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THE LABOR MANAGEMENT REPORTING AND DISCLOSURE
ACT: THE EXTENT OF DISCLOSURE REQUIRED
UNDER SECTIONS 203(b) AND (c)

Donovan v. The Rose Law Firm
768 F.2d 964 (8th Cir. 1985)

NAOMI BRAUDE*

INTRODUCTION

Throughout the history of the American labor movement, employers have engaged in anti-union activity.¹ To aid in their anti-union efforts, employers often hire attorneys and labor-relations consultants,² also known as "union-busters." These attorneys and consultants attempt to persuade employees not to sign union authorization cards, to vote against union representation or to vote for union decertification. "Persuader" activities may be distinguished, however, from other labor-related activities such as giving advice on labor matters, and representing clients in court, in administrative proceedings and during collective bargaining.

Congress enacted sections 203(b) and (c) of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959³ (LMRDA) to regulate persuaders⁴ and thus protect workers' statutory rights to organize and bargain collectively.⁵ The underlying purpose of section 203(b) is

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1. See Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U.C.D. L. REV. 3 (1980). (hereinafter cited as Bernstein).

2. Both attorneys and professional labor-relations consultants may act as persuaders. For the purposes of this Comment, the term "consultant" will be used to include both attorneys and labor-relations consultants who act as persuaders.

3. 29 U.S.C. §§ 401-531 (1982) (hereinafter cited as LMRDA).

4. Congress enacted Title II of the LMRDA to "curb activities of middlemen in labor-management disputes . . ." S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2318, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 398 (1959).

5. Section 7 of the National Labor Relations Act of 1935 codifies the right of employees to organize and bargain collectively. Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities
29 U.S.C. § 157 (1982). The National Labor Relations Act is found at 29 U.S.C. §§ 151 et seq. (1982).

to force persuaders to publically disclose their persuader activity in order to supply employees with information regarding the identity of the persuader. Once employees are aware that an attorney or labor-relations consultant is not a disinterested third party but is in the "business" of discouraging union activity, employees are better able to evaluate the ideas and arguments presented to them by the persuader.

The extent to which an attorney or labor-relations consultant must disclose persuader activity is currently in dispute among the circuit courts. The Department of Labor has taken the position that once an attorney or consultant engages in persuader activity, he must disclose receipts and disbursements on behalf of every employer for whom he performed *any* labor-relations consulting services during the fiscal year. Four circuit courts⁶ have agreed with the Labor Department's position. The Eighth Circuit, in *Donovan v. The Rose Law Firm*,⁷ recently held, however, that the LMRDA does not require the disclosure of information with respect to labor-related clients who did not use the attorney as a persuader. According to the Eighth Circuit, a persuader need only disclose receipts from and disbursements on behalf of an employer-client for whom he acted as a persuader.⁸

This Comment will demonstrate that Congress intended to protect workers' statutory rights by requiring persuaders to disclose *all* of their labor-related activities, not merely persuader activities. The Comment will examine sections 203(b)⁹ and (c)¹⁰ of the LMRDA, and will address

6. *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985), and *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc); *Douglas v. Wirtz*, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

7. 768 F.2d 964 (8th Cir. 1985).

8. *Id.* at 974-75.

9. Section 203(b) of the LMRDA states:

Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly, or indirectly—

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disburse-

their purpose in publicizing persuader activity so that employees are able to understand the source of a persuader speech. Finally, the Comment will explore the persuaders' contention that requiring complete disclosure chills the employers' first amendment rights to speak out on the subject of unionism.

HISTORICAL PERSPECTIVE

The Legislative History of the LMRDA

The union-busting business existed before the enactment of the National Labor Relations Act (NLRA) in 1935.¹¹ Employers used private detectives, spies, hired guns and law enforcement officers to fight the growing labor movement. Anti-union tactics included injunctions, lawsuits and jailings as well as "spying, blacklisting, firing, physical intimidation . . . [and] . . . violence."¹² While some of these tactics disappeared¹³ following the enactment of the NLRA, the persistence of anti-union sentiment gave rise to new methods for fighting labor organizations. For example, the "labor-relations consultant" emerged as a tool against organized labor.¹⁴

The Senate Select Committee on Improper Activities in the Labor or Management Field, better known as the McClellan Committee, investigated illegal and unethical activities on the part of employers and labor-relations consultants. Created to uncover corruption and racketeering within labor organizations,¹⁵ the Committee also discovered serious

ments of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

29 U.S.C. § 433(b) (1982).

10. Section 203(c) of the LMRDA 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 or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c) (1982).

11. See Bernstein, *supra* note 1, at 3. See also HOUSE OF REPRESENTATIVES REPORT OF THE SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS OF THE COMMITTEE ON EDUCATION AND LABOR, 96th Cong., 2d Sess., PRESSURES IN TODAY'S WORKPLACE 26 (Comm. Print 1981).

