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Union-Busting: From Benign Neglect to Malignant Growth

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INTRODUCTION

Throughout its history, the American labor movement has encountered stiff, sometimes ferocious, and often brutal opposition from employers. Prior to the enactment of modern labor legislation, employers—occasionally with the help of the state—fought union organizers with spies, Pinkerton guards, guns, goons, injunctions, lawsuits and other weapons, legal and illegal.[1]

Within a few years after the enactment of the National Labor Relations Act[2] in 1935, some of these tactics disappeared and others subsided, victims of changes in the law and the popular climate. But it is now being increasingly recognized that only the methods of the anti-labor crusade in America have changed. A significant portion of American employers still view organized labor as an enemy, to be contained or, if possible, destroyed.[3]

The modern day "labor relations consultant" is an important force in the recent upsurge of sophisticated anti-union activity. Labor relations consultants advise employers on how to manipu-

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[1] *See generally* J. BRECHER, STRIKE! (1972); R. DUNN, THE EMPLOYER OFFENSIVE AGAINST TRADE UNIONS (1927); L. HUBERMAN, THE LABOR SPY RACKET (1939); J. RAYBACK, A HISTORY OF AMERICAN LABOR (2d ed. 1966).

[2] 29 U.S.C. §§ 151-166 (1976).

[3] *See generally Labor Reform Act of 1977: Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. (1977); *Labor Reform Act of 1977: Hearings on H.R. 8410 Before the Subcomm. on Labor Management Relations of the House Comm. on Educ. and Labor*, 95th Cong., 1st Sess. (1977); *Amendments to Expedite the Remedies of the National Labor Relations Act: Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 92d Cong., 1st Sess. (1971).

late their employees' working lives and environment in order to "prevent" unions, plan and control employer anti-union campaigns when a union representation election occurs, and teach and implement strategies designed to rid an employer of a union after one has been established. As times have changed, so have the consultants' tactics. As stated by George Meany: "Today's labor relations consultants carry briefcases instead of brass knuckles and they leave no visible marks on their victims. But their job is the same—frustrate human hopes and nullify human rights."[4]

The rapid and recent growth of the "union-busting" industry is widely noted but not yet precisely measured. The AFL-CIO estimates that over 1,000 firms offer labor consulting services and that over 1,500 individuals do so full-time. It also reports that in two-thirds of all organizing campaigns, the employer utilizes outside expert assistance, with expenditures for these services exceeding $500 million each year.[5] More precise quantification awaits further study.

Consultants, whether or not they are lawyers, are usually expert on the labor laws, for their goal is to operate at "the peripheries of the law"[6] or, if considered safe to do so, to break it. This article presents an overview of the "union-busting" industry. After examining the legal framework regulating the activities of labor consultants, it discusses the available and potential legal recourse against improper and illegal consultant practices.

I. The Union-Busting Industry: An Overview

Union-busting is generated by individuals and organizations in both the private and public sectors. Their effective combinations of legal, psychological and political strategies present a formidable obstacle to the protections afforded employees from unionism. Congress and organized labor are just beginning to

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[4] Statement of George Meany, *quoted in* Payne, *The Consultants Who Coach the Violators*, AFL-CIO Federationist, September 1977.

[5] *Pressures in Today's Workplace: Oversight Hearings Before the House Subcomm. on Labor-Management Relations of the House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. (vol. 1) 410 (1979) (statement of Robert A. Georgine, President, Building and Construction Trades Department, AFL-CIO) [hereinafter cited as *1 Hearings*].

[6] *Id.* at 213 (transcript of tape recording of presentation by Fred R. Long, Chairman of the Board, West Coast Industrial Relations Association, Inc.).

recognize and react to the problems posed by this recent phenomenon.

A. The Union-Busting Network

1. Private Consultant Firms

The most specialized practitioners of the various facets of union-busting are private consultant firms. These firms are staffed by people with industrial relations, social science, business or psychology degress and/or with "labor relations" experience for management, and occasionally for unions.[7] They contract with employers to perform a variety of services. One leading firm, John Sheridan Associates, Inc. ("JSA"), has worked for hundreds of large companies, for which it has conducted representation election campaigns, handled collective bargaining, administered employee attitude surveys, trained supervisors in labor relations and taught "preventive" measures for "maintaining non-union status."[8]

If these firms did their work openly and respected ethical and legal standards, labor might well be left only to devise its own responsive strategies. As has become increasingly apparent, however, consultant firms thrive precisely because they do not conform to such standards; rather, their counsel and conduct are rife with hidden persuasion, deceit and outright violations of the law. A National Labor Relations Board decision, for example, describes in detail how JSA personnel pressured supervisors at a New Mexico firm into committing a host of unfair labor practices during a representation election campaign. These practices included surveillance of employees, interrogation into their union sympathies and discharge of union supporters.[9]

JSA's activities are not an isolated phenomenon. An offshoot firm, Modern Management, Inc. ("3M"), claims a 93% election victory record[10] from 1977 through 1979, far exceeding the na-

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[7] *Id.* at 422-23 (statement of Robert A. Georgine); firm resume of John Sheridan Associates, Inc. (on file with author).

[8] *1 Hearings*, supra note 5, at 422-23; "Preventive Labor Relations," presented by John Sheridan Associates, Inc., to National Retail Merchants Association (Jan. 17, 1979) (on file with author); firm resume of John Sheridan Associates, Inc. (on file with author).

[9] GTE Lenkurt, Inc., 204 N.L.R.B. 921, 83 L.R.R.M. 1684 (1973).

[10] *Pressures in Today's Workplace: Oversight Hearings Before the House Subcomm. on Labor-Management Relations of the House Comm. on Educ. &*

tional rate of 55% for union losses.[11] In testimony before the House Subcommittee on Labor-Management Relations, 3M asserted that its role was to provide employees with an "informed choice" because "[b]asic to our system of labor relations is the democratic principle, operating within a defined set of laws, rules and regulations."[12] Other testimony, however, described 3M as a secretive, aggressive enterprise which has exerted intense pressure on supervisors to counteract employee organizing efforts, created an atmosphere of fear among the entire work force and directed campaigns marked by unfair labor practices.[13] At management seminars on "Avoiding Unions," 3M personnel instruct employers on how to screen job applicants to preclude hiring anyone who might be disposed favorably to a union.[14] Other consultants explicitly recommend that employers avoid hiring Blacks, who are allegedly more prone to unionism, and to prefer women, who are allegedly more easily intimidated and less unionizable.[15]

These management seminars are a favorite means for employ-

Labor, 96th Cong., 1st and 2d Sess. (vol. 3) 125-26 (1979-80) (letter of Joseph F. Vella, Principal, Modern Management, Inc.) [hereinafter cited as *3 Hearings*]. According to 3M, unions lost 647 of the 696 elections in which 3M was involved during this period. The actual union loss figure is somewhat higher since, as 3M noted, many unions withdrew their efforts before an election was held. *Id. See also* AFL-CIO, "Report on Union Busters (RUB Sheet)," No. 3 (Apr. 1979 [hereinafter cited as RUB Sheet]. 3M has previously been known as Modern Management Methods, Inc., and Melnick, Mickus & McKeown. *Id.*

[11] 44 NLRB ANN. REP. 19 (1979).

[12] *3 Hearings, supra* note 10, at 77 (testimony of Herbert G. Melnick, Chairman of the Board, Modern Management, Inc.).

[13] *Id.* at 156-59 (statement of Robert Muehlenkamp, Executive Vice President, Director of Organization, District 1199, National Union of Hospital and Health Care Employees); *1 Hearings, supra* note 5, at 101-03, 108-20 (testimony of Nancy Mills, organizer, Local 880, Service Employees International Union; Anna Cucchi, former dietary employee, St. Elizabeth's Hospital, Brighton, Mass.; Al Gaspar, darkroom technician, St. Elizabeth's Hospital). 3M's campaign at St. Elizabeth's led the National Labor Relations Board to issue a complaint against the hospital listing thirty-eight unfair labor practices. Case Nos. 1-CA-14,762; 1-CA-14,940; 1-CA-14,991; 1-CA-15,041, *reprinted id.* at 104-08.

[14] Seminar sponsored by Professional Seminar Associates (brochure on file with author); *see* notes 10 and 13 *supra.*

[15] *1 Hearings, supra* note 5, at 27 (statement of Alan Kistler, Director of Organization and Field Services, AFL-CIO); RUB Sheet, *supra* note 10, No. 8, at 8-9 (Sep. 1979) (activities of labor consultant Woodruff P. Imberman).

ers to learn anti-union tactics and for consultants to forge business contacts.[16] Journalists and labor officials who have attended such seminars report that they emphasize evasion of the law.[17] The seminars offer "preventive" packages that appear benign, with their stress upon removing sources of discontent in the workplace. The asserted goal, however, is not the improvement of wages, benefits or working conditions, but a workforce selected and conditioned to maximize employer control and minimize the chance of unionization.[18]

2. Law Firms

Employers regularly retain attorneys when confronted with union organizing campaigns or other union "problems." While employers are, of course, entitled to legal counsel, the range of services provided by attorneys has gone far beyond the conventional work product of lawyers. For example, attorneys may operate as strategists for employer campaigns, often observing neither the law nor professional canons of ethics.[19] Lawyers also conduct seminars on election strategies, including suggestions of how an employer can encourage and campaign in deauthorization and decertification elections. Under the law, employer prompting of these efforts is prohibited,[20] but attorneys have nevertheless taught employers how to do so without being discovered.[21] Many attorneys have also become prolific writers on various union-busting and preventive tactics,[22] and some con-

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[16] *1 Hearings, supra* note 5, at 410-19 (statement of Robert A. Georgine).

[17] *Id.* at 420 (statement of Robert A. Georgine: report in Chicago Tribune of decertification seminar conducted by attorney James Baird of Seyfarth, Shaw, Fairweather & Geraldson for Illinois State Chamber of Commerce, October 12, 1978); *id.* at 194-202 (testimony of Joel Smith, International Representative, United Auto Workers: presentation of Fred R. Long, note 6 *supra*).

[18] *See, e.g., id.* at 228-85 (West Coast Industrial Relations Association, Inc., "The Non-Union Company"); *id.* at 656-96 (excerpts from C. Hughes, "Making Unions Unnecessary"); Advanced Management Research International, Inc., "How to Make Unions Unnecessary" (brochure on file with author); Management Science Associates, Inc., "Preventive Labor Relations" (handbook on file with author).

[19] *1 Hearings, supra* note 5, at 419-21 (statement of Robert A. Georgine); *see also* Section II(C), *"Bar Discipline," infra.*

[20] *See, e.g.*, Consolidated Rebuilders, Inc., 171 N.L.R.B. 1415, 69 L.R.R.M. 1447 (1968).

[21] *1 Hearings, supra* note 5, at 420 (statement of Robert A. Georgine).

[22] *See, e.g.*, R. LEWIS & W. KRUPMAN, WINNING NLRB ELECTIONS: MANAGE-

duct their practices exclusively as labor consultants.[23]

3. Industrial Psychologists

Industrial psychology is at the heart of consultant stratagems designed to manipulate employees.[24] Every consultant utilizes it in formulating anti-union programs. Industrial psychologists have devised attitude surveys to analyze employees' proclivity to unionism and design a working environment which inhibits and discourages it.[25] Professional studies of employee and organizational behavior, once the exclusive province of academia and production-oriented management theory, are now regularly taught and applied in anti-union endeavors.[26] These novel applications of behavioral knowledge have been subject to harsh criticism by social scientists[27] and others, but the practice is considered indispensable to union-busting.

4. Employer and Trade Associations

Employer and trade associations combine considerable economic resources and a ready employer audience to provide perhaps the most comprehensive union-busting services. In ex-

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MENT'S STRATEGY AND PREVENTIVE PROGRAMS (2d ed. 1979); Krupman & Rasin, *Decertification: Removing the Shroud*, 30 LAB. L.J. 231 (1979); Cabot & Linn, *What Management Can Do During a Union Organization Campaign*, 22 PRAC. LAW. 13 (Mar. 1976); T. YEISER, HOW TO DE-CERTIFY A UNION (1979), *reprinted in 1 Hearings, supra* note 5, at 315-407.

[23] *E.g.*, Fred R. Long, Chairman of the Board, West Coast Industrial Association, Inc. *See* notes 6 and 18 *supra*.

[24] *1 Hearings, supra* note 5, at 421 (statement of Robert A. Georgine).

[25] *Id.* at 421-22.

[26] *Id.; see id.* at 457-59 (statement of Michael Russell, Southerners for Economic Justice).

