2016

Brief for Legal Ethics and Labor Law Professors as Amici Curiae Supporting Appellants, Nat'l Fed'n of Indep. Bus. v. Perez

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Case No. 16-11315

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL FEDERATION OF INDEPENDENT BUSINESS; TEXAS ASSOCIATION OF BUSINESS; LUBBOCK CHAMBER OF COMMERCE; NATIONAL ASSOCIATION OF HOME BUILDERS; TEXAS ASSOCIATION OF BUILDERS,
Plaintiffs – Appellees

STATE OF TEXAS; STATE OF ARKANSAS; STATE OF ALABAMA; STATE OF INDIANA; STATE OF MICHIGAN; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF WISCONSIN,

Intervenor Plaintiffs – Appellees

v.

THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR; MICHAEL J. HAYES, DIRECTOR, DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR,
Defendants – Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, LUBBOCK

BRIEF OF LEGAL ETHICS AND LABOR LAW PROFESSORS AS AMICI CURIAE SUPPORTING DEFENDANTS – APPELLANTS AND URGING REVERSAL

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Defendants – Appellants

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5TH CIR. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National Federation of Independent Business

2. Texas Association of Business

3. Lubbock Chamber of Commerce

4. National Association of Home Builders

5. Texas Association of Builders

6. State of Texas

7. State of Arkansas

8. State of Alabama

9. State of Indiana

10. State of Michigan

11. State of Oklahoma

12. State of South Carolina

13. State of Utah

14. State of West Virginia

15. State of Wisconsin

16. Thomas E. Perez, Secretary, Department of Labor

17. Michael J. Hayes, Director, Department of Labor

18. United States Department of Labor

19. Jeffrey C. Londa

20. Fernando Manuel Bustos

21. Charles C. High, Jr.

22. Christopher Charles Murray

23. Prerak Shah

24. Michael Cantrell

25. Andrew Drake Leonie, III

26. David Austin Robert Nimocks

27. Michael Christopher Toth

28. Daniel Bentele Hahs Tenny

29. Sarah Wendy Carroll

30. Michael S. Raab

31. Daniel M. Reiss

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are 20 members of United States law school faculties who teach, write and practice in the fields of Labor Law, Constitutional Law and Professional Responsibility.[2] *Amici* are concerned that reasonable regulations of the Department of Labor might be hampered by erroneous interpretations of the ethical duty of confidentiality and the evidentiary attorney-client privilege as they exist in United States jurisdictions.

Amici submit this brief to provide information to the Court about the operation of the legal ethics rules in several states, and the history and reasons for the U.S. Department of Labor's (DOL) revisions to the rule requiring disclosure of employer activities to influence employees in the selection of their bargaining representative ("the Persuader Rule").

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation of this brief. No person other than the Amici Curiae or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is accompanied by a Motion requesting leave to file this Brief.

[2] The full list of Legal Ethics and Labor Law Professors joining this brief is in the Appendix.

PERMISSION TO FILE AMICUS BRIEF

This Brief is accompanied by a Motion For Leave to File an *amicus* brief pursuant to Federal Rule of Appellate Procedure 29(a).

ISSUES PRESENTED BY AMICI

1. The district court erred in enjoining the revised Persuader Rule because there is no conflict between the attorney-client privilege and the Rule.

2. The district court erred in enjoining the revised Persuader Rule because there is no conflict between attorneys' ethical duty of confidentiality and the Rule.

SUMMARY OF ARGUMENT

We write as members of law school faculties with research and teaching experience in Legal Ethics, Labor Law and Constitutional Law to address attorney-client confidentiality concerns that have been raised by members of the legal community to the Department of Labor's (DOL's) Final "Persuader" Rule ("revised Persuader Rule"). The Final Rule implements the disclosure requirements of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 *et seq.*,

by requiring employers and their hired labor-relations consultants to report agreements under which the consultants agree, directly or indirectly, to persuade employees in the exercise of their rights in the selection of a collective bargaining representative. For the reasons discussed below, we believe that the reporting regime contemplated by the LMRDA as amended, can coexist comfortably within the lawyer's obligations under the American Bar Association's Model Rules of Professional Conduct (herein, "M.R." or "Model Rules"), the ethics rules of the states, and the attorney-client privilege in the evidence code of the states.