12. PRESSURES IN TODAY'S WORKPLACE, *supra* note 11, at 26. See also Bernstein, *supra* note 1, at 3.

13. See Bernstein, *supra* note 1, at 3.

14. Today, the union-busting business is comprised of private consulting firms, law firms, industrial psychologists, employer and trade associations, non-profit advocacy organizations and public officials. See Bernstein, *supra* note 1, at 4-10.

15. The McClellan Committee was created after the Subcommittee on Investigations of the Senate Committee on Governmental Operations discovered evidence of union corruption and racketeering.

abuses by employers, and labor relations consultations with respect to union activity. The McClellan Committee reports

[describe] management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization. In some cases they work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices. The middlemen have acted, in fact if not in law, as agents of management.¹⁶

The revelation of abuses within the ranks of labor and management prompted Senators Kennedy and Ives to introduce the first of a series of labor-management reform bills predicated on the theory that mandatory reporting and disclosure by both labor and management would discourage unlawful activity. The Kennedy-Ives bill¹⁷ (Senate Bill 3974) contained section 103(b), the first version of sections 203(b) and (c) of the LMRDA. Section 103(b)¹⁸ required a person engaged in persuader activity to file with the Secretary of Labor an annual financial report con-

teering. See Beaird, *Reporting Requirements For Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959*, 53 GEO. L. J. 267, 269 (1965).

16. S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2326-27, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 406 (1959).

17. S. 3974, 85th Cong., 2d Sess., 104 CONG. REC. 18, 261-62 (1958).

18. Section 103(b) of the Kennedy-Ives bill stated:

Every person engaged in providing labor relations consultant services to an employer engaged in an industry affecting commerce pursuant to any agreement or arrangement under which such consultant undertakes—

(A) to influence or affect employees in the exercise of their rights guaranteed by section 7 of the National Labor Relations Act, as amended, or by the Railway Labor Act, as amended, or

(B) to provide an employer involved in a labor dispute with the services of paid informants or investigators, or any agency or instrumentality engaged in the business of interfering with, restraining, or coercing employees in the exercise of rights guaranteed by section 7 of the National Labor Relations Act, as amended, by the Railway Labor Act, as amended, or

shall file annually a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the following information:

(1) the name under which the labor relations consultant is engaged in doing business and the address of its principal place of business;

(2) receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof;

(3) disbursements of any kind, in connection with such services and the purposes thereof; and

(4) a detailed statement of such agreement or arrangement.

Provided, That nothing in this section shall be construed to require a report from a labor relations consultant retained by an employer by reason of his giving advice to such employer or representing such employer in any court or administrative agency or engaging in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

S. 3974, 85th Cong., 2d Sess., 104 CONG. REC. 18, 261-62 (1958).

taining receipts and disbursements made in connection with the persuader activity.¹⁹ In addition, section 103(b) contained a proviso indicating that no report would be required when an attorney was hired to advise, or to represent the employer in court, before an administrative agency or in collective bargaining. The Kennedy-Ives bill passed the Senate but encountered opposition in the House due to its broad reporting requirements for employers.

The following year, Senators Kennedy and Ervin introduced Senate Bill 505. The Kennedy-Ervin bill contained section 103(b)²⁰ which required a persuader to file an annual financial report detailing agreements, receipts and disbursements made with respect to persuader activity. However, Senate Bill 505 did not contain the Kennedy-Ives proviso exempting attorneys hired to advise, or to represent their employer-clients in court, before administrative agencies or in collective bargaining. Instead, it included section 103(c) which stated that “[n]othing in this section shall be construed to require any employer or labor relations consultant to file a report covering the services of a consultant by reason of his giving . . . advice . . . or representing . . . before any court . . . or engaging . . . in collective bargaining on behalf of such employer”²¹ The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare began hearings on Senate Bill 505. At the conclusion of

19. The Kennedy-Ives bill did not use the word “persuader.” Rather, the language of section 103(b) referred to activities “to influence or affect employees.” S. 3974, 85th Cong. 2d Sess., 104 CONG. REC. 18, 261 (1958).

20. Section 103(b) of the Kennedy-Ervin bill stated:

Every person engaged in providing labor relations consultant service to an employer engaged in an industry affecting commerce pursuant to any agreement or arrangement under which such consultant undertakes activities where an object thereof is, directly or indirectly,

(A) to persuade employees not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing;

(B) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute, except information for use solely in conjunction with a judicial, administrative or arbitral proceeding, shall file annually a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the following information:

(1) the name under which the labor relations consultant is engaged in doing business and the address of its principal place of business;

(2) receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof;

(3) disbursements of any kind, in connection with such services and the purposes thereof; and

(4) a detailed statement of the terms of such agreement or arrangement.

