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Labor Law-Two Views of a Labor Relations Consultant's Duty To Report Under Section 203 of the LMRDA

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NOTES

LABOR LAW—Two Views of a Labor Relations Consultant's Duty To Report Under Section 203 of the LMRDA

Title II of the Labor-Management Reporting and Disclosure Act (LMRDA)[1] requires unions, union officials, union employees, employers and "labor relations consultants" to file various reports with the Secretary of Labor. The purpose of these provisions is to discourage corrupt, though not necessarily illegal, labor management activities by disclosing them for public scrutiny.[2] Section 203(b) of the Act,[3] which is aimed at the "labor relations con-

1. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964). Since reference will be made throughout this note to different bills and committee reports, it may be helpful to set down an abbreviated chronological history of the Act. In 1958, shortly after the McClellan Committee Report, S. REP. No. 1417, 85th Cong., 2d Sess. (1958), which dealt with corruption and other illegal activities in the area of labor-management relations, the Senate passed the Kennedy-Ives Bill, S. 3974, 85th Cong., 2d Sess. (1958), but it never came to a vote in the House. The following year, Senators Kennedy and Ervin introduced S. 505, 86th Cong., 1st Sess. (1959), which was consolidated with several others by the Senate Committee on Labor and Public Welfare and reported out as S. 1555 in S. REP. No. 187, 86th Cong., 1st Sess. (1959). After lengthy debate and amendments from the floor, the Senate passed S. 1555. Meanwhile, in the House, after considering several bills, the Committee on Education and Labor favorably reported out H.R. 8342 in H.R. REP. No. 741, 86th Cong., 1st Sess. (1959). However, during debate in the House, H.R. 8342 was amended so as to substitute the text of another bill, H.R. 8400 (the Landrum-Griffin Bill) and it was passed in that form. The Senate-House Conference Committee included Senator Kennedy and Representatives Landrum and Griffin, the chief architects of the two bills, and the differences between the Senate and House versions were alleviated. The findings and actions of the conference committee were reported to the respective bodies by S. DOC. No. 51, 86th Cong., 1st Sess. (1959) and H.R. REP. No. 1147, 86th Cong., 1st Sess. (1959). The bill which emerged from the Conference Committee, now called the "Landrum-Griffin Bill," was passed by both the House and the Senate and was signed into law by the President. See, 1 U.S. NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 vii-xi (1959) [hereinafter cited as LEGISLATIVE HISTORY (NLRB)].

2. As stated in S. REP. No. 187, 86th Cong., 1st Sess. 16 (1959), reprinted in 1 LEGISLATIVE HISTORY (NLRB) 412:

> there are three reasons for relying upon the milder sanction of reporting and disclosure to eliminate improper conflicts of interest: (1) the searchlight of publicity is a strong deterrent. . . . Before adopting extreme measures it is wise to see whether milder sanctions are sufficient. (2) The requirements of reporting and disclosure will help the labor unions to better regulate their own affairs . . . . (3) The reports would furnish a strong factual basis for further action in the event that other legislation is required.

See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 878 (1960).

3. LMRDA § 203(b), 73 Stat. 527 (1959), 29 U.S.C. § 433(b) (1964) provides:

> (b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—
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> (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
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> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving

sultant,"[4] states that "every person" who agrees with an employer to "directly or indirectly" (1) "persuade employees" regarding their right to organize and bargain collectively or (2) inform the employer of certain union-employee activities must file within thirty days of the agreement a report containing "a detailed statement of the terms and conditions of such agreement." Section 203(b) further requires "every such person" to file an annual report setting out his "receipts of any kind from employers on account of labor relations advice or services and their sources" and his disbursements "in connection with these services."

Standing alone, this language seems to indicate that any person who has engaged in "persuader activities" or acted as an informant pursuant to an agreement with an employer should include in his annual report *all* receipts and disbursements in connection with advice or services rendered to *any* employer. However, section 203(c) of the Act[5] provides that "nothing in this section [203] 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 . . . ." Neither the language[6] nor the legislative history[7] of this section reveals clearly how subsection (c)'s exemption provision with respect to advice is to be

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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 agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of it receipts of any kind from employers on account of labor relations' advice or services, designating the sources thereof, and (B) of its disbursements 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.