[27] *See, e.g., id.* at 452 (testimony of Louis Harris, Louis Harris & Associates, Inc.):

> [W]hen you get findings and methodologies of the social sciences being used, if you will, to come very close to violating the law . . . it seems to me that the application of social science techniques combined, if you will, with a certain immunity that I think law firms and lawyers have, sort of legal-social science here, the two together, I think, are riding for a lot of trouble. . . . [T]he moment you hit the roots of freedom and say these techniques can be used at the risk of people losing their freedom or violating the laws that guarantee their freedom, then I think it is not only serious, it is devastating. . . .

change for annual membership fees, they provide information, research and assistance in union prevention, defeat and disposal.[28]

A few examples indicate the associations' sophistication and influence. The National Association of Manufacturers founded the "Council on a Union-Free Environment" in 1977 to help subscribing companies prevent unions and establish non-union operations.[29] The U.S. Chamber of Commerce provides guidance to employers on how to defeat union organizing drives,[30] while local chapters expend their own resources and even public funds to maintain "union-free" practices in their communities.[31] One industry-specific trade association, the Master Printers of America (the "open-shop" division of Printing Industries of America), conducts seminars and provides information on every stage of anti-union activity, from prevention through decertification.[32] Regional associations such as the Central Piedmont Employers Association also engage in these endeavors.[33]

5. "Advocacy" Organizations

Non-profit organizations which are not creatures of any particular segment of industry but which promote anti-union causes also provide research and aid to union-busting efforts.[34] The National Right to Work Legal Defense and Education Fund., Inc.,

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[28] *Id.* at 425-33 (statement of Robert A. Georgine); *see also* notes 30-35 and accompanying text *infra*.

[29] 232 *Daily Lab. Rep.* (BNA) A-18 (Dec. 1, 1977); "Council on a Union Free Environment," seminar brochures (on file with author); *1 Hearings, supra* note 5, at 426-27 (statement of Robert A. Georgine); RUB Sheet, *supra* note 10, No. 8, at 4-7 (Sep. 1979).

[30] U.S. Chamber of Commerce, "What to Do When the Union Knocks: A Handbook on Union Organizing" (1975).

[31] *See, e.g.*, West Virginia Chamber of Commerce, "Labor Relations Handbook for Small Employers" (1980); *see also* note 339 and accompanying text *infra*.

[32] *1 Hearings, supra* note 5, at 425-26 (statement of Robert A. Georgine); RUB Sheet, *supra* note 10, No. 5, at 2 (June 1979); Master Printers of America v. Marshall, 101 L.R.R.M. 2483 (E.D.Va. 1979); *rev'd and remanded*, No. 79-1513 (4th Cir. Apr. 14, 1980); Master Printers of America, "Fed Up?" (1976); Master Printers of America, "What Your Supervisor Should Know About Unions" (1977) (pamphlets on file with author).

[33] RUB Sheet, *supra* note 10, No. 2, at 3 (Mar. 1979); *1 Hearings, supra* note 5, at 426 (statement of Robert A. Georgine).

[34] *See, e.g.*, RUB Sheet, *supra* note 10, No. 2, at 5 (Mar. 1979).

the legal arm of the various "right to work" committees, is an active litigative force with considerable employer backing.[35]

6. Public Officials

The participation of public officials in anti-union activity is as old as the labor movement itself.[36] In the consultant context, local and national public officials take part in anti-union conferences either as speakers[37] or as attendees.[38] Publications such as *Maintaining Public Service: The National Public Employee Relations Association Strike Planning Manual,*[39] written by three members of the management law firm of Seyfarth, Shaw, Fairweather & Geraldson,[40] is tailored to public sector labor relations. The relationship between consultants and public employers has yet to be examined fully.

B. Response by Labor and Congress

Organized labor has undertaken several efforts in response to the recent upsurge in consultant activity. The AFL-CIO has initiated an effort to gather information about consultants from the field and now publishes a monthly newsletter, "Report on Union Busters (RUB Sheet)," which is circulated to affiliates. Union lawyers have also begun concerted efforts to meet this

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[35] National Right to Work Legal Defense Foundation, Inc., 1977 Ann. Rep. (1978); *see, e.g.,* UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978).

[36] J. RAYBACK, A HISTORY OF AMERICAN LABOR (2d ed. 1966), *passim.*

[37] *See, e.g.,* American Employers for Free Enterprise, "A Dialogue Between Industry and Government Leaders," conference brochure (on file with author). The AEFE is a creature of John Sheridan Associates, Inc. Speakers included Sen. Orrin G. Hatch and Rep. John N. Erlenborn. NLRB Member Howard Jenkins, originally scheduled to appear, withdrew when apprised of JSA's record. RUB Sheet, *supra* note 10, No. 4, at 6 (May 1979).

[38] *See, e.g.,* Federal Publications, Inc., "Public Employee Unionism," *reprinted in Pressures in Today's Workplace: Oversight Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor,* 96th Cong., 1st Sess. (vol. 2) 204-09 (1979) (seminar brochure) [hereinafter cited as *2 Hearings*]; Federal Publications, Inc., "Dealing with Municipal Strikes," seminar brochure (on file with author); RUB Sheet, *supra* note 10, No. 5, at 4 (June 1979), and No. 6, at 3 (July 1979).

[39] J. BAIRD, R. CLARK & M. RYBICKI (1978).

[40] *See generally* RUB Sheet, *supra* note 10, No. 2, at 1-2 (Mar. 1979), and No. 4, at 1-5 (May 1979).

phenomenon.[41]

The House Subcommittee on Labor-Management Relations, in partial response to reports about the new wave of union-busting activity, recently held hearings which included testimony by and about labor relations consultants.[42] The questions which the subcommittee sought to answer accurately identify the problem:

> [A]re these underlying assumptions [of the labor statutes of 1935, 1947 and 1959] still valid? Is the game still being played by the rules that existed then, or has there been a qualitative change in the assumptions? Is management today, with the assistance of consultants, acting in ways that mean the original assumptions no longer prevail?[43]

II. The Legal Context and Legal Recourse

Effective regulation of labor relations consultants could take many forms. Although the existing statutory scheme encourages disclosure of consulting activities and provides civil and criminal penalties for unlawful consulting practices, many gaps remain in the statutes and regulations and in their enforcement. This section outlines the current legal framework and suggests ways of minimizing the danger that the union-busting industry poses to organized labor.

A. The Department of Labor and the Labor-Management Reporting and Disclosure Act

Labor consultants are regulated directly on the federal level by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 ("LMRDA").[44] Title II of the LMRDA sets out a series of employer and consultant reporting and disclosure requirements, along with various exemptions and qualifications.[45] Unfortunately, the scheme "is something less than a

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[41] AFL-CIO, Report of the Executive Council of AFL-CIO: Thirteenth Convention 121-26 (1979).

[42] *See* notes 5, 10 & 38 *supra*.

[43] *3 Hearings, supra* note 10, at 74 (remarks of Rep. Thompson).

[44] 29 U.S.C. §§ 401-531 (1976).

[45] These requirements provide, in relevant part:

> Section 203. Report of Employers.
>
> (a) Every employer who in any fiscal year made—
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> . . . (2) any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or

model of statutory clarity,"[46] a problem well-recognized soon af-

committee of employees to persuade other employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;

(3) any expenditure, during the fiscal year, where an object thereof; directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

(4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is 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 undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);

shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

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

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

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection

ter the Act's passage[47] and since.[48] Moreover, the dearth of case

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with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipt 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.

(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.

(d) 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) of this section unless he was a party to an agreement or arrangement of the kind described therein.

(e) Nothing contained in this section shall be construed to require any regular officer, supervisor, or employee of an employer to file a report in connection with services rendered to such employer nor shall any employer be required to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

(f) Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 158(c) of this title.

(g) The term "interfere with, restrain, or coerce" as used in this section means interference, restraint, and coercion which, if done

law arising under the employer and consultant reporting and disclosure provisions leaves some important issues unresolved.

What does this mean twenty-one years later when consideration is given to how to apply the LMRDA to the current labor scene? It is submitted that at least two precepts should guide the Department of Labor and the courts. First, insofar as the Act's language is clear and offers a plain meaning, it should be followed. Second, it is imperative that the law be applied in ac-

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with respect to the exercise of rights guaranteed in section 157 of this title, would, under section 158(a) of this title, constitute an unfair labor practice.

29 U.S.C. § 433 (1976).

Section 204. Exemption of attorney-client communications.

Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

29 U.S.C. § 434 (1976).

The Act defines "labor relations consultant" as follows:

Section 3(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

29 U.S.C. § 402(m) (1976).

[46] Wirtz v. Fowler, 372 F.2d 315, 325 (5th Cir. 1966).

[47] *See, e.g.*, Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195, 216-21 (1960); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 886-92 (1960); Lang, *Reporting Requirements in General*, in SYMPOSIUM ON LMRDA 369, 374-80 (R. Slovenko ed. 1960) [hereinafter cited as SYMPOSIUM]; Loomis, *Employer and Consultant Reporting Requirements*, *id.* at 391-403; Bernstein & Sullivan, *Lawyer Reporting and the Attorney-Client Privilege*, *id.* at 410-16. The then-commissioner of the Department's Title II enforcement arm reported that, during the first six months after the Act became effective, his office received 41,000 inquiries concerning the law and its application to specific situations. Holcombe, *Aims and Methods of the Bureau of Labor-Management Reports*, *id.* at 432, 437.

[48] *See, e.g.*, Beaird, *Some Aspects of the LMRDA Reporting Requirements*, 4 GA. L. REV. 696 (1970); Note, *Two Views of a Labor Relations Consultant's Duty to Report Under Section 203 of the LMRDA*, 65 MICH. L. REV. 752 (1967); Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959*, 53 GEO. L. J. 267 (1965) [hereinafter cited as Beaird]. Section 203 has been virtually ignored by commentators as well as by the federal government since the 1960's.

cordance with its underlying rationale: to expose employer and consultant activity—be it legal, illegal or questionable—which affects employees' exercise of their legally protected organizing and bargaining rights.[49]

Unfortunately, the Department of Labor has not followed this approach. Instead, it has interpreted the law narrowly and has enforced it timidly. The result is a climate which encourages employers and their consultants to engage in many questionable activities without reporting them, or to ignore the reporting requirements without changing their activities in any meaningful way.

1. Legislative History of the LMRDA

The legislative history of the Act is instructive in providing insight into the problems of enforcement which have ensued. As with the rest of the LMRDA, the reporting and disclosure provisions were enacted largely in response to the extensive investigations and wide publicity of the Senate Select Committee on Improper Activities in the Labor or Management Field, known as the "McClellan Committee" after its chairman, Arkansas Senator John L. McClellan.[50] The focus of the McClellan Committee's three years of hearings was primarily upon improper activities by union representatives,[51] but the Committee also uncovered considerable abuses by employers and their labor relations consultants ("middlemen") and agents.[52]

The Committee's examination of labor consultants almost exclusively concerned itself with the activities of one Nathan W.

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[49] S. REP. No. 187, 86th Cong., 1st Sess. 5, 10-12 (1959), *reprinted in* 1 NAT'L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 at 401, 406-08 (1959) [hereinafter cited as NLRB].

[50] *See, e.g.*, Gross, *The Evolution of American Labor Law*, in SYMPOSIUM, *supra* note 47, at 3, 4; Loftus, *LMRDA in Retrospect, id.* at 8, 10; Beaird, *supra* note 48, at 269-70.

[51] Indeed, many in organized labor viewed the McClellan Committee and its legislative aftermath as a union-busting operation. *See* Wyle, *Landrum-Griffin: A Wrong Step in a Dangerous Direction*, 13 N.Y.U. CONF. ON LABOR 395, 395-97 (1960).

[52] *See generally* SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, FINAL REPORT, S. REP. No. 1139, 86th Cong., 2d Sess. (1960) [hereinafter cited as FINAL REPORT].

Shefferman and his firm, Labor Relations Associates ("LRA").[53] LRA was originally set up in 1939 by Sears, Roebuck & Company. By 1957 it represented some 400 employer clients throughout the country, grossing nearly $2.5 million during one seven-year period.[54] The Committee found that LRA carried out four categories of anti-union activity, much of which appeared to violate the Labor-Management Relations Act:

(1) Covertly organizing and financing "spontaneous" anti-union employee committees during union organizing drives;

(2) Replacing "unfriendly" unions with "friendly" ones or installing "friendly" unions in non-union shops, and signing "sweetheart contracts" with them;

(3) Setting up rotating employee committees in order to discover union sympathizers; and

(4) Taking "morale surveys," often under various guises but always with the real purpose of discovering union sympathizers.[55]

The McClellan Committee squarely and harshly addressed the responsibility of employers for the union-busting activities of LRA and similar organizations, saying:

> The Committee finds that the activities of Shefferman provide a shocking indictment of the activities of a number of employers. . . . As long as there are employers who persist in the antiquated notion that all unions are evil and their organization attempts may be met by any tactics, fair or foul, Shefferman and other fixers and middlemen like him will continue to exist and prosper.[56]

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[53] *Hearings Before the Senate Select Committee on Improper Activities in the Labor or Management Field,* 85th Cong., 1st Sess., 5765-6658 (1957) [hereinafter cited as *Hearings on Improper Activities*]. The Committee's preoccupation with Shefferman led one commentator to complain that the Committee had only "briefly and somewhat lightly scrutinized" the labor consultant phenomenon, making Shefferman and LRA "principal scapegoats for a much larger and still relatively anonymous class of individuals and firms similarly employed." Aaron, *supra* note 47, at 890 [footnote omitted]. *See also* N. SHEFFERMAN, MAN IN THE MIDDLE (1961); R. KENNEDY, THE ENEMY WITHIN 3-32, 218-22 (1960).