For over 50 years, the Persuader Rule has afforded employees information about the resources spent by employers to hire consultants or attorneys to support or oppose unionization efforts at their workplaces. In 1962, the DOL chose to interpret the statute to exempt a consultant's preparation of speeches or materials as unreportable "advice," as long as the employer could "accept or reject" the material. The Revised Final Rule, which went into effect March 24, 2016, now properly interprets the LMRDA in favor of a very limited set of

activities by attorneys that might require disclosure consistent with their ethical obligations, as discussed below.

ARGUMENT

I. The DOL's Revised Persuader Rule Does Not Require Disclosure of Information Protected by the Attorney-Client Privilege or the Ethical Duty of Confidentiality.

The LMRDA's reporting regime has always accommodated attorneys' professional responsibility concerns when attorney-client communications were potentially subject to disclosure. Section 204 of the LMRDA expressly exempts the reporting of any "information which was lawfully communicated to such attorney by any of his clients and in the course of a legitimate attorney-client privilege." 29 U.S.C. § 434 (2012). Further, several circuit courts of appeals have seen no conflict between LMRDA's reporting requirements and the attorney-client privilege. In *Humphreys, et al. v. Donovan*, 755 F.2d. 1211 (6th Cir. 1985), the Sixth Circuit upheld the reporting requirements for attorneys engaged in persuader activity and noted that "[i]n general, the fact of legal consultation or employment, client's identities, attorneys' fees, and the scope and nature of employment are not deemed privileged." *Id.* at 1219. The Fourth and Fifth Circuits have reached

similar conclusions. *See Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), *rev'd sub nom in part on other grounds*, *Price v. Wirtz*, 412 F.2d 647 (1969); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965).

The Persuader Rule is one of many regulatory regimes that require attorneys to disclose information about the identity of their clients. For example, the Legal Services Corporation (LSC), at the instruction of Congress, requires grantees receiving LSC funds to disclose information about the clients being served and the services rendered. In 2000, the LSC required attorneys to provide the type of case, the case number, and the client name. Attorneys at Legal Services of New York (LSNY) and Legal Aid of Baltimore (LAB) challenged the subpoenas as violations of the New York and Maryland rules of professional conduct and the attorney-client privilege. When the legal services attorneys refused to comply with the administrative subpoenas seeking the information, the government brought an enforcement action in district court.

The district court began its analysis with the attorney-client privilege argument and made it clear that "[t]he attorney-client privilege does *not* ordinarily protect the identity of the client, the

amount of a fee, or the general purpose of legal work performed." *U.S. v. Legal Services for New York City*, 100 F. Supp.2d 42, 45 (D.D.C. 2000), *citing Clarke v. American Commerce Nat'l Bank*, 941 F.2d 127, 129 (9th Cir. 1992). The "extremely narrow" exceptions to this general rule, according to the court, occur only when disclosure would implicate the client in criminal wrongdoing, or when revealing the client's identity would be "tantamount to revealing an 'indubitably confidential communication..." *Id.*, *citing In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 493 (7th Cir. 1984). After reviewing the authorities from several different circuits, the court concluded that there was no violation of the attorney-client privilege in LSC seeking the information.

The court then addressed the ethical duty of confidentiality, first reviewing the ABA, New York and Maryland rules in light of the LSC's stated goal to not abrogate "the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction." 42 U.S.C. § 2996e(b)(3). The court then pointed to the exceptions to confidentiality present in the New York, Maryland and ABA standards – allowing the lawyer to

disclose client names when disclosure is required by "law or court order." The LSC petitioned for summary enforcement of the subpoenas and the District of Columbia Circuit affirmed the district court, holding that the information sought was not protected by the privilege and would not interfere with the attorney's professional obligations. *U.S. v. Legal Services for New York City*, 249 F.3d 1077 (D.C. Cir. 2001).

The Department of Labor's regulatory regime is similar to the Legal Services Corporation mandate, but it is even more obvious that what the Persuader Rule requires to be disclosed is not *confidential* legal advice (the Rule states this explicitly) but a very public act of employers using contractors (some of whom may not be attorneys) to influence their employees in whether or not to vote for a union at their workplace. The disclosures sought by the revised Persuader Rule simply do not implicate either attorneys' duties of confidentiality or the attorney-client privilege.

