privileged if they "reveal something about the advice sought or given." Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999).

The proposed rule would require attorneys to disclose information that is protected because its disclosure would "reveal something about the advice sought or given" or would reveal "the specific nature of the services provided." This is apparent in the elimination of the advice exemption and in the changes to Proposed Form LM-21. The form explicitly requires disclosure of information about the "nature of activities performed or to be performed," and the categories are quite specific, as these examples show:

- Drafting, revising or providing written materials [or speech] for presentation, dissemination or distribution to employees
- Training supervisors or employer representatives to conduct individual or group employee meetings
- Developing personnel policies or practices
- Conducting a seminar for supervisors or employer representatives

Courts also recognize that communications between attorney and client, where legal services are indistinguishable from the non-legal, are privileged. NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965). There the National Labor Relations Board ("NLRB") attempted to force the attorney to reveal reports prepared for its client by a private investigator hired by the attorney in connection with labor issues. The court refused the request saying if "... [the lawyer] was retained ... to render a legal opinion, perform a legal service or afford representation in legal proceedings and as an incident to this employment [the attorney] hired the detective, the privilege should be recognized."[22]

The proposed rule not only ignores this holding but in fact twists it upside down by taking the position that where advice and persuasion are inseparable, the conduct is reportable. This is precisely the opposite conclusion of Harvey, supra. Just as hiring the detective was "incident" to the retention in that case, persuasion is often "incident" to the giving of legal advice involving lawful communications under the NLRA. Separation is not possible since the client's purpose in seeking the advice is to persuade the employees in a lawful manner.

We agree that if the attorney communicates directly with employees regarding the exercise of their rights under the NLRA, the attorney is required to report without exception, even though reporting discloses the nature of the services performed, because the attorney and client have agreed to make those activities public and the attorney has become the actor for that

[22] Id. at p. 907

client.[23] However, anything less than direct communication is "advice" so long as the client may accept it or reject it, and the privilege attaches, and neither the attorney nor the client can be forced to disclose the specific nature of the services provided.

c. The Subsequent Dissemination of Persuasive Materials Does Not Affect the Attorney-Client Privilege

The proposed rule attempts to sidestep the privilege concerns when it states that deliberate disclosure of materials designed to persuade employees waives "any attorney-client privilege that might have attached to the activity." NPRM at 36183. This misstates both the law and the concern. It is true that a letter itself, drafted or revised by counsel, is not privileged once it has been disseminated to employees. The same is true of a motion for summary judgment filed with a court. But in both cases all communications including the attorney's involvement in the preparation of the document between the client and its attorneys regarding the letter or the motion remain privileged.

In the case of the letter, it would not be uncommon for the attorney to recommend, subject to client acceptance or rejection, deleting language that would be deemed unlawful and replacing it with lawful language that makes the same point and recommending strategy, subject to acceptance or rejection, that would make the communication more effective. Under the proposed rule, this would be deemed reportable persuasive activity. Thus, the attorney would be required to disclose the identity of the client and the subject matter of representation, even though the legal advice which deals with persuasive activities are inseparable and the attorney did not communicate directly with any employees or take any public position on behalf of the client.

If the law were to permit the practical total elimination of the advice exemption, it would also remove from the protection of the privilege the fact of communication and the nature of the communication between an attorney and a client preparing for a public event, even though the client's sole purpose for the retention was to obtain confidential advice to assist the client with its planning. This would be contrary to the privilege, which exists to foster open discussions between attorney and client without fear of disclosure. The subsequent dissemination of materials or activities taking place in public have no bearing on the privilege that applies to the communication between attorney and client in preparation for that dissemination.

d. The NPRM Relies on Inapposite Cases to Quell Concerns Regarding Forced Violation of the Attorney-Client Privilege

In support of the principle that disclosure of advice pertaining to persuasive activities is not protected by the advice exemption or the attorney-client privilege, the proposed

[23] This does not suggest broader disclosure for other clients in the same reporting period would be ethical or otherwise consistent with the terms of the statute. It is not.

rule cites only cases in which attorneys communicated directly with employees regarding their rights under the NLRA. Humphreys v. Donovan, 755 F. 2d 1211 (6th Cir. 1985) (Court finds that nature of attorney communications to employees must be disclosed because they were not privileged). Again, we do not dispute the fact that if an attorney communicates directly with employees regarding their rights under the NLRA, the attorney has directly engaged in the type of persuasive activities that Congress found inappropriate. Those activities are neither covered by the current correct interpretation of the advice exemption or any interpretation of the privilege or ethical requirements. However, these cases are inapposite with regard to the questions, raised in this section, about the proposed rule's conflict with the attorney-client privilege in cases that meet the current appropriate definition of the advice exemption or are covered by the privilege and ethical considerations.

