UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR MANAGEMENT STANDARDS

LABOR-MANAGEMENT REPORTING	)	RIN 1215-AB79
AND DISCLOSURE ACT:	)	RIN 1245-AA03
INTERPRETATION OF THE "ADVICE"	)	76 Fed. Reg. 36178
EXEMPTION	)	(June 21, 2011)

COMMENTS OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

The International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") hereby submits these comments in response to the Department of Labor's ("DOL") proposal, published at 76 Fed. Reg. 36178 (June 21, 2011) ("proposed rule"), to modify the DOL's interpretation of the advice exemption to the reporting requirements stated in § 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Act"), 29 U.S.C. § 433. The IBEW urges the DOL to adopt the proposed rule.

The IBEW represents approximately 668,000 employees in the public utility, telecommunications, manufacturing, broadcast, railroad, and electrical construction industries, and has 882 affiliated local unions. The IBEW and its affiliated local unions are routinely involved in organizing campaigns, and have extensive experience with the anti-union campaigns orchestrated for employers by third-party consultants.

The DOL has ably explained the basis for the proposed rule. The IBEW writes to (1) provide an overview of its experience with labor consultants who have hidden their persuader activities in support of an employer's anti-union campaign

behind the veil of the current interpretation of the advice exemption; and (2) explain that the DOL's proposed modification of the advice exemption will not cause attorneys to breach the attorney-client privilege or their broader ethical duties. The IBEW also hereby incorporates and adopts the comments of the AFL-CIO, which also urge the adoption of the proposed rule.

1. The IBEW's Experience with Labor Consultants

The IBEW's experience with the use of labor consultants is consistent with the utilization rate noted in the proposed rule. 76 Fed. Reg. at 36186 (citing Kate L. Brofenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in Restoring the Promise of American Labor Law 80 (Sheldon Friedman et al., eds. ILR Press 1994) for a consultant-utilization rate between 71% and 87%). As the proposed rule notes, however, employees often do not know that a third-party has been retained to orchestrate a non-union campaign. 76 Fed. Reg. at 36187. Nevertheless, in most IBEW campaigns, all signs point to the use of such a third-party.

The anti-union materials used in each campaign – often involving entirely different industries – undoubtedly make the same assertions, sometimes using identical language. For example, in almost all anti-union campaigns in the IBEW's experience, employers disseminate professionally produced materials in writing or via video: (i) warning employees not to sign union authorization cards; (ii) asserting that the union is a "third-party"; (iii) contending that the union is a "business"; (iv)

warning about strikes; and (v) stating that collective bargaining cannot force the employer to make any concessions.

During these campaigns, unidentified strangers are seen by employees shuttling in and out of meetings with management officials and first-line supervisors. Rarely, if ever, however, do these consultants meet with employees face-to-face. For if they do, not only will they trigger a reporting requirement even under the current interpretation of the advice exemption, but in the IBEW's experience, the consultants' actions when meeting with employees may constitute objectionable conduct resulting in setting aside an election under the National Labor Relations Act. *E.g.*, *Exelon Generation Co.*, 347 NLRB 815, 826-32 (2006) (election set aside due in part to objectionable conduct by the employer's labor consultants).

As the proposed rule notes, "employees have a great deal of information available to them concerning unions, such as annual union financial reporting provided on Forms LM-2, LM-3, and LM-4 pursuant to Section 201 of the LMRDA. 76 Fed. Reg. at 36188. Indeed, in the IBEW's experience, just as it is inevitable that a labor consultant will prepare materials for employers to distribute asserting that the union is a "third party," so too will those consultants prepare materials based on the union's LM reports.

For example, in 2009, IBEW Local No. 1900 was involved in a campaign to organize the employees of Baltimore Gas & Electric ("BGE"). During the course of that organizing campaign, BGE distributed to employees several fliers that not only

appeared to be prepared by labor consultants, but also used LM reports filed by the IBEW and its local unions. One such handbill claimed to have analyzed the LM-2 reports filed by 132 IBEW local unions that represent employees at investor owned utilities.

Another example concerns a 2009-10 campaign by IBEW Local No. 340 to organize certain employees of DirectTV. During that campaign, DirectTV distributed handbills that appeared to be prepared by a labor consultant and that used the local's LM-2 report to make claims regarding the local's finances.

