Ethical Considerations for Lawyers Engaging in Union-Avoidance Persuasion, Including the Impact of the "Persuader" Rule

Daphne Assimakopoulos*

Introduction

Law firms and attorneys are intimately tied up in labor-management tensions. Employers and unions alike turn to lawyers to protect themselves from legal liability and vindicate their rights. Amidst a broader public debate around unions and corporate power, it is imperative to examine what lawyers engaging in union-avoidance consultations owe to society from an ethical perspective, both broadly and under the *Model Rules of Professional Conduct*.

Union density in the United States is low. From 2018 to 2019, union membership dropped by 170,000, reducing the unionized share of the workforce to 10.3%, the lowest portion on record since 1983.[1] At the same time, the popularity of unions is increasing, particularly among young people. A 2020 Gallup poll found that 71% of people ages 18–34 support unions.[2] Almost half of nonunion workers polled in 2017 (48%) said they would join a union in their workplace tomorrow if they had the chance.[3] This figure is 50% higher than in 1995, when 32% of those surveyed said they would vote for a union.[4]

Labor-management tensions are front page news, with large organizing campaigns continuing within major businesses like Amazon and Starbucks. Amazon in particular has been subject to public scrutiny due to the tactics deployed against unionization at its Bessemer, Alabama, fulfillment center.[5] The Department of Labor ("DOL") estimates that between 71% and 87% of employers hire professional

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* Georgetown University Law Center, J.D. expected 2023; Hamilton College, B.A. 2017.

1. Eric Morath, *U.S. Union Membership Hits Another Record Low*, The Wall St. J. (Jan. 22, 2020), https://www.wsj.com/articles/u-s-union-membership-hits-another-record-low-11579715320 [https://perma.cc/7XRQ-DHEY].

2. Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, Gallup (Sept. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/Z9B5-MSVR].

3. Econ. Pol'y Inst., *Working People Want a Voice at Work* (Apr. 21, 2021), https://www.epi.org/publication/working-people-want-a-voice/ [https://perma.cc/E489-EFGC].

4. *Id.*

5. David Streitfeld, *How Amazon Crushes Unions*, N.Y. Times (Mar. 16, 2021), https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html [https://perma.cc/5NEH-YAY3].

union-avoidance consultants to run campaigns to hinder workers' organizing efforts.[6] The Economic Policy Institute estimates that employers are now spending nearly $340 million per year on such consultants.[7]

This Note will provide a detailed roadmap after sketching a brief background on current labor law and the field of union avoidance consulting.

BACKGROUND

The country's predominant labor law, the National Labor Relations Act ("NLRA"), was passed in 1935 with the purpose of encouraging "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of their representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[8] The NLRA also established the National Labor Relations Board ("NLRB"), the independent agency tasked with assuring fair labor practices through enforcement of the NLRA.[9] The NLRB is headquartered in Washington, D.C. and has regional offices across the country where parties can file charges alleging illegal behavior or file a petition seeking a union election.[10]

Despite the lofty goals established in the NLRA, the statute faces criticism from labor advocates who note that the legal framework is ill-equipped to address the challenges facing workers today.[11] The NLRA has not been meaningfully amended since 1947, and in that time, many of its core provisions have been chipped away, weakening workers' rights.[12] The NLRB is largely unable to take strong action to prevent or disincentivize unfair labor practices. Notably, Section 10(c) of the NLRA limits the remedies available to the Board to a cease-and-desist order, and in the event of an unlawful firing, reinstatement with back pay with a required notice posting.[13] At the same time, the Supreme Court has issued

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6. Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15,924-01, 15,927 (Mar. 24, 2016) (to be codified at 29 C.F.R. pts. 405–406) [hereinafter Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA].

7. Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019).

8. 29 U.S.C. § 151.

9. *What We Do*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do [https://perma.cc/W52X-BQTU].

10. *Id.*

11. *See, e.g.*, *Protecting Workers' Right to Organize: The Need for Labor Law Reform Before the H. Comm. On Education and Labor, Subcomm. On Health, Employment, Labor, and Pensions*, 116th Cong. (Mar. 16, 2019) (statement of Devki K. Virk, Bredhoff & Kaiser P.L.L.C.) https://edlabor.house.gov/imo/media/doc/VirkTestimony032619.pdf [https://perma.cc/TQ2Z-22F7]; Sarah Jones, *The PRO Act Could Do More Than Revive Unions*, N.Y. MAG. (Mar. 13, 2021), https://nymag.com/intelligencer/2021/03/what-is-the-pro-act.html [https://perma.cc/X23C-325A]; Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570–72 (2007).

12. Liebman, *supra* note 11, at 570.

13. 29 U.S.C. § 160(c).

several landmark opinions in the last decade that have further eroded legal protections for workers and unions.[14]

Amidst this backdrop of weak legal protections, a robust market of union-avoidance services has emerged to assist employers in preventing unionization among their workers. Union-avoidance consultants are often attorneys housed within law firms.[15] While not every union-avoidance consultant is a lawyer, many of them are,[16] and they are the focus of this Note. Union-avoidance services can include scripting conversations between managers and workers, creating materials for employers to present to workers in captive audience meetings, high-level strategizing for how to defeat a union election, and more.[17] Recent reporting has brought this usually secretive industry into the mainstream news due to high-profile unionization efforts at large corporations, including Amazon, Dollar General, and Starbucks.[18] For example, in 2021, workers in Amazon's Bessemer warehouse engaged in an organizing campaign with the Retail, Wholesale and Department Store Union (RWDSU).[19] Amazon hired attorneys from the prominent firm Morgan, Lewis & Bockius LLP, and ultimately defeated the union campaign using a strategy almost certainly developed in concert with the management-side firm.[20] Workers and mainstream outlets noted the extremity of

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14. *See generally* Janus v. AFSCME, 138 S. Ct. 2448, 2460 (2018) (holding collection of union dues from nonconsenting public-sector employees violates the First Amendment and that no further collection, or attempts at collection, can occur); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (holding that the Federal Arbitration Act supersedes the National Labor Relations Act in instructing federal courts to enforce arbitration agreements according to their terms, thus allowing employers to bar employees from collective arbitration); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074, 2080 (2021) (holding the California Labor Relations Act regulation granting union organizers a 'right to access' an employer's property for the purpose of organizing constitutes a Fifth Amendment takings).