B. The Proposed Rule Attempts to Amend the Statute through Rulemaking

1. The Proposed Rule Fails the Test Established by the Supreme Court because It is Contrary to the Clear Intent of the Congress

The Supreme Court applies a two-part test to the review of agency statutory interpretations.[24] The first step requires an analysis of the intent of Congress: "If the intent of Congress is clear, that is the end of the matter."[25] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. The court is not guided by a single sentence or part of a sentence but looks to the provisions of the whole law, and to its object and policy.

A court moves to the second step of the analysis only if Congress's intent in enacting the law is ambiguous. The second step requires an analysis of the agency's interpretation of the statute. If its interpretation is "permissible," courts will defer to the agency's interpretation unless it is arbitrary or capricious, an abuse of discretion, not predicated on reasoned decision making, or contrary to constitutional right. The agency's rule can also be overturned if the agency failed to observe the proper procedure required under the Administrative Procedure Act ("APA").

The proposed rule does not pass the first step of the Chevron analysis because it interprets the advice exemption out of the statute, contrary to the clear intent of Congress. Therefore, the proposed rule violated the APA because it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[26]

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[24] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
[25] 467 U.S. at 842-43.
[26] 5 U.S.C. Sec. 706(2)(C). In addition, the Department's propensity to misread and improperly interpret the statute is not limited to the advice exemption. In the proposed rule, the Department expands the definition of persuader activity and, therefore, the reporting requirements, to include protected concerted activity (NPRM 36192). This aspect of the proposed rule also is in direct conflict with the express statutory language set forth in Sections 203(a) and (b). The LMRDA never mentions protected concerted activity, and there is nothing in the statute or the

2. The Proposed Rule is Inconsistent with the Statutory Language: The False Dichotomy between "Persuasive Activities" and "Advice"

The LMRDA establishes a reporting scheme that requires symmetrical reporting by employers and consultants. Employers must report "any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to 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 ... ." (Sec. 203(a)(4.).

Similarly, consultants must report: "any agreement or arrangement [pursuant to which such person] undertakes activities where an object thereof, directly or indirectly, [is] to 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." (Sec. 203(b)(1.).

However, the LMRDA provides a sweeping exemption for the provision of advice: "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." (Sec. 203(c)).

The Department's consistent interpretation of the "advice exemption" since 1962[27] is that where the consultant has no direct contact with employees, and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees, which the employer has the right to accept or reject, the employer-consultant agreement is exempt from reporting under the Section 203(c) advice exemption.

This longstanding interpretation is consistent with the language and structure of the statute, which establishes the following simple, two-stage analysis:

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legislative history which would support the expansion of the reporting requirements to activities that may influence employees with respect to any protected concerted activity. The proposal to expand the reporting requirement in this regard offers another clear example of the Department's improper attempt to amend the statute through rulemaking.

[27] The only exception was a brief period in 2001, when the Department issued, without rulemaking or the opportunity for comment, a very limited new interpretation of the advice exemption. However, the new interpretation was rescinded before it took effect and was never subject to judicial scrutiny.

> **First stage of the analysis:** Are the activities "persuasive"? That is, do they have an object, directly or indirectly, "to 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 ... ."
>
> If the activities are not persuasive, they are not covered by the LMRDA. They are not reportable.[28] If the activities are persuasive, they are covered by the LMRDA and may be reportable subject to the second stage of the analysis.
>
> **Second stage of the analysis:** Are the persuasive activities exempt from reporting under the "advice exemption," i.e., consistent with the person's "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" (or exempt by reason of ethical confidentiality consideration or privilege concerns[29])?
>
> If the activities are persuasive but they are consistent with "giving or agreeing to advice" under the LMRDA, they meet the advice exemption and are absolutely exempt from the reporting requirement.[30]

The language of the LMRDA requires that the analysis be conducted in this sequence; since Sec. 203(c) provides an *exemption*, it follows that the activities must necessarily be persuasive before the advice exemption is considered or there would be no need to exempt the activities from reporting. This is the point that the Department seeks to obscure in its lengthy discussion of the claimed distinction between persuasive activities and advice.

The Department's NPRM maintains that persuasive activity cannot be advice ignoring the second stage of the analysis. Persuasive activity can, indeed, fall within the advice exemption!