S. 505, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 29, 40-41 (1959).

21. S. 505, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 29, 41-42 (1959).

the hearings Senate Bill 505 emerged as Senate Bill 1555²² and passed the Senate.²³

The House Committee on Education and Labor held hearings on labor-management reform legislation. In 1958 and 1959, five bills were introduced in the House of Representatives.²⁴ Upon conclusion of the hearings, the House Labor Committee reported House Resolution 8342,²⁵ known as the Elliott bill, to the House. This bill did not refer to persuader activity. Instead, the bill required reporting and disclosure only if the consultant's activities were intended to "interfere with, coerce, or restrain"²⁶ employees in their right to organize and bargain collectively. Additionally, the Elliott bill conferred a much broader exemption on consultants than did Senate Bill 1555 and extended a corresponding exemption to employer-clients. Specifically, section 204 of the Elliott bill exempted an attorney and an employer-client from reporting confidential information including the existence of the relationship, financial details, "or any information obtained, advice given, or activities carried on by the attorney within the scope of the legitimate practice of law."²⁷

Representatives Landrum and Griffin introduced House Resolution 8400.²⁸ Its employer and consultant reporting requirements and the attorney-client privilege provision were identical to those contained in the Elliott bill. The Landrum-Griffin bill passed the House, adopting the aforementioned provisions of the Elliott bill.

22. S. 1555, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 516 (1959).

23. Section 103(b) of S. 505 differed from § 203(b) of S. 1555. While S. 505 required an annual report detailing the receipts, disbursements and terms of the persuader agreement, S. 1555 required a monthly report. It was not until the Conference Committee agreed on the final version of § 203(b) that both thirty day and annual reports were required.

24. H.R. 4473 and H.R. 4474, 86th Cong., 1st Sess. (1959) (introduced by Rep. Barden); H.R. 7265, 86th Cong., 1st Sess. (1959) (introduced by Rep. Kearns); H.R. 8342, 86th Cong., 1st Sess. (1959) (introduced by Rep. Elliott: favorably reported by Committee on Education and Labor; passed the House after floor debates and amendments by incorporation of text of H.R. 8400, 86th Cong., 1st Sess. (1959) (introduced by Reps. Landrum and Griffin)); H.R. 8490, 86th Cong., 1st Sess. (1959) (introduced by Rep. Shelley). *See generally* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959).

25. H.R. 8342, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 687 (1959).

26. H.R. 8342 stated that "the term 'interfere with, restrain or coerce' as used in this section means interference, restraint and coercion which, if done with respect to the exercise of rights guaranteed in section 7 of the National Labor Relations Act, would, under section 8(a) of such Act, constitute an unfair labor practice." H.R. 8342, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 687, 713 (1959).

27. H.R. 8342, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 687, 713 (1959).

28. H.R. 8400, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 619 (1959).

The House and Senate conferees met in Conference Committee to reconcile Senate Bill 1555 and House Resolution 8400. The Committee chose the Senate's reporting criteria for labor-relations consultants. First, the Committee decided that reporting requirements would be triggered not by actual interference, restraint or coercion, but by mere attempts by attorneys or consultants to persuade²⁹ employees. Second, the conferees required consultants to file, within thirty days after entering into an agreement with an employer, a report setting out the terms and conditions of the agreement. Third, the Committee decided that an annual financial report disclosing receipts and disbursements is required. The Conference bill passed both the House and Senate and became law in 1959.

Thus, section 203(b) of the LMRDA requires that every person hired by an employer to persuade employees to join or not to join a union must file financial disclosure reports with the Secretary of Labor. A report detailing the terms of the agreement between the employer and the persuader must be filed within thirty days after an agreement is reached. The section also requires a person engaging in persuader activity to file an annual report disclosing client names, receipts and disbursements for labor-relations advice and services provided during the preceding fiscal year.³⁰ However, section 203(c) exempts reporting when an attorney has given advice, represented the employer in court or before an administrative agency or engaged in collective bargaining on behalf of the employer.³¹

Case Law Supports Full Disclosure

The Department of Labor takes the position that the LMRDA requires full disclosure of all labor-relations activity if an attorney or consultant acts as a persuader for one or more employers. The Fourth, Fifth, Sixth and Seventh Circuits support³² this position, relying on the language and legislative history of the statute. Furthermore, the Sixth and Seventh Circuits found that the requirement of full disclosure does not offend the employer's first amendment right to free speech.³³

In *Humphreys, Hutcheson and Moseley v. Donovan*,³⁴ *Donovan v.*

29. Persuasion includes speeches to employees in which the persuader encourages the employees to vote against union representation. "Interference, restraint or coercion" include direct tactics such as firing, threats and violence.

30. See *supra* note 9.

31. See *supra* note 10.

32. See *supra* note 6 and accompanying text.

33. See *infra* notes 83-95 and accompanying text.

34. 755 F.2d 1211 (6th Cir. 1985).