[54] SENATE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, INTERIM REPORT, S. REP. No. 1417, 85th Cong., 2d Sess. 255 (1958) [hereinafter cited as INTERIM REPORT].

[55] *Id.* at 256.

[56] *Id.* at 300. *See also Hearings on Improper Activities, supra* note 53, at 6571 (remarks by Sen. McClellan). Among the companies who utilized Shefferman's services were Whirlpool Corp., Morton Frozen Food Corp., Seamprufe

Moreover, the Committee found the current labor laws inadequate to control these "vicious practices":[57]

> We find that the present law, as administered by the National Labor Relations Board, is impotent to deal with Shefferman's type of activity and with the employers who retain him. Despite the fact that firms he represented had been involved in scores of unfair labor practice cases, Shefferman has never received even a slight reprimand, and the companies that he represents merely make a written statement that they will not do again what they have done. Shefferman moved from town to town, from state to state, with impunity, and the law as presently written is apparently powerless to deal with his activities. This situation should be remedied.[58]

Among the Committee's five legislative recommendations was "[l]egislation to curb activities of middlemen in labor-management disputes."[59] Thus, it was left to Congress to decide how to follow through on the findings of the McClellan Committee.

The legislative history[60] of the LMRDA indicates that at no time was serious thought given to the possibility of outlawing employer use of consultants or middlemen or of identifying and prohibiting particular tactics and practices. The lone exception was Congress' amendment to LMRA section 302.[61] In addition to its ban on employer payments to employee representatives, section 302 contains a prohibition against "any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer" in making payments

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Co., Allstate Insurance Co., Englander Co. and H.P. Wasson Co. *Id.* The Committee's general investigations uncovered improper and illegal activities by dozens of other major corporations. FINAL REPORT, *supra* note 52, at 871.

[57] FINAL REPORT, *supra* note 52, at 871.

[58] INTERIM REPORT, *supra* note 54, at 300.

[59] FINAL REPORT, *supra* note 52, at 868. In fact the Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1976 & Supp. II 1978), did provide means to deal with consultants and their employers, though the NLRB had theretofore rarely exercised its authority to reach such activity. *See* Section II(B)(2), "Recourse Under the LMRA," *infra*.

[60] It is beyond the scope of this article to provide a full legislative history of the LMRDA or of its reporting and disclosure provisions, but it is discussed herein as is necessary. The Act's legislative history has been compiled in NLRB, *supra* note 49. *See also* Bureau of National Affairs, The Labor Reform Law (1959). The legislative history of Title II is analyzed in Beaird, *supra* note 48, and by some of the federal courts interpreting it, *e.g.*, Wirtz v. Fowler, 372 F.2d 315, 324-44 (5th Cir. 1966).

[61] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257 § 505, 73 Stat. 519, 537 (codified at 29 U.S.C. § 186(2) (1976)).

or loans to labor unions which the employer's employees belong to or could join, to union officers and employees with the intent to influence their exercise of union duties, or to employees or employee groups or committees for the purpose of influencing any employee's exercise of organizational or collective bargaining rights.[62] Congress thus sought to deal firmly and unequivocally with the most egregious forms of management-labor bribery and collusion revealed by the McClellan Committee hearings, no matter who acted for each side.[63]

While the legislative record does not indicate why Congress decided not to go further in defining unlawful activity, several rationales can be surmised. First, the essence of many of the exposed activities—employer bribery of employee representatives—was already proscribed by section 302. Extension to other actors in the labor scene was seen as necessary to plug the loopholes in the 1947 provisions uncovered during the McClellan Committee hearings.[64] Second, despite the focus on Shefferman, the investigation revealed abuses by many sorts of people, including lawyers,[65] and legislation proscribing lawyer actions on behalf of clients raised many legal and political difficulties.[66] Finally, leaving proscriptions of particular practices out of the statute comported with the general theory of the labor laws, of which vague unfair labor practice provisions leave to the NLRB and the judiciary the fleshing out of their meaning against the background realities of labor-management conflict.[67]

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[62] *Id.*

[63] *See, e.g.*, S. REP. No. 187, 86th Cong., 1st Sess. 10-12 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 406-07.

[64] *Id.*

[65] *See, e.g.*, INTERIM REPORT, *supra* note 54, at 255-300; Kennedy, *Union Racketeering: The Responsibility of the Bar*, 44 A.B.A. J. 437 (1958); 105 CONG. REC. S5889-90 (daily ed. Apr. 23, 1959) (remarks of Sens. Kennedy and Goldwater), *reprinted in* 2 NLRB, *supra* note 49, at 1163-64; 105 CONG. REC. H10,328-30 (daily ed. June 19, 1959) (letter of Rep. Shelley), *reprinted in* 2 NLRB, *supra* note 49, at 1504.

[66] One such difficulty is reaching a precise definition of ethical and unethical behavior. Congress did grapple with attorney reporting obligations and was lobbied on this subject by the American Bar Association. See note 87 and accompanying text *infra*.

[67] Congress chose to rely on the reporting provisions where it would not or could not itself define illegal activity:

> The bill is designed to prevent, discourage, and make unprofitable improper conduct on the part of union officials, employers, and

Rather than attack consultant and employer practices directly, then, Congress set out to follow an approach predicated on public exposure of these arrangements via various reporting and disclosure requirements. During 1958 and 1959, reporting and disclosure requirements appeared in ten bills introduced in the House of Representatives or the Senate to carry out the McClellan Committee recommendations.[68]

A contest developed between the Eisenhower Administration and the House on one hand, and the Senate on the other, over what was to be reported. The legislation originally offered by the Administration[69] limited reporting to certain payments for activities illegal under the Labor-Management Relations Act ("LMRA"), *i.e.*, those which might subject an employee to "restraint, coercion, or interference."[70] The bill that ultimately

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> their representatives by requiring reporting of arrangements, actions, and interests which are questionable. In some instances, the matters to be reported are not illegal and may not be improper. But only full disclosure will enable the persons whose rights are affected, the public and the Government to determine whether the arrangements or activities are justifiable, ethical, and legal.
>
> In addition to comprehensive reporting the bill provides criminal penalties for *actions which are clearly improper* such as the embezzlement of union funds, tampering with or destroying union records, *bribing employee representatives*, and violation of the trusteeship or election provisions of the bill.

S. REP. No. 187, 86th Cong., 1st Sess. 5 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 401 (emphasis added).

[68] S. 3974, 85th Cong., 2d Sess. (1958) (introduced by Sens. Kennedy and Ives: passed the Senate); S. 505, 86th Cong., 1st Sess. (1959) (introduced by Sen. Kennedy); S. 748, 86th Cong., 1st Sess. (1959) (Administration bill introduced by Sen. Goldwater); S. 1137, 86th Cong., 1st Sess. (1959) (introduced by Sen. McClellan); S. 1555, 86th Cong., 1st Sess. (1959) (introduced by Sen. Kennedy: favorably reported by Committee on Labor and Public Welfare; passed by Senate after floor debates and amendments); H.R. 3540, 86th Cong., 1st Sess. (1959) (Administration bill introduced by Rep. Kearns); H.R. 4473, 86th Cong., 1st Sess. (1959) (introduced by Rep. Barden); H.R. 8342, 86th Cong., 1st Sess. (1959) (introduced by Rep. Elliott: favorably reported by Committee on Education and Labor; passed by House after floor debates and amendments by incorporation of text of H.R. 8400, 86th Cong., 1st Sess. (1959) (introduced by Reps. Landrum and Griffin)); H.R. 8490, 86th Cong., 1st Sess. (1959) (introduced by Rep. Shelley). *See generally* NLRB, *supra* note 49; Beaird, *supra* note 48, at 270-80.

[69] S. 748, 86th Cong., 1st Sess. (1959), *reprinted in* 1 NLRB, *supra* note 49, at 84-150; H.R. 3540, 86th Cong., 1st Sess. (1959) (text identical to S. 748).

[70] 1 NLRB, *supra* note 49, at 103.

passed the House, H.R. 8342,[71] reflected this approach, requiring reports of only those activities and agreements conducted with that purpose.[72] Offering only a terse explanation, the House Committee on Education and Labor said, "The Committee believes that the exposure of such practices will serve as an effective curb to an area of activities concerning which the McClellan committee has heard a considerable amount of testimony."[73]

A more expansive view took hold in the Senate. Following the initial passage of the very broad Kennedy-Ives bill[74] in 1958 and the bill's subsequent rejection by the House,[75] the Senate in 1959 passed S. 1555, which required employer and consultant reporting of expenditures, agreements and arrangements with either "an object, directly or indirectly, to persuade" or an intent to obtain or supply certain information.[76] The Senate Committee on Labor and Public Welfare explained:

> The committee believes that employers should be required to report their arrangements with these union-busting middlemen. . . . All of the activities required to be reported by this section are not illegal nor are they unfair labor practices. However, since most of them are disruptive of harmonious labor relations and fall into a gray area, the committee believes that if an employer or a consultant indulges in them, they should be reported.[77]

The AFL-CIO vigorously endorsed this approach over that of the restrictive House bill.[78]

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[71] 86th Cong., 1st Sess. (1959), *reprinted in* 2 NLRB, *supra* note 49, at 1693-1701.

[72] *Id.* at 1695.

[73] H.R. REP. No. 741, 86th Cong., 1st Sess. 13 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 771.

[74] The Kennedy-Ives bill, S. 3974, 86th Cong., 2d Sess. (1958), required (1) annual employer reports of expenditures exceeding $5,000 for "activities intended to influence or affect" employee exercise of rights guaranteed by the NLRA or the Railway Labor Act; (2) annual employer reports of agreements or arrangements with third parties for the performance of such activities, or with paid informers or others "engaged in the business of interfering with, restraining or coercing employees" in the exercise of those rights; and (3) annual labor relations consultant reports of these activities.

[75] 104 CONG. REC. 18,287-88 (1958).

[76] S. 1555, 86th Cong., 1st Sess. 14-17 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 529-32.

[77] S. REP. No. 187, 86th Cong., 1st Sess. 10, 12 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 406, 408.

[78] *See* H.R. REP. No. 741, 86th Cong., 1st Sess. 85 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 843 (remarks of AFL-CIO President George Meany).

In conference, the Senate's broader view prevailed. Under the LMRDA, employers must report their own expenditures where an object "directly or indirectly is to interfere with, restrain, or coerce employees."[79] In addition, both employers and consultants must report agreements or arrangements where the consultant undertakes persuader or certain information-gathering activity.[80] But these requirements were ameliorated, albeit with much uncertainty,[81] by the exemptions in section 203(c) for "advice" and "representation" activities, the affirmation in section 203(f) of employer "free speech" rights under section 8(c) of the LMRA, an exception for certain activities of "regular" employees in section 203(e), and the somewhat redundant section 203(d), which apparently was intended as a warning against judicial or administrative extensions of Title II to employers other than those explicitly covered by section 203(a).[82]

Both H.R. 8342 and S. 1555 contemplated reporting by both employers and consultants, within the parameters of the subject matter each bill designated as reportable.[83] Most of the disagreement about who would report concerned the requirements for attorneys. Recognizing the instances of attorney abuses, one congressman warned that the legislation must be designed to reach "all those hundreds, perhaps thousands, of respectable lawyers and labor relations consultants who daily advise business on how to seduce labor officials, how to threaten union spokesmen, how to beat up labor organizers who refuse to be seduced or

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[79] LMRDA § 203(a)(3), 29 U.S.C. § 433(a)(3) (1976).

[80] *Id.* § 203(b), 29 U.S.C. § 433(b) (1976).

[81] *See* notes 97-132 and accompanying text *infra*. Pungently and presciently, however, the AFL-CIO in 1960 said of the legislative scheme, "Business interests punched many loopholes in the provisions for employer reporting. It is doubtful whether the mutilated remains will have any substantial value in exposing improper labor activities by employers." AFL-CIO, Publication No. 111, "Landrum-Griffin" 45 (1960).

[82] These provisions are set forth in full in note 45 *supra*. Section 203(d) was taken virtually intact from S. 1555 and did not appear in H.R. 8342. The Senate Committee Report noted only that "most employers who maintain normal collective bargaining relations with their employees will not have to file reports under this bill." S. REP. No. 187, 86th Cong., 1st Sess. 40 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 436.