Similarly, the Department's NPRM claims that whenever advice and persuasion are combined, "persuasion" trumps "advice". This is completely at odds with the clear language of the statute.

Under the proposed rule – again regardless of the definition of advice – the language of Sec. 203(c) is rendered meaningless surplusage if the advice involves persuader

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[28] We focus here only on the advice given to a specific labor relations client in contrast to the broader reporting obligations which ACC maintains are unethical and impermissible.
[29] See Section A.2., supra.
[30] If the advice exemption does not apply, the LMRDA looks to whether the activities are protected by the attorney-client communication exemption in Sec. 204.

activity.[31] Such a tortured construction of the statutory language is inconsistent with the Department's interpretation of the statute for more than the last half century. The legislative intent and the will of Congress are frozen in time as of 1959. To now reinterpret that will in 2011 requires one to conclude the Department has misread the statute for all these decades, has been wrong and has misled the public. Such a conclusion is not a reinterpretation of a statute – it is rewriting history. It is also arbitrary, capricious and just plain wrong.

3. The Proposed Rule is Internally Inconsistent: The Reinterpretation of the Advice Exemption is Inconsistent with the Proposed Definition of "Advice"

The Department proposes the following as the definition of "advice": "With respect to persuader agreements or arrangements, 'advice' means an oral or written recommendation regarding a decision or course of conduct."[32] Yet the Department's proposed reinterpretation of the advice exemption is inconsistent with this definition.

The Department explicitly rejects the current interpretation, "which distinguishes between direct and indirect contact and asks whether or not an employer is 'free to accept or reject' materials provided."[33] The Department now claims:

> In particular, the interpretation of advice currently contained in section 265.005 of the LMRDA Interpretative Manual (IM) – that an activity is characterized as advice if it is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him – sets a standard that is not grounded in common or ordinary understanding of the term "advice" as used in section 203(c).
>
> . . .
>
> "Advice" ordinarily is understood to mean a recommendation regarding a decision or a course of conduct. Thus, this common construction of "advice" does not rely on the advisee's acceptance or rejection of the guidance obtained from the advisor. Indeed, the act of supplying the guidance itself, or supplying a "recommendation regarding a decision or a course of conduct," constitutes the provision of advice, regardless of the advisee's ability or authority to act or not to act on it.[34]

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[31] A basis principle of statutory interpretation is that statutes should be construed "so as to avoid rendering superfluous" any statutory language. Astoria Federal Savings & Loan Ass'n. v. Solimino, 501 U.S. 104, 112 (1991). See also, Bailey v. United States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").

[32] NPRM 36182

[33] Id.

[34] NPRM 36183 (citations omitted).

The Department's proposed reinterpretation of the advice exemption is incorrect. The Department ignores the simple fact that to "recommend" is defined as: "to present as worthy of confidence, acceptance, or use; commend."[35] Simply stated, there is no advice without a recommendation (as the Department's definition of "advice" confirms) and, by definition, there is no recommendation without the client's ability to accept or reject!

The Department, by ignoring any consideration of the client's ability to accept or reject the advice, has proposed a reinterpretation of the advice exemption that is inconsistent with the statutory language and that is inconsistent with the Department's own proposed definition of "advice." This might be seen as a mere error in analysis were it not for the Department's acknowledgment that the reinterpretation was designed to achieve an end; i.e., to correct the perceived problem of under-reporting by the existing interpretation:

> The focus on whether an employer can "accept or reject" the material submitted by a consultant has resulted in an overbroad interpretation of "advice" that, in the Department's present view, exempts from reporting agreements and arrangements to persuade employees for which disclosure is appropriate. The interpretation now proposed by the Department better serves the purposes of section 203 to provide the level of disclosure for persuader agreements as described.[36]

4. The Proposed Rule is Inconsistent with the Statutory Language: "Advice" Reinterpreted as "Legal Advice"

The Department's proposed reinterpretation of the advice exemption is inconsistent with the definition of "advice" as it is used in the statute and is inconsistent with the accepted meaning of advice under any objective definition. The proposed rule limits advice to "legal advice," and compounds its error by narrowly defining and taking a jaundiced view of what may constitute legal advice. The Department describes those agreements or arrangements that are exempt under Sec. 203(c) in the proposed rule as follows:

> *Exempt Agreements or Arrangements*
>
> *No report is required concerning an agreement or arrangement to exclusively provide advice to an employer. For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent, is providing "advice." Reports*

[35] Random House Webster's College Dictionary.
[36] NPRM 36183.

are not required concerning agreements or arrangements to exclusively provide such advice.[37]

The Department's proposal is clear that advice is limited to the following: if an attorney or consultant (1) counsels employer representatives on what they may lawfully say to employees, or (2) ensures a client's compliance with the law, or (3) provides guidance on NLRB practice or precedent, the attorney or consultant is providing "advice" and the activities are not reportable.