Master Printer's Ass'n,³⁵ *Price v. Wirtz*³⁶ and *Douglas v. Wirtz*,³⁷ the courts held that the language of sections 203(b) and (c) compels a consultant to fully disclose all of his non-persuader labor-relations activity when he engages in persuader activity for one or more employers. They noted that section 203(b)(1) (the persuader clause) discusses only persuader activity and does not include the word "advice." The courts viewed Congress' failure to include the word "advice" as an indication that the entire section applies only to persuader activity. Section 203(b)(A) (the annual report section) states, however, that a consultant must include in his annual report receipts and disbursements in providing *advice and services*. The courts concluded that both persuader and advice information is required in the annual report.³⁸ Thus, if a consultant engaged in persuader activity and also gave advice, and represented employers in court, in administrative proceedings, or in the negotiations the persuader would be required to disclose financial information relating to all of these activities in his annual report.

The four circuits also examined the legislative history of the Act as further support for their position that the LMRDA requires full disclosure. Specifically, the courts pointed to Senate Report 187 which accompanied Senate Bill 1555 and which stated:

[a]n attorney or consultant *who confines himself* to giving legal advice, taking part in collective bargaining and appearing in court or administrative proceedings would not be included among those required to file reports under this subsection [§ b]. Specific exemption for *persons giving this type of advice* is contained in [section 203(c)].³⁹

Thus, the courts concluded that section 203(c)'s exemption applies only when a consultant has not engaged in persuader activity.

In addition, the courts reasoned that full disclosure satisfies the goals of the statute. Congress intended to subject persuaders to public scrutiny.⁴⁰ According to the courts, disclosure enables employees to

35. 532 F. Supp. 1140 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

36. 412 F.2d 647 (5th Cir. 1969) (en banc).

37. 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

38. *See, e.g., Douglas v. Wirtz*, 353 F.2d 30, 32 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

39. *See, e.g., Price v. Wirtz*, 412 F.2d 647, 651 (5th Cir. 1969) (en banc), *quoting* S. REP. NO. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2318, 2328, *and in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 408 (1959).

40. Senate Report 187 states:

Under section 103(b) every person who enters into an agreement with an employer to persuade employees as regards the exercise of their right to organize and bargain collectively or to supply an employer with information concerning the activity of the employees or labor organizations in connection with a labor dispute would be required to file a de-

"consider the source" of the persuader speech presented to them.⁴¹ The courts noted that Congress was not addressing the act of "persuasion" itself, "but the tendency of persuaders to engage in unfair labor practices."⁴²

Finally, the Sixth and Seventh Circuits⁴³ examined the constitutionality of section 203(b) and found that requiring full disclosure does not constitute a first amendment violation. The courts reasoned that full disclosure does not substantially burden the employer's first amendment rights by exposing him to a threat of violence or loss of business.⁴⁴ Furthermore, the government's interest in maintaining harmonious labor relations outweighs any chill on the employer's freedom of speech.⁴⁵ Finally, the courts held that under *Buckley v. Valeo*, full disclosure is "substantially related" to the government's interest in maintaining harmonious labor relations. Full disclosure aids employees in understanding the source of a persuader's speech⁴⁶ and thereby exercising their statutory rights.

STATEMENT OF THE CASE

In 1980, the United Brotherhood of Carpenters and Joiners of America engaged in a union organizing drive at the Monark Boat Company in Monticello, Arkansas. Monark's management hired the Rose Law Firm to deliver speeches to Monark employees⁴⁷ in an attempt to

tailed report. An attorney or consultant who confines himself to giving legal advice, taking part in collective bargaining and appearing in court or administrative proceedings would not be included among those required to file reports under this subsection. Specific exemption for persons giving this type of advice is contained in subsection (c) of section 103.

All of the activities required to be reported by this section are not illegal nor are they unfair labor practices. However, since most of them are disruptive of harmonious labor relations and fall into a gray area, the committee believes that if an employer or a consultant indulges in them, they should be reported. This public disclosure will accomplish the same purpose as public disclosure of conflicts of interest and other union transactions which are required to be reported in sections 101 and 102 of this bill.

S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2328, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 408 (1959).

41. *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140, 1150 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

42. *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140, 1150 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

43. See *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985) and *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

44. See, e.g., *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221.

45. *Id.* at 1221-22.

46. See, e.g., *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1222.

47. Brief for Appellee at 2, *Donovan v. The Rose Law Firm*, 768 F.2d 964 (8th Cir. 1985).

persuade the employees to vote against union representation. The Rose Law Firm also advanced money to Monark to lease a film that advised employees against joining the union.⁴⁸

The Department of Labor requested that the firm file LMRDA monthly and annual disclosure statements. Rose filed the monthly statement detailing the terms of its persuader agreement with Monark, and the annual financial statement detailing receipts from and disbursements on behalf of Monark, the only employer for whom the firm performed persuader services. However, the firm refused to disclose financial information for labor clients who did not use the firm for persuader activity. The Secretary of Labor brought suit against the Rose Law Firm requiring financial disclosure of services for all of its labor clients.