4. The Act defines a "labor relations consultant" as "any person who, for compensation, advises or represents an employer, employer organization, or labor organizations concerning employee organizing, concerted activities, or collective bargaining activities." LMRDA § 3(m), 73 Stat. 520 (1959), 29 U.S.C. § 402(m) (1964).

5. LMRDA § 203(c), 73 Stat. 527 (1959), 29 U.S.C. § 433(c) (1964) provides:
(c) 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.

6. Perhaps it is not surprising that inconsistencies and ambiguities appear, for it has been stated that "the bill itself was very much a scissors and paste job . . . written between sunset and sunup." Roosevelt, *LMRDA in the Congressional Arena*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 127 (Slovenko ed. 1961) [hereinafter cited as SYMPOSIUM].

7. See text accompanying notes 19-22 *infra*.

reconciled with subsection (b)'s reporting requirements. Possible interpretations of subsection (c) are that it (1) excludes the reporting of any and all advice given by a labor relations consultant, including that given to an employer in connection with reportable subsection (b) "persuader activities"; (2) excludes the reporting of advice if, and only if, no reportable subsection (b) "persuader activities" have been performed by the consultant for any employer, that is, if the consultant does *nothing but* give advice to any employer; or (3) excludes only the reporting of the advice given to an employer *with whom* there is no reportable subsection (b) persuasion agreement.[8]

Two recent cases, involving similar factual situations, have posed this interpretative question to the Courts of Appeals for the Fourth and Fifth Circuits.[9] In both cases, attorneys who were engaged in general labor-relations practice undertook "persuader activities" for an employer-client by explaining to assembled groups of employees legal questions involved in pending representation elections.[10] Both attorneys were ordered by the Secretary of Labor to report not only the terms, conditions, receipts, and disbursements relative to these "persuader activities," but also the names of all of their labor-relations clients and all receipts and disbursements in connection with these clients, regardless of the nature of advice or services performed for them. Both attorneys sought declaratory judgments against the Secretary of Labor, claiming protection under

8. In noting the imprecise effect of §§ 203(b) and (c), Professor Aaron commented, "This is another example of the ambiguities produced by the inartistic draftsmanship which characterizes much of the statute." Aaron, *supra* note 2, at 891. See also Loomis, *Employer and Consultant Reporting Requirements*, in SYMPOSIUM 391, 398.

The first of the three possible interpretations mentioned in the text has not been adopted by any appellate court. This interpretation is clearly the least desirable of the three, for as a matter of statutory construction, it would eliminate the word "advice" from subsection (b)'s reporting requirements. Moreover, this interpretation would largely thwart the statutory purpose of "floodlighting" those "persuader agreements" deemed by Congress to be in the "gray area." See text accompanying notes 31-35 *infra*.

9. Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966), *vacating* 232 F. Supp. 348 (M.D.N.C. 1964) [hereinafter cited as *Douglas*]; Wirtz v. Fowler, 54 CCH Lab. Cas. ¶ 11514 (5th Cir. 1966), *reversing on other grounds* 236 F. Supp. 22 (S.D. Fla. 1964) (A rehearing *en banc* is pending) [hereinafter cited as *Fowler*].

10. In *Douglas*, the attorney made three speeches in which he explained legal issues. While the attorney was doubtful that these speeches encompassed "persuader activities," the point was conceded for purposes of this litigation. 232 F. Supp. at 350. In *Fowler*, the attorney spoke before assembled groups of employees and also questioned employees individually with respect to unfair labor practice charges filed against the employers. The lower court held that these were *not* "persuader activities" since the attorney was fully disclosed as the employer's agent. The District Court thus accepted the argument that prior disclosure insulates the "labor consultant" from any reporting requirement at all. 236 F. Supp. at 33-34. In rejecting this theory, the Fifth Circuit correctly noted that the reporting provision would be emasculated if a labor relations consultant could insulate himself from all reporting requirements merely by disclosing that he was an agent of the employer. Congress obviously wanted more information than mere identification or it would not have enacted § 203(b).