The Department's proposed reinterpretation of the advice exemption seeks to narrow the advice exemption to legal advice in its purest and most technical form. This is inconsistent with the plain language of the statute, which provides an exemption for attorneys and non-attorneys.[38] It is all inconsistent with the holding of Harvey, supra, which teaches that activity incidental to the core legal engagement is also privileged.[39]

In addition, in its description of exempt "advice," the Department seems to take all issues of strategy out of the term – whether it be strategy about corporate campaigns, issues and timing of communications, employee meetings or about statements to selected employees. Attorneys always strategize – whether it be with respect to jury selection, the order of presentation of witnesses, witness preparation, advising a client with respect to defeating hostile corporate takeovers, tailoring a closing argument to specific jurors, or advising as to what must be in an annual report or a corporate disclosure statement and incorporating that advice into a draft letter subject to client acceptance or rejection. Why should the term advice – legal or otherwise – be different here? The heart of the Department's position is that any advice with respect to persuasive communications is either not advice or is reportable anyway. The NPRM is simply inconsistent with the meaning of "advice."

5. The Proposed Rule is Inconsistent with the Meaning of "Advice" in Labor Relations Cases

The NLRB applies a "totality of the circumstances" test in certain unfair labor practice cases and when ruling on objections alleging that an employer interfered with an NLRB election. This often includes the review of conduct that is not unlawful, as the NLRB looks to whether all the conduct – lawful and unlawful – reasonably tended to coerce employees (in unfair labor practice cases) or reasonably tended to interfere with employees' free and uncoerced choice in the election (in objections cases).

The NLRB has described the standard in these terms:

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[37] NPRM 36192-36193.
[38] "[A]ny employer or other person ... by reason of his giving or agreeing to give advice to such employer ... ." Sec. 203(c).
[39] NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965).

> The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation was adopted by the Board in Rossmore House, 269 NLRB 1176 (1984), affd. sub nom. Hotel Employees Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985). Under Rossmore House, the Board considers whether, under the totality of the circumstances, the questioning at issue would reasonably tend to coerce the employee in the exercise of rights protected by Section 7 of the Act. In analyzing alleged interrogations, the Board "considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; Stoody Co., 320 NLRB 18, 18–19 (1995).[40]

The totality of the circumstances in an objections case may include such details as the scheduling and sequencing of employee meetings, the identity of those in attendance at the meetings, the location of the meeting, the identity of the speaker and listener(s), the content of the presentation and its relationship to previous and subsequent communications, the employer's policies (especially if they are referenced in the employer's communications), and many other aspects of the employer's pre-election conduct.

The Department seeks to cast providing guidance on these issues as persuasive activities, suggesting that it constitutes the "orchestrating, planning, or directing a campaign to defeat a union organizing effort." Again, this fails to follow the analysis required by the statute.

In this case, guidance on these issues would qualify as advice because they are relevant to the ultimate determination whether the employer committed an unfair labor practice or objectionable conduct. Thus, it is exempt from reporting.

Even if one accepts, *arguendo*, the limitation of the advice exemption to "legal advice," the Department's proposal would require reporting of "legal advice" because suggestions by counsel on these matters, which are deemed "non-legal" and "persuader activities" under the proposed rule, "infects" the legal guidance, making it reportable.

Indeed, several of the categories of reportable "persuader activities" listed in Proposed Form LM-20 would apply to advice on such matters, including: "Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees," and "Training supervisors or employer representatives to conduct individual or group employee meetings."

But counsel on these issues is a "recommendation regarding a decision or course of conduct," as advice is defined in the proposed rule. Yet the Department claims that, because there is a persuasive component, it is now reportable.

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[40] Matros Automated Electrical Construction Corp., 353 NLRB 569 (2008).

The existing, 50-year interpretation of the statute addresses these issues cleanly, comprehensively and logically. Under the existing interpretation, the same basic analysis applies and "orchestrating, planning, or directing a campaign to defeat a union organizing effort" would be reportable unless it constituted advice. How would one determine whether it was exempt advice or reportable persuasive activities? By applying the simple test and asking whether the client had the right to accept or reject the guidance. If the client had the right to accept or reject the guidance, it is exempt advice. If the client did not have the right to accept or reject the guidance, then the consultant or attorney was engaged in "orchestrating, planning, or directing a campaign to defeat a union organizing effort" and must report. No reason exists to depart from this settled understanding.