II. The DOL's Final Rule Is Consistent with the Model Rules of Professional Conduct, As Amended in 2002 to Square the Duty of Confidentiality with the Obligations of Attorneys to the Public After High-Profile Corporate Scandals.

There is no conflict between the LMRDA's regulatory regime administered by the DOL and the ethical responsibilities of lawyers. In

the comment of the American Bar Association, filed with the DOL on September 21, 2011, the ABA argued that the proposed Persuader Rule was inconsistent with Model Rule 1.6 which prevents attorneys from disclosing confidential information. Even when an attorney engages in persuader activities and must report those activities under the Final Rule, however, there is no conflict between the Persuader Rule and legal ethics rules because the current version of the Model Rules contains several possible exceptions to the attorney's ethical duty of confidentiality. The language of ABA Model Rule 1.6(a) is broad in terms of the material possibly covered by the attorney's ethical duty of confidentiality, as it applies to all "information relating to the representation of a client." M.R. 1.6(a). For decades, though, the ABA has gradually added exceptions to the confidentiality rule.

Indeed, current Model Rule 1.6(b)(6) was added to the rules in 2002, and protects attorneys from discipline if they disclose certain client information to comply "with other law or court order." M.R. 1.6(b)(6). As Comment 12 states in relation to M.R. 1.6(b)(6): "Other law *may require* that a lawyer disclose information about a client. . . . Whether such law *supersedes* Rule 1.6 is a question beyond the scope of

these rules." M.R. 1.6, Com. 12 (emphasis added). Therefore, the Model Rule explicitly contemplates the disclosure of confidential information to comply with a law such as the LMRDA. To date, 49 states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules.[3]

After corporate scandals such as the one involving ENRON in the early 2000s, there were good reasons for the expansion of the exceptions to attorney-client confidentiality. As the ABA Task Force on Corporate Responsibility ("Task Force") made clear about the additions of the early 2000s: "The conduct of inside and outside lawyers representing companies involved in recent failure of corporate responsibility has been the subject of legislative inquiry and public criticism…." *See* Final Report of the ABA Task Force on Corporate Responsibility, 84 Mercer L. Rev. 1599 (2003). The Task Force also referred to the regulatory

[3] Almost all states follow the ABA model rules wholesale, California is an exception. While the State Bar of California has not adopted ABA Model Rule 1.6, the "other law" exception is also in the California Rules of Professional Conduct. *See* CRPC 3-100 n.2 (attorney may not reveal information "except as authorized or required by, the State Bar Act, these rules, *or other law*") (emphasis added). The California courts also have followed the ABA rules in numerous instances. *See*, *e.g.*, *Cho v. Superior Court*, 39 Cal. App. 4th 113 (1995); *Goldberg v. Warner/Chappell Music*, 125 Cal. App. 4th 752 (2005).

activity of the time regarding public companies: "Members of Congress and commentators have questioned whether in light of the events that transpired, the rules of professional conduct governing lawyers adequately serve and protect the public interest in circumstances such as those that were present in such corporate failures." *Id.*

As a result of these concerns, several new statutes requiring reporting and disclosure have been enacted, such as the Sarbanes-Oxley (SOX) Act and Dodd-Frank Act. 18 U.S.C. §§ 1514a *et seq.* and 15 U.S.C. § 78u-6. The whistleblower protections of SOX have coexisted with the confidentiality concerns of each state for over 14 years with little evidence that attorneys are being chilled from fulfilling their duties for clients. There are many other laws that require certain disclosures by attorneys when they engage in certain activities on behalf of a client, including the Lobbying Disclosure Act (LDA) of 1995, 2 U.S.C. § 1601 *et seq.* Lobbying disclosure reports require much of the same information as required on the forms at issue here, including the names of clients and payments. Both lawyers and non-lawyers alike are subject to the reporting requirements of the LDA, which has never been successfully challenged in the more than 20 years in which it has

been in effect. *See, e.g., Nat'l Assoc. of Manufacturers v. Taylor*, 549 F. Supp. 2d 33 (D. D.C. 2008). There are numerous other examples of similar reporting regimes that have been enacted over the last several decades, with little evidence that attorneys are being chilled from fulfilling their duties to clients.