section 203(c). The Fourth Circuit, in *Douglas v. Wirtz*,[11] sustained the Secretary's order by adopting the second of the above-mentioned interpretations. The court reasoned that in order to reconcile the statutory provisions, subsection (c)'s advice exemption must be construed to mean that a report of services is not required ("triggered") where the consultant only gives advice. Thus, by construing the words "by reason of" as relating back to "report" and as meaning "because of," it read section 203(c) as if it said "no employer or other person shall be required to file a report because of his giving or agreeing to give advice . . . ." However, the court held that once the consultant goes beyond the giving of advice, that is, once he engages in any "persuasion activity," he is no longer within subsection (c)'s exemption and must thereafter report all advice and services given to all employer-clients. The Fifth Circuit, in *Wirtz v. Fowler*,[12] conceded that the *Douglas* reading may be supported by the syntax of section 203(c), but, in light of the other statutory provisions and the legislative history and purposes of the LMRDA, it concluded that the third of the above-mentioned interpretations was the most proper. This court tacitly read "by reason of" as relating not to "report" but to "services," and as meaning "consisting of" rather than "because of." Thus, it interpreted section 203(c) as saying that a consultant need not report services consisting solely of advice, even if he engages in persuasion activities with other employers.[13]

Although both the *Douglas* and *Fowler* courts attempt to read section 203(c)'s advice exemption in a manner which can be reconciled with the language of section 203(b), the *Douglas* approach has several serious shortcomings. First, it eliminates from the statute the words "covering the services of such person." More important, in construing the exemption to mean only that the giving of advice alone does not give rise to a duty to report, the *Douglas* court makes section 203(c) a mere repetition of what was already clear under section 203(b). While it is apparent that in a given factual situation there may be some question as to where the precise line is drawn between nonreportable "advice" and reportable "indirect persuasion," the terms would seem to be mutually exclusive.[14] In the con-

11. 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

12. 54 CCH Lab. Cas. ¶ 11514 (5th Cir. 1966).

13. The only other case found which presents the issue herein supports the *Douglas* view. See Price v. Wirtz, 51 CCH Lab. Cas. ¶ 19555 (N.D. Tex. Feb. 8, 1965), *appeal docketed*, No. 22630, 5th Cir. June 1, 1965.

14. See Bernstein & Sullivan, *Lawyer Reporting and the Attorney-Client Privilege*, in SYMPOSIUM 410, 414:

> A reasonable construction of 'advice' would hold it applicable to all activities of the lawyer in which it is contemplated that the client will be the ultimate implementing actor . . . [and] would not include activities in which the lawyer or his agent implement the activity by interdisposition between the client and his employees . . . .

text of section 203, "persuasion" connotes influencing the actions of a group without their knowledge, whereas "advice" involves influencing the actions of a paying client with his knowledge. Since under subsection (b) neither a thirty-day nor an annual report is required unless there has been "persuasion," the *Douglas* approach appears to reduce subsection (c) to the truism that the non-reportable giving of advice does not give rise to a duty to report.[15] Such a narrow construction of the subsection would appear to be inconsistent with the House Conference Committee's statement that section 203(c) "grants a *broad exemption* from the requirements of the section with respect to the giving of advice."[16] Finally, the *Douglas* court assumed that "advice" in subsection (b)'s requirement for the reporting of advice in the annual report must embrace "independent advice" that is "apart from statutory persuasion." Consequently, it believed that if subsection (c) were construed to exempt any advice from the reporting requirement when a report was required, subsection (b)'s reporting of advice requirement would be rendered meaningless. However, the *Douglas* court's underlying assumption may be questioned since subsection (b) calls for a thirty-day report containing all the terms of an employer-consultant agreement when "*an* object" of the agreement is persuasion, and therefore if an agreement contemplates both advice and persuasion, this advice is clearly reportable. With this in mind, section 203(b) may be read as requiring an annual report covering such advice, that is, advice which is collateral to a particular persuasion agreement, while section 203(c) exempts all advice which is not so related to persuader activity.

The *Fowler* court in effect adopted this approach and took an additional step, saying that advice given to a persuader employer should be reported even if that advice was unrelated to the persuasion activity. While this step was not necessary for a reconciliation of the advice provisions of sections 203(b) and 203(c), it is consistent with both the purposes and the underlying policy considerations of the statute.[17] Furthermore, it seems to be justified by the language in section 203(b) requiring a report as to "receipts of any kind from employers." The *Douglas* court reasoned that the plural terminology ("employers") evinces a congressional intent that the annual report cover *all* employers with whom the labor relations consultant has dealt, regardless of the nature of the dealings. However, since the section contemplates several thirty-day reports during the year cov-

15. The District Court in *Fowler* recognized that this would be the logical result of the Secretary's position, although the court did not reach this question since it decided that no reportable "persuader activities" took place. Fowler v. Wirtz, 236 F. Supp. 22, 34 n.4 (S.D. Fla. 1964) (dictum).