6. The Proposed Rule has the Effect of Interpreting the "Advice Exemption" Out of the Statute

The Congress included the advice exemption in the LMRDA. The Department may not usurp the authority of the Congress and itself amend the statute under the guise of rulemaking and the proposed reinterpretation of the advice exemption. The proposed rule fails this test. Under the statute, if activities are found to be persuasive activities, they are not reportable if they are exempt from reporting under the advice exemption. Under the proposed rule, if activities are found to be persuasive activities, the advice exemption would never apply.[41]

This view is totally contrary to the intent of Congress and the statute and changes 50 years of Department interpretation. A basic rule of statutory construction requires that words are used for a purpose and, if used, they have meaning. The only reason to have an advice exemption is to make clear that advice regarding persuasive activity is exempt from reporting. If the statute was meant to require all matters dealing with persuasive activity to be reported, then the advice exemption would not be in the statute. If the advice exemption meant that advice unrelated to persuader activity was exempt, the language is unnecessary because only persuader activity is reportable. If the statute was intended only to exempt advice that met the definition of legal advice, then the term "advice" in Sec. 203(c) is again meaningless and all that would be required is the exemption for the attorney-client relationship (Sec. 204).

C. The Proposed Rule is Inconsistent with Congressional Intent

1. The Congress Did Not Intend to Require Reporting by "Legitimate Labor Relations Consultants"

There is no question that the Congress intended to curb the abuses of what it described as unscrupulous "middlemen" in labor management disputes. However, there is no

[41] "Thus, if a consultant engages in activities constituting persuader services, then the exemption would not apply even if activities constituting 'advice' were also performed or intertwined with the persuader activities." NPRM 36191.

support for the proposed rule, which appears to be intended to curb the advice of legitimate labor relations consultants and attorneys.

The McClellan hearings revealed the ugly side of labor relations in mid-20th century America. While most of the evidence related to union corruption and criminality, the hearings also uncovered evidence of serious misconduct by some labor relations consultants. The evidence of labor consultant misconduct was largely focused on the activities of Nathan W. Shefferman and his consulting firm, Labor Relations Associates of Chicago, Inc. The Committee found that:

> It was shown that Shefferman's agents flitted about the country from one client to another, violating the Taft-Hartley law with seeming impunity. A top attorney for the NLRB admitted that the present law is not sufficient to deal with this type of activity. It is the committee's opinion that for such a middleman to be found guilty of unfair labor practices in one community and then to go on to another community and commit the same offenses reveals a defect in the law as it is now written.[42]

In the conclusion to the section of the McClellan Committee's Interim Report dealing with the "middleman," the Committee noted that: "The hearings ended with Nathan Shefferman and his son, Shelton, invoking the Fifth Amendment on all matters. The silent Nathan Shefferman was a sharp contrast to his previous voluble appearance before the committee during the hearings on [Teamsters President] Dave Beck."[43]

The McClellan Committee's findings were referenced repeatedly during the discussion of the bill that became the LMRDA. The Senate Report on the bill described the unlawful practices of the "middlemen":

> These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices. The middlemen have acted, in fact if not in law, as agents of management.[44]

The Senate Report clearly stated that the bill was intended to address these evils:

> It is also plain that there are important sections of management that refused to recognize that the employees have a right to form and join unions without interference and to enjoy freely the right to bargain collectively with their employer concerning their wages, working conditions, and other conditions of employment. The hearings of the

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[42] Select Committee on Improper Activities in the Labor or Management Field, 85th Cong. Rep. No. 1417, at 452.
[43] Id. at 297.
[44] S. Rep. No. 85-1684 (1958)(Conf. Rep.), at 10-11.

> McClellan committee have shown that employers have often cooperated with and even aided crooks and racketeers in the labor movement at the expense of their own employees. They have employed so-called middlemen to organize "no-union committees" and engage in other activities to prevent union organization among their employees. They have financed community campaigns to defeat union organization. They have employed investigators and informers to report on the organizing activities of employees and unions. ... It is essential that any legislation which purports to drive corruption and improper activities out of labor-management relations contain provisions dealing effectively with these problems.[45]

One searches the legislative history in vain for any reference to consultants or attorneys drafting, reviewing and revising a proposed speech or letter which may be considered a persuasive communication, subject to client acceptance or rejection, which is intended for employee dissemination by the client or training supervisors to conduct lawful individual or group employee meetings, or developing personnel policies or practices or any type of strategy dealing with election or corporate campaigns. There are no such references because those activities have nothing to do with the nefarious and unlawful dealings of the "middlemen." Indeed, those activities are in the nature of advice that the Department now wants to be reportable because the advice involves persuasion.