15. *See, e.g.*, John Logan, *The Labor-Busting Law Firms and Consultants That Keep Google, Amazon and Other Workplaces Union-Free*, THE CONVERSATION (Aug. 24, 2020), https://theconversation.com/the-labor-busting-law-firms-and-consultants-that-keep-google-amazon-and-other-workplaces-union-free-144254 [https://perma.cc/5BK8-V2H8]; John Logan, *The New Union Avoidance Internationalism*, 13 WORK ORG., LAB. & GLOB. 57, 57–62 (2019).

16. *See, e.g.*, John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. OF INDUS. RELS. 651, 651–661 (2006).

17. *See generally* Lauren Kaori Gurley, *'Lazy,' 'Money-Oriented,' 'Single Mother': How Union-Busting Firms Compile Dossiers on Employees*, VICE (Jan. 5, 2021), https://www.vice.com/en/article/pkdqaz/lazy-money-oriented-single-mother-how-union-busting-firms-compile-dossiers-on-employees [https://perma.cc/8ULC-9LF5]; Gordon Lafer & Lola Loustaunau, *Fear at Work*, ECON. POL'Y INST. (July 23, 2020), https://files.epi.org/pdf/202305.pdf [https://perma.cc/PU2P-67B6].

18. *See, e.g.*, Chris Isidore, *Workers are Seeking Unions at Starbucks, Dollar General and Amazon Locations. Here's Why That Matters*, CNN BUS. (Oct. 22, 2021), https://www.cnn.com/2021/10/22/business/unions-starbucks-dollar-general-amazon/index.html [https://perma.cc/2LNZ-Q2XT].

19. Streitfeld, *supra* note 5.

20. Jon Skolnik, *Corporations Like Amazon Pay Big Bucks for "Union-Avoidance" – And It Happens in the Dark*, SALON (June 24, 2021), https://www.salon.com/2021/06/24/corporations-like-amazon-pay-big-bucks-for-union-avoidance-and-it-all-happens-in-the-dark/ [https://perma.cc/7DSB-GD8D]; Ian Kullgreen, *Amazon Hires Former Republican NLRB Member to Fight Union Push*, BLOOMBERG L. (Nov. 25, 2021), https://news.bloomberglaw.com/daily-labor-report/amazon-hires-former-republican-nlrb-member-to-fight-union-push [https://perma.cc/N37R-2BAD].

tactics used to combat the union effort, such as changing a traffic signal in town to prevent organizers from approaching warehouse employees as they left work.[21] Management also employed more standard tactics, like posting anti-union signs in bathrooms and work spaces.[22] Workers ultimately voted against the union in April 2021.[23] Immediately, reporting emerged of potential unfair labor practices used by Amazon.[24] In August 2021, the NLRB determined that Amazon violated labor law in the process of campaigning against the union.[25] Amidst public debate about the ethics of these measures generally, the legal profession should consider the implications of advising and supporting these types of persuasion tactics.

Part I of this Note examines the ethical considerations that arise under the American Bar Association's ("ABA") *Model Rules for Professional Conduct* when union-avoidance consultants engage in persuasion activities. Of particular note are the potential ethical quandaries with scripting communications between managers and workers, and the use of unethical conduct such as fraud and misrepresentation to encourage workers to vote "no" in a union election. This Note proposes that some persuasion activity runs afoul of the *Model Rules*, and as such, should be subject to disciplinary action. Part II of this Note delves into the "persuader rule," a proposed measure to shine light on the union-avoidance industry. The persuader rule would require consultants engaging in union-avoidance persuasion activity to publicly disclose the names of their clients and amount in expenditures, among other information. The proposed rule has come under fire from the ABA and other prominent organizations due to potential conflict with attorney-client confidentiality. This Note argues that the persuader rule does not threaten attorney ethics; in fact, it serves the public interest and should be adopted. Finally, this Note concludes with suggestions for future study.

I. ETHICAL CONSIDERATIONS ARISING UNDER THE ABA MODEL RULES FOR UNION-AVOIDANCE CONSULTANTS ENGAGING IN PERSUASION ACTIVITIES

Model Rule 4.4 codifies the principle that, in the course of representing a client, a lawyer will not take action to violate the legal rights of a person.[26] In the labor context, this implicates a balancing of legal rights – for the corporation to maximize its profits and decision-making independence, and for workers to come

21. Streitfeld, *supra* note 5.

22. *Id.*

23. Hearing Officer's Report on Objections, Amazon.com Servs., LLC, No. 10-RC-269250 (N.L.R.B. 2020) [hereinafter Hearing Officer's Report].

24. *See, e.g.*, Alina Selyukh, *It's A No: Amazon Warehouse Workers Vote Against Unionizing in Historic Election*, NPR (Apr. 9, 2021), https://www.npr.org/2021/04/09/982139494/its-a-no-amazon-warehouse-workers-vote-against-unionizing-in-historic-election [https://perma.cc/Q8ZG-27UQ].

25. Hearing Officer's Report, *supra* note 23.

26. "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." MODEL RULES OF PROF'L CONDUCT R. 4.4 (2016) [hereinafter MODEL RULES].

together and collectively bargain. The NLRA assures the right to organize.[27] Employers, and their consultants, are free to express their belief that the union is unfit for their workplace.[28] However, they should have to do so within guardrails set by ethical standards of the legal profession.