III. The ABA and State Bar Opinions Have Never Held that the Duty of Confidentiality Extends to the Identity of a Client or to the Fees Paid by a Client under a Generally Applicable Regulation such as the Persuader Rule.

The ABA has never issued an Opinion or a Comment under Model Rule 1.6 holding that the identity of a client or the fees paid by a client is confidential information. Indeed, the ABA has expressly stated otherwise. First, it is clear that even if client identity is considered protected information, the direct or indirect contact with employees that would make a lawyer's involvement reportable would constitute a waiver of the attorney's ethical duty of confidentiality. *See* M.R. 1.6(b)(1) (no confidentiality where client gives implied or express consent to disclose). Second, the ABA has expressly recognized that such information is not included in the attorney-client privilege. *See* ABA Formal Op. 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation, note 3 ("Thus, while the client's name and identity

generally are not considered privileged, they *may be* entitled to protection under Rule 1.6 *unless* disclosure is necessary or desirable for representation.") (emphases added).

Here, it is the lawyers indirectly influencing employees in the choice of their bargaining representative who wish to remain anonymous, not the clients. Thus, the ABA's concerns about protecting client identity are inapplicable to a generally applicable reporting regime such as the Persuader Rule.

Nothing in the Comments presented to the Department of Labor before the revised Persuader Rule was finalized changes this conclusion. In his April 2011 letter expressing concerns with the Persuader Rule as proposed at that time, the American Bar Association President, Wm. T. (Bill) Robinson III, cited ethics opinions from several state bar associations for the proposition that the identity of clients and fee arrangements may be protected by the ethical duty of confidentiality. But these state bar opinions are inapposite to a regulatory reporting regime such as the Persuader Rule. Texas Ethics Opinion 559 (2005), for example, deals with a court ordering a criminal defense attorney to provide details about the representation. Similarly,

ABA Formal Ethics Opinion 94-385 was issued in 1994, before Model Rule 1.6 expressly adopted the current exception for release of information "when required by law or court order." Even Opinion 94-385 notes that disclosure may be necessary, and that the attorney should not be a bystander "*when served with a subpoena or court order.*" Several ethics opinions address lawyers confronting administrative subpoenas and state court orders but none of these involve federal regulatory regimes like DOL's Persuader Rule.[4]

New Mexico Ethics Opinion 1989-2 is most instructive in this case. There, the State Ethics Committee recognized the tension between IRS rules requiring cash-transaction reporting and client identity. But the

[4] Several of the opinions discuss lawyers confronting subpoenas and court orders to disclose the names and arrangements with clients, *not* generally applicable regulations like the Persuader Rule. D.C. Ethics Opinion 219 (1990) (IRS administrative summons); D.C. Ethics Opinion 266 (1996) (notice of withdrawal in immigration court); D.C. Ethics Opinion 288 (1999) (Congressional Subcommittee subpoena); N.Y. City Formal Ethics Op. 1997-2 (report of suspected child abuse); N.Y. City Formal Ethics Op. 2004-02 (confidentiality of clients in government investigations); Neb. Ethics Op. 11-05 (2011) (guardian ad litem called before a legislative committee); South Carolina Ethics Op. 90-14 (1990) (response to a valid court order, not the attorney-client privilege); Va. Ethics Op. 1811 (2005) (contract not the same as law for purpose of "compliance with law" exception); Va. Ethics Op. 1300 (1989) (GAO investigation at the behest of a congressional committee).

Committee did not conclude that it was a *per se* violation of the rules and encouraged the lawyer to make a good faith effort to ascertain the scope, meaning and application of the law at issue. That could take a number of forms, but it does not mean *a priori* that the Persuader Rule is invalid. Once again, the difference between this regime and the criminal-defense situation is that none of the regulated parties under the DOL's Rule are being accused of anything – nor is anything in their reports going to be indicative of wrongdoing.