The review of communications, training of supervisors, and development of policies and strategies are all legitimate activities, in contrast to the activities of the "middlemen" of the 1950s. There is no evidence that the Congress sought to subject these legitimate activities to the same "fishbowl publicity" reserved for the evils of Mr. Shefferman and his ilk. The Senate Report drew this distinction when noting that the Committee was "particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants."[46] When Senator Kennedy detailed the major points of the bill that would become the LMRDA on the Senate floor, he described the consultant reporting provisions as:

> Public financial reports of the operations of Shefferman-type middlemen; and a prohibition of channeling bribes and improper influence through such middlemen.[47]

The proposed rule is inconsistent with the Congressional intent that the LMRDA's reporting requirements should be imposed on "Shefferman-type middlemen," not on legitimate labor relations consultants and attorneys who render advice, i.e., recommendations concerning a course of action or strategy subject to client acceptance, even if that advice involves persuasive communications.

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[45] Id. at 6.
[46] Id. at 39.
[47] 86 Cong. Rec. S817 (daily. ed. January 20, 1959)(statement of Sen. Kennedy)

2. The Congress Did Not Intend to Require Reporting by Attorneys Acting in the Course of a Legitimate Attorney-Client Relationship

One also searches the legislative history in vain for any reference to misconduct committed by attorneys within the context of an attorney-client relationship. There are no such references. The attorneys who came to the attention of the McClellan Committee were acting as "consultant middlemen." There is no evidence they held themselves out as attorneys providing legal services, counsel and advice to their clients.

The Senate Report on the bill that became the LMRDA, in describing the advice exemption, noted that the new reporting requirements were not intended to cover attorneys or consultants who did not engage in the misconduct identified by the McClellan Committee:

> The Committee did not intend to have the reporting requirement of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations who do not engage in activities in the types listed in Section 103(b).[48]

Indeed, Chairman McClellan advised, in the context of discussing the activities of Nathan Shefferman's consulting firm:

> I am compelled to observe that I see nothing wrong in seeking counsel and employing legal counsel, and employing even experts in labor-management relations, and those things. I think that we have some more, but it looks to me like we are developing a pattern of what amounts to a payoff to union officials to have them disregard the rights of the working man or to be reluctant, if not to refuse, to test any drive for unionization.[49]

Similarly, the Committee observed that:

> Since attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings nor would such a consultant be required to report.[50]

As the above quote from the history shows, reporting was intended only for those who engaged in direct persuasive communications with employees – those who themselves "engage in influencing or affecting employees in the exercise of their rights under the National

[48] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 40.
[49] Select Committee on Improper Activities in the Labor or Management Field, 85th Cong. Rep. No. 1417, at 293.
[50] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 8.

Labor Relations Act." The Committee itself noted the breadth of the advice exemption: "Subsection (c) of section 203 of the conference substitute grants a broad exemption from the requirements of the section with respect to the giving of advice. This subsection is further discussed in connection with section 204."[51]

Section 204 makes clear that the reporting requirements were not intended to apply to attorneys. The language is not limited to a description of the attorney-client privilege. Rather, it is crafted to protect "legitimate attorney-client relationship[s]":

> Nothing contained in this Act 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 Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

In the discussion of the amendment that added the attorney-client communications exemption, which became Section 204 of the LMRDA, Senator Kennedy expressed the view that it was unnecessary due to the breadth of the advice exemption:

> There is no doubt in my mind that the bill which was originally drafted by lawyers adequately protected them. Therefore, I do not feel that the amendment offered by the senator from Arizona is wholly necessary. But in order that there may be no question about it, I will accept the amendment.[52]

Thus, clearly the advice exemption and Section 204 were intended to broadly exempt attorneys who gave advice with respect to persuasive communications. The Department's new interpretation of advice, which in essence makes any advice concerning persuasive communications reportable, does not reflect the Congressional intent but rather rejects it and therefore usurps the will of Congress by attempting to amend the statute in the guise of rulemaking.

