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Regulation of Bar

Decision Blocking DOL 'Persuader' Rule Cites Irreconcilable Clash With Ethical Duties

The Labor Department's new ''persuader rule'' can't coexist with lawyers' ethical obligations, a federal judge in Texas said June 27 (*Nat'l Fed'n of Independent Bus. v. Perez*, 2016 BL 221945, N.D. Tex., No. 5:16-cv-00066-C, *preliminary injunction* 6/27/16). The new rule must be put on hold for the time being to avoid irreparable harm to the attorney-client relationship between employment lawyers and their employer-clients, Cummings decided. The nationwide preliminary injunction blocks implementation of the rule until the court reaches a final decision of the merits.

At issue is the Labor Department's new regulation on reporting obligations that kick in under federal labor law when employers get help from attorneys or other consultants about resisting union organizing campaigns.

The case centers on a new regulatory regime that has produced a fundamental disagreement between the nation's largest bar association and a group of law professors from around the nation. The ABA has opposed the rule since its proposal five years ago, and nearly two dozen law professors have gone on the record supporting it.

The new rule is under attack on multiple fronts. Just a few days before Cummings handed down his decision, a federal judge in Minnesota said the regulation is probably invalid, but he denied the challengers' bid for a preliminary injunction. *Labnet Inc. v. DOL*, 2016 BL 200241, D. Minn., No. 16-CV-0844, 6/22/16. See 32 Law. Man. Prof. Conduct 424.

DOL's new rule would force lawyers to breach their duties of confidentiality and loyalty to their employer-clients and preclude them from serving as true advisors, Judge Sam R. Cummings of the U.S. District Court for the Northern District of Texas decided. The new rule doesn't trump state ethics rules and doesn't fit within the confidentiality exception that allows disclosure when it's required by other law, the Reagan appointee said.

ABA, Law Professors at Odds. After the final version of the rule came out, the ABA sent a letter to Congress strongly objecting to the new rule.

DOL should stick to its longtime, bright-line rule excluding lawyers from the statutory reporting requirements when they merely provide advice or other legal services directly to their employer clients but have no direct contact with the client's employees, the letter said.

DOL's new rule will ''conflict with lawyers' existing state rules of professional conduct regarding client confidentiality and will seriously undermine both the confidential lawyer-client relationship and the employers' fundamental right to effective counsel,'' the ABA letter said.

But a group of 23 law professors sent Congress a contrary letter saying DOL's new reporting regime ''can coexist comfortably'' with lawyers' obligations under the ABA Model Rules of Professional Conduct. The letter describes the signatories as law school faculty members who have research and teaching experience in legal ethics, constitutional law and labor law.

The professors pointed out that Model Rule 1.6(b)(6) allows disclosure of client information to comply ''with other law or court order.'' The rule therefore allows disclosure to comply with a law such as the Labor Management Relations Act, they said.

The letter also pointed out that courts have upheld many other laws, such as the Lobbying Disclosure Act of 1995, which require lawyers to make disclosures when they engage in certain activities on behalf of a client.

Anyway, the DOL's new persuader rule doesn't require reporting when a lawyer provides exclusively legal advice, the professors said.

Broad New Triggers for Reporting. The DOL rule is a new interpretation of the disclosure requirements set out in the Labor Management Reporting and Disclosure Act, 29 U.S.C. 433(b), regarding so-called ''persuader activity'' that's meant to sway employees against unionizing.

The LMRDA imposes disclosure requirements not only on employers that engage in persuader activity but also on the consultants they hire—including attorneys—for help resisting union organizing campaigns.

Attorneys and other consultants that engage in persuader activities must file ''LM-20'' reports disclosing the client's identity, the nature of the activity, the fees received and other information. Moreover, they must also file ''LM-21'' reports that disclose receipt of fees from all employer clients for labor relations advice or services, not just fees related to persuader activities. Both types of reports are public records.

The Act has an ''advice exemption'' that excuses reporting of a consultant's advice to an employer. Under DOL's longstanding interpretation of the advice exemption, attorneys and other consultants were exempt from the reporting requirements so long as they didn't have direct contact with the client's employees.

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However, DOL's new rule interprets the advice exemption much more narrowly. Under the new rule, indirect persuader activities don't constitute ''advice'' and thus aren't exempt.