[83] The Administration bill had required only limited employer reporting and none by consultants. S. 748, 86th Cong., 1st Sess. § 206 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 102-04.

silenced."[84]

On the other hand, the American Bar Association, concerned with protecting attorney-client confidences, passed a resolution in 1959 entreating Congress to exempt from any reporting and disclosure requirements even the most rudimentary information about attorney-client arrangements.[85] Nevertheless, lawyers were included within the term "labor consultant" in both bills as passed.[86] H.R. 8432 included an express exemption for attorney-client communications which paralleled the ABA resolution,[87] but S. 1555 offered instead a narrower exemption[88] which the conference adopted.[89]

The effectiveness of reporting depends, in part, upon how contemporaneous it is to the disclosed activities, since employees can only evaluate and react to an employer's actions or arrangements with a consultant if notice thereof is timely. But it was not until S. 1555 was amended on the Senate floor that a bill required employers and consultants to report more currently than on an annual, fiscal-year basis.[90] As amended, S. 1555 provided that both employers and consultants would be required to report within thirty days of any agreement or arrangement with each other.[91] It also required employers to file annual reports of persuader and certain information-obtaining expenditures not

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[84] 105 CONG. REC. H10,328 (daily ed. June 19, 1959) (letter of Rep. Shelley), *reprinted in* 2 NLRB, *supra* note 49, at 1504. *See also* note 65 *supra*.

[85] *Quoted in* S. REP. No. 187, 86th Cong., 1st Sess. 82 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 478. According to Senator Kennedy, no bar association acted against any lawyer who had come before the McClellan Committee or had been involved in the improper practices it found. 105 CONG. REC. S5889 (daily ed. Apr. 23, 1959), *reprinted in* 2 NLRB, *supra* note 49, at 1163.

[86] S. REP. No. 187, 86th Cong., 1st Sess. 12 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 408; H.R. REP. No. 741, 86th Cong., 1st Sess. 36-37 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 794-95.

[87] H.R. 8432, 86th Cong., 1st Sess. § 204 (1959), *reprinted in* 2 NLRB, *supra* note 49, at 1696.

[88] S. 1555, 86th Cong., 1st Sess. § 611 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 577.

[89] LMRDA § 204, 29 U.S.C. § 434 (1976).

[90] The Kennedy-Ives bill had required only annual reports. The only other bill to require more timely filings was H.R. 8490, belatedly introduced by Rep. Shelley on August 3, 1959, four days after H.R. 8342 had been favorably reported by the House Committee on Education and Labor. 105 CONG. REC. H13,719 (daily ed. Aug. 3, 1959), *reprinted in* 2 NLRB, *supra* note 49, at 1536.

[91] S. 1555, 86th Cong., 1st Sess. § 203 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 528-32.

necessarily involving consultants.[92] The Senate added the employer 30-day requirement at the behest of Senator McClellan, who pointed out that belated exposure of the relationship would be of no benefit to employees and unions.[93] H.R. 8342 required only annual reports.[94]

The conference committee retained the 30-day requirement for consultant reports of agreements or arrangements with employers, but it placed consultant receipts and disbursements reports, together with all employer reports, on an annual basis.[95] Thus, under the LMRDA, every employer-consultant arrangement must be reported by the consultant within thirty days of its consummation and is public information under section 205. But employer reports need not be filed for as long as fifteen months after the fact, since section 207 requires that annual reports be filed within ninety days after the end of the employer's fiscal year.[96]

2. "Advice" and "Persuasion": Reconciling Sections 203(a)(4), (a)(5), (b)(1) and (c)

No question has sparked more heated debate than the reconciliation of the obligation of the employer and the consultant to report "any agreement or arrangement" or payment between them for persuader activity[97] with the exemption from having to file a "report covering the services" of a consultant or other person "by reason of his giving or agreeing to give advice to such employer."[98] Consultants, including lawyers, commonly prepare speeches, leaflets and other material for communication to employees by the employer. They also coach supervisors and employers on methods and communications designed to influence employee attitudes, particularly during union organizing drives.

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[92] *Id.*

[93] 105 CONG. REC. S5848 (daily ed. Apr. 23, 1959), *reprinted in* 2 NLRB, *supra* note 49, at 1122.

[94] 105 CONG. REC. H14,534 (daily ed. Aug. 14, 1959), *reprinted in* 2 NLRB, *supra* note 49, at 1695.

[95] LMRDA §§ 203(a) & (b), 29 U.S.C. §§ 433(a) & (b) (1976).

[96] 29 U.S.C. § 437 (1976).

[97] LMRDA § 203(a)(4), 29 U.S.C. § 433(a)(4) (1976). The wording of § 203(a)(4) parallels the consulting reporting obligation in § 203(b)(1), making them essentially coextensive. *See* DEPARTMENT OF LABOR INTERPRETATIVE MANUAL §§ 257.400, 261.010 [hereinafter cited as MANUAL].

[98] LMRDA § 203(c), 29 U.S.C. § 433(c) (1976).

Where the contact between the consultant and employees is thus "indirect," what is the reporting obligation?

Initially the Department of Labor took the position that when consultants or lawyers drafted or revised such materials for ultimate dissemination by the employer to employees, these activities were reportable.[99] But following inquiries and objections submitted by the Bar Association of St. Louis[100] and Representative Philip Landrum in 1961,[101] Bureau of Labor-Management Reports Commissioner John L. Holcombe asked Solicitor of Labor Charles Donahue to review the existing interpretation:

> If we say that the revising of a draft is "advice," but the initial preparation of a draft is an "activity" rather than "advice" we may be accused of hairsplitting, but it seems to me that we should draw the line at some point in this shadowy area and I would be willing to draw it there.[102]

But Donahue chose a broader exemption, which became Department policy. He said:

> A more difficult problem is presented where the lawyer or middleman prepares an entire speech or document for the employer. We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.[103]

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[99] Letter from John L. Holcombe, Commissioner, Bureau of Labor-Management Reports, U.S. Department of Labor, to Allen Tepper, Snyder & Tepper, (Feb. 15, 1961); letter from Arthur J. Goldberg, Secretary of Labor, to Rep. Philip Landrum (June 29, 1961); Bureau of Labor-Management Reports, Technical Assistance Aid No. 4, *Guide to Employer Reporting* 18 (1960); Donahue, *Some Problems Under Landrum-Griffin*, 1962 PROCEEDINGS OF AMERICAN BAR ASSOCIATION SECTION ON LABOR LAW 45 (1962); Naumoff, *Reporting Requirements Under the Labor-Management Reporting and Disclosure Act*, 14 N.Y.U. CONF. ON LABOR 129, 140 (1961).

[100] Letters from F. Wm. McCalpin to John L. Holcombe (June 29 and Sep. 28, 1951).

[101] Letters from Philip Landrum to Arthur J. Goldberg (May 9 and June 7, 1961).

[102] Letter from John L. Holcombe to Charles Donahue (Nov. 17, 1961).

[103] Letter from Charles Donahue to John L. Holcombe (Feb. 19, 1962). This

This change of position was both erroneous and unwise. First, it ignored the unequivocal statutory language requiring reporting of "*activities* where *an object* thereof, directly *or indirectly,* is to persuade."[104] By so rewarding the simple expedient of the interposition of the employer between the consultant and the employees, the Labor Department in effect read the term "indirectly" out of the statute. Consequently, consultants whose activities unquestionably merited disclosure seized upon this interpretation to justify their noncompliance with section 203.[105] The Department also ignored the broad scope of the provision which declares that merely "*an* object"[106] of the activity need be persuasion.

Second, this approach raised unnecessary logical and practical problems, as a review of other Department interpretive documents demonstrates. For example, in its public guide to the reporting requirements, the Department advises employers:

> [Y]ou have to report if. . .
> c. You make arrangements with or pay a labor relations consultant to handle all phases of labor-management relations for you, if the arrangements include activities that, *directly* or *indirectly*, are for the purpose of persuading employees about exercising their

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letter was subsequently incorporated almost verbatim in the Department's MANUAL, *supra* note 97, § 265.005.

[104] LMRDA §§ 203(a)(4) & (b)(1), 29 U.S.C. §§ 433(a)(4) & (b)(1) (1976) (emphasis added).

[105] As to non-reporting under the Landrum-Griffin Act, it is true that Modern Management does not report. You will note, however, that as the testimony concedes, Modern Management does not ever deal directly with employees. Modern Management has not filed because we have been advised by counsel that Modern Management is not required to report because of its method of operation—because its method of operating is confined to consulting and advising with management and managerial personnel exclusively.

3 Hearings, supra note 10, at 78 (statement of Herbert G. Melnick, Chairman of the Board, Modern Management, Inc.).

[106] The LMRDA also chose to use the phrase "an object" over "the object" in adding § 8(b)(7) to the Labor-Management Relations Act. LMRDA § 704(c), 29 U.S.C. § 158(b)(7) (1976). Section 8(b)(7) proscribes certain picketing where "an object thereof" is recognitional. Cases interpreting this language have held that it encompasses situations in which the recognitional purpose was not proclaimed but was nonetheless present. *See, e.g.,* Retail Clerks Int'l Ass'n Local 345, 145 N.L.R.B. 1168, 1172, 55 L.R.R.M. 1122 (1964). The "an object" language also appears in § 8(b)(4) of the LMRA, 29 U.S.C. § 158(b)(4) (1976), and is similarly interpreted. *See, e.g.,* NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 689 (1951).

> rights to organize and bargain collectively, and provided that these activities are not excluded as advice.[107]

This question-begging instruction confuses more than it clarifies, particularly since "advice" is not clearly defined.

The Department's internal definition of "advice" is more descriptive but hardly more illuminating:

> The question of application of the "advice" exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or for other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied. It involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it.[108]

This case-by-case approach is no more workable or realistic than even the direct-indirect standard contained in the Department's public guide.

Third, the legislative purpose of the reporting requirements makes it apparent that the duty to report should not depend upon the circumstance of who actually comes in "direct" contact with the employee. The requirements seek to regulate employer and consultant activities by full disclosure. Since employees are entitled to timely notice when outsiders have been hired to "persuade" them, they should also be informed when their employer acts as a conduit for consultant-prepared anti-union material.[109]

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[107] U.S. OFFICE OF LABOR-MANAGEMENT AND WELFARE-PENSIONS REP., LABOR-MANAGEMENT SERVICES ADMINISTRATION, DEP'T OF LABOR, TECHNICAL ASSISTANCE AID No. 6, *Employer and Consultant Reporting* 8 (1964) (emphasis in original) [hereinafter cited as TECHNICAL ASSISTANCE AID No. 6].

[108] MANUAL, *supra* note 97, § 265.005. In fact, the internal manual currently suggests that a variety of activities commonly performed by consultants are susceptible to reporting depending upon their underlying object. These include a consultant's developing or performing various services intended to improve employee-employer relations, *id.* §§ 260.100, 261.120, training supervisors, *id.* § 260.400, conducting employee attitude surveys, *id.* (which activity is clearly reportable under § 203(b)(2) if conducted during a union organizing drive, *id.* § 264.006) and advising management regarding job evaluation, wage and salary administration or personnel administration, *id.* § 261.200. Hence, the internal guide appears to conflict with the official direct-indirect distinction.

[109] This preference for full disclosure is demonstrated by the "trigger" mechanism of LMRDA § 203)(b), 29 U.S.C. § 443(b) (1976). Under this section, a consultant who engages in *any* reportable persuader activity for *any* client must fully report its receipts and disbursements for *all* labor relations advice and service for *all* employers during that year, even though the latter informa-

In view of these considerations, the way is clear for a more realistic and aggressive approach to the advice-persuasion issue. The Department need only change some of its interpretations and enforce others. Employees will benefit as the LMRDA intended, and law-abiding employers and consultants need fear only public and employee scrutiny.

3. Employees, Supervisors and Sections 203(a)(2) and (e)

In any anti-union campaign, whether at the preventive, organizational or decertification stage, consultants teach employers that supervisors are the most effective carriers of the employer's message to employees.[110] While section 203(a)(2) requires employers to report payments to employees intended to cause them to persuade other employees, an important issue is whether this provision contemplates payments to supervisors for such a purpose.[111] The LMRDA's definition of "employee"[112] does not ex-

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tion would not otherwise have to be reported. Thus, it is clear that the LMRDA favors full disclosure to employees of the activities of individuals who overstep the advice-persuasion line in any way. S. REP. No. 187, 86th Cong., 1st Sess. 12 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 408; SYMPOSIUM, *supra* note 47, at 415; Beaird, *supra* note 48, at 290-92. *Cf.* Note, *Two Views of a Labor Relations Consultant's Duty to Report Under Section 203 of the LMRDA*, 65 MICH. L. REV. 752 (1967). The Department also so interpreted § 203(b) in TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 3, and the issue was ultimately determined by judicial resolution of several civil suits on this point filed against the Department by attorney consultants. *See* Price v. Wirtz, 412 F.2d 647 (5th Cir. 1969), overruling in part Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966); Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

The Department also emphasizes that the words "agreement" or "arrangement" should be read broadly so as to encompass even informal "understandings," including those in which no financial remuneration is involved. TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 3; MANUAL, *supra* note 97, §§ 257.100, 260.500. It even makes clear in its regulations that one who procures the services of a consultant for performing reportable activity, or who acts at a consultant's behest, must report. 29 C.F.R. §§ 406.1(d), 406.2(a), 406.3(a) (1979).