A review of the discussion of the amendment that became Section 204 of the LMRDA makes two facts abundantly clear. First, Senator Goldwater, who offered the amendment, intended to specifically exempt from the reporting requirements any communication between an attorney and his client. Second, Senator Kennedy, who was convinced to accept the amendment, was concerned about the unlawful activities of unscrupulous attorneys identified by the McClellan Committee.

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[51] Select Committee on Improper Activities in the Labor or Management Field, 86th Cong. Rep. No. 621, at 33.
[52] 86 Cong. Rec. S1164 (daily. ed. April 23, 1959)(statement of Sen. Kennedy)

> Mr. Goldwater. ... **The amendment specifically exempts from the reporting requirements of the bill any communication between an attorney and his client.** I do not know how I can explain the amendment any more completely than that. I think every attorney and every member of this body understands the historic relationship and sanctity of such communications. I hope the senator from Massachusetts will accept the amendment.
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> Mr. Kennedy. Mr. President, I am prepared to accept the amendment. As I understand it, it is the amendment which takes care of the lawyers.
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> * * *
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> **I will accept the amendment; and I hope it will encourage the bar associations of the United States to fulfill their responsibility in a more substantial way than they have so far in this particular problem of ethical practices. I think this responsibility is tied up completely with the problem of corrupt practices, "sweetheart deals," and all the rest of the racketeering and corruption which the committee found to exist in labor-management relations.**
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> * * *
>
> **I was referring to lawyers who deal collusively with crooked unions, crooked union leaders, or crooked employers, and then, in an attempt to protect themselves, justify their actions on the basis of a confidential relationship.**[53]

This exchange confirms that the legislative intent was to "specifically exempt from the reporting requirements any communication between an attorney and his client."[54] It also confirms that the intent in subjecting attorneys to the reporting requirements, when acting as consultants, was to curb the unlawful activities identified by the McClellan Committee, such as **lawyers who deal collusively with crooked unions, crooked union leaders, or crooked employers, and then, in an attempt to protect themselves, justify their actions on the basis of a confidential relationship.** Nothing was ever intended to subject to reporting the lawful activities of attorneys acting in the course of a legitimate attorney-client relationship even where the subject matter of the advice may deal with a persuasive communication.

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[53] Id. (emphasis added).

[54] The House Report on the bill that became the LMRDA, in describing intent of Sec. 204, echoes this point: "The purpose of this section is to protect the traditional confidential relationship between attorney and client from any infringement or encroachment upon the reporting provisions of the Committee bill." H. Rep. No. 85-8342 (July 30, 1959)(Conf. Rep.), at 36-37.

3. The Congress Had Nearly 50 Years to Amend the Statute if the Department's Longstanding Interpretation was Inconsistent with its Intent

The Department's interpretation of the advice exemption, as applied, has been consistent for nearly 50 years – since the 1962 memo by Solicitor of Labor Charles Donahue. Solicitor Donahue explained the interpretation, and its modification of the initial 1960 interpretation, as follows:

> [T]he Department ... originally took the position that [the exemptions in LMRDA section 203(b) and section 204] did not extend to drafting or revising speeches, statements, notices, letters, or other materials by attorneys or consultants for the use or dissemination by employers to employees for the purpose of persuading them with respect to their organizing or bargaining rights. This kind of help was not viewed as advice but, instead, was regarded as an affirmative act with the direct or indirect objective of persuading employees in the exercise of their rights.
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> **Donahue observed that this position had been "reviewed in the light of Congressional intent," which revealed "no apparent attempt to curb labor relations advice in whatever setting it might be couched." Expert legal advice was often necessary, Donahue suggested, and thus: "Even where this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be fairly treated as advice. The employer and not the advisor is the persuader."**[55]

Solicitor Donahue in 1962 – 49 years ago, was making decisions almost contemporaneously with the legislative debate and the enactment of the statute. The Department in 2011 is rewriting history a half century after the fact. The new proposed interpretation is improper, does not reflect the will of Congress and certainly undermines public confidence in the Department and its proposed rule. The proposed rule is nothing more than an attempt to amend the statute by denying employers legitimate advice in a complex area and thereby restricting the employer's first amendment and NLRA free speech rights. The Donahue interpretation is consistent with legislative history as it relates to the application of the reporting requirements to attorneys. As the proposed rule notes, Solicitor Donahue explained that an attorney's drafting of communications for an employer "can reasonably be regarded as a form of written advice where it is carried out as part of **a bona fide undertaking which contemplates the furnishing of advice to an employer.**"[56] This is consistent with the advice exemption and the "legitimate attorney-client relationship" protected by Section 204, and with the legislative history regarding the application of the reporting requirements to attorneys.