The district court ruled in favor of the Labor Department. In an unpublished opinion,⁴⁹ the district court agreed with the holdings in *Donovan v. Master Printer's Ass'n*, *Price v. Wirtz*, and *Douglas v. Wirtz* that the LMRDA requires full disclosure. The court held that "there exists a substantial relation between the government's interest [in discouraging persuader activity] and [full] disclosure."⁵⁰

The Eighth Circuit reversed the district court.⁵¹ It held that the annual report required by the LMRDA must disclose persuader services performed for the particular employer-client using those services.⁵² However, the court declined to require disclosure of the firm's labor consulting services for those clients who did not utilize the firm for persuader activity.⁵³

The court based its reasoning on the language and legislative history of section 203. The court asserted that Congress intended for the annual disclosure statements to include only receipts and disbursements for those clients who used the firm's *persuader* services.⁵⁴ The court reasoned that while Congress created a broad duty of disclosure in section 203(b) for those engaged in persuader activity, Congress severely limited that disclosure in section 203(c).⁵⁵

48. The advance was later charged to Monark Boat Company's account. Brief for Appellee at 2, *Donovan v. The Rose Law Firm*, 768 F.2d 964 (8th Cir. 1985).

49. *Donovan v. The Rose Law Firm*, No. 83-784 (E.D. Ark. 1984).

50. *Donovan v. The Rose Law Firm*, No. 83-784, slip op. at 3-4 (E.D. Ark. 1984).

51. Justice Bright dissented in *Donovan v. The Rose Law Firm*. The dissent agreed with the reasoning of the Fourth, Fifth, Sixth and Seventh Circuits that the LMRDA requires full disclosure. The dissent also rejected the majority's constitutional argument that no compelling governmental interest is served by full disclosure. *The Rose Law Firm*, 768 F.2d at 976.

52. *The Rose Law Firm*, 768 F.2d at 975.

53. *Id.*

54. *Id.*

55. *Id.* at 974.

In support of its decision to limit disclosure, the court first examined the difference between the proviso in section 103(b)⁵⁶ of the Kennedy-Ives bill and section 203(c) of the LMRDA. The *Rose* court noted that the Fourth, Fifth, Sixth and Seventh Circuits failed to consider the differences between the Kennedy-Ives proviso (section 103(b)) and section 203(c) of the LMRDA. The *Rose* court read the Kennedy-Ives proviso, which provided that an attorney is not required to file a report when he is hired by an employer-client to give advice as "merely making an implicit point explicit" According to the court, the proviso explained only that a report is not required when an attorney gives advice.⁵⁷ It does not speak to the contents of disclosure for persuader activity. However, the court interpreted section 203(c) of the LMRDA as specifically limiting the *contents* of the financial disclosure report. Section 203(c) states that "[n]othing 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"⁵⁸ Thus, section 103(b) of the Kennedy-Ives bill stated that reporting is not necessary when the attorney or consultant is giving advice, while section 203(b) of the LMRDA states that a person who provides persuader services must report the giving of advice. The court thus concluded that the section 203(c) limit on disclosure, by analogy to the Kennedy-Ives proviso, is a broad-based exception to section 203(b).⁵⁹

The court next attacked the argument advanced by the four circuits that Senate Report 187 indicated that an attorney is exempt from reporting only if he does not engage in *any* persuader activity. Senate Report 187, which accompanied Senate Bill 1555, stated that "[a]n attorney or consultant *who confines himself* to giving legal advice . . . would not be included among those required to file reports under [section 103(b)]."⁶⁰ The *Rose* court, however, drew a distinction between *whether* the attorney must disclose (under 203(b)) and *what* an attorney must disclose (under 203(c)). The court argued that Senate Report 187 indicated only that an attorney who has not engaged in persuader activity, who has confined himself to giving advice, has no obligation to report.⁶¹ The court emphasized that Senate Report 187 did not specify *what* is to be

56. See *supra* note 18 and accompanying text.

57. *The Rose Law Firm*, 768 F.2d at 971.

58. *The Rose Law Firm*, 768 F.2d at 971, quoting 29 U.S.C. § 433(c) (1982) (emphasis added).

59. *The Rose Law Firm*, 768 F.2d at 971.

60. S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2328, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 408 (1959).

61. *The Rose Law Firm*, 768 F.2d at 972.

included in the report *when* an attorney engaged in persuader activity.⁶²

Attempting to answer the question raised by Senate Report 187, the court relied on Conference Report 1147, the final conference report before the emergence of the Landrum-Griffin Act. Quoting the Conference Report, the court stated that section 203(c) of the LMRDA is a "broad exemption from the requirements of [section 203(b)]."⁶³ The court further stated that "Conf. Rep. No. 1147 is the most compelling indication of congressional intent as to the meaning of § 203(c)."⁶⁴

The court also found that Congress intended to require congruity of reporting within the LMRDA. Thus, Congress did not intend to require broad reporting for persuaders under sections 203(b) and (c) and limited reporting for employers under section 203(a).⁶⁵

