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PERSPECTIVE

'Persuader rule' would destroy attorney-client privilege and duty of confidentiality

By Michael J. Lotito

Organized labor, among others, is aggressively pushing the Senate to pass the Protective the Right to Organize Act, commonly referred to as the PRO Act. This destructive legislation would, among other alarming changes to our labor laws, amend the "persuader rule," which would significantly undermine the doctrine of attorney-client privilege and the duty of client confidentiality.

Section 202 of the PRO Act would codify the controversial persuader rule. Currently, Section 203 of the Labor and Management Disclosure Act of 1959 (known as LMRDA), requires employers and their labor consultants, including attorneys, to file extensive periodic disclosures with the Department of Labor when they engage in certain activities or enter into agreements or arrangements to persuade employees on whether or how to exercise their rights to organize a union and bargain collectively. Section 203(c) of the LMRDA has been — for over five decades — consistently interpreted by the DOL and federal courts. Specifically, as the American Bar Association stated in a recent letter to leaders on Capitol Hill, attorneys are exempt "from the reporting requirements when they merely provide advice or other legal services directly to their employer clients on these unionization issues, *but the attorneys have no direct contact with the employees.*"

Now the administration wants attorneys to file detailed disclosure reports even if they have *no direct contact* with employees. The disclosure requirements are so extensive that clients would be compelled to decide whether they want their lawyer to advise, or they want confidential and privileged information disclosed to the public at large. Attorneys would be forced to disclose the existence of the attorney-client relationship, the identity of their client, the general nature of the legal representation, and a description of the tasks performed for that client. Attorneys would also be compelled to disclose significant financial data *completely unrelated* to the persuader activities set forth in the LMRDA.

In essence, Section 202(a) of the PRO Act would pierce the sacred common-law doctrines of privilege and confidentiality and invite the entire world to monitor attorneys representing employer clients in the course of union-related activities.

The Biden administration is also reportedly looking to implement this change through administrative rulemaking, should the PRO Act fail in the Senate. As Jeffrey Freund, director of DOL's Office of Labor-Management Standards, recently stated, "We are definitely looking at the 'persuader' rule, no question about it." In fact, the persuader rule has not only been looked at, but it has received intense public scrutiny.

In 2016, the DOL sought to promulgate a rule which would have modified the LMRDA's disclosure requirement in a parallel way to Section 202(a) of the PRO Act. The 2016 rule outlined four broad categories of indirect persuader activities that would trigger an attorney's obligation to file disclosures. Those same categories/scenarios, while they are not replicated word-for-word in Section 202(a), are extremely similar. The ABA convincingly opposed this rule in 2016, even testifying before Congress regarding the intrusion of the rule in the attorney-client relationship.

Moreover, the department's final rule was ultimately blocked by U.S. District Court Judge Sam R. Cummings of the Northern District of Texas. In 2016, Judge Cummings permanently enjoined the 2016 rule from taking effect. In the underlying opinion, in which Judge Cummings granted the plaintiffs' preliminary injunction, Judge Cummings made several conclusions of law. Importantly, he found that the amended rule would "no longer protect[] closed-door, confidential communications between attorney and client. To the contrary, under the new rule, an attorney that communicates confidentially with only his or her employer-client, advising the client about a unionization matter, is now required to disclose to DOL, and thus the world, confidential information." *Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 WL 3766121, at *19 (N.D. Tex. June 27, 2016).

Judge Cummings also found that the DOL's position that "none of the information … is protected as a general rule by the attorney-client privilege," to be "plainly incorrect." As Judge Cummings stated, "The Attorney-client relationship is governed by state law. Both client confidentiality and the attorney-client relationship itself enjoy legal protection under state rules regulating the legal profession." Therefore, the "DOL has no authority or expertise in the regulation of attorney-client relationships." Indeed, ten state attorneys general intervened in the lawsuit making this precise point to Judge Cummings, which he evidently accepted.

Additionally, the court found the 2016 rule violated the First Amendment. Specifically, "[t]here is also a long-recognized First Amendment right to hire and consult an attorney." Judge Cummings found that the 2016 rule's burden on free speech is content-based, and the DOL even conceded this point. Applying strict scrutiny review — where the government must articulate a compelling governmental interest to justify the implementation of the rule — Judge Cummings found the DOL failed to meet its burden. "DOL has only identified vaguely described, speculative benefits that it believes may result from the New Rule," wrote Judge Cummings, and "[i]ndeed, the fact that DOL has waited over fifty years to promulgate its New Rule strongly suggests there is no compelling government interest at stake."

Despite these strong findings, the DOL apparently now believes such definitive conclusions of law need to be revisited. As Director Freund recently stated, "We don't have anything close to a final decision by a court of competent jurisdiction … [i]t's just, it was a district court."

Indeed, it was a district court that stated in a 90-page opinion that the 2016 rule was "not merely fuzzy around the edges. Rather, the [2016] Rule is defective to its core." And any effort to erode the sanctity of the attorney- client relationship will always be "defective to its core." *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *45.

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