[110] *See, e.g.*, R. LEWIS & W. KRUPMAN, *supra* note 22, at 87-104.

[111] The Department of Labor's public guidebook to employer reporting leaves this issue unresolved. *See* TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 6-7.

[112] [A]ny individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization

clude supervisors, and the Act does not define them elsewhere. In contrast, the LMRA—which the 1959 Congress looked to for guidance and amended in the LMRDA—does both.[113] Rendering persuader payments to supervisors exempt from the reporting requirements would leave a gaping hole in the LMRDA's effectiveness.

That supervisors are not outside the scope of section 203(a)(2) is bolstered by the general exemption provided in section 203(e) for "any regular officer, supervisor, or employee of an employer." The qualifier "regular" indicates that at least some supervisors (and officers and other employees) must report. If supervisors were intended to be completely exempted on the theory that *any* actions taken pursuant to their employer's instructions were *a priori* "services as a regular . . . supervisor," the Act presumably would have stated so explicitly.[114] Thus, reasonably read, section 203 means that officers, supervisors and employees who regularly engage in persuader activities need neither report nor be the subject of employer reports. However, when an employer instructs those whose regular duties do *not* include persuader activity to engage in such activity, reporting is required with respect thereto.

This approach is reflected in the Department's interpretive manual, which observes that the exemption applies only to "services which are performed by employees in the regular and ordinary course of their employment."[115] The manual then goes on to illustrate this principle by distinguishing the persuader activi-

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> in any manner or for any reason inconsistent with the requirements of this Chapter.

LMRDA § 3(f), 29 U.S.C. § 402(f) (1976).

[113] LMRA §§ 2(3) & (11), 29 U.S.C. §§ 152(3) & (11) (1976).

[114] The legislative history does not clarify § 203(e). The provision was taken by the Conference Committee from the expansive Senate bill almost verbatim. The committee reports add nothing to the statutory language. S. REP. No. 187, 86th Cong., 1st Sess. 40 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 436; H.R. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 937. The AFL-CIO termed § 203(e) "farcical" in 1959 because of its potential use as an exemption from reporting supervisor conduct. AFL-CIO, Analysis of the "Labor Management Reporting and Disclosure Act of 1959" 13 (1959), quoted in Aaron, *supra* note 47, at 890; *see also* SYMPOSIUM, *supra* note 47, at 370 (1960) (suggesting that management may use employees to perform—without reporting—actions which would otherwise be done by reporting labor consultants).

[115] MANUAL, *supra* note 97, § 266.100.

ties of a "labor relations director who is a regular staff member" (not reportable) from those of a "drill press operator" (reportable).[116]

It may be suggested that employees necessarily understand that their supervisors are paid by management and represent its thinking in labor matters. This should not make a supervisor's activity "regular," however, when in fact it is not. Absent employer disclosure, there is no way for an employee to know that a supervisor has undergone specific, usually secret, training by the employer or a consultant in methods of employee persuasion.

4. Gathering and Supplying Information: Sections 203(a)(3), (4) and (5) and 203(b)(2)

Gathering information about a union adversary is an integral part of management's strategy when fighting a union organizing drive. This commonly includes obtaining the union's informational and financial reports filed with the Department of Labor, its constitution and by-laws, and information about its dues structure, contracts and relations with other companies, strike history and the particular union organizers who are involved in the campaign.[117] Employers and consultants then use this information in devising letters, leaflets and other anti-union communications to employees.

The LMRDA's reporting requirement for such activity arises when the information obtained is "connected with a labor dispute" involving the employer.[118] The Act's definition of "labor dispute" is identical to that contained in the LMRA[119] and is therefore extremely broad. Thus, whenever an employer or consultant, by whatever means, obtains or supplies information

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[116] *Id.*

[117] *See, e.g., 1 Hearings, supra* note 5, at 244 (West Coast Industrial Relations Association, "The Non-Union Company"); S. REP. No. 187, 86th Cong., 1st Sess. 39-40 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 435-36.

[118] LMRDA § 203(a)(4), 29 U.S.C. § 433(a)(4) (1976).

[119] [A]ny controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

LMRDA § 3(g), 29 U.S.C. § 402(g) (1976); LMRA § 2(9), 29 U.S.C. § 152(9) (1976).

about a union or about employees for use during a representation campaign, the reporting requirement is triggered.[120]

The plain language of the statutory information provisions leaves no doubt that the reporting requirement was intended to be applied broadly. The lone exception—"information for use solely in conjunction with" an administrative, arbitral or judicial proceeding—is much narrower than the "by reason of" language in the section 203(a) "advice" exemption.[121] Information-gathering or supplying must be reported if it is to be used in conjunction with *any* activity other than or in addition to such a proceeding.

An employer may obtain this information from public sources or employer contacts, or it may be obtained illegally through labor spies, surveillance or bribery. The question is the extent to which this activity must be reported under section 203. Congress was especially concerned with exposing surreptitious actions to obtain information,[122] and Department policies specify that the use of labor "spies," "plants" or surveillance of employees by employers or consultants must be reported.[123] For decades these activities had been considered unfair labor practices under section 8(a)(1) of the National Labor Relations Act,[124] but, as the McClellan Committee discovered, consultants still engaged in

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[120] The Department also interprets this to mean that the labor dispute need not necessarily be in progress at the time of the information-gathering or supplying activity, so long as the requisite "connection" exists. MANUAL, *supra* note 97, § 261.005.

[121] *See* Section II(A)(2), "'Advice' and 'Persuasion': Reconciling Sections 203(a)(4), (a)(5), (b)(1) and (c)," *supra*.

[122] The committee . . . was particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants. The committee believes that if unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees and to provide the employer with information concerning the activities of employees or a union in connection with a labor dispute.

S. REP. No. 187, 86th Cong., 1st Sess. 39-40 (1959), *reprinted in* 1 NLRB, *supra* note 49, at 435-36.

[123] TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 8, 9, 12; MANUAL, *supra* note 98, §§ 257.200, 257.205, 257.210, 264.100, 264.200.

[124] *See, e.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) (use of detectives to learn about union organizing activities).

them freely.[125]

"Employee opinion surveys" conducted during a representation campaign must also be reported if intended to elicit information for use in connection with the campaign.[126] Pre-election polls are often considered grounds for setting aside elections or an unfair labor practice as a coercive interrogation or an implied promise of benefit, even when the union is not mentioned.[127]

Despite the unequivocal statutory language, however, the Department has offered contradictory signals on the reportability of certain means of information-gathering and supplying. On one hand, it recognizes that if, in connection with a labor dispute between an employer and a union, the employer seeks information concerning "activities of the union or its officers during a previous organizing drive or a labor dispute involving a different employer in another location," this is reportable.[128] On the other hand, the Department advises consultants that they need not report if they "merely obtain copies of a public document and transmit it to the employer."[129]

But neither the statute nor the purposes of the LMRDA provide a basis for such a distinction. Given employers' extensive use of public information in fighting unions[130] and the Act's purpose to reveal the existence of employer-consultant pacts, this "public document" exemption is wholly unwarranted. Indeed, the Department does not allow employers to evade the statute by researching information for another employer, and trade associations which perform persuader services are treated as con-

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[125] INTERIM REPORT, *supra* note 54, at 255-300.

[126] MANUAL, *supra* note 97, § 264.006.

[127] NLRB v. Tom Wood Pontiac, Inc., 447 F.2d 383 (7th Cir. 1971) (employee opinion survey concerning working conditions conducted by employer's labor relations consultant during election campaign); St. Joseph's Hospital, 247 N.L.R.B. No. 135, 103 L.R.R.M. 1314 (1980) ("attitude" survey conducted during renewed union activity); The Miller Press, 197 N.L.R.B. 574, 80 L.R.R.M. 1483 (1972) (employer use of industrial psychologist to interview employees and solicit complaints about working conditions following union request for recognition). *See also* Section II(B)(1), "Consultant Involvement in Unfair Labor Practices," *infra*.

[128] MANUAL, *supra* note 97, § 257.220.

[129] TECHNICAL ASSISTANCE AID NO. 6, *supra* note 107, at 12.

[130] Reports filed pursuant to the LMRDA's union reporting requirements are commonly sought by employers during representation election campaigns. *See, e.g.*, R. LEWIS & W. KRUPMAN, *supra* note 22, at 63-68.

sultants.[131] It is thus safe to conclude that only legitimate information-gathering activities conducted solely in preparation for an adversary legal proceeding[132] can escape reportability under the broad reach of these provisions.

5. Enforcement of Section 203: Two Decades of Neglect

Non-enforcement of the employer and consultant provisions of the LMRDA crippled their effectiveness from the outset. The Department of Labor's inattention to section 203 is plain from its rare use of the civil enforcement authority granted by section 210[133] against employers and consultants. The Department has initiated only sixteen actions against employers or consultants in the twenty-one years since the Act took effect, and only three actions have been filed since 1966.[134] It is probably something less than a coincidence that employer and consultant reporting reached its nadir during the six-year period (1968-74) when the Department filed no actions at all.[135]

Of the eleven reported cases, one involved an employer alone, six involved a consultant alone and four involved both an employer and a consultant. Among the consultants were three detective agencies, two employer associations, two labor con-

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[131] TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 8, 10.

[132] If an employer or consultant engages in spying or other surreptitious activity to obtain information "for use solely in conjunction with" a legal proceeding, however, this should be reportable under § 203(a)(3), 29 U.S.C. § 433(a)(3) (1976), covering expenditures made in the commission of an unfair labor practice. But since this provision does not require the consultant to report, employees can learn of these expenditures only via the untimely annual report. This then, remains a glaring loophole in the LMRDA.

[133] Section 210 provides:

> Whenever it shall appear that any person has violated or is about to violate any of the provisions of this subchapter, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia.

29 U.S.C. § 440 (1976).

[134] U.S. OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, LABOR-MANAGEMENT SERVICES ADMINISTRATION MESSAGE No. 19-80, March 6, 1980 [hereinafter cited as LMSA MESSAGE].

[135] *See id.*

sultant firms, a law firm, the National Right to Work Committee and an individual consultant.[136] Most of the cases were eventually settled by stipulation on terms favorable to the Department,[137] suggesting that a suit can achieve the desired result without extensive litigation. The case law interpreting sections 203 and 204 has largely come about not from the Department's own litigative initiative but from a handful of civil suits brought *against* the Department by consultants.[138]

Although the reporting and disclosure provisions incorporate a congressional belief in the need of mutuality in the law—that is, that public disclosure of union practices should be accompanied by similar requirements for employers and consultants—actual enforcement and compliance have virtually rendered the Act "for unions only." Through mid-1979, labor organizations had filed 1,291,039 information and financial reports (LM-1, 1A, 2 and 3). Employers and consultants had filed only 5,018 Employer Reports (LM-10), Consultant Agreement and Activities Reports (LM-20) and Consultant Receipts and Disbursement Reports (LM-21)—an average of 250 per year.[139] Through March

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[136] These few actions demonstrate the breadth of the term "labor relations consultant" in the LMRDA (§ 402(m)). The Department's most recent suit, Master Printers of America v. Marshall, 101 L.R.R.M. 2483 (E.D. Va. 1979), seeks to compel the Master Printers of America ("MPA") to comply with § 203(b). MPA's "Craftmanship Program" singles out employees of its non-union member firms to receive without charge MPA's quarterly magazine, Insight, which regularly contains articles hostile to labor unions. A federal district court held on a summary judgment motion that this was reportable persuader activity because when member firms elect to join the "Craftmanship Program," the employers "presum[ably]" understand the program "and intend to effect its natural consequences," and the anti-union articles both "subtly" and "directly" "attempt to dissuade MPA employees from joining a union." *Id.* at 2485. The Fourth Circuit, however, reversed and remanded the case for an evidentiary hearing because it found that the record did not adequately support the district court's conclusion. Master Printers of America v. Marshall, No. 79-1513 (4th Cir. April 14, 1980). Following a new hearing, the district court reaffirmed its original holding. Master Printers of America v. Marshall, Civ. Action Nos. 78-720A and 78-721A (E.D. Va. July 14, 1980). MPA has appealed again.

[137] LMSA MESSAGE No. 19-80, *supra* note 134.

[138] Price v. Wirtz, 412 F.2d 647 (5th Cir. 1969); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966); Douglas v. Wirtz, 353 F.2d 30 (4th Cir. 1965), *cert. denied,* 383 U.S. 909 (1966).

[139] U.S. OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR (LMSE), COMPLIANCE, ENFORCEMENT AND REPORTING IN 1974 at 25, and information provided to the au-

1978, the Department lists only 215 consultant registrants[140] and approximately 1,550 employer registrants.[141]

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thor by LMSE. *See* Appendix. Curiously, LMSE has fallen behind publication of its annual reports on compliance with Title II; the last such report, issued in June 1980, covers 1976 and 1977.