Finally, the court chose not to reach the constitutional questions raised by the Rose Law Firm. The court had "difficulty perceiving the compelling governmental interest to be served by the reporting of all receipts and disbursements related to any labor-relations advice given to or services performed for clients for whom a consultant has not performed any persuader activity."⁶⁶

ANALYSIS

The Eighth Circuit erred in reversing the district court's decision requiring full disclosure. The language and legislative history of sections 203(b) and (c) do not clearly indicate whether full disclosure is required. However, the purpose behind the statute—the publication of persuader activity—leads to the conclusion that Congress intended full disclosure. Public disclosure of persuader activity enables employees to "consider the source" of the information they are given during the union representation campaign, allowing them to make an informed decision about union representation. However, full disclosure causes serious problems for an attorney/persuader and his other labor clients, and thus indirectly discourages persuader activity. Nevertheless, at least two circuits have held that any potential first amendment claim by a persuader is outweighed by the government's interest in promoting harmonious labor relations.

62. *Id.*

63. *Id.* at 974, quoting CONF. REP. NO. 1147, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2505, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 934, 937 (1959).

64. *The Rose Law Firm*, 768 F.2d at 974.

65. *Id.*

66. *Id.* at 975.

I.

When read together, sections 203(b) and (c) are ambiguous.⁶⁷ The language does not clearly state whether a persuader is required to report the finances for persuader clients only or whether he must report finances of all labor-related clients for whom he performed any labor-consulting services during the year. Despite this ambiguity, however, the *Rose* court's reading of the statute as requiring limited disclosure is unpersuasive.

The court asserted that section 203(c) represents a broad-based exemption to section 203(b) since section 203(c) states that it does not require reporting when a consultant gives advice, or represents an employer in court or in collective bargaining. According to the *Rose* court, section 203(c) exempts a consultant from reporting any labor-related advice.⁶⁸ However, the *Rose* court ignored a more plausible interpretation of section 203(c). Section 203(c) can be interpreted to mean that a persuader is exempt from reporting only when he has not engaged in any *persuader* activity. If he engaged in persuader activity, he must report *all* labor-related activities. This construction is supported by the language of sections 203(b) and (c). Since section 203(b) requires disclosure when a consultant gives advice *or* persuades, and section 203(c)'s exemption provision does not mention persuasion, section 203(c) indicates that a consultant is exempt from reporting only if he has not engaged in any persuader activity.

The court relied on Senate Report 187 as further evidence that its construction is correct.⁶⁹ The court noted that Senate Report 187 does not specify *what* is to be included in the annual report when a consultant acts as a persuader, suggesting that the report should only include persuader activity. However, the court failed to consider an alternative construction of the statute. The language stating "an attorney or consultant *who confines himself* to giving legal advice . . . would not be included among those required to file reports . . ."⁷⁰ could just as easily mean that

67. *The Rose Law Firm* court admits that the language is ambiguous and subject to conflicting interpretations. *Id.* at 970. One commentator states that §§ 203(b) and (c) compel opposite conclusions. This, he says, "is another example of the ambiguities" characteristic of the statute. See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 891 (1960).

68. *The Rose Law Firm*, 768 F.2d at 975.

69. *Id.* at 972.

70. *The Rose Law Firm*, 768 F.2d at 972, quoting S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2328 and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 408 (1959).

the section 203(c) exemption only applies when there is no persuader activity.

Furthermore, the *Rose* court asserted that Conference Report 1147 confirms its view that section 203(c) is a broad exemption to section 203(b).⁷¹ While Conference Report 1147 does state that section 203(c) is a broad exemption to section 203(b), the Report does not indicate *when* section 203(c) exempts reporting.

Further analysis of the statutory language sheds light on the proper construction of the statute. Section 203(c) states that "[n]othing 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 advice"⁷² This section does not mean that advice is *always* exempt from disclosure. Section 203(b)(A) requires disclosure for advice *and* persuasion. Therefore, section 203(c) cannot exempt all reporting of both persuader and non-persuader advice since section 203(b)(A) calls for reporting of advice. Section 203(b) simply means that giving advice, and representing employers in court or in collective bargaining does not always require reporting. The section requires reporting when the attorney has engaged in persuader activity.⁷³

The court also stated that sections 203(b) and (c) were not meant to require broad reporting for persuaders since section 203(a) requires only limited reporting for employers.⁷⁴ While there may be merit in the court's argument that Congress intended the sections to be congruous, there is nothing in the Congressional reports to indicate that this was an overriding concern of Congress.

II.

The *Rose* court addressed the language of the statute but failed to address the statute's purpose of publicizing persuader activity. These omissions are significant because the language of the statute is so ambiguous that a complete statutory interpretation must include policy considerations. Since the court emphasized the statute's language rather than its purpose, the court did not have to explain its construction of the statute.

The congressional intent behind section 203(b) was not to stamp out persuader activity but to publicize it. Since some members of Congress

71. *The Rose Law Firm*, 768 F.2d at 974.

72. 29 U.S.C. § 433(c) (1982) (emphasis added).

