AMERICAN BAR ASSOCIATION

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The Honorable Charles Schumer
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable Patty Murray
Chairwoman
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, D.C. 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, D.C. 20510

Re: ABA Opposition to the Persuader Rule Provision in Section 202 of S. 420 and H.R. 842, the Protecting the Right to Organize (PRO) Act of 2021

Dear Majority Leader Schumer, Minority Leader McConnell, Chairwoman Murray, and Ranking Member Burr:

On behalf of the American Bar Association (ABA), the largest voluntary association of attorneys and legal professionals in the world, I write to express our opposition to a provision in S. 420 and H.R. 842, the PRO Act, which would undermine the confidential attorney-client relationship and the right to counsel by requiring employers' attorneys to report confidential client information to the federal government. We urge you and your colleagues to remove this provision from the PRO Act and to oppose any efforts to include it in the upcoming infrastructure package or any other legislation.

Although the ABA takes no position on the other provisions in the PRO Act, we oppose Section 202 of the legislation, which would reverse the Department of Labor's more than 50-year policy of protecting confidential attorney-client communications by effectively reinstating the controversial "Persuader Rule." By expressing our opposition to the Persuader Rule provision in the PRO Act, the ABA is not taking sides on a union-versus-management dispute. Instead, the ABA is defending the confidential attorney-client relationship and right to counsel by urging Congress not to impose an unjustified and intrusive burden on clients and the attorneys and law firms that represent them.

The ABA-opposed Persuader Rule,[1] which a U.S. District Court in Texas permanently enjoined in 2016 before the Labor Department rescinded it in 2018, would have substantially narrowed the Department's longstanding interpretation of what attorney activities constitute "advice" to employer

[1] The ABA has consistently opposed all proposals to narrow the "advice" exception under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 433 (2019), and require attorneys to disclose confidential client information to the Labor Department, including the Persuader Rule. *See* the ABA's September 21, 2011 comment letter to the Department of Labor opposing the proposed Persuader Rule and the ABA's April 27, 2016 written testimony to the House Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions expressing concerns over the final Persuader Rule.

clients and hence are exempt from the extensive reporting requirements of Section 203 of the LMRDA.[2]

Section 203 of the LMRDA requires employers and their labor consultants, including attorneys, to file extensive periodic disclosures with the Department when they engage in certain activities or enter into agreements or arrangements to persuade employees on whether or how to exercise their rights to organize a union and bargain collectively. However, Section 203(c) of the statute has long been interpreted by the Department and the federal courts to exempt attorneys from the reporting requirements when they merely provide advice or other legal services directly to their employer clients on these unionization issues, *but the attorneys have no direct contact with the employees.*

Although the attorneys' advice to their employer clients takes many forms, some of the most common examples of attorney advice the Department and courts have long deemed to be non-reportable under the Act include: making recommendations about how the employers should communicate with their employees (such as drafting or revising employer personnel policies, speeches, presentations, and other written communications); helping employers to plan employee meetings; and training supervisors or other employer representatives to conduct these meetings.

Unfortunately, Section 202 of the PRO Act—like the previous Persuader Rule—would dramatically narrow the traditional scope of the advice exception and require attorneys providing this type of legal advice to their employer clients to file detailed disclosure reports with the government even if the attorneys have no direct contact with the employees. These reports would have to include extensive confidential client information, including the existence of the attorney-client relationship and identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. Attorneys would also be forced to report extensive confidential financial information about their clients that is unrelated to persuader activities that the LMRDA is intended to monitor.

Section 202 of the PRO Act would be a major change to federal law, and if it is enacted, many attorneys and their employer clients would be forced to report a substantial amount of sensitive and confidential client information to the government that has not previously been subject to disclosure. The ABA believes that Section 202 is deeply flawed, and we oppose it for several important reasons.

First, Section 202 is inconsistent with longstanding attorney ethics rules, including ABA Model Rule of Professional Conduct 1.6 (Confidentiality of Information) and the many binding state court rules of professional conduct that closely track the ABA Model Rule.

For more than one hundred years, the ABA has served as the national leader in developing legal ethics and professional responsibility standards, including the ABA Model Rules of Professional Conduct (ABA Model Rules). Although the ABA Model Rules have no force and effect unless adopted by individual jurisdictions, all states and the District of Columbia have adopted binding rules of professional conduct that are identical or substantially similar to the ABA Model Rules.

ABA Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to

[2] In June 2016, the U.S. District Court for the Northern District of Texas granted a nationwide preliminary injunction against the Persuader Rule that quoted extensively from the ABA's 2011 comment letter. *See* preliminary injunction at 11-15. The court then issued a permanent injunction in November 2016. In July 2018, the Labor Department published a final rule formally rescinding the Persuader Rule, based in part on comments submitted by the ABA and other entities.

carry out the representation…" or one or more of the narrow exceptions listed in the Rule is present.[3] The scope of confidential client information that attorneys are not permitted to disclose under the ABA Model Rule is broader than that covered by the attorney-client privilege. Although the Model Rule prohibits attorneys from disclosing information protected by the attorney-client privilege and the work product doctrine, it also forbids them from voluntarily disclosing any information relating to the representation. In most jurisdictions, this category of non-privileged, but still confidential client information includes the identity of the client, the nature of the representation, and the amount of legal fees paid by the client to the attorney.