Union-avoidance consultants are often retained to assist employers in persuasion activities—essentially campaigns for workers to vote no in an NLRB election regarding whether to form a union in their workplace.[29] In the course of an election, consultants may work with an employer to develop a strategy.[30] Services can range from high-level advice about how to approach campaigning and legal limitations on permissible actions, to engaging in the details of crafting pamphlets or posters to display in a workplace.[31] Attorneys are often directly engaged in this activity, and the *Model Rules* raise concerns in two key areas: scripting conversations and presenting misleading information. This Note posits that some persuasion activity can violate the *Model Rules* and thus should be subject to disciplinary action. The *Model Rules* should be read to limit the extremes to which union-avoidance consultants may go to defeat a unionization campaign, and call into question the appropriateness of law firms explicitly offering union-avoidance services.

A. SCRIPTING COMMUNICATIONS BETWEEN MANAGEMENT REPRESENTATIVES AND WORKERS

Model Rules 4.2 and 4.3 should bar union-avoidance consultants from scripting conversations between managers and workers seeking to organize. Rules 4.2[32] and 4.3[33] deal with attorney communication with parties represented by a different counsel or dealing with persons unrepresented by any counsel. These limits are bolstered by Model Rule 8.4, stating that a lawyer may not circumvent prohibitions in the rules through the actions of another person.[34] The precise

27. 29 U.S.C. § 151.

28. *See Election-Related Content*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/election-related-content [https://perma.cc/W7XC-4U24].

29. *See, e.g.*, Gurley, *supra* note 17; Lafer & Loustaunau, *supra* note 17, at 4.

30. Lafer & Loustaunau, *supra* note 17, at 4.

31. *Id.*

32. "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES R. 4.2.

33. "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." *Id.* at R. 4.3.

34. "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." *Id.* at R. 8.4.

limitations of the rules are unclear, despite ABA attempts to clarify.[35] Comment 4 to Rule 4.2 affirms that "parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make."[36] ABA Opinion 11-461 added further complexity to the mix. In it, the ABA reiterated "the basic purpose of Rule 4.2, [is] to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel."[37] However, it ultimately established that a lawyer may give advice to a client regarding substantive communication with an adversary, including "the subjects or topics to be addressed, issues to be raised and strategies to be used."[38] The opinion sought to protect against bad faith overreach by suggesting a lawyer advise their client to encourage the other party to consult with their own counsel prior to making any consequential decisions.[39]

ABA Opinion 11-461 was not without controversy. Ethics leaders across the country decried the lack of specificity in the opinion, arguing that it left the line of acceptability murky.[40] The Office of Lawyers Professional Responsibility for the Minnesota Supreme Court—in a rare break with the ABA—ruled that under Rule 4.2 an attorney may not script communication with an adverse party, even at the client's request.[41] While state courts ultimately rule on matters of attorney ethics, they often stay consistent with ABA courses of action to avoid confusion within the profession.

Despite the muddled rules in this ethical area, there is enough of a basis to implicate, and limit, a consultant scripted conversation between a manager and a worker. In combatting a unionization drive, managers may be provided with scripted talking points to deliver to workers with the goal of dissuading unionization efforts. For example, during a unionization drive at a Starbucks store in Buffalo, N.Y., corporate officials descended on the store with prepared anti-union talking points and presentation materials.[42] If such materials are prepared by attorneys, they could implicate the relevant rules. Workers central to an organizing effort may be represented by union counsel or may be unrepresented. They are thus parties covered by 4.2 and 4.3.

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35. *See, e.g.*, James Podgers, *On Second Thought: Changes Mulled Re ABA Opinion on Client Communications Issue*, A.B.A. J. (Jan. 1, 2012), https://www.abajournal.com/magazine/article/on_second_thought_changes_mulled_re_aba_opinion_on_client_communications [https://perma.cc/HM8N-CT9Y].

36. MODEL RULES R. 4.2 cmt. 4.

37. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11–461 (2011) [hereinafter Formal Op. 11–461].

38. *Id.*

39. *Id.*

40. *See, e.g.*, Podgers, *supra* note 35.

41. Martin A. Cole, *Scripting Conversations with Represented Persons*, MINN. OFF. LAWS. PRO. RESP. (Nov. 2011).

42. Noam Scheiber, *As Starbucks Workers Seek a Union, Company Officials Converge on Stores*, N.Y. TIMES (Nov. 9, 2021), https://www.nytimes.com/2021/10/18/business/economy/starbucks-union-buffalo.html [https://perma.cc/57JV-MM8V].

Additionally, managers that are provided with scripted conversations, talking points, or other materials at the direction of counsel are taking advantage of the type of power imbalance that the rules seek to address, per the ABA opinion that the purpose is to prevent "otherwise irrational decisions as a result of undue pressure."[43] Workers are under intense pressure during organizing efforts.[44] Union-avoidance consultants target supervisors to deliver anti-union messages because of the power dynamic at play. One union-avoidance consultant explained that supervisors are effective messengers because "the warnings . . . come from . . . the people counted on for that good review and that weekly paycheck."[45]

At a minimum, the opinion's suggested disclosure requirement should mandate that a manager inform a worker that their communication has been influenced by counsel, or that they should consult with the union prior to making any substantive decision regarding the election. Otherwise, the resulting decision could be tainted by "undue pressure" that the *Model Rules* seek to prevent.

B. MISREPRESENTATION AND FRAUD IN MESSAGING

Model Rule 8.4 addresses "maintaining the integrity of the profession" and defines conditions of professional misconduct.[46] Specifically, 8.4(c) states that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[47] Efforts to dissuade workers from organizing, or from supporting a union, can involve actions covered by 8.4(c). For example, although it is illegal for an employer to *threaten* to close the workplace in response to unionization, it is legal for employers to *predict* negative repercussions that could occur due to union activity.[48] Supreme Court precedent clarifies that "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization."[49] This standard is malleable, creating an opening for carefully phrased persuasion that may meet the legal test for prediction, yet be received by workers as a threat. In this legal grey area, consultants craft talking points that are designed to make workers believe their jobs are at risk if they vote to approve a union, which can overlap with forbidden dishonesty, fraud, or deceit under 8.4(c).[50] Other common misleading talking points utilized in union elections include: that collective bargaining could result in wages going down, that a union only cares

43. Formal Op. 11–461, *supra* note 37.

44. *See* Lafer & Loustaunau, *supra* note 17, at 11.