73. Commentators have supported this interpretation of the statute. See Beaird, *supra* note 15, at 291 and 1 GA. L. REV. 128, 134 (1967).

74. *The Rose Law Firm*, 768 F.2d at 975.

were concerned that persuaders tended to engage in unfair labor practices,⁷⁵ full disclosure was seen as a way to subject a persuader to public scrutiny so that he would be unable "to couch [his] function as 'advice' rather than persuasion."⁷⁶ The Fifth Circuit, in *Price v. Wirtz*, emphasized the purpose of the statute in interpreting its language. The *Price* court stated that the difficulty in distinguishing between persuader and non-persuader activity, and the ease with which a persuader can conceal illegal speeches justified subjecting the persuader to full disclosure.⁷⁷

Full disclosure enables employees to understand the source of the information they are given during the election campaign.⁷⁸ If persuader activity is presented as advice from an unbiased third party, employees are unable to critically evaluate the persuader's message. Workers who know that a persuader is in the business of discouraging union activity may be skeptical of the persuader's message. Consequently, the speech will have less of an impact on the employees' freedom to organize and bargain collectively.

The National Labor Relations Act protects the rights of both employees and employers. Section 8(a)(1) of the NLRA⁷⁹ protects the rights of employees to organize and bargain collectively, while section 8(c)⁸⁰ protects the rights of employers to comment on union representation. Thus, a fine line exists between the employer's right to comment on labor matters and the employees' right to exercise their rights without unlawful interference. The employer has the right to hire a consultant to persuade his employees not to join the union. Nevertheless, the employees will be unable to put the persuader's speech into the proper context unless they are aware of the persuader's other labor-related activities. An employee's decision regarding union representation will be an in-

75. Senate Report 187 stated:

All of the activities required to be reported by . . . [section 203(b)] are not illegal nor are they unfair labor practices. However, since most of them are disruptive of harmonious labor relations and fall into a gray area, the committee believes that if . . . a consultant indulges in them, they should be reported.

S. REP. NO. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2318, 2328, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 408 (1959).

76. *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140, 1150 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

77. *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969) (en banc).

78. *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140, 1150 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

79. Section 8(a)(1) states that it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [to organize and bargain collectively]." 29 U.S.C. § 158(a)(1) (1982).

80. Section 8(c) of the NLRA states that it is not an unfair labor practice for an employer to express views, arguments, or opinions about a labor union. 29 U.S.C. § 158(c) (1982).

formed one only if he knows that the persuader is in the business of union-busting. Thus Congress enacted Section 203(b) as a compromise that allows employers to comment as long as they disclose. Through disclosure, the employees can properly evaluate the speech in light of the persuader's other activities.

III.

The purpose of financial disclosure is to publicize persuader activity. However, the practical effect of full disclosure may be to inhibit an attorney from engaging in persuader activity. Full disclosure of all labor-consulting activities impacts the attorney-client relationship.⁸¹ The attorney is forced to divulge the names of labor-related clients, receipts, disbursements, and the nature of the activities performed on behalf of the client. Thus, the attorney who engages in persuader activity may lose clients for whom he provides non-persuader labor-relations services. The client might not want his name associated with a law firm with a reputation for union-busting. The attorney may also lose a persuader client if he chooses not to persuade for fear of losing other clients.

In addition, an "innocent" client whose name is revealed through disclosure might be subjected to hardships. He could be prejudiced if it is disclosed that he paid large attorney fees to defend against unfair labor practice charges. Unions could use this information as a bargaining wedge in future negotiations with the client. Thus, full disclosure may tend to inhibit persuader activity by forcing an attorney to risk losing clients by exposing them to public scrutiny.

Critics argue that full disclosure ignores the impact on the attorney-client relationship and the innocent client, and exposes legitimate activities to public inspection. They further argue that the intended purpose of

81. Section 204 of the LMRDA 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 a legitimate attorney-client relationship.

29 U.S.C. § 434 (1982).

Section 204 exempts an attorney/persuader from filing financial disclosure reports because this would breach the attorney-client relationship. However, this section does not completely relieve an attorney of the obligation to report. Rather, he is excused from including certain information in the report. An attorney must include communications made by the attorney to the client, receipts and disbursements. However, this section excludes communications made by the client to the attorney. Thus, the reporting requirements do not infringe on the attorney-client privilege. The report requires the names of the attorney and the client, receipts from and disbursements made on behalf of the client and the terms of the agreement. These facts are not protected by the attorney-client relationship. *Cf. In re Colton*, 201 F. Supp. 13, 17-18 (S.D.N.Y. 1961), *aff'd sub nom. Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

disclosure is to publicize only persuader activity, not non-persuader activity.⁸² The critics fail to note, however, that the goal of the statute is to publicize persuader activity in order to give the employee enough information about the persuader to put his speech in its proper context. Full disclosure of the persuader's labor-related activities is necessary to educate the employee about the persuader's occupation.

IV.