In particular, the advice exemption doesn't apply if an attorney or other consultant plans or directs an employer's persuader activities, provides materials for the employer to disseminate, conducts seminars for employers on how to resist union organizing campaigns or develops personnel practices.

Professors Stick to their Views. Three professors who signed the letter to Congress told Bloomberg BNA that they stand by the views they expressed in their letter to Congress despite the court's strong criticism of the rule.

The judge's findings and conclusions on the ethics issues are incorrect and don't adequately address the reasons given in the professors' letter for believing the new rule can coexist with ethics rules, Catherine Fisk said in an e-mail to Bloomberg BNA. Fisk is a professor at University of California-Irvine School of Law.

Professor Ariana R. Levinson of University of Louisville Brandeis School of Law also said the decision hasn't changed her opinion. ''I continue to adhere to the view that the new persuader rule can comfortably coexist with the lawyers' ethical obligations,'' she said in an e-mail to Bloomberg BNA.

Levinson pointed out that the decision was based only on the evidence provided by the plaintiffs because, as noted in the opinion, the defendants called no witnesses and introduced no exhibits. ''The opinion, therefore, relies only on evidence favorable to the plaintiffs,'' she said.

Levinson also noted that the new persuader rule applies to situations where advice is intended to persuade rank-and-file employees. ''These employees generally constitute third parties, and disclosure to them breaks attorney client-privilege,'' she said.

''Additionally, the rule mirrors the common distinction made in ethics decisions between situations involving legal advice, which are protected by attorney-client privilege, and those involving business advice, which are not,'' Levinson said. These categories correspond to the new persuader rule's distinction between protected legal advice and unprotected persuader activity, she said.

Levinson also reiterated, as stated in the professors' letter to Congress, that, ethics rules generally permit disclosure when required by law.

Won't Erode Attorney-Client Relationship. In an interview with Bloomberg BNA, professor Ruben J. Garcia also stood by the professors' view of the new persuader rule. Garcia is at the University of Nevada, Las Vegas, William S. Boyd School of Law.

Garcia said the court's discussion of ethics issues isn't material to the validity of the persuader rule. Ethics issues are generally regulated by states and not by federal courts, he said. Whether compliance with the persuader rule may get attorneys in trouble with state ethics bodies is a state-by-state issue, Garcia said.

Garcia disputed the idea that the new persuader rule will erode the attorney-client relationship. Part of the persuader rule specifically protects the attorney-client privilege, he said.

Regarding the ethical duty of confidentiality, that's enforced by state ethics bodies, Garcia said. As the professors' letter said, there's an exception allowing disclosure for regulatory compliance, he said.

Garcia also said the rule doesn't require lawyers to disclose their advice. If there's a concern that lawyers won't advise clients because their attorney-client relationship would be disclosed, that concern has nothing to do with ethics, he said.

As for the potential chilling effect the rule might have on lawyers and clients under the First Amendment, the issue is whether that's enough to justify a nationwide preliminary injunction against an entire regulatory scheme, Garcia said.

'Question-Begging.' Not everyone agrees with the professors' views.

''I think the position the professors have offered on coexisting comfortably is mostly question begging,'' Brian S. Faughnan said in an e-mail to Bloomberg BNA. He's with Lewis Thomason in Memphis.

''Certainly if this is going to be the law, then provisions like Rule 1.6(b)(6) will allow it to trump confidentiality under the ethics rules,'' Faughnan said.

''But the real question is whether this further erosion of the protection of confidentiality for clients is needed or worthwhile,'' he said.

Faughnan also said the professors' position ignores the practical problems associated with other aspects of DOL rules. Form LM-21 would require disclosures by lawyers and firms of money received from other unrelated clients, and DOL hasn't yet proposed changes to that form, he said.

In an e-mail to Bloomberg BNA, Trisha M. Rich of Holland & Knight LLP, Chicago, said the professors' position isn't technically inconsistent with the current version of the Model Rules.

But it's not clear that's good or desirable for attorney-client relationships, she said. Rather, it reflects how broad the exceptions to Model Rule 1.6 have become, Rich said.

''It makes perfect sense that lawyers and jurists would strongly object to the continued erosion of the protections that Model Rule 1.6 provides, because holding and protecting confidential information is at the core of our ethical duties as attorneys,'' Rich said.