Because Section 202 would require attorneys who provide persuader-related advice or other legal assistance to their employer clients to disclose the identity of those clients, the nature of the representation, the fees received from the clients, and other confidential client information, the provision is clearly inconsistent with attorneys' existing ethical duties outlined in Model Rule 1.6 and the many binding state court rules of professional conduct that are similar to the ABA Model Rule.

Second, Section 202 would seriously undermine both the confidential attorney-client relationship and employers' fundamental right to legal counsel.

Employer companies have a right to counsel, and attorneys play a key role in helping those companies and their officials to understand and comply with the applicable law and to act in the entities' best interest. To fulfill this important societal role, attorneys must enjoy the trust and confidence of the company's officers, directors, and other leaders, and the attorneys must be provided with all relevant information necessary to properly represent the entity. In addition, attorneys must be able to consult confidentially with their employer clients to maintain the clients' trust and confidence and to provide them with effective legal representation. Only in this way can attorneys engage in a full and frank discussion of the relevant legal issues with their clients and provide appropriate legal advice.

By requiring attorneys to file these detailed reports with the Labor Department disclosing the identity of their employer clients, the nature of the representation, the types of legal tasks performed, and the receipt and disbursement of legal fees whenever they provide advice or other legal services relating to the clients' persuader activities—all under penalty of criminal sanctions—Section 202 would seriously undermine the confidential attorney-client relationship. In addition, by imposing these unfair reporting burdens on both the attorneys and the employer clients they represent, Section 202 would discourage many employers from seeking the expert legal representation that they need, thus effectively denying them their fundamental right to legal counsel.

Third, the scope of the information that Section 202 would require attorneys to disclose is overly broad and includes a great deal of confidential financial information about their clients that has no reasonable nexus to the persuader activities the LMRDA seeks to monitor.

Section 202 would amend the LMRDA to provide that when an attorney or law firm enters into an agreement to provide any of the many persuader legal services listed in that provision to an employer client, the attorney or firm will be required to disclose information about both the legal services provided to the client (by submitting Form LM-20 titled "Agreement & Activities Report") and the financial arrangement with the client (by submitting Form LM-21 titled "Receipts and Disbursements Report"). The scope of Form LM-21 is extremely broad and requires attorneys to disclose all receipts

[3] See ABA Model Rule of Professional Conduct 1.6, and the related commentary. *See* also Charts Comparing Jurisdictional Variations in Individual Rules with Model Rules.

of any kind received from all their employer clients "on account of labor relations advice or services" and disbursements made in connection with such services, not just those receipts and disbursements that are related to persuader activities.[4]

The overly broad scope of this disclosure requirement will compel many attorneys who were previously exempt from the LMRDA's reporting requirements to disclose a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. In particular, the disclosure requirement is grossly excessive to the extent it would compel attorneys to report all receipts from and disbursements on behalf of *every employer client* for whom the attorneys performed any "labor relations advice or services," not just those employer clients for whom the attorneys provided persuader-related advice.

No rational governmental purpose would be served by this overly broad disclosure requirement. By analogy, while law firms and attorneys who lobby Congress on behalf of clients must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying, the House Clerk and the Senate Secretary would never presume to require a law firm or attorney to disclose extensive information regarding all of their other clients to whom they give advice on governmental issues, but for whom they are not registered lobbyists.

In addition, by discouraging attorneys and law firms from agreeing to represent employers, this overly broad financial disclosure requirement could have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities in response to union organizing campaigns and concerted, protected conduct by employees.

In our view, these required disclosures that would be triggered by Section 202 are excessively broad and unjustified. In addition, the scope of the financial information that would have to be disclosed is inconsistent with an attorney's existing ethical duties under ABA Model Rule 1.6 (and the related state court rules) not to disclose confidential information absent certain narrow circumstances that are not present here. Attorneys should not be required, under penalty of perjury, to publicly disclose confidential information about clients who have not even engaged in the persuader activities that the statute seeks to address.

For all these reasons, the ABA urges you and your colleagues to remove Section 202 from the PRO Act and to oppose any efforts to include this provision in the upcoming infrastructure package or any other legislation. Thank you for your consideration, and if you have any questions, please contact ABA Associate Governmental Affairs Director Larson Frisby at (202) 662-1098 or larson.frisby@americanbar.org.

Sincerely,

Patricia Lee Refo

Patricia Lee Refo
President, American Bar Association

cc: Members of the Senate Health, Education, Labor, and Pensions Committee

[4] *See* Instructions for Department of Labor Form LM-21.