16. H.R. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), reprinted in 1 LEGISLATIVE HISTORY (NLRB) 937 (Emphasis added.)

17. See text accompanying notes 23-30 *infra*.

ering each of the separate employer arrangements,[18] the use of the plural form can just as readily indicate a congressional intent that the annual report cover all employers with whom "persuader activity" agreements were made over the preceding year. Similarly, "receipts of any kind" may be harmoniously interpreted to refer to receipts for any nonpersuader activities which may have been performed on behalf of an employer-client for whom persuader activities were also performed.

The legislative history of sections 203(b) and 203(c) also support the *Fowler* interpretation. Senate Bill 1555, the precursor of the LMRDA, originally required the consultant to make only one report, to be submitted annually.[19] This report was to be triggered in the same manner as the present thirty-day report, but was to contain all the information which is now required in both the thirty-day and annual reports. The section 203(c) exemption followed the reporting provision.[20] Then, in order to inform employees quickly and effectively of the identity of the consultant and the details of reportable arrangements, the Senate advanced the submission date of the report to thirty days after the date of the agreement.[21] However, the conference committee, apparently recognizing that the reporting of some of this information within such a short time period would be impractical, placed the receipts and disbursements components of the report back on an annual basis.[22] The sole concern of the conferees appears to have been the timing of the reports. There is nothing to indicate that they intended the "new" annual report to include transactions not covered by the previous combined report. Nor is there anything to indicate that it was their intention to create an annual report to which the exemption of section 203(c) would not apply. Yet the *Douglas* opinion applies section 203(b)'s annual reporting requirements to transactions not included in the thirty-day report and construes section 203(c)'s exemption as applicable only to the triggering of the thirty-day report.

The *Fowler* approach is also more consistent with the statutory purposes which are evident from the other provisions of Title II. First, examination of Title II reveals that Congress has provided for a mutuality of reporting requirements: where a reportable transaction occurs, the parties on *both* sides are under a duty to report.[23]

18. Section 203(b) states that when a person enters into a "persuader" agreement, he "shall file within thirty days after entering into such agreement. . . ." If more than one agreement is made, a separate report is required for each; the thirty-day report is excluded from the general timing provisions of § 207(b).

19. 1 LEGISLATIVE HISTORY (NLRB) 338, 351.

20. *Id.* at 352.

21. 2 *id.* at 1122-23.

22. See H.R. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), reprinted in 1 LEGISLATIVE HISTORY (NLRB) 937.

23. For example, both parties to the transaction must report when a loan is made

The House Report on the final conference bill[24] states that section 203(b) requires a consultant to report on "activities that . . . must be reported by the employer" and that section 203(d) "makes it clear that reports are required only where an expenditure . . . or agreement . . ." has been made. Since section 203(d)[25] explicitly states that neither an employer nor a consultant is required to report "unless he has made . . . an arrangement of the kind described" [persuader agreement], the nonpersuader employers in *Fowler* and *Douglas* are clearly not obligated to report. Thus, the *Douglas* approach of requiring attorneys to report when their employer-clients have clearly been exempted destroys what appears to be the intentional mutuality requirement underlying the reporting provisions. Second, and of greater significance, is the fact that the *Douglas* holding contravenes the avowed congressional intent to protect the attorney-client relationship to the extent that the lawyer's activities do not cross the line between nonreportable "advice" and reportable "indirect persuasion."[26] Section 204,[27] which exempts an attorney

by an employer to a union officer or employee, LMRDA §§ 202(a)(6), 203(a)(1), 73 Stat. 526, 29 U.S.C. §§ 432(a)(6), 433(a), when a labor-relations consultant makes a payment to a union, LMRDA §§ 202(a)(6), 203(b), 73 Stat. 526, 527, 29 U.S.C. §§ 432(a)(6), 433(b), and when a labor relations consultant and an employer enter into a "persuader agreement," LMRDA §§ 203(b), 203(a)(4), 73 Stat. 527, 525, 29 U.S.C. §§ 433(b), 433(a)(4).