Two circuit courts have held that disclosure requirements are not an unconstitutional infringement on the employer's right to free speech.⁸³ These courts recognized that full disclosure is permissible as long as the chill on first amendment rights is justified by the legislative purpose.⁸⁴

The analytical framework for examining disclosure requirements against first amendment attack is set out in *Buckley v. Valeo*.⁸⁵ Under the *Buckley* analysis, the court must consider 1) the degree of infringement on first amendment rights, 2) the importance of the governmental interest involved, and 3) whether a "substantial relation" exists between the governmental interest and the information to be disclosed.⁸⁶ The courts in *Master Printer's Ass'n* and *Humphreys, Hutcheson and Moseley* weighed these factors and determined that the burden imposed on the persuader "is justified by the government's interest in maintaining anti-septic conditions in the labor-relations setting."⁸⁷ These courts, in applying *Buckley*, reasoned that the degree of infringement created by the statute was not sufficient to outweigh the governmental interest involved. According to these courts, the type of infringement required is a threat of physical violence or loss of employment to the employer.⁸⁸ The courts also held that the statute is narrowly tailored to serve the governmental interest in harmonious labor relations.⁸⁹ Finally, the courts found that the statute was substantially related to the government compelling

82. See Note, *Two Views of a Labor Relations Consultant's Duty to Report Under Section 203 of the LMRDA*, 65 MICH. L. REV. 752, 760 (1967). See also, Comment, 45 NOTRE DAME LAW., 541 (1970).

83. See *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Donovan v. Master Printers Ass'n*, 532 F. Supp. 1140, 1150 (N.D. Ill. 1981), *aff'd*, 699 F.2d 370 (7th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

84. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221; *Master Printers Ass'n*, 532 F. Supp. at 1147.

85. 424 U.S. 1, 64 (1976).

86. *Id.*

87. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1220.

88. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221; *Master Printers Ass'n*, 532 F. Supp. at 1148 n.11.

89. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221-22; *Master Printers Ass'n*, 532 F. Supp. at 1151.

interest.⁹⁰

The Eighth Circuit did not reach the first amendment issue, reasoning that the legislative history supported its interpretation of sections 203(b) and (c). The court noted, however, that had it reached the constitutional question it would have had "difficulty perceiving the compelling governmental interest to be served by [full disclosure]."⁹¹ Thus, if the court had reached the first amendment issue, it might well have tried to argue that the statute chills the employer's first amendment rights, and that the governmental interest in promoting harmonious labor relations does *not* outweigh the chill on first amendment rights.

The *Rose* court's motivation in not reaching the first amendment issue may have been to avoid applying the *Buckley* test to the particular facts in *Rose*. Strained reasoning would be required in order for the *Rose* court, under the *Buckley* test, to show that the law firm's right to not disclose outweighed governmental interest in protecting harmonious labor-relations. In applying *Buckley* as interpreted by the Sixth and Seventh Circuits, the burden is on the persuader to show that full disclosure would subject him to adverse consequences. In the absence of this showing, the presence of harm is merely speculative, and there is no justification for limiting disclosure. In *Rose Law Firm*, the statute's reporting requirements are not a substantial burden on the employer's first amendment rights. The reporting requirements do not pose a threat of physical violence or loss of employment.⁹² In addition, although the chill is not inconsequential, the statute is narrowly tailored to preserve employee rights while allowing employers to comment on labor matters.⁹³ Thus, "[t]he government's compelling interest in maintaining harmonious labor relations outweighs the chill placed upon [the employer's] exercise of its first amendment rights."⁹⁴ Finally, full disclosure is substantially related to the government's compelling interest in maintaining antiseptic conditions since full disclosure aids employees in understanding the source of the information they are given during the election campaign.⁹⁵ As a result, the employee is capable of exercising his rights under the NLRA.

90. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1222; *Master Printers Ass'n.*, 532 F. Supp. at 1150 n.12.

91. *The Rose Law Firm*, 768 F.2d at 975.

92. *Humphreys, Hutcheson and Moseley*, 755 F.2d at 1221.

93. *Id.*

94. *Id.* at 1222.

95. *Id.*

CONCLUSION

Section 203(b) of the Labor Management Reporting and Disclosure Act of 1959 requires an attorney or labor-relations consultant to file monthly and annual financial disclosure reports with the Secretary of Labor. Section 203(c) exempts reporting when the attorney or consultant has not engaged in persuader activity. Because the language of sections 203(b) and (c) is ambiguous, the circuits are split as to whether a persuader is required to report receipts and disbursements for persuader activity only, or whether the persuader must disclose information with respect to all labor-related clients. Congressional intent calls for full disclosure. The underlying premise of section 203(b) is to force persuaders to publicly disclose their persuader activity so that workers can understand the source of a persuader speech. While the effect of full disclosure may be to inhibit persuader activity to some degree, two circuit courts have held that the governmental interest in promoting harmonious labor relations outweighs any chilling effect on persuader speech.

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