45. *Id.* at 4.

46. MODEL RULES R. 8.4.

47. *Id.*

48. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (holding that an employer may not threaten reprisal against employees in response to unionism, but may make a prediction about the predicted effects unionization could have on the company).

49. *Id.* (citing Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 274 n.20 (1965)).

50. *See, e.g.*, Lafer & Loustaunau, *supra* note 17, at 7.

about exorbitant dues, or that paying higher wages forced by unionization could put the employer out of business.[51] Although some of these claims may be true in unique circumstances, they are often false and directly designed to instill uncertainty and fear among workers seeking to exercise their statutory rights.[52] One union-avoidance consultant leader put it this way:

> Union busting is a field populated by bullies and built on deceit. A campaign against a union is an assault on individuals and a war on the truth. . . . The only way to bust a union is to lie, distort, manipulate, threaten, and always, always attack. . . . Each "union prevention" campaign, as the wars are called, turns on a combined strategy of disinformation and personal assaults.[53]

There should be disciplinary consequences for attorney consultants when 8.4(c) is violated in an effort to deprive workers of their statutory right to organize.

C. CHALLENGES IN CURRENT ENFORCEMENT

In addition to being subject to legal liability under the NLRA for unfair labor practices, attorneys should be sanctioned under ethical standards if their anti-union persuasion runs afoul of the *Model Rules*. This largely does not happen.[54] This is an area of particular concern, because management consultants face little oversight either from ethics authorities regulating the legal profession or from the NLRB.[55]

Each year, the NLRB adjudicates hundreds of unfair labor practice claims.[56] It is unclear how many involve attorney advice, but some clearly implicate law firms and attorneys. Under procedural regulations, the NLRB has authority to sanction attorneys for their misconduct at any stage of an Agency proceeding.[57] NLRB disciplinary action is subject to appeal in the form of judicial review of the administrative determination.[58] Early NLRB efforts to sanction practitioners

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51. *Id.*

52. *Id.*

53. MARTIN JAY LEVITT, CONFESSIONS OF A UNION BUSTER 1 (1993).

54. Terry A. Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U. L. REV. 506, 509 (1984).

55. *See* John F. Wirenius, *The Ethics of Non-Lawyer Advocacy: Expectations, Rules, and Complications*, 2 INT'L COMP. POL'Y & ETHICS L. REV. 777, 777–80 (2019).

56. *Unfair Labor Practice Charges Filed Each Year*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges [https://perma.cc/YN8Q-8KEG].

57. *See* 29 C.F.R. § 102.177(a) (2022) ("Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section."); 29 C.F.R. § 102.177(d) (2022) ("[M]isconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, may be grounds for discipline. Such misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.").

58. *Id.* at § 102.177(f) (2022).

resulted in federal courts rejecting modest disciplinary actions.[59] When the NLRB does sanction lawyers, the sanctions carry weight only within their own administrative system.[60] Disciplining an employer's union avoidance consultant for impermissible persuasion activity creates an additional challenge: a consultant may not necessarily be representing an employer in the NLRB proceedings that the Agency's procedural regulations directly address.[61] The NLRB has adopted an "agency" theory of liability to determine when a consultant can be found liable.[62] This can prove challenging in cases where a consultant avoids direct contact with employees in order to dodge reporting obligations under the other laws.[63]

Additionally, while NLRB sanctions may reflect poorly on an individual attorney, they carry no weight with the bar or the judicial system more broadly.[64] One scholar described the lack of consequence as follows:

> Since the consultant who encouraged, planned, and even participated in the campaign is usually ignored by the Board, he is free to act largely without fear of direct sanction. The only threat is to the consultant's client, but even then any unfair labor practice liability will be of slight discomfort compared to the advantage gained from the unlawful campaign. The only consequences to the consultant are a substantial fee, the admiration and recommendation of his client, and the knowledge that his tactics have worked and can be used again in campaigns for other clients.[65]

Further, it is cumbersome and challenging to determine which attorneys have been sanctioned by the NLRB. There is no central repository of this information available to the public. This makes it difficult to conduct more detailed analysis on the NLRB's current actions and prevents affected parties from learning

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59. *See* Camp v. Herzog, 104 F. Supp. 134, 136, 139 (D.D.C 1952) (reversing NLRB disciplinary action, prohibition of practice before NLRB for two years, against attorney who physically assaulted an NLRB employee on grounds that agency had not enacted rules for disciplinary process); NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108, 111-12 (5th Cir. 1963) (holding that there was no basis for charging or holding the employer's lawyer responsible for unfair labor practices where the lawyer had interrogated employees concerning union membership and activities in violation of § 8(a) of the NLRA).

60. Bethel, *supra* note 54, at 525.

61. For example, an employer could retain one attorney for the purpose of assisting it in an anti-union campaign and retain another attorney for NLRB proceedings if it was charged with an unfair labor practice.

62. "Under an agency theory, consultants have been separately named and found liable when they were directly involved in the commission of an unfair labor practice and their conduct was especially egregious. Thus, cease-and-desist orders have been entered against consultants for unlawful interrogation, threats, and the promise of benefits. Cases applying the theory are in accord with established common law principles that hold an agent accountable for his own unlawful acts even if those acts are performed under conditions that also impose liability on the principal." *The Liability of Labor Relations Consultants for Advising Unfair Labor Practices*, 97 HARV. L. REV. 529, 536 (1983).

63. *Id.*at 536–37. The LMRDA reporting requirements will be discussed in greater detail in Part II of this Note.

64. *Id.*

65. *Id.*

whether attorneys or consultants have been disciplined in the past or are currently facing sanctions.

The NLRB should consider increased disciplinary actions against attorneys who violate the *Model Rules* in the process of committing an unfair labor practice. State disciplinary authorities and the ABA should also explore sanctions for this type of behavior, as the remedies available to them (disbarment, suspension) are far more potent, and could potentially deter future bad acts more effectively than NLRB action.