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[55] Charles Donahue, "Some Problems under Landrum Griffin in American Bar Association, Section of Labor Relations Law," Proceedings 48-49 (1962), as described and quoted in NPRM at 36180.
[56] NPRM at 36180 (quoting Solicitor Donahue's 1961 memo) (emphasis added).

The proposed rule quotes selectively from the legislative history and fails to anchor the quotes to the underlying illegal and unethical practices that were identified by the McClellan Committee that led to the LMRDA. The proposed rule also quotes selectively from statements by members of the Executive Branch and hearings held by one house of Congress which did not result in the amendment of the statute.[57] These statements – from 1980 and 1984 – are not part of the legislative history and have no bearing on the intent of the Congress at the time the statute was enacted. If anything, the quoted criticisms of the current interpretation serve to underscore the fact that the Congress, even in the face of these criticisms, felt no need to amend the statute.

It would be arbitrary and capricious for the Department to issue a radical reinterpretation at this juncture, when the Congress has had nearly 50 years in which it to overturn the Department's interpretation by legislation, yet never did so.

4. The Department Has Failed to Demonstrate Good Reasons for the Proposed Interpretation of the Advice Exemption after Nearly 50 Years of Consistent Interpretation upon which the Management Community Relied

The Department may enact rules and interpret the statute in accordance with the APA. Through rulemaking, the Department may not contravene the statutory language or amend the statute in the guise of rulemaking for such efforts exceed the agency's power.

The Department may change a statutory interpretation only if it can "show that there are good reasons for the new policy."[58] We maintain that the proposed interpretation contravenes the statute.

Nor has the Department shown that there are good reasons for the new policy. As we have said, the NPRM involves a change in the interpretation of a statute that has been in effect for more than a half century. But the NPRM does more than that as it dramatically reverses a long-standing interpretation of the LMRDA going to the heart of the law. The NPRM is not a clarification of a few points of contention; it is a reformulation and rejection of legislative intent.

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[57] NPRM 36181, 36184-36185.
[58] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

In such cases, the Supreme Court has held that the agency proposing the new interpretation may be required to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[59] Specifically, the Court noted that when the "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," the agency may not ignore the significance of those factors:

> It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[60]

The Department articulated a number of reasons for the radical reinterpretation of the advice exemption. However, these reasons are based upon: (1) a misreading of the statute and the legislative history over a period of a half century, and (2) the application of contemporary industrial relations research by a small group of partisan interested observers whose conclusions and recommendations are utterly unrelated to the problems identified by the Congress and which the LMRDA was enacted to address.[61] Those observers are free, of course, to petition Congress for change, as was done with the proposed Employee Free Choice Act. But the Department cannot reply upon their "research" to justify what amounts to new legislation in the name of rulemaking.

Those observers may wish to have the Department address a new set of labor relations "problems" they perceive, and we do not begrudge them their beliefs, but there is no statutory regime in existence today to support those views. If they believe their research supports new or expanded statutory prohibitions and requirements, they should lobby for a change in the law. In the meantime, it would be arbitrary and capricious for the Department to implement the new rule to achieve these goals in the absence of legislative action.

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[59] Id.

[60] Id. at 11-12.

[61] For example, these observers claim that consultants play a role in an increasing number of NLRB elections, and they question the role of consultants – and the employers themselves – in engaging in lawful communications and campaigning on the question of unionization. It is clear that the observers would prefer employers not to communicate with employees at all on this issue. Yet, the LMRDA does not restrict employer speech, which is protected by statute, by numerous NLRB decisions, and by the Supreme Court. The LMRDA was enacted to curb the abuses of the 1950s-era "middlemen" whose conduct, when identified and cited by the Congress, was invariably unlawful.

CONCLUSION

For all of the foregoing reasons, the Association of Corporate Counsel and its Employment and Labor Law Committee strongly urge the Department to withdraw its proposed rule and to administer the LMRDA as Congress intended. It is really very simple. If a labor relations consultant or attorney chooses to persuasively communicate directly with employees – whether it be in person or by letter – that triggers a reporting obligation. However, if an employer chooses to directly communicate persuasively with its own employees, and seeks advice to legally and effectively do so, no reporting should be required as long as the advice meets the current – i.e., 50-year-old and consistently applied – definition of the advice exemption or is protected by the attorney-client relationship as Congress intended.

Respectfully submitted,

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