[140] U.S. DIVISION OF REPORTS ANALYSIS & DISCLOSURE, OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, REGISTER OF REPORTING LABOR CONSULTANTS (1978).

[141] U.S. DIVISION OF REPORTS ANALYSIS & DISCLOSURE, OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, REGISTER OF REPORTING EMPLOYERS (1978).

A closer look at employer and consultant compliance with Title II is instructive. Despite the expectations of the drafters of the LMRDA, filing by consultants and employers under § 203 peaked during the early 1960's and then quickly declined for a long period. In the first full year of the Act's operation, labor consultants filed 339 LM-20's, but this figure sharply declined the next year and has yet to approach the original compliance level. *See* Appendix. This reporting trend contradicts the widely noted proliferation of consultants and indicates widespread ignorance and evasion of the Act. *1 Hearings, supra* note 5, *2 Hearings, supra* note 38, *3 Hearings, supra* note 10, *passim.*

The discrepancy between the number of LM-20 Reports and the number of Receipts and Disbursement Reports (LM-21) in every year but 1970 also indicates meager compliance. The LM-20 figure more accurately reflects the number of active labor consultants, since one LM-21 may be used to report the financial aspects of every reportable agreement or activity (and of every otherwise unreportable activity which is swept in by the existence of a single reporting obligation). U.S. OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, COMPLIANCE, ENFORCEMENT AND REPORTING IN 1969 at 33. Since § 203(b) requires that every LM-20 Report be followed at the end of the fiscal year by an LM-21, the discrepancy between these figures may also mean that some consultants filed only the first report.

A comparision of the number of LM-20 Reports and Employer Reports (LM-10) which have been filed demonstrates another aspect of Title II's failure. Sections 203(a)(4) and 203(b) require separate filings by both the employer and the consultant for each agreement or arrangement that the consultant will undertake persuader or certain information-gathering activity for the employer. The number of LM-10 Reports in a given year, therefore, should at least match the number of LM-20 Reports, since LM-10 Reports are required also for numerous other types of agreements and payments, i.e., certain payments or loans or promises or agreements therefor to unions or employees of unions (§ 203(a)(1)); undisclosed payments to employees or employee groups for "persuader" purposes (§ 203(a)(2)); expenditures with an object to "interfere with, restrain or coerce" employees in their exercise of organizational or bargaining rights (§ 203(a)(3)) and certain information-gathering expenditures (§ 203(a)(3)). According to Department figures, however, in seven of the twenty years the number of LM-20 reports actually exceeded the number of LM-10 reports, and in most other years the figures were close (*see* Appendix), strongly

Non-compliance is probably attributable to several factors: wilfulness and ignorance of consultants and employers, inadequate enforcement and publicity by the Department of Labor and general uncertainty as to the precise parameters of the statutory requirements. Empirical analysis of the reasons why would-be regulatees do not comply is virtually nonexistent. One recent survey[142] of management attorneys serving on committees of the Labor Relations Law Section of the American Bar Association—a group of consultants presumably knowledgeable about the law and especially sensitive to the personal consequences of noncompliance—revealed the law's ineffectiveness as currently enforced. Whereas 64.6% of the respondents acknowledged having performed reportable activity during the previous five years, only 1.8% had in fact filed reports with the Department of Labor. Of the non-reporters, 19.4% knew of their obligation, 17.5% were uncertain about their duty and the remainder were ignorant of the requirements.[143] Moreover, 59% of the respondents believed that fewer than 10% of all management attorneys com-

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indicating employer noncompliance with at least some parts of § 203. The Department apparently keeps no records regarding compliance with the statutory mutual filing requirement.

Perhaps the most discouraging statistic of noncompliance is the vast difference between the number of Employer Reports and the number of unfair labor practice charges and findings against employers by the National Labor Relations Board. Section 203(a)(3) of the LMRDA requires employer reporting of every expenditure where an object is "to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing," language which, as § 203(g) explicitly states, is drawn from § 8(a) of the Labor-Management Relations Act, 29 U.S.C. § 158(a) (1976). From 1959 through mid-1979, 2,646 LM-10 reports were filed by employers, only some of which, of course, would have been filed pursuant to the first clause of § 203(a)(3). But during the same period, the annual number of unfair labor practice charges against employers had increased from 8,266 in 1959 to 29,026 in fiscal year 1979. 44 NLRB ANN. REP. 11 (1979), 24 NLRB ANN. REP. 174 (1960). Even granting that the intent element required by § 203(a)(3) may be absent in many unfair labor practices, the numbers demonstrate convincingly that the Act is widely flouted and that the affected government agencies have not been working together to assure compliance.

[142] Craver, *The Application of the LMRDA "Labor Consultant" Reporting Requirements to Management Attorneys: Benign Neglect Personified*, 73 NW. U. L. REV. 605 (1978).

[143] *Id.* at 625-26.

plied fully with section 203.[144] Comparing this group with non-attorney consultants who are unversed in the law and have no bar association wielding concurrent authority over them, the dimensions of the problem come into clearer focus.

Even so, the current law is far from toothless, and there is much the Department ought to do to revitalize it. Section 210 remains available as a potent weapon to compel compliance in particular cases and to serve notice generally that the Department is serious about section 203. Unions have a role to play here as well: they can request civil actions if they are aware of unreported employer or consultant activity and are probably entitled to judicial review of a Department decision not to seek compliance.[145]

Labor consultants are also subject to criminal penalties under the LMRDA. Section 209 provides for fines up to $10,000 and imprisonment for up to one year for wilfully violating the Act, knowingly making false statements or misrepresentations of a material fact, knowingly failing to disclose a material fact or wilfully violating the Act's record-keeping requirements.[146] The culpability standard has been interpreted to include reckless dis-

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[144] *Id.* at 638.

[145] *See* Dunlop v. Bachowski, 421 U.S. 560, 566-68 (1975); UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 590 F.2d 1139, 1155 (D.C. Cir. 1978).

[146] Section 209 states:

> (a) Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
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> (b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> (c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> (d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

29 U.S.C. § 439 (1976).

regard of whether the action was lawful or not.[147] Moreover, any labor consultant (or other person) who is convicted of violating Title II or of bribery, extortion or certain other criminal offenses is prohibited under section 504 from serving as a labor consultant for five years following conviction or the end of imprisonment.[148] One can only speculate about the potential deterrent effect if the Justice and Labor departments were to prosecute labor consultants for wilful violations.

Along with this enforcement authority, section 601 confers broad investigatory powers on the Department exercisable when the Department "believes it necessary in order to determine whether any person has violated or is about to violate" Title II.[149] This authority includes the power to subpoena records and to conduct searches.[150] In addition, the Department need not have probable cause in order to initiate an investigation and is not bound by specific time limitations.[151] While the way is clear

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[147] United States v. Budzanoski, 462 F.2d 443, 452 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972).

[148] Section 504 provides, in part:

> (a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III [Title II] or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
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> > . . . (2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment . . . ."

29 U.S.C. § 504 (1976). This part of § 504 is ignored almost totally by the Department and commentators alike.

[149] 29 U.S.C. § 521 (1976).

[150] *Id.*

[151] United States v. Budzanoski, 462 F.2d 443, 451 (3d Cir.), *cert. denied*, 409 U.S. 949 (1972); International Brotherhood of Teamsters v. Goldberg, 303 F.2d 402 (D.C. Cir.), *cert. denied*, 370 U.S. 938 (1962); Goldberg v. Truck Drivers Local Union No. 299, 293 F.2d 807, 809-12 (6th Cir.), *cert. denied*, 368 U.S. 938 (1961); Schulman, *Developments Under Title VI of the Landrum-Griffin*

for the Department to look more closely into the affairs of particular consultants or employers, the Department has, up to now, aggressively applied this authority only against unions.[152]

The LMRDA expressly authorizes the Department of Labor to establish cooperative arrangements with other federal agencies and directs those agencies to comply.[153] The Department can then employ its investigatory authority under section 601[154] to determine independently whether the reporting obligation applies and has been complied with. The Department of Labor should also integrate its enforcement of the LMRDA with the National Labor Relations Board's enforcement of the LMRA. Generally, the NLRB should notify the Department whenever it discovers that an employer has utilized arguably reportable ex-

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Act, 5 GA. L. REV. 709, 710-16 (1971).

[152] *See, e.g.*, Local 57, Int'l Union of Operating Engineers v. Wirtz, 346 F.2d 552 (1st Cir. 1965); International Brotherhood of Teamsters v. Wirtz, 346 F.2d 827 (D.C. Cir. 1965), U.S. OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, COMPLIANCE, ENFORCEMENT AND REPORTING IN 1975, *passim*.

[153] *Cooperation with other agencies and departments.*

> In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this chapter and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this chapter. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this chapter as may be found to warrant consideration for criminal prosecution under the provisions of this chapter or other Federal law.

LMRDA § 607, 29 U.S.C. § 527 (1976).

The Department of Labor might also arrange with the Federal Mediation and Conciliation Service to receive notification of disputes in which FMCS is involved, since many of them may not enter the purview of the NLRB but might involve consultants.

[154] 29 U.S.C. § 521 (1976). *See* notes 149-52 and accompanying text *supra*.

pert assistance.

At the same time, the Board should routinely notify employers of the reporting requirements, including the penalties provided by section 209, in order to spur Title II compliance. The Department of Labor could also undertake a program to apprise employers, consultants and attorneys of the LMRDA's requirements.[155]

Engaging NLRB involvement in these areas is a matter of administrative convenience. The NLRB—not the Department—is involved in most labor-management disputes, including virtually all contested representation elections in the private sector. A routine practice of notification would considerably assist LMRDA enforcement without unduly burdening the Board.

Special considerations come into play in integrating Board disposition of unfair labor practices and Department enforcement of section 203(a)(3).[156] This section requires employers to report annually "any expenditure . . . where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing."[157] This provision seeks to obtain disclosure of activity prohibited under section 8(a)(1) of the LMRA.[158] One court has held, however,

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[155] Such a program should include revision of the Department's 16-year-old explanatory pamphlet, TECHNICAL ASSISTANCE AID NO. 6, *supra* note 107, which precedes all of the case law applying and interpreting Title II.

[156] 29 U.S.C. § 433(a)(3) (1976).

[157] *See* note 45 *supra*.

[158] LMRDA § 203(g), 29 U.S.C. § 433(g) (1976). The Department of Labor provides some guidance as to the expenditures and activities it has in mind:

> 3. You spend money to interfere with, restrain, or coerce employees in their rights to organize and bargain collectively. For example, you have to report if—
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> a. You make expenditures for the printing and dissemination of pamphlets, advertisements, or other printed matter, that threatened to move or close your plant should the employees organize.
>
> b. You make loans, give gifts, or provide services to employees on the condition they will not organize.
>
> c. You make any expenditure (by salary, compensatory time or otherwise) for the purpose of having a supervisory employee threaten other employees against organizing or joining a union, or otherwise interfere with, restrain or coerce other employees in the right to organize and bargain collectively through representatives of their own choosing.

that an unfair labor practice determination against an employer implicates the reporting requirement only if the weight of the evidence shows that a motive of the employer's act was to interfere, restrain or coerce.[159] Another court has indicated that an employer denial of an expenditure precludes the Department from compelling a report despite a prior Board or judicial determination that the payment was made.[160] Therefore, whenever the NLRB pursues an unfair labor practice complaint under section 8(a), the employer confronts a legal dilemma. Filing under section 203(a)(3) may be construed as an admission of guilt;[161] not filing may subject the employer to the LMRDA's criminal penalties.[162] Refraining from making such reportable expenditures is obviously the most judicious course.

Even if an employer complies with section 203(a)(3), the report will be of little utility to employees since the annual report need not be filed until long after the unfair labor practices have been committed. Only when a consultant is involved and required to report would public disclosure be timely.[163] But NLRB assistance to the Department's enforcement of the LMRDA might additionally deter employer and consultant abuses.

In the wake of renewed concern by organized labor about employer and consultant non-reporting, the Department's office of Labor-Management Standards Enforcement recently ordered its field offices to give the investigation of section 203 complaints priority equivalent to that accorded investigation of embezzlement complaints.[164] Primary consideration was to be given to complaints involving large or national consultant organizations or employers.[165] According to the Department, section 203 inves-

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TECHNICAL ASSISTANCE AID No. 6, *supra* note 107, at 7.

[159] Wirtz v. National Welders Supply Co., Inc., 254 F. Supp. 62, 64-66 (W.D.N.C. 1966).

[160] Wirtz v. Ken Lee, Inc., 369 F.2d 393 (5th Cir. 1966).

[161] It should also be noted that the annual report of § 203(a)(3) activity risks no liability under the LMRA if no charge has yet been filed and the activity took place over six months before the reporting date. 29 U.S.C. § 160(b) (1976).

[162] *See* notes 146-48 and accompanying text *supra*.

[163] *See* notes 90-96 and accompanying text *supra*.