With Peter R. Jarvis, Rich co-authored a recent law review article on the growing breadth of the exceptions to lawyer-client confidentiality in Rule 1.6. See *The Law of Unintended Consequences: Whether and When Mandatory Disclosure Under Rule 4.1(b) Trumps Discretionary Disclosure Under Model Rule 1.6(b)*, 44 Hofstra L. Rev. 421 (Winter 2015).

Rule Imperils Lawyer-Client Confidentiality. Large portions of the legal profession are opposed to the new DOL rule, according to Amar D. Sarwal, vice president and chief legal strategist of the Association of Corporate Counsel in Washington, D.C.

In an interview with Bloomberg BNA, Sarwal said the DOL rule ''strikes at the heart of the duties of loyalty and confidentiality, and puts the lawyer in a very difficult situation.'' Lawyers will have to warn clients in advance that ''whatever I do with you will be available at least in summary form to the public,'' he said.

Sarwal said the professors supporting the rule cited the ''other law'' exception to Rule 1.6 in their letter without mentioning that the comment to Rule 1.6 calls for lawyers to resist disclosure demands.

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Also, Sarwal disputed the professors' reliance on the Lobbying Disclosure Act as support for requiring disclosure. That act involves very different lawyer conduct that's not analogous to lawyers advising clients, he said.

Sarwal described Cummings's opinion as ''a very powerful opinion on many different fronts,'' such as its discussion of a client's First Amendment right to engage in speech with a lawyer. That's a larger point that may be valuable in other contexts such as a consumer's right to use Rocket Lawyer, he said.

ACC filed comments objecting to the proposed rule when DOL floated it for public feedback in 2011.

DOL's proposal drew thousands of comments, mostly negative. Numerous bar groups submitted critical comments, including the ABA, the Arizona State Bar, the Florida Bar, the Georgia State Bar, the Illinois State Bar Association, the Michigan State Bar, the Mississippi Bar and the Ohio State Bar Association.

Bad Policy. In an interview with Bloomberg BNA, Marshall B. Babson, who served on the NLRB during the Reagan administration, praised the decision blocking the persuader rule.

''The court got it precisely right,'' Babson said. He's counsel at Seyfarth Shaw LLP in New York.

The new rule is bad policy, in Babson's view. It's unwise in the guise of regulating persuader activity to say lawyers can't provide counsel without these onerous restrictions, he said.

''The general view in the management community is that these restrictions have less to do with persuader activity and more to do with restraining the availability of good counsel by lawyers to their clients regarding union organizing activity and related matters,'' Babson said.

Babson said that the new rule is intended to make it easier for unions to organize. It goes along with other changes, such as ''hurry-up elections'' and ''micro-bargaining units,'' that have the same political goal, he said.

'Defective to Its Core.' In granting a preliminary injunction, Cummings concluded that the challengers will probably prevail on their claim that the DOL's new rule is arbitrary and capricious, as well as their claims that the rule is beyond DOL's statutory authority, infringes free speech and association rights and is unconstitutionally vague.

The rule is ''defective to its core'' because it entirely eliminates the statutory advice exemption, Cummings said.

Cummings devoted at least 35 paragraphs of his opinion to discussing how the new rule clashes with ethics duties (paragraphs 76-86) and would irreparably harm the attorney-client relationship (paragraphs 145-170).

The revised rule unreasonably conflicts with state rules governing the practice of law and ''contains reporting requirements that are inconsistent with and undermine the attorney-client relationship and the confidentiality of that relationship,'' the court said.

In reaching these conclusions, Cummings relied heavily on expert testimony from attorney Dennis P. Duffy about legal ethics, the interpretation and operation of professional conduct rules and the impact of DOL's new rule on attorneys' ethical obligations.

Duffy is a BakerHostetler partner in Houston who concentrates exclusively on representation of management, and he's the author of an ethics handbook for labor and employment lawyers.

Cummings also drew on testimony from Frost Brown Todd partner William T. Robinson III about the ABA's position on the ethical implications of the new rule. Robinson was president of the ABA when DOL floated the proposed rule in 2011, and he authored the ABA comments blasting the proposals. See 27 Law. Man. Prof. Conduct 614.