24. H.R. REP. No. 1147, 86th Cong., 1st Sess. 32-33 (1959), reprinted in 1 LEGISLATIVE HISTORY (NLRB) 936-37.

25. LMRDA § 203(d), 73 Stat. 527 (1959), 29 U.S.C. § 433(d) (1964) provides:

> Nothing contained in this section shall be construed to require an employer to file a report under subsection (a) unless he has made an expenditure, payment, loan, agreement, or arrangement of the kind described therein. Nothing contained in this section shall be construed to require any other person to file a report under subsection (b) unless he was a party to an agreement or arrangement of the kind described therein.

26. In proposing what is now § 204, Senator Goldwater stated on the floor of the Senate that "there should be a perpetuation of the sanctity of relations between the attorney and client. I know that if I were involved in a situation in which an attorney was representing me, and a report had to be made, I would not want all the intimate details of communications between the attorney and me to become public property." U.S. DEPARTMENT OF LABOR, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 535 (1964) [hereinafter cited as LEGISLATIVE HISTORY (LABOR)]. The House counterpart to this section (H.R. 8342) protected and exempted both communications to and from an attorney and was explained in H.R. REP. No. 741, 86th Cong., 1st Sess. 37 (1959), reprinted in LEGISLATIVE HISTORY (LABOR) 577, as "protect[ing] the traditional confidential relationship between attorney and client from any infringement or encroachment under the reporting provisions of the committee bill." While the Conference Committee adopted the Senate version in which only communications to the attorney were exempt, the House Conference Report, H.R. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), indicates that the compromise was not intended to weaken the bona-fide attorney-client relationship; indeed, specific reference was made to § 203(c)'s protection of what may be considered those legitimate areas of labor relations practice, that is, advice, representation, and negotiation. It seems clear that the House version attempted to protect too much and that it would have opened up too great a loophole in the reporting requirements. It is not contended here that Congress intended to protect *all* attorney-client relationships, but rather that it wished to protect those which do not fall in the "reprehensible" category.

27. LMRDA § 204, 73 Stat. 527 (1959), 29 U.S.C. § 434 (1964) provides: "Nothing

from reporting "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship," was enacted as an express reinforcement of the protection which arguably was already provided by section 203(c).[28] Where a client has not instituted litigation, disclosure of the client's name and the amount of fees paid by him to his attorney are protected by the attorney-client privilege;[29] the privilege is not absolute, but rather depends upon a balancing of the rights of the client against the purpose for which disclosure is sought.[30] However, even assuming that this common law "balancing" test is not displaced by the express language of section 204, it appears that the disclosure required by *Douglas* would not substantially promote the underlying purposes of the LMRDA and would therefore be insufficient to override the attorney-client privilege.

The LMRDA was precipitated by the "McClellan Committee's" extensive forays into the murky area of union corruption and labor-management relations, which focused attention, *inter alia*, on the so-called "middlemen," including some lawyers, who performed various undercover services in and among the employees on behalf of the employer.[31] It is these activities, designed to frustrate and corrupt legitimate unionization, that Congress sought to expose to the

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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."

28. See Bernstein & Sullivan, *Lawyer Reporting and the Attorney-Client Privilege*, in SYMPOSIUM 415-16, for the view that § 204 is virtually meaningless since § 203(c) excludes the "only area in which it [§ 204] may be employed." Senator Kennedy, in accepting the § 204 amendment, stated: "There is no doubt in my mind that the bill which was originally drafted by lawyers adequately protected them. Therefore I do not feel that the amendment offered by the Senator from Arizona [§ 204] is wholly necessary. But in order that there may be no question about it, I will accept the amendment." LEGISLATIVE HISTORY (LABOR) 536.

29. Where litigation is commenced on behalf of an undisclosed client, it is generally held that the attorney must disclose the name of his client. People v. Warden, 150 Misc. 714, 270 N.Y. Supp. 362 (Sup. Ct.), *aff'd*, 242 App. Div. 611, 271 N.Y. Supp. 1059 (1934). The policy reason underlying this partial breach of the attorney-client relationship is that "every litigant is in justice entitled to know the identity of his opponents." 8 WIGMORE, EVIDENCE § 2313 (rev. ed. McNaughton 1961). But where disclosure is sought and the client has not brought suit, that is, where the attorney is called before the court to force disclosure, then it has been held the privilege extends to disclosure of names and, *a fortiori*, the amount of fees paid. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); *In re* Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 836 (1960). See generally MCCORMICK, EVIDENCE § 94 (1954); 8 WIGMORE, EVIDENCE §§ 2290-91, 2311-13 (rev. ed. McNaughton 1961).