II. THE ETHICS OF THE PERSUADER RULE AND DISCLOSURE UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) mandates that labor organizations, employers, and third-party consultants disclose particular information to DOL.[66] DOL then provides this information to the public through an online database.[67] In 2016, the Obama administration proposed a regulation under the LMRDA that sought to expand the activities that triggered disclosure under the law.[68] This proposed regulation became known as the "persuader rule."[69] The ABA opposed the regulation on the grounds that it would violate (or at least substantially weaken) an attorney's duty to confidentiality.[70] Despite this criticism, the Obama administration proceeded to enact the regulation.[71] However, in 2018 the Trump administration revoked the regulation before it could go into effect, restoring the regulatory environment to the status quo.[72]

Although the persuader rule is not in effect today,[73] its ethical implications are worth considering because the Biden administration has considered re-enacting it.[74] A provision similar to the persuader rule has also been included in the Protecting the Right to Organize ("PRO") Act, [75] a major legislative update to the

66. *Laws, Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), Synopsis of Law*, U.S. DEP'T LAB. OFF. LAB.-MGMT. STANDARDS, https://www.dol.gov/agencies/olms/laws [https://perma.cc/43UZ-QF4S].

67. *Online Public Disclosure Room*, U.S. DEP'T LAB. OFF. LAB.-MGMT. STANDARDS, https://www.dol.gov/agencies/olms/public-disclosure-room [https://perma.cc/H8CB-BLJX].

68. *See generally* Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6 (proposed regulation seeking to expand activities triggering disclosure).

69. *See generally id.* (referring to the proposed regulation as the "persuader rule").

70. *Labor Department Issues Persuader Rule Opposed by ABA*, A.B.A. WASH. LETTER (May 1, 2016), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2016/april/persuader/ [https://perma.cc/ZUS9-9QA5].

71. *Id.*

72. *See generally* Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 83 Fed. Reg. 33,826-01 (July 18, 2018) (to be codified at 29 C.F.R. pts. 405–406) [hereinafter Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of LMRDA].

73. *Id.*

74. Ben Penn, *Biden DOL Explores Redo of Obama Union-Avoidance Reporting Rule*, BLOOMBERG L. (Apr. 28, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-dol-explores-redo-of-obama-union-avoidance-reporting-rule-1 [https://perma.cc/2DU4-SGK8].

75. Protecting the Right to Organize Act, H.R. 842, 117th Cong. § 202 (2021).

country's labor laws that has passed the House but stalled in the Senate.[76] The continued relevance of this reporting provision warrants further examination in the context of legal ethics. This Note posits that the ethical concerns regarding the persuader rule are overblown and suggests that its benefits warrant implementation.

A. CURRENT REPORTING REQUIREMENTS UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Section 203 of the LMRDA requires labor organizations, consultants, and employers to file reports to DOL disclosing their expenditures on labor management activities.[77] The Act was passed in response to corruption and breaches of the trust and rights of employees.[78]

Section 203 of the LMRDA subjects to disclosure employers that hire labor relations consultants with the purpose of persuading employees whether to exercise their rights to organize and bargain collectively.[79] Disclosure consists of "a detailed statement of the terms and conditions of such agreement or arrangement," and must be filed "within thirty days after entering into such agreement or arrangement."[80] Section 203(b) further requires that labor relations consultants or other parties engaged in covered activity file an additional report at the close of their fiscal year.[81] Section 203(a)(4) states both direct and indirect persuader activity is covered for purposes of disclosure.[82]

Section 203(c) contains the so-called "advice exemption" to reporting requirements and states, "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."[83] Current DOL interpretation of Section 203(c) provides broad coverage to employers. Disclosure of persuader activity is required only when the outside party directly communicates with employees.[84] For example, if a consultant develops speeches, communications, or pamphlets for an employer, but does not directly deliver them to employees, the activity is covered by the advice exemption and thus not subject to disclosure. Section 204 further states that attorney-client confidential communications are also exempt from disclosure.[85]

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76. Don Gonyea, *House Democrats Pass Bill That Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts [https://perma.cc/B549-MDTL].

77. 29 U.S.C. § 433.

78. 29 U.S.C. § 401(b).

79. 29 U.S.C. § 433(b).

80. *Id.*

81. *Id.*

82. 29 U.S.C. § 433(a)(4).

83. 29 U.S.C. § 433(c).

84. *See* 29 C.F.R. § 406.5 (2022).

85. 29 U.S.C. § 434.

Labor advocates argue that the current regulation creates a large gap in which third parties may fully direct a union-avoidance campaign by proxy.[86] So long as the consultant never directly engages with an employee, they do not have to disclose their services under the LMRDA.[87]

B. 2016 REGULATION AND INCLUSION IN THE PROTECTING THE RIGHT TO ORGANIZE ACT

In 2016, the DOL Office of Labor-Management Standards proposed the persuader rule in an effort to narrow the coverage of 203(c) and close the gap.[88] The proposed rule narrowed the meaning of "advice" under 203(c) to exclude indirect persuader activities, thus triggering reporting under 203(a) and (b).[89] This increased the information subject to disclosure to include both direct and indirect persuader activities. As such, four new types of consultant activities were no longer covered by the exemption, and thus required disclosure: 1) planning, direction, or coordination of managers to persuade workers; 2) providing persuader materials to employers to disseminate to workers; 3) conducting union-avoidance seminars; and 4) developing or implementing personnel policies or actions to persuade workers.[90]

DOL argued that the changes to the persuader rule would remedy the problematic loophole in 203(c), that allowed employers to avoid reporting certain activities that were clearly undertaken with the goal of persuading employees to reject a union.[91] As examples of this type of activity, DOL pointed to recommending drafts of or revisions to an employer's speeches and communications if those drafts or revisions were designed to influence employees' exercise of their statutory rights.[92] DOL also put forth that the proposed rule was more in line with the text of Section 203, as well as the purpose of the LMRDA broadly.[93]

When announced in 2016, the proposed change prompted much controversy from employer associations.[94] Many submitted public comments decrying the proposed changes as burdening small businesses, discouraging employers from seeking legal advice, and infringing on attorneys' ethical obligations.[95]

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86. *See, e.g.*, Tyrone Richardson, *DOL 'Persuader' Rule 'Pulls Back the Curtain,'* BLOOMBERG L. (Mar. 23, 2016), https://news.bloomberglaw.com/bloomberg-law-news/dol-persuader-rule-pulls-back-the-curtain [https://perma.cc/KVM6-HPL7].