New Rule Compels Ethical Violations. Cummings found that the new interpretation of the advice exemption would force lawyers to violate ethics rules on lawyer-client confidentiality. Texas Disciplinary Rule of Professional Conduct 1.05 bars attorneys from disclosing any information they acquire about clients, and it protects clients' names, fees and terms of engagement agreements, the judge said.

The court also found that DOL's new rule would compel lawyers to violate their duty of loyalty to clients and their obligations under the general rule on conflicts of interest, which in Texas is Rule 1.06. Lawyers would face substantial conflicts between their new reporting duties and their longstanding duty to maintain client confidentiality, Cummings said.

Moreover, Cummings said DOL's new rule would require lawyers to violate the ethics rule on their role as advisors. Texas Rule 2.01 commands lawyers to exercise independent professional judgment and render candid advice, he noted. The advice that clients are entitled to receive under the rule would trigger reporting duties, yet that advice is confidential under both attorney ethics rules and the statutory advice exemption, the judge said.

Other states have adopted counterparts to those rules, and DOL's new rule would compel ethical breaches in those states too, Cummings found.

DOL 'Plainly Incorrect.' The court spurned all of DOL's arguments in defense of its new rule.

► DOL said the attorney-client privilege doesn't cover the information that must be reported under the new rule. But that's ''plainly incorrect,'' and ignores that a lawyer's duty of confidentiality covers both privileged and unprivileged information, Cummings said.

► The agency cited the doctrine of federal preemption, claiming its rule trumps any conflicts with state ethical requirements. However, the question here is whether it's arbitrary and capricious for the agency to create those conflicts in the first place by adopting its new interpretation, the court said.

► The DOL invoked the exception in Rule 1.05(c)(4) that allows a lawyer to reveal unprivileged confidential information in order to comply with ''other law.'' But Cummings said the new rule likely doesn't constitute a valid ''other law'' for purposes of the exception. On the contrary, the rule invalidly requires disclosure of advice that's statutorily protected from disclosure by the LMRDA, he said.

► DOL contended that lawyers can stay within the advice exemption and avoid triggering disclosure requirements by advising clients only about the law itself. However, Cummings endorsed Duffy's testimony that lawyers generally can't fulfill their role as advisors by just giving clients technical ''hornbook'' advice.

► The agency also said lawyers can simply decline to provide persuader services to clients that won't consent to the required disclosures, or limit their services to le-

gal services. But some persuader activities are legal services, and DOL's approach would severely burden clients that need these services, Cummings said.

Irreparable Harm Would Result. Cummings found that irreparable harm would likely result from implementing the new rule. It would deter employers from exercising their First Amendment rights to hire counsel, and would deter lawyers from giving advice that might trigger reporting under the new rule, Cummings said.

Cummings found it likely that many lawyers won't be willing to advise lawyers about union campaigns as a result of the new rule.

For example, Don Graf, the only management-side lawyer in Lubbock, Tex., with union election experience, testified that he would stop providing these services, he said.

Also, large firms such as Morgan Lewis have already announced that they will cease providing some services to avoid the new rule's disclosure requirements, Cummings said.

Two Other Suits. In *Labnet Inc. v. DOL*, Judge Patrick J. Schiltz of the U.S. District Court for the District of Minnesota said a coalition of law firms has a strong likelihood of success on their claim DOL has adopted an interpretation of LMRDA-exempt ''advice'' that conflicts with the plain language of the federal statute. However, he refused to block the agency from enforcing the regulation, saying it's preferable for the law firms to press their legal arguments in enforcement actions brought under the rule.

In a July 18 order, Schlitz set a timetable for briefing on the defendants' motion to dismiss and the parties' dueling motions for summary judgment, along with an Oct. 3 hearing on those motions.

A challenge to the new DOL rule is also underway in Arkansas federal district court. On July 8, Judge Kristine G. Barker consolidated the plaintiffs' motion for a preliminary injunction with a determination on the merits of the claims, and directed the parties to file simultaneous briefs by Aug. 5 in support of summary judgment on the merits of the dispute (*Associated Builders & Contractors of Ark. v. Perez*, E.D. Ark., No. 4:16-cv-00169, 7/8/16).

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Full text of decision granting preliminary injunction is at http://src.bna.com/g63.

Law professors' letter is at http://src.bna.com/g64.

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