[164] U.S. OFFICE OF LABOR-MANAGEMENT STANDARDS ENFORCEMENT, LABOR-MANAGEMENT SERVICES ADMIN., DEP'T OF LABOR, LABOR-MANAGEMENT SERVICES ADMINISTRATION NOTICE No. 69-79, Nov. 13, 1979, *reprinted in* 52 Daily Lab. Rep. (BNA) A-4 (Mar. 14, 1980).

[165] *Id.* New procedures include national office review of field office decisions not to investigate.

tigations increased five-fold during the following year, from 30 to 150.[166]

This long-overdue administrative action is welcome, but the success of the Department's enforcement scheme depends upon the Department's willingness to commit resources and personnel to the task and upon the basic efficacy of the statutes and regulations in exposing and deterring union-busting activity. As the preceding discussion demonstrates, there is reason for continued skepticism on both counts.

B. The National Labor Relations Board and the Labor-Management Relations Act

The spectacular growth of the union-busting industry coincides with clear trends showing increases in violations of the labor laws,[167] employer success in defeating unions in representation elections[168] and a sharply rising incidence of decertification and deauthorization elections.[169] Hard data linking these trends to the consultant phenomenon has not yet been assembled, but union organizers, journalists, government officials and other observers have pointed to rising consultant activity as a cause.[170]

1. Consultant Involvement in Unfair Labor Practices

The NLRB does not specifically record the involvement of consultants, attorneys, trade associations, industrial psycholo-

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[166] *Id.*

[167] *See* note 149 *supra.*

[168] Between 1959 and 1979 the percentage of representation elections won by unions declined precipitously from 64.5% to 45%. 44 NLRB ANN. REP. 16 (1979); 24 NLRB ANN. REP. 174 (1958).

[169] The incidence of decertification elections increased from 216, *id.* at 174, in fiscal year 1959 to 777 in fiscal year 1979. 44 NLRB ANN. REP. 17 (1979).

[170] *See 1 Hearings, supra* note 5, at 31 (statement of Alan Kistler); "Labor Fights Back Against Union Busters," U.S. News & World Report, Dec. 10, 1979, at 98; "Firms Learn Art of Keeping Union Out; Figures Indicate They're Passing Course," *Wall St. J.*, Apr. 19, 1977, at 1; Chernow, "The New Pinkertons," Mother Jones, May, 1980, at 50.

For example, although no concrete data exists tracking consultant involvement in the sharp rise of decertification petitions, a 1975 study determined that "[l]egal or expert assistance was often used [by management] when a union was decertified but almost never when union representation was retained." Fulmer, *When Employees Want to Oust Their Union,* 56 HARV. BUS. REV. 163, 168 (1978).

gists or other outsiders in labor disputes which come to its attention. One is left largely to combing recorded cases to ferret out instances where management enlisted such assistance. Growing sensitivity to consultant activity by unions has also elicited information concerning their transgressions, and the consultants' own publications and advertising reveal the services they offer employers. Evidence from all of these sources indicates that consultants counsel and commit a broad spectrum of unfair labor practices in every phase of labor-management activity.

One major service offered by consultants—"preventive labor relations"—involves a variety of employee relations gimmicks and programs which, in the consultant jargon, can "make unions unnecessary."[171] Although it is an unfair labor practice under section 8(a)(3) of the NLRA to discriminate against union members when hiring,[172] a favorite consultant technique is to screen job applicants in order to exclude union activists and those who have worked in union shops, hiring instead workers who have characteristics which to the consultant indicate "the least propensity towards unionism."[173] In one recent case, the Board found a violation when the "personnel consultant" who handled new applicants recorded in the file of a *hired* employee the notation "has always been a non-union man."[174] Consultants have advised at management seminars that only enough Blacks be hired to satisfy Equal Employment Opportunity Commission guidelines because, they say, Blacks are more likely to be pro-union.[175] Conversely, other ethnic groups and personality types are deemed less likely to be pro-union, and consultants recommend that they be preferred.[176] While the law has reached the

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[171] *See, e.g.*, "How to Make Unions Unnecessary," seminar by Advanced Management Research International, Inc. conducted by Dr. Charles L. Hughes and Jackson, Lewis, Schnitzler & Krupman. *See also* notes 8, 18, 22 and 25 and accompanying text *supra*.

[172] Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

[173] *1 Hearings, supra* note 5, at 260 (West Coast Industrial Relations Association, "The Non-Union Company"). For example, the U.S. Chamber of Commerce, in a guide for employers prepared by Thompson, Mann and Hutson, a management law firm, suggests "[c]arefully screening job applicants, while not asking specifically about union activism, *e.g.*, has the employee always worked in a union shop?"

[174] Electri-Flex Co., 238 N.L.R.B. No. 97, 99 L.R.R.M. 1510 (1978).

[175] *See* note 15 and accompanying text *supra*.

[176] RUB Sheet, *supra* note 10, No. 8, at 8-11 (Sep. 1979); *1 Hearings, supra* note 5, at 26-28 (statement of Alan Kistler).

more explicit illegal practices, it has been unable to combat those which are more subtle but equally effective.

Another active battleground for consultants is the representation election campaign. The NLRB has repeatedly found employers guilty of unfair labor practices or other conduct requiring an election rerun where consultants advised or controlled the employer's campaign.[177] Consultant speeches and publications

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[177] In some cases consultants have delivered "captive audience speeches," which include threats that an employer will go out of business, that the company will refuse to bargain and that employees will face more onerous working conditions if they persist in seeking to unionize. *E.g.*, Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB, 491 F.2d 1200 (9th Cir. 1974), *enforcing* 199 N.L.R.B. 250, 82 L.R.R.M. 1162 (1972) (Gladys Selvin, labor consultant). *See also* NLRB v. Mangurians, Inc., 566 F.2d 463 (5th Cir. 1978), *enforcing* 227 N.L.R.B. 113, 94 L.R.R.M. 1548 (1976) (Robert Poutre, employer's "labor relations representative" and "management consultant," visited employer's stores and suggested that employer would close if union won). In other cases, consultants have conducted unlawful interrogations or interviews of employees concerning their union activities or sympathies. *E.g.*, NLRB v. Tom Wood Pontiac, Inc., 447 F.2d 383 (7th Cir. 1971), *enforcing* 179 N.L.R.B. 581, 72 L.R.R.M. 1494 (1969) (Robert Laster, "labor relations consultant"); Ridgewood Management Co. v. NLRB, 410 F.2d 738 (5th Cir. 1969), *enforcing* 171 N.L.R.B. 148, 68 L.R.R.M. 1058 (1968), *cert. denied*, 396 U.S. 832 (1969) (Shawd, "labor relations consultant"); NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108 (5th Cir. 1963), *enforcing in part* 135 N.L.R.B. 971, 49 L.R.R.M. 1611 (1962) (Paul A. Saad, attorney); Sterling Faucet Co., 203 N.L.R.B. 1031, 83 L.R.R.M. 1530 (1973) (Farr Associates, psychological testing firm); The Miller Press, 197 N.L.R.B. 574, 80 L.R.R.M. 1483 (1972) (Dr. Ernest Larsen, Byron, Harless, Schaffer, Reid & Associates, Inc., psychological consulting firm); Automotive Warehouse Distributors, Inc., 171 N.L.R.B. 683, 68 L.R.R.M. 1169 (1968) (Ronald R. Morgan, attorney and labor consultant).

Employers have been found guilty of unfair labor practices where a consultant's presence was only mentioned or noted. *E.g., Ridgewood Management Co.* (unlawful solicitation rule); *Automotive Warehouse Distributors, Inc.* (threats, promises, interrogations and coercive statements; unlawful discharge of employee initiator of organizing drive); NLRB v. Stemun Mfg. Co., 423 F.2d 737 (6th Cir. 1970), *enforcing in part* 174 N.L.R.B. 288, 70 L.R.R.M. 1198 (1969) (Harvey Rector, labor consultant; coercive interrogations, threats of reprisals and promise of benefits, solicitation of employees to engage in surveillance of union activities, unlawful discharges, solicitation of and aiding employees in withdrawing unfair labor practice charges and statements); Plastic Film Products Corp., 238 N.L.R.B. No. 22, 99 L.R.R.M. 1216 (1978) (Blankenship threatened and intimidated employees subpoenaed to testify at a Board hearing); Meyer Stamping & Mfg. Co., Inc. 237 N.L.R.B. 1322, 99 L.R.R.M. 1205 (1978) (Rayford T. Blankenship, "labor counsel," suggested that company would close if union came in; company subsequently made discriminatory layoffs). *See also* PPG Indus., Inc., N.L.R.B. Case Nos. 11-CA-7573, 11-CA-7805,

spell out in detail how employers can wage aggressive anti-union campaigns, replete with standardized propaganda materials and pointers on how to skirt, evade and sometimes even violate the law.[178]

Consultants commonly use supervisors for unlawful purposes, including surveillance, interrogation and discharge of pro-union employees.[179] They have also been found guilty of section 8(2)(5)

11-CA-7846, 11-CA-7928 (A.L.J. decision, November 5, 1979), *reprinted in 2 Hearings, supra* note 38, at 51-121 (company during representation election campaign unlawfully threatened loss of jobs, plant closing and cessation of plant expansion, interrogated employees about union activities, solicited employees to withdraw union authorization cards, solicited grievances, promised benefits, threatened refusal to bargain, threatened more onerous working conditions, held disciplinary meetings without permitting union representation, and stringently enforced work rules); *id.* at 3-8, 12-21 (statement and testimony of R. V. Durham concerning involvement of lawyer-consultants Hogg, Allen, Ryce, Norton & Blue, Coral Gables, Fla., in PPG events); *id.* at 9-12 (statement of John Jones to similar effect); *3 Hearings, supra* note 10, at 219-54 (testimony of Terri Drake, Vicki Saporta, Christopher Scott, Lida Snalley and Alice Wilcox concerning activities of Hogg, Allen, *et al.*, and PPG Industries).

[178] A transcript of an address by one consultant—Fred R. Long, chairman of West Coast Industrial Relations Association, Inc.—to employers at a 1976 seminar on NLRB election procedures includes the following suggestions: (1) hire a consultant to guide their campaigns; (2) delay an election "up to a year" by raising "many, many, many issues" to force NLRB hearings; (3) delay filing briefs; (4) pad the bargaining unit with pro-management people; (5) fire union supporters for "unrelated" reasons; (6) "massage the workforce" by pretending to listen to their problems; (7) make only minor changes; (8) backdate company memoranda so that wage increases appear regularly scheduled; (9) attack the union's credibility; (10) stress strikes and union fines and (11) tell employees that the company could go out of business. The same consultant advised that employers "play the peripheries of the law" and observed that even if they were caught breaking the law, the "worst thing" that could occur was a second election—"and the employer wins 96% of those." *1 Hearings, supra* note 5, at 205-27. Most of these suggested actions are unfair labor practices. For his part, Mr. Long expressed doubt about but did not deny the accuracy of the tape. *3 Hearings, supra* note 42, at 310-11, 320-25 (statement of Fred Long); *id.* at 205-06 (affidavit of David Mathews); *1 Hearings, supra* note 5, at 194-202, 291 (testimony of Joel Smith); *id.* at 228-90 (West Coast Industrial Relations Association, Inc., "The Non-Union Company"). This last publication in effect counsels employers to engage in every tactic for which the McClellan Committee excoriated Nathan Shefferman 20 years ago. *See* INTERIM REPORT, *supra* note 54, at 256.

[179] *See, e.g.*, GTE Lenkurt, Inc., 204 N.L.R.B. 921, 83 L.R.R.M. 1684 (1973) (John Sheridan Associates, Inc., labor consultants).

A favorite practice is to assign each supervisor to monitor and record the

violations for using various devices to delay or frustrate collective bargaining.[180] Indeed, "bargaining to impasse" as a "prelude to union ouster" is a tactic recommended by consultants.[181] Decertification and deauthorization, which under the law are restricted to employee efforts alone,[182] also receive significant attention from consultants, who advise employers how they can lawfully or surreptitiously encourage these efforts and how they should campaign once a petition is filed.[183]

2. Recourse Under the LMRA

a. Agency Theory

Agency theory offers some possibility for reaching consultant activity directly. Under the LMRA, the term "employer" in-

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union attitudes and activities of particular employees. This practice is legal only if the information is legally obtained and there is no surveillance or impression of surveillance. Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir. 1978), *enforcing as modified* 228 N.L.R.B. 847, 96 L.R.R.M. 1361 (1977), *cert. denied,* 439 U.S. 911 (1978); Tipton Elec. Co. & Professional Furniture Co., 242 N.L.R.B. No. 36, 101 L.R.R.M. 1154 (1979).