30. Baird v. Koerner, *supra* note 29; *In re* Wasserman, 198 F. Supp. 564 (D.D.C. 1961).

31. *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field* [McClellan Committee], S. REP. No. 1417, 85th Cong., 2d Sess. (1958).

public gaze. Recognizing that the "floodlighting" could not, from a practical standpoint, be pinpointed precisely and that some "not illegal" activities may be involved, the Senate Labor Committee stated that "since most of them are disruptive of harmonious labor relations and fall into a gray area . . . if an employer or a consultant indulges in them, they should be reported."[32] However, the *Douglas* view would "floodlight" not only the illegal and "gray area" practices, but also a vast area of legitimate and private relationships. The Secretary of Labor argues that this, in fact, was what Congress intended: that once a person is known to engage in "persuader activities," *all* of his relationships with any employer become immediately suspect.[33] Although certain language in the committee reports does seem to support this view, this language is ambiguous, and may be read just as consistently with the *Fowler* approach.[34] The Secretary argues that broad exposure would "make it more difficult to conceal the details of the clearly reprehensible activities" by facilitating "the Secretary's check as to the accuracy of the reports filed,"[35] but it is difficult to visualize the value of this additional information. Clearly it would not facilitate any cross-correlation as to the name of the persuader, the terms and conditions of the agreement, or the disbursements under it, since these elements of the several reports would not bear any necessary relationship to other clients. The receipts element would permit compilation and comparison and would perhaps suggest unreported receipts or disbursements, but, since section 203(d) exempts non-persuader employers from reporting, it does not appear that the hurdles for a determinedly elusive "consultant" have been greatly heightened.

On the other hand, the impact on the attorney-client relationship could be substantial. First, forcing an attorney to divulge the names of his clients and the amount of the fees paid by them for

32. S. REP. No. 187, 86th Cong., 1st Sess. 12 (1959), reprinted in 1 LEGISLATIVE HISTORY (NLRB) 408.

33. Brief for Appellant, p. 10, Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965). See also Bernstein & Sullivan, *supra* note 14, at 415, concurring in this argument.

34. The Secretary chiefly relies on the language of S. REP. No. 187, 86th Cong., 1st Sess. 12 (1959), where the committee, speaking of § 203(c), states:

> 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 [b]. Specific exemption for persons giving this type of advice is contained in subsection (c) of section [203].

1 LEGISLATIVE HISTORY (NLRB) 408. (Emphasis added.) The Secretary argues that this means that one must "confine himself" to giving advice in order to take advantage of § 203(c). However, the committee report does not say that an attorney who does *not* "confine himself" to wholly non-persuader activities is unable to take advantage of any part of subsection (c). Furthermore, this language does not indicate the extent or nature of the information which a persuader report must include; it merely states that a report may be required if the lawyer undertakes a "persuader activity."

35. Brief for Appellant, pp. 15-18, Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965).

legitimate services may place the attorney in an ethical dilemma where he had previously promised to maintain the client's privacy. Moreover, the client may be seriously prejudiced. For example, disclosure of the fact that the employer has expended large fees for defending himself against unfair labor practice allegations or for negotiating a labor contract could be utilized by the union as a bargaining wedge in future negotiations. Furthermore, where once a confidential relationship existed, the client now finds himself subject to intensive investigation not only by agents of the Department of Labor, but also perhaps by the Internal Revenue Service.[36] While such investigations certainly should not be thwarted where they are appropriate, the conversion of a lawful transaction into an investigatory touch-off point is an unwarranted burden on even the most legitimate businessman. Finally, the burden on the labor lawyer is substantial. When asked to perform activities which might fall under section 203(b), the attorney must be prepared not only for the formidable task of allocating all of his expenses and disbursements to each separate client, but also for the possibility that he will be exposing his other clients to public scrutiny and perhaps losing them as clients. On the other hand, if he refuses to take this risk, he may well lose his persuader client. If the pursuasion activity involved is not illegal, there appears to be no justification for placing such a heavy burden on the attorney.

In light of the purposes of Title II, the legislative history of the reporting provisions, and policy considerations, the approach taken by the Fifth Circuit in *Fowler* is clearly preferable to that taken by the Fourth Circuit in *Douglas*.

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36. See Schmidt, *Income Tax Implications of LMRDA*, in SYMPOSIUM 420.