87. *See* Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6, at 15,926.

88. *See id.*

89. *Id.* at 15,925.

90. *Id.* at 15,927–28.

91. *Id.* at 15,926.

92. *Id.* at 15,927.

93. *Id.* at 15,925.

94. *See, e.g.*, Richardson, *supra* note 86.

95. Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6, at 15,999 ("A comment from a small business public policy association posed a scenario where employers, due to the chill on the ability to obtain counsel, would be forced to either 'go it alone' or find a lawyer willing to overlook the ethical obligations involved with filing as a persuader."); *id.* at 16,006 (summarizing comments lamenting

The final rule was ultimately repealed by the Trump DOL in 2018, citing legal challenges, a lack of DOL authority to interpret the LMRDA in this manner, and concerns regarding attorney-client privilege.[96]

Nevertheless, the persuader rule remains relevant with rumors that the Biden administration may attempt to revive the regulation.[97] Additionally, the PRO Act considered by the 117th Congress incorporated the persuader rule into proposed amendments to Section 203(c), seeking to amend the LMRDA to explicitly state that indirect persuasion activities are not exempt under the advice exemption.[98]

C. OPPOSITION ON THE BASIS OF ATTORNEY'S ETHICAL DUTY OF CONFIDENTIALITY

The ABA and employer advocates objected to the persuader rule on several grounds.[99] This Note focuses on objections made on ethical grounds, particularly those alleging that the persuader rule undermines the confidential attorney-client relationship. Primarily, the ABA argued there was tension between the persuader rule and Model Rule 1.6.[100]

Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . ." or unless the disclosure is permitted by a list of exceptions provided including "to comply with other law. . ."[101] Model Rule 1.6 is broader than the traditional attorney-

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increased reporting obligations as onerous, taking too many hours, potentially forcing small consulting businesses to guess their client's intent, and estimating total reporting costs at over $100 million).

96. *See generally* Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 72 (rescinding persuader rule).

97. Ben Penn, *Biden DOL Explores Redo of Obama Union-Avoidance Reporting Rule*, BLOOMBERG L. (Apr. 28, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-dol-explores-redo-of-obama-union-avoidance-reporting-rule-1 [https://perma.cc/2DU4-SGK8].

98. Protecting the Right to Organize Act, H.R. 842, 117th Cong. § 202 (2021) ("[Section 203(c)] shall not exempt from the requirements of this section any arrangement or part of an arrangement in which a party agrees, for an object described in subsection (b)(1), to plan or conduct employee meetings; train supervisors or employer representatives to conduct meetings; coordinate or direct activities of supervisors or employer representatives; establish or facilitate employee committees; identify employees for disciplinary action, reward, or other targeting; or draft or revise employer personnel policies, speeches, presentations, or other written, recorded, or electronic communications to be delivered or disseminated to employees.").

99. For example, the ABA asserted that the persuader rule would "thwart the will of Congress." *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Comm. On Education and Labor, Subcomm. On Health, Employment, Labor, and Pensions*, 114th Cong. (Apr. 27, 2016) (statement of Paulette Brown, President of the American Bar Association). The law firm Ogletree Deakins stated that the regulations impose a difficult burden on small businesses. *The Final Persuader Rule: What You Need to Know About the New Reporting Requirements*, OGLETREE DEAKINS (Mar. 24, 2016), https://ogletree.com/insights/the-final-persuader-rule-what-you-need-to-know-about-the-new-reporting-requirements/ [https://perma.cc/F92S-YK2G].

100. *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Comm. On Education and Labor, Subcomm. On Health, Employment, Labor, and Pensions*, 114th Cong. (Apr. 27, 2016) (statement of Paulette Brown, President of the American Bar Association).

101. MODEL RULES R. 1.6.

client privilege, extending to "situations other than those where evidence is sought from the lawyer through compulsion of law."[102] In 2016 testimony, the ABA argued that the disclosure mandated by the persuader rule (including the identity of clients, nature of the representation, and expenditures received) impermissibly infringed on the duties imposed by Model Rule 1.6.[103] The ABA warned that the persuader rule could chill "full and frank discussion of relevant legal issues" between attorneys and their clients, and may even discourage employers from seeking legal representation or advice at all.[104] The Trump DOL fully adopted this argument when rescinding the rule in 2018, writing that:

> [T]he duty not to disclose confidences plays a vital role in encouraging businesses and individuals alike to seek counsel. Potential clients who fear their decision to retain counsel, or facts about the representation, will become public may hesitate before consulting a lawyer. Such hesitation would run counter to society's interest in fostering legal compliance, as more citizens and businesses would be forced to act based on an uninformed interpretation of the law.[105]

Some other opponents questioned whether Section 204 sufficiently protected the even more fundamental attorney-client privilege.[106] For example, some worried that DOL would subjectively assess whether communications were considered persuader activity or exempted privileged information.[107] This would require disclosure of potentially confidential information to determine whether it fell into Section 204's exemption. These opponents suggested that even the risk of this type of disclosure could chill speech within the attorney-client relationship and perhaps even prompt some employers to avoid legal representation out of fear of potential liability spurred by disclosure.[108]

D. THE PERSUADER RULE DOES NOT INFRINGE ON AN ATTORNEY'S ETHICAL DUTY OF CONFIDENTIALITY

Legislative history shows that the ABA objected to the statute on the same basis when the LMRDA was initially passed, arguing that the Act should more

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102. *Id.* at R. 1.6 cmt. 3.