Indeed, the use of unions' LM reports has long been part and parcel of the labor consultant playbook. Martin Jay Levitt explained that the LMRDA's reporting requirements imposed on unions are a great asset to labor consultants. "Wow. Union busters couldn't have asked for a bigger break. For the first time, detailed, timely information on the inner working and finances of unions and labor leaders would be available to consultants and attorneys for the price of a photocopy. Thank you Congress." Martin Jay Levitt (with Terry Conrow), *Confessions of a Union Buster* 41 (New York: Crown Publishers, Inc. 1993). Mr. Levitt, of course, also explained that the LMRDA's labor consultant reporting requirements are easily avoided under the DOL's current interpretation of the advice exemption because no reporting is required so long as the consultant delivers his or her message through a supervisor. 76 Fed. Reg. at 36187 (quoting Levitt, *Confessions of a Union Buster* 41-42). As Mr. Levitt stated in discussing his time as a consultant, "our anti-union activities were carried out in backstage secrecy; meanwhile we

gleefully showcased every detail of union finances that could be twisted into implications of impropriety or incompetence." Levitt, *Confessions of a Union Buster* 42.

The relevant point is not that labor consultants should be prohibited from using the reports filed by unions under the LMRDA. Although it is frustrating when those reports are taken out of context, nevertheless, the IBEW understands the role of union financial reports in furthering the LMRDA's goal of promoting union self-government. The reporting scheme designed by Congress in Title II of the LMRDA, however, was not meant to be a one-way proposition. As the proposed rule recognizes, in promulgating the LMRDA, Congress recognized that: "[I]f unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees . . . ." 76 Fed. Reg. at 36184 (quoting S. Rep. 187 at 39-40, LMRDA Leg. Hist. at 435-46).

2. The Proposed Rule will not Require Attorneys to Breach the Attorney-Client Privilege or Their Broader Ethical Duties

The proposed rule modifies and narrows the advice exemption, and thus will make reportable a wider array of persuader activity. The nature of the information that is required to be reported once the reporting obligation is triggered, however, is not changed substantively by the proposed rule. Proposed revised Form LM-20 requires attorneys engaged in persuader activity to report (1) the client's identity;

(2) the nature of the fee arrangement; and (3) basic facts regarding the nature of the representation. 76 Fed. Reg. at 36207-08. That information has long been required on Form LM-20.

Section 204 of the LMRDA provides that the Act's reporting requirements shall not be construed to require an attorney to report information subject to the attorney-client privilege.[1] In enacting §204, Congress sought "to accord the same protection as that provided by the common-law attorney-client privilege." *Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985).

The attorney-client privilege broadly protects from disclosure communications between an attorney and his or her client. *E.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The scope of the privilege is not, however, without limitations. It is well-settled that, with limited exceptions that do not apply here, the existence of an attorney-client relationship, the identity of an attorney's client, the terms of a fee arrangement, and the details regarding the scope and nature of the attorney-client relationship, are not subject to the privilege. *United States v. Kingston*, 971 F.2d 481, 491 n.5 (10th Cir. 1992) (noting that testimony by an attorney concerning the client's identity and the source of legal fees would not constitute a violation of the privilege); *In re Grand Jury Proceedings (Goodman)*, 33 F.3d 1060, 1063 (9th Cir. 1987) (holding that information regarding

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

a fee arrangement was not privileged); *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 247-48 (2d Cir.) (en banc), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986) (explaining that the Second Circuit has "consistently held" that client identity and fee information are not privileged); *Condon v. Petacque*, 90 F.R.D. 53, 54 (N.D. Ill. 1981) (explaining that the attorney-client relationship and the dates on which services were performed are not privileged); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 707 (S.D.N.Y. 1979) (explaining that the purpose for which a lawyer was retained is not protected from disclosure by the attorney-client privilege).

It is not surprising, therefore, that courts have long held that the information required on Form LM-20 – which the proposed rule does not substantively modify – is not protected by the attorney-client privilege. In *Humphreys,* 755 F.2d at 1219, for example, the Sixth Circuit held that, "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." Accord *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969).

The reporting required under the proposed rule is similar to that required under Internal Revenue Code Section 6050-1, which states that, "[a]ny person . . . engaged in a trade or business, and who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" must file a return specified as IRS Form 8300. 26 U.S.C. § 6050-I. Form 8300 requires the filer to provide the name, address, date of birth, taxpayer

identification number, and occupation, profession, or business of the individual from whom the cash was received. *See* IRS Form 8300, available at http://www.irs.gov/pub/irs-pdf/f8300.pdf (last visited Sept. 14, 2011). The form also requires the filer to provide a description of the transaction, including a specific description of any services provided. *Id.* Finally, the filer must verify the identity of the person from whom the cash was received. *Id.*

Section 6050-I's reporting requirements apply to attorneys, and legislative and judicial efforts to exempt attorneys from the reporting requirement have failed. For example, Congress has rejected efforts by, among others, the American Bar Association to amend the law to exempt attorneys. *See* Ellen S. Podger, Form 8300: The Demise of Law as a Profession, 5 *Geo. J. Legal Ethics* 485, 492 and n.45 (1992). Likewise, in promulgating regulations implementing Section 6050-I, the IRS specifically rejected the argument that attorneys should be excluded from the reporting requirements. 56 Fed. Reg. 57974, 57976 (Nov. 15, 1991).

