To the Editor of the ABA Journal

. Your article, "Unpersuaded," in the December issue of the *Journal* has inspired me to write this as an individual. I have been an ABA member for 43 years, and an ABA "junkie" who has at times been a member of as many as six Sections and one Center. I do not represent either management or unions in activities covered by the National Labor Relations Act, but I know the difference between what is right and what is wrong, and I am afraid the ABA has stepped over that line.

The issue in question is whether the U.S. Department of Labor should proceed with a proposed regulation trying to stop serious abuses of employee rights. The letter sent by the ABA President chose to take a broad approach, opposing the entire draft regulation, rather than a narrow approach targeted at the one area where I think the Labor Department clearly overreached. In so doing, the letter—despite its statement that it was not taking sides on union-organizing issues—clearly aligned the ABA with the abusers of employee rights. No such action should have been taken without a grant of current authority by the HOD. The precedent the letter set raises extremely serious issues for ABA policy governance.

The context reveals the importance of the issues at stake. In 1959, Congress was faced with a track record of serious abuses— lies, threats, retaliation, and bribes to set up phony employee committees to challenge unions—by management consultants resisting union organizing campaigns or running union de-certification campaigns. Employees who favored unions soon lost their jobs, often for trumped-up reasons. Some of the abusers were lawyers, and some were not. The House of Delegates passed a resolution, co-sponsored by the precursors of the Section of Labor and Employment Law and the Section of Business Law, stating:

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

Congress passed legislation to require the persons coordinating such resistance—called "persuader activity"—to report the identity of their clients and their fees, and the U.S. Department of Labor adopted a regulation stating that persons who merely advised companies, but did not engage in direct contact with the employees in the proposed bargaining unit, would be exempt from the reporting requirement.

Unfortunately, water finds its own level, and the breadth of the "advice exemption" allowed abuses to flourish. Since 1959, the activities of labor consultants and lawyers in this area have grown exponentially. One of them, Martin Jay Levitt, wrote with Terry Conrow in *Confessions of a Union Buster* (Crown Publishing, 1993) at p. 41, that the reporting requirements could have been effective without the advice exemption: "Had it not been for a couple of well-placed loopholes, those disclosure provisions could have snuffed out the anti-union consulting

industry in its infancy. A master of illusion, the union buster pulls off his tricks amid the confusion of smoke and mirrors; his magic disappears under the blazing lights of center stage." He continued: "But the loopholes in Landrum-Griffin are shameful—enormous, gaping errors in the law that have left room for a sleazy billion dollar industry to plod through without even sucking in its bloated middle." Levitt reports that he engaged in these activities, but never filed a Landrum-Griffin report in his life. He explained: "Here's why not: According to the law, in order to be considered engaging in 'persuader' activities, he must speak directly to the employees in the voting unit. As long as he deals directly only with supervisors and management, he can easily slide out from under the scrutiny of the Department of Labor, which collects the Landrum-Griffin reports." *Id.* at 42.

Attorneys increasingly adopted the abusive tactics of the labor consultants who were the source of so much worry in 1959. No one quarrels with the ability of counsel to advise the management group, but it stretches the notion of attorney-client confidentiality and the "advice exemption" to extend this safe harbor to attorneys who instruct first-line supervisors to buttonhole employees at work and in the community, tell them what to say, and use them as a means of intelligence as to the names of employees who support the union. Those are the actions of a bandleader, not an attorney. And when they engage in abusive behavior, they are engaged in a conspiracy to cheat employees of their rights under the law.

Large corporations have been very successful in reducing the size of the unionized workforce, in part through tactics like these, until unions now represent only 6.9% of the private workforce.

Recognizing that sunshine is the best disinfectant, the Labor Department has proposed amendments to its "persuader regulations" that would shine a small light on some of this abuse, by narrowing the advice exemption and requiring reporting by the "bandleaders." There is nothing extraordinary in such reports; union attorneys are required to identify their clients and state their fees in filing public reports with the Department of Labor in certain circumstances, and the ABA never protested the requirement. The ABA has supported greater disclosures of thus type by attorneys who are lobbyists. There is no principled basis to oppose such reports by attorneys as to clients for which they act as "persuaders," either speaking directly to employees or acting as bandleaders.

The Labor Department made one serious mistake, in my view, in its proposed regulation. It required any attorney who was a "persuader" for one client to report on all other labor-management clients for whom the attorney was not a "persuader." That trespasses on client confidentiality, and I believe management attorneys were right to protest against this part of the proposed regulation. If the President of the ABA had brought this issue before the House of Delegates in August in Toronto, I am confident the House would have overwhelmingly granted authority to oppose this part of the draft regulation.

What happened, however, was very different and very dangerous to the policymaking authority of the House, any ABA entities that sponsor resolutions, and its members. Relying on the zombie resolution of 1959, the President of the ABA declared that it authorized him to oppose not only the requirement of revealing and reporting information on non-persuader clients, but also the narrowing of the advice exemption. In effect, the ABA opposed the entire proposed

regulation.

The House of Delegates has never had an opportunity to speak on whether the "advice exemption" should extend to the "bandleaders," or even on whether attorney-client privilege should apply to attorneys' meetings with working foremen and first-line supervisors, in which union-combat advice, not legal advice, is being given. The 1959 HOD resolution had nothing to do with these subjects.

The Section of Labor and Employment Law orally informed the President of the ABA and the Office of Government Affairs that it could not reach a consensus, and sent a letter to the ABA President confirming that it was deeply divided on the issue and could not reach consensus. This, and a series of conversations and written communications, should have made clear that this was an area in which it was important to tread carefully and narrowly. The ABA President could have asked for a grant of authority from the House of Delegates in August, and the House would have had an opportunity to consider the policy issues described above. The ABA President could have proceeded narrowly under the 1959 zombie resolution and simply addressed the overreach described above.

Rather than proceeding carefully and narrowly, the ABA President took from the hands of the House of Delegates the critical policy questions described above, and announced that he could interpret the few 1959 words urging protection for the attorney-client privilege to accomplish everything he wanted to say about a different situation with different issues more than a half-century later. Simultaneously, the ABA engaged in completely unbalanced broadsides to State and local Bars urging them to join the bandwagon, making no mention of the documented record of evils the proposed regulation sought to address, and making no mention of the lack of authority for the broad position being taken by the ABA. A number of other bar associations then joined the stampede, relying on the ABA's reputation for care in its actions.

The bylaws of the ABA make clear that the President has no policymaking authority, but merely the authority to implement policies adopted by the House of Delegates and, in limited circumstances when the House is not in session, the Board of Governors. Because resolutions adopted by the HOD are frequently general in their wording, acceptance of this manner of proceeding would allow any future ABA President to don an explorer's helmet, dive into the dustbin of old HOD resolutions, interpret any past broad language in any other zombie resolution to fit pretty much any new situation, and declare ABA policy that the policymakers never envisioned.

This places too much, and too freewheeling, power in the hands of an officer who is not supposed to have any such power. The House and the Board of Governors should act to limit the discretion of the ABA President. A useful and necessary step would be to require that, when any resolution more than ten or twenty years old is sought to become the basis for a policy declaration, the sponsoring ABA entities and affected ABA entities be given an opportunity to state whether there is a consensus that the old resolution does in fact apply to the proposed declaration. If there is no consensus within one of these ABA entities, or among them, the President should be required to submit the question to the House for a decision on policy as to the new situation, and all concerned should act as narrowly as possible.

The alternative is policy chaos, and an alignment of the ABA with the worst elements of the corporate and legal world, as we saw in the ABA President's letter to the Department of Labor.

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