IV. The Persuader Rule Does Not Violate the Constitutional Rights of Attorneys or Their Clients.

Finally, we touch briefly upon the constitutional claims that lawyers representing employers may have in response to a regulatory regime that requires attorney speech. The Supreme Court has long recognized that lawyers' First Amendment rights may be subordinate to their responsibilities in a regulatory environment. *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *Florida Bar v. Went for It*, 515 U.S. 618 (1995). Circuit courts have followed this principle in cases directly involving the Persuader Rule. *See, e.g.*, *Master Printers of America v. Donovan*, 751 F.2d Cir. 700 (4th Cir. 1984); *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985).

Challenges to other regulatory regimes on First Amendment grounds, such as the Lobbying Registration Act and similar state political reform statutes have been similarly unsuccessful. *See U.S. v. Harriss*, 347 U.S. 612 (1954); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015). There is no authority for wide ranging regulatory schemes such as this one being stuck down under the First Amendment.

Indeed, as several scholars have noted, in the post-ENRON era, attorneys' obligations to their clients are dynamically viewed in light of the public interest, particularly in light of regulatory efforts such as the Persuader Rule, which are meant to bring ethical transparency to employees and provide them with the information needed to make their decisions in union elections conducted by the National Labor Relations Board. *See* Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. REGULATION; Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First Century New Governance*, 77 FORDHAM L. REV. 1245 (2009).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's injunction and its holding that the Persuader Rule conflicts with the attorney-client privilege or the ethical duty of confidentiality as enforced by state bar associations throughout the United States.

Dated: November 14, 2016

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CERTIFICATE OF SERVICE

I certify that on November 14, 2016, the foregoing Brief was filed electronically using the Court's CM/ECF filing system which will give notice of the filing to counsel for the parties. In addition, a copy of the brief will be served by First-Class mail, addressed as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 4,120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 15.27 in 14-point Century type.

/s/ Ruben J. Garcia

Attorney for *Amici Curiae* Legal Ethics and Labor Law Professors

Dated: November 14, 2016

APPENDIX: LIST OF AMICI

The *Amici* professors have substantial experience in labor law, legal ethics, constitutional law, or all three fields. Their expertise thus bears directly on the issues before the Court in this case. *Amici* are listed in alphabetical order below. *Institutional affiliations are provided only for identification purposes.*

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MOTION OF LEGAL ETHICS AND LABOR LAW PROFESSORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE SUPPORTING DEFENDANTS – APPELLANTS AND URGING REVERSAL

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LEGAL ETHICS AND LABOR LAW PROFESSORS SUPPORTING DEFENDANTS-APPELLANTS AND URGING REVERSAL

TO THE COURT:

Pursuant to Federal Rule of Appellate Procedure 29(b) and Fifth Circuit Rule 29.1, the *Amici Curiae* listed below respectfully request leave to file the attached brief in support of the Defendants-Appellants and would respectfully show the Court the following:

BACKGROUND AND INTEREST OF AMICI CURIAE

The attached brief should be filed pursuant to Rule 29(b)(2) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 29.2 because it adds to and expands upon arguments made by the Defendants – Appellants. Thus, the *Amici Curiae*, whose interests are discussed in further detail below, believe the accompanying brief adds to the Court's understanding of the issues.

Amici are 20 members of United States law school faculties who teach, write and practice in the fields of Labor Law, Constitutional Law

and Professional Responsibility.[1] *Amici* are concerned that reasonable regulations of the Department of Labor might be hampered by erroneous interpretations of the ethical duty of confidentiality and the evidentiary attorney-client privilege as they exist in United States jurisdictions.

Amici submit this brief to provide information to the Court about the operation of the legal ethics rules in several states, and the history and reasons for the U.S. Department of Labor's (DOL) revisions to the rule requiring disclosure of employer activities to influence employees in the selection of their bargaining representative ("the Persuader Rule").

CONCLUSION AND PRAYER

For the reasons discussed above, the *Amici Curiae* respectfully request that this Court grant them leave to file the attached brief. The

[1] The full list of Legal Ethics and Labor Law Professors joining the Brief is in the Appendix to this motion.

Amici Curiae further request that the Court deem the brief to be properly filed without further action on the part of the *Amici Curiae*.

Dated: November 14, 2016

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