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

privilege." *Leventhal*, 961 F.2d at 940 (quoting *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982).

Thus, as set forth above, although the proposed rule will require more consultants and attorneys to report under Section 203(b) of the Act, the information to be reported remains unchanged. That information is not protected by the attorney-client privilege.

Courts also have rejected claims that such information although not protected by the attorney-client privilege is nevertheless confidential information that cannot be divulged under state bar ethics rules. These rules require attorneys to maintain client confidences, even if the confidences are not subject to the attorney-client privilege. For example, the American Bar Association *Model Rules of Professional Conduct* provide in Rule 1.6 that "[a] lawyer shall not reveal information relating to representation of a client . . . ." This prohibition, while broader than the attorney-client privilege, is subject to several exceptions. Rule 1.6(b)(6) provides, "[a] lawyer may reveal information relating the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or a court order."

Courts have consistently held that Rule 1.6 does not shield attorneys from reporting requirements mandated by federal law. In *United States v. Monnat*, 853 F.Supp. 1304 (D.Kan. 1994), for example, the court considered whether an attorney could be compelled to comply with the reporting requirements mandated by Internal Revenue Code Section 6050-I, discussed above. The court referred the

matter to the court's Committee on Attorney Conduct, which concluded that "[a] lawyer does not act unethically by complying with Section 6050I or an order of the court directing compliance because he is permitted under Rule 1.6(b) to disclose otherwise confidential information when he reasonably believes disclosure is required by law or order of court." Likewise, in *Blackman*, 72 F.3d at 1424, the court ruled that attorneys are not exempt from Section 6050-I's reporting requirement, explaining that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements[.]" (quoting *United States v. Sindel*, 53 F.3d 574, 577 (8th Cir. 1995)). The courts have, therefore, consistently found that Section 6050-I is an "other law" that privileges attorneys to disclose otherwise confidential information.

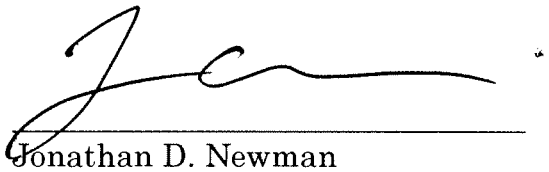
The LMRDA is another such law, and nothing in the Act indicates that Congress intended that state ethics rules should protect from disclosure the information that must be reported on Form LM-20. Indeed, the legislative history reveals that such protections for attorneys were considered, but rejected.

The House version of LMRDA Section 204 protected from disclosure the type of confidential client information covered by Rule 1.6 and similar state ethics rule. It adopted almost verbatim a proposal from the American Bar Association and would have protected from disclosure "any information which is confidential" between an attorney and client, "including but not limited to the existence of the relationship of attorney and client, the financial details thereof, or any information obtained, advice given, or activities carried on by the attorney within the scope of

the legitimate practice of law." H.R. 8342, 86th Cong., 2d Sess. § 204 (1959), U.S. Cod. Cong. & Admin. News 1959, p. 2318. In conference, however, Congress rejected that language, enacting the much narrower protection afforded by Section 204, which Congress intended "to accord the same protection as that provided by the common-law attorney-client privilege." *Humphreys,* 755 F.2d at 1219. Thus, for the purpose of Model Rule 1.6 and similar state ethics laws, the LMRDA is an "other law" that permits attorneys to reveal client confidences without breaching their ethical obligations.

In sum, the proposed modification to the advice exemption will close a massive loophole that has allowed labor consultants to avoid reporting their persuader activities. The modified interpretation will enable employees to be better informed regarding issues surrounding union organizing and/or collective bargaining, and will lend transparency to an industry that has been able to hide in the shadows for far too long.

Respectfully submitted,



Jonathan D. Newman
Lucas R. Aubrey
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
900 Seventh Street, N.W.
Suite 1000
Washington, D.C. 20001
Telephone: 202-785-9300
Facsimile: 202-775-1950

Counsel for the International Brotherhood of Electrical Workers, AFL-CIO