103. *The Persuader Rule: The Administration's Latest Attack on Employer Free Speech and Worker Free Choice Before the H. Comm. On Education and Labor, Subcomm. On Health, Employment, Labor, and Pensions*, 114th Cong. (Apr. 27, 2016) (statement of Paulette Brown, President of the American Bar Association).

104. *Id.*

105. Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 72, at 33,831.

106. *See The Department of Labor New Rule on the Labor-Management Reporting and Disclosure Act; Interpretation of "Advice" Exemption Before the H. Comm. On Education and Labor, Subcomm. On Health, Employment, Labor, and Pensions*, 114th Cong. (Apr. 27, 2016) (statement of Bill Robinson, Frost Brown Todd LLC).

107. *See id.*

108. *See id.*

clearly protect confidentiality past that of attorney-client privilege.[109] However, Congress did not incorporate these suggestions and passed now-existing Section 204 that specifically states only privileged information is protected, not all confidential communications.[110]

Even so, the persuader rule does not impermissibly infringe on Model Rule 1.6. The Fourth and Sixth Circuits have repeatedly upheld disclosure requirements under the LMRDA in light of the public benefit they produce.[111] In *Humphreys, Hutcheson & Moseley v. Donovan*, the Sixth Circuit stated that disclosure "enable[s] employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign."[112] The Fourth Circuit found similar justification in combatting actual corruption as well as the appearance of corruption.[113] Like the disclosure of federal election contributions, disclosure under the LMRDA marks a happy medium between allowing First Amendment protected speech to occur and ensuring that voters fully understand the information landscape in which they are operating.[114] As the Sixth Circuit explained when upholding the LMRDA's reporting requirements for attorneys:

> [A]s long as an attorney confines himself to the activities set forth in section 203(c), [rendering legal advice and representing a client in legal proceedings or in bargaining] he need not report, but if he crosses the boundary between the practice of labor law and persuasion, he is subject to the extensive reporting requirements.[115]

Moreover, Model Rule 1.6 contains a number of carve-outs in which disclosure is warranted, including compliance with another law or court order.[116] LMRDA-mandated disclosure should fall within such an exception. This is not an unprecedented circumstance. Other federal statutes, like the Lobbying Disclosure Act, trigger reporting requirements consisting of similar substance (e.g., identifying information, expenditure amounts) and coexist with Model Rule 1.6.[117]

E. THE PERSUADER RULE DOES NOT THREATEN ATTORNEY-CLIENT PRIVILEGE

In *Upjohn Co. v. United States,* the Supreme Court famously held that the protection of the attorney-client privilege encourages full and frank communications

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109. *See* Humphreys, Hutcheson & Mosely v. Donovan, 755 F.2d 1211, 1218–20 (6th Cir. 1985).
110. 29 U.S.C. § 434.
111. *See Humphreys*, 755 F.2d at 1222; Master Printers of Am. v. Donovan, 751 F.2d 700, 713–14 (4th Cir. 1984).
112. *See Humphreys*, 755 F.2d at 1222.
113. *See Master Printers of Am.*, 751 F.2d at 709–10.
114. *Id.* at 709.
115. *See Humphreys*, 755 F.2d at 1216.
116. MODEL RULES R. 1.6.
117. 2 U.S.C. § 1603.

between attorneys and their clients, and thus promotes broad public interests such as observance of the law and administration of justice.[118] The LMRDA ensures that this important function is maintained by targeting disclosure that is not covered by the attorney-client privilege and by the inclusion of Section 204. These safeguards sufficiently protect attorney-client privilege and should not prevent adoption of the rule.

First, LMRDA disclosure requires limited information, much of which is not subject to attorney-client privilege protection.[119] Generally, the identity of a client does not come within the protection of the federal attorney-client privilege.[120] Expenditures, fee arrangements, and existence of agreements are also generally not protected by the federal attorney-client privilege.[121] The federal attorney-client privilege is construed narrowly rather than in a blanket manner.[122] The disclosure itself does not require a consultant to reveal the communication with their client, nor the client to disclose the communication with their consultant.

Additionally, the activity that triggers the rule is not protected legal advice, but rather business advice or strategic communications advice, which also comes under the protective sphere of attorney-client privilege.[123] The persuader rule would not be triggered by an attorney's preparation of legal documents, such as collective bargaining proposals or other documents prepared for grievance procedures or an NLRB proceeding.[124] The rule is narrowly targeted to documents or other materials created for the purpose of persuading employees how to exercise their rights to representation and collective bargaining. For example, if a consultant writes a speech promoting rejection of a union for a manager to read at a captive audience meeting, it would be covered and subject to disclosure.[125] In

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118. 449 U.S. 383, 389 (1981).

119. The required information is limited to: "a copy of the persuader agreement between the employer and consultant (including attorneys); the identity of the persons and employers that are parties to the agreement; a description of the terms and conditions of the agreement; the nature of the persuader and information-supplying activities, direct or indirect, undertaken or to be undertaken pursuant to the agreement—information provided by simply selecting from a checklist of activities; a description of any reportable persuader and information-supplying activities: the period during which the activities were performed, and the extent to which the activities have been performed as of the date of the report's submission; and the name(s) of the person(s) who performed the persuader or information-supplying activities; and the dates, amounts, and purposes of payments made under the agreement." Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6, at 15,992.

120. *See, e.g.*, Taylor Lohmeyer L. Firm v. United States, 957 F.3d 505, 510 (5th Cir. 2020); United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984).

121. *See, e.g.*, United States v. Blackman, 72 F.3d 1418, 1424 (9th Cir. 1995); *Humphreys*, 755 F.2d at 1219.

122. *Humphreys*, 755 F.2d at 1219.

123. Joan C. Rogers, *Opinion Blocking DOL Rule Cites Clash with Ethics Rules*, BLOOMBERG L. (July 29, 2016), https://news.bloomberglaw.com/bloomberg-law-news/opinion-blocking-dol-rule-cites-clash-with-ethics-rules [https://perma.cc/4GVU-H5WH]; JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2296 (4th ed. Supp. 2021).

124. Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6, at 15,953.

125. *See id.* at 15,953–54.

contrast, if a consultant is asked to review a speech prepared by the employer for any legal issues, its primary purpose is legal advice and thus the interaction is not subject to disclosure.[126] As such, the narrow purpose of the attorney-client privilege, to encourage full and frank disclosure between attorney and client, is not threatened by the reporting requirements.

Finally, Section 204 is a sufficient bulwark against intrusion into a legitimate attorney-client relationship. The persuader rule does not undermine it—the 2016 regulation explicitly stated that "to the extent [an] agreement provides confidential details about services other than reportable persuader/information supplying activities, the principles of attorney-client privilege would apply, and such information is not reportable."[127] Concerns that the 2016 proposed rule is impermissibly malleable and subject to abuse in determination of what constitutes "persuasion" are also unfounded. The rule stated that in determining the intent of a consultant's activity "the test is not subjective."[128] It added: "[e]very communication from the consultant to the employer would not be analyzed; rather, only communications created by the consultant and intended for dissemination or distribution to employees."[129] These standards are objective and easy for an attorney to determine coverage under. If something is intended for persuasion via distribution to employees, it is not protected by attorney-client privilege. For example, anti-union talking points prepared for a supervisor to state to employees would be covered. The same talking points created for the employer but never intended for distribution would not be covered. Coverage hinges on the need for distribution or communication. Because most persuasion activities are communicative with employees, most persuasion activities will be covered. This will not chill or deter employers from seeking legitimate legal advice, which is generally not communicated to employees and thus not covered.

F. DISCLOSURE PROVIDES A SUBSTANTIAL PUBLIC POLICY BENEFIT THAT OUTWEIGHS WEAK CONFIDENTIALITY CONCERNS

The attorney-client relationship exists to further societal public policy interest. The persuader rule similarly promotes the public interest by ensuring employees are fully informed when determining how to exercise their rights to representation and collective bargaining.[130] The LMRDA was passed as an attempt to promote stable, peaceful, and ethical labor-management relations.[131] It is this Note's position that the persuader rule helps further the LMRDA's goal and would ultimately have a positive impact on society. The public interest benefits outweigh any of the overblown concerns regarding confidentiality.

126. *See id.* at 15,953.
127. *Id.* at 15,992.
128. *Id.* at 15,969.
129. *Id.* at 15,970.
130. *See* 29 U.S.C. § 401.
131. *See id.*

As the Fourth Circuit noted in *Master Printers*, Congress specifically targeted consultants engaging in persuasion activity due to concerns about the actual corruption and the appearance of corruption.[132] The Supreme Court has primarily addressed matters related to disclosure in the election law context. The Court has been generally favorable of such measures to promote an informed electorate and combat corruption and the appearance of corruption.[133] As it noted in *Buckley*, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman."[134] Nothing in the LMRDA or the persuader rule prohibits or bans employer or consultant action. It simply ensures that employees are fully aware of the actions that their employers are taking, including spending funds on consultants to assist in their campaigning.

As explained above, consultants seek to operate in the shadows to increase the effectiveness of their actions.[135] Many anti-union talking points may be received differently if an employee knew an employer had retained the services of a consultant to conduct their campaign. For example, a common anti-union argument is that a union is a third party, and employees do not need an "outsider" to come into the business and dictate working conditions.[136] An employee could find this argument persuasive from a trusted manager, but it could ring hollower if an employer knew that their manager had retained the services of a third-party consultant. Additionally, many of the messages will be delivered through supervisors and other managers because they are familiar and may be considered by an employee to be trustworthy.[137] Employees may develop their opinion of their employer and ultimately vote in a union election without ever learning that management retained the services of a consultant seeking to defeat the union vote.

Without disclosure, there cannot be free and fair union elections. Rather than eliminate an employer's access to these services, the LMRDA and the persuader rule strike a balance by shining a light on this secretive industry. The public policy benefits of disclosure are clear and warrant implementation of the persuader rule either by regulation or Congressional policy making.

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132. *See Master Printers of Am.*, 751 F.2d at 708.

133. *See generally* Buckley v. Valeo, 424 U.S. 1, 60–84 (1976) (holding disclosure requirements in the Federal Election Campaign Act are of sufficient importance to justify intrusion on First Amendment rights because they serve the governmental interest in promoting an informed electorate, combatting corruption, and combatting the appearance of corruption); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–71 (2010) (upholding disclosure requirements as-applied to a nonprofit because they could not show a reasonable probability that disclosure of its contributors' names would subject them to threats, harassment, or reprisals).

134. *Buckley*, 424 U.S. at 67.

135. *See, e.g.*, Lafer & Loustaunau, *supra* note 17, at 5–7.

136. *See, e.g.*, Interpretation of the "Advice" Exemption in Section 203(c) of LMRDA, *supra* note 6, at 15,946.

137. *See* Lafer & Loustaunau, *supra* note 17, at 7.

CONCLUSION

This Note has proposed that attorneys engaging in union-avoidance persuasion activities raise ethical concerns. The ABA and other disciplinary bodies should consider disciplinary actions for the actions described here, or consider issuing an opinion clearly establishing the problematic nature of these activities. This Note has also endorsed the persuader rule as a worthwhile endeavor that does not raise ethical issues. Should it proceed via regulation by the Biden administration or by inclusion in the PRO Act, it will not have a negative impact on attorney-client confidentiality and privilege.

The question of attorney ethics in union avoidance activity warrants deeper exploration and study. Many of these quandaries have some corollary in the tax setting, where attorneys seek to maximize benefits to their client while respecting the limits, and purpose, of the tax code.[138] Perhaps there is opportunity for an exchange of lessons learned between these two fields.

138. *See generally* Bret N. Bogenschneider, *Tax Ethics and Legal Indeterminacy*, 4 BUS. ENTREPRENEURSHIP & TAX L. REV. 1 (2020).