[180] *E.g.,* NLRB v. Selvin, 527 F.2d 1273 (9th Cir. 1975), *enforcing in part,* 205 N.L.R.B. 512, 84 L.R.R.M. 1249 (1973) (employer's labor consultant Gladys Selvin avoided discussion of bargaining subjects and boasted to union representative that none of her clients had signed contracts); International Union of Elec. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied,* 400 U.S. 950 (1970) (labor relations consultant Harvey Rector refused to meet with union after filing "patently frivolous" objections to election and refusing to meet with union until all litigation was completed); NLRB v. Southland Cork Co., 342 F.2d 702 (4th Cir. 1965), *enforcing in part* 146 N.L.R.B. 906, 55 L.R.R.M. 1426 (1964) (employer claimed bargaining delays resulted partially from inability to spend time securing labor consultant who, when finally hired, was himself also "busy"). *See also* Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974), *enforcing* 199 N.L.R.B. 250, 82 L.R.R.M. 1162 (1972) (Gladys Selvin); NLRB v. Schweigers, Inc., 453 F.2d 255 (8th Cir. 1971), *enforcing as modified* 185 N.L.R.B. 420, 75 L.R.R.M. 1541 (1970) (Henry N. Teipel); Lozano Enterprises v. NLRB, 327 F.2d 814 (9th Cir. 1964), *enforcing* 143 N.L.R.B. 1347, 53 L.R.R.M. 1502 (1963) (Richard Fenton); San Luis Obispo County & Northern Santa Barbara Restaurant & Tavern Ass'n, 196 N.L.R.B. 1082, 80 L.R.R.M. 1584 (1972).

[181] *See, e.g., 1 Hearings, supra* note 5, at 45-50 ("De-Unionizing" seminar by Francis T. Coleman, Pierson, Ball & Dowd, Washington, D.C.); RUB Sheet, *supra* note 10, No. 13 (Feb. 1980).

[182] 29 U.S.C. § 159(e) (1976); *e.g.,* Sperry Gyroscope Co., 136 N.L.R.B. 294, 49 L.R.R.M. 1766 (1962).

[183] *See* publications cited in note 22 *supra.*

cludes "any person acting as an agent of an employer, directly or indirectly . . . ."[184] The Act further declares that, "[i]n determining whether any person is acting as an agent of another person so as to make such other person responsible for his act, the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling."[185] Thus, a common-law agency relationship must exist before a third party's actions are imputed to the employer.[186] A hired consultant, just like any supervisory or other employee who acts at management's behest with respect to employees, is undoubtedly an "agent" of management. The question is, should the NLRB also treat consultants as "employers," as section 2(2) directs, holding them liable as party respondents in unfair labor practice actions?

A review of those cases in which consultants coached the employer in the violative activity or directly engaged in it themselves reveals that such liability is rarely imposed and that the Board is apparently content to impute all acts to a single defendant, the employer.[187] Where the consultant has engaged in direct activity aimed at employees, the Board has occasionally been more willing to name the consultant as a respondent. For example, in *Sierra Academy of Aeronautics, Inc. and Rolland Weller and Jerry Weller, d/b/a/ Transamerican Employers Group, Inc.*,[188] the Board named two labor consultants as parties for promising unlawful benefits to employees during a representation campaign and attempting to trick a pro-union employee so as to prevent him from going to work on election day. The Trial Examiner was careful to note that this personal liability was predicated on the consultant's agency relationship with the employer.[189]

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[184] 29 U.S.C. § 152(2) (1976).

[185] *Id.* § 152(13) (1976).

[186] H.R. REP. No. 510, 80th Cong., 1st Sess. 36 (1947) (Conference Report).

[187] *See, e.g.*, GTE Lenkurt, Inc., 204 N.L.R.B. 921, 83 L.R.R.M. 1684 (1973) (John Sheridan Associates instructed supervisors to commit unlawful surveillance and interrogations; only employer named party respondent).

[188] 182 N.L.R.B. 546, 75 L.R.R.M. 1314 (1970).

[189] *Id.* at 548, 75 L.R.R.M. at 1316. The trial examiner expressly refused to reach the question "whether a labor consultant is subject to the Act's remedial process where he advises his principal to commit an unfair labor practice." *Id.* at 552 n.13, 95 L.R.R.M. at 1320 n.13. The Fifth Circuit addressed this issue seven years earlier in NLRB v. Guild Indus. Mfg. Corp., 321 F.2d 108 (5th Cir.

There is no apparent reason why the Board should substantively distinguish between a consultant's direct and indirect dealings with employees.[190] By not holding consultants personally responsible for the unfair labor practices they commit or urge, the Board encourages consultants to act irresponsibly.[191] Therefore, to the extent that an employer commits unfair labor practices at the behest of a consultant, or a consultant acts directly to control a campaign or the employer's business operations,[192] the consultant should be charged as well as the employer.[193] A more aggressive prosecutorial policy on this front by the Board might force employers and consultants alike to moderate their unlawful excesses.

b. NLRB Remedial Authority

The remedial authority of the NLRB has long been viewed by labor as too slow and too weak to effectively deter or punish employer abuses.[194] Labor's complaints would likely apply with equal force if the NLRB prosecuted consultants directly. Nevertheless, the Board currently falls far short of what it could be doing to maximize its control over improper consultant activity.

The cases involving labor consultant Gladys Selvin are in-

1963). The Board sought relief against a lawyer who had unlawfully interrogated employees on behalf of his client. The court said that a lawyer could be held only where he "was purposely aiding the employer in contravening the statute, rather than restricting his activity to matters within the scope of and relevant to rights of the employer by way of proceedings pending or imminent." *Id.* at 112. Although the court held that the attorney, Paul Saad, could not be named, Saad's conduct for Guild Industries and for another employer was held reportable under the LMRDA as persuader activity in a subsequent civil action. Wirtz v. Fowler, 372 F.2d 315, 320-24 (5th Cir. 1966). *See* Section II(A), *"The Department of Labor and the Labor-Management Reporting and Disclosure Act," supra.*

[190] The parallel to the advice-persuasion dichotomy under the LMRDA is obvious and equally unconvincing. *See* Section II(A)(1), " 'Advice' and 'Persuasion': Reconciling Sections 203(a)(4), (a)(5), (b)(1) and (c)," *supra.*

[191] *See* notes 195-97 and accompanying text *infra.*

[192] Testimony before the House Subcommittee on Labor-Management Relations indicated that this is often the case. *E.g., 1 Hearings, supra* note 5, at 59 (testimony of Alan Kistler); *id.* at 102-03 (testimony of Nancy Mills).

[193] Even if the employer is ignorant of a particular act by a consultant, both should be charged since § 2(13) eschews the need to prove specific authorization or ratification.

[194] *See* note 3 *supra.*

structive. In eleven cases decided between 1958 and 1975, Selvin was found to have practiced the same unlawful bargaining tactics for various employers—generally bargaining in bad faith and through a variety of vexatious and outrageous methods.[195] Nevertheless, the Board did not name this labor law recidivist as a party respondent until 1971, a circumstance which the Board said compelled it to limit the Trial Examiner's broad remedial order against her.[196] Only in Selvin's next two appearances as a *party* did the Board find that her "proclivity to violate the act" justified a broad order directing her not to refuse to bargain in good faith when she serves as any employer's agent.[197]

Naming consultants as parties will encourage the Board to collect information about consultant activities. Indeed, while the Selvin cases are strikingly similar factually, the Board seemed

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[195] NLRB v. Selvin, 527 F.2d 1273 (9th Cir. 1975), *enforcing* 205 N.L.R.B. 512, 84 L.R.R.M. 1249 (1973); Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB 497 F.2d 1200 (9th Cir. 1974), *enforcing* 199 N.L.R.B. 250, 82 L.R.R.M. 1162 (1972); Chalk Metal Co., 197 N.L.R.B. 1133, 80 L.R.R.M. 1516 (1972); Inter-Polymer Indus., Inc., 196 N.L.R.B. 729, 80 L.R.R.M. 1509 (1972), *petition denied,* 480 F.2d 631 (9th Cir. 1973); West Coast Casket Co., Inc., 192 N.L.R.B. 624, 78 L.R.R.M. 1026 (1971), *enforced in part*, 469 F.2d 871 (9th Cir. 1972); KFXM Broadcasting Co., 183 N.L.R.B. 1187, 76 L.R.R.M. 1852 (1970); Sir James, Inc., 183 N.L.R.B. 256, 74 L.R.R.M. 1511 (1970), *enforced,* 446 F.2d 570 (9th Cir. 1971); Architectural Fiberglass, 165 N.L.R.B. 238, 65 L.R.R.M. 1331 (1967); Duro Fittings Co., 130 N.L.R.B. 653, 47 L.R.R.M. 1363 (1961); California Girl, Inc., 129 N.L.R.B. 209, 46 L.R.R.M. 1533 (1960); Duro Fittings Co., 121 N.L.R.B. 377, 42 L.R.R.M. 1368 (1958).

[196] West Coast Casket Co., Inc., 192 N.L.R.B. 624, 624 n.2, 78 L.R.R.M. 1026 n.2 (1971).

[197] Chalk Metal Co., 197 N.L.R.B. 1133, 90 L.R.R.M. 1516 (1972), and NLRB v. Selvin, 527 F.2d 1273 (9th Cir. 1975). In the latter case, however, the 9th Circuit deemed "too broad" the Board's additional order barring Selvin from "in any manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act." 527 F.2d at 1277-78. The Board's former general counsel has noted the unusually broad nature of even the surviving part of this order. Irving, *Remedies and Compliance—Putting More Teeth Into the Act,* LABOR LAW DEVELOPMENTS: PROCEEDINGS OF 23D ANNUAL INSTITUTE ON LABOR LAW 349, 385 (1977).

In yet another case a Trial Examiner reluctantly found a union "technically" guilty of a § 8(b)(1)(B) violation for picketing Selvin's employer client to force her removal as its bargaining agent, stating: "[H]er reputation . . . is so notorious that one may well question whether any employer desirous of establishing a mutually satisfactory bargaining relationship would designate her as his negotiator." Local 986, International Brotherhood of Teamsters, 145 N.L.R.B. 1511, 1519, 55 L.R.R.M. 1205 (1964).

aware in only a few cases of her track record. Since Board remedial authority is not intended to punish past violations but rather to remedy them and deter future abuses,[198] only by naming consultants as parties and aggregating information about their activities can the Board successfully fashion remedies which will address likely future acts and will pass muster on judicial review.[199]

Recent years have seen the Board develop creative variations of traditional remedies to meet the exigencies of particular cases.[200] The NLRB has also on occasion applied extraordinary remedies, such as that devised in *Tiidee Products, Inc.*,[201] where the Board compelled an employer to pay the costs and expenses incurred by both the Board and the union in opposing the employer's "frivolous" litigation.[202] The Board's action in *Tiidee* is especially significant since it was Tiidee's labor relations consultant who carried out the violations prompting the novel remedy.[203]

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[198] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[199] The Board's usual remedy, a cease-and-desist order, does include the employer and "its officers, agents, successors and assigns," but this does not succeed in building a record against particular consultants who are chronic violators. Besides the weakness of using a generic term rather than naming specific parties, the unnamed party is left free to litigate later whether it was in fact an "agent" for purposes of the earlier proceeding.

Another advantage in theory to naming consultants as parties is that the Board can later use its contempt powers to punish consultants who disobey the earlier order. The Board has not used this authority aggressively, however. *See* Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. CHI. L. REV. 255 (1972).

[200] Irving, *supra* note 197, *passim*.

[201] 194 N.L.R.B. 1234, 79 L.R.R.M. 1175 (1972). *See also* Tiidee Products, Inc. 196 N.L.R.B. 158, 79 L.R.R.M. 1692 (1972), *enforced as modified sub nom.* International Union of Elec. Workers v. NLRB, 502 F.2d 349 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974).

[202] Tiidee Products, Inc., 194 N.L.R.B. 1234, 1236-37, 79 L.R.R.M. 1175, 1177-78 (1972).

[203] International Union of Elec., Radio & Machine Workers, AFL-CIO v. NLRB, 426 F.2d 1243, 1248 (D.C. Cir. 1970), *enforcing in part and remanding in part*, 174 N.L.R.B. 705, 70 L.R.R.M. 1346 (1969), *cert. denied*, 400 U.S. 950 (1970). The consultant, Harvey Rector, appeared also in Stemun Mfg. Co., Inc., 174 N.L.R.B. 288, 70 L.R.R.M. 1198 (1969), where the Board implied that he was responsible for preparing a false memorandum submitted to the Board in support of an employer's defense of a § 8(a)(3) charge. Although the Sixth Circuit determined that this conclusion was not based on sufficient evidence, it enforced the Board's findings that the company had committed other unfair

Whether or not an extraordinary remedy is justified in a particular case depends, of course, upon the gravity of the offense. At a minimum, however, the Board can certainly direct an employer to notify employees of a consultant's involvement. Where the consultant's role has been instrumental in the unlawful activity, the Board might order the employer to dispense with consultant services entirely.

c. NLRB Discipline and Disbarment of Practitioners

It is the rare employer who faces an organizing drive or NLRB proceeding without retaining legal or other counsel.[204] Many decided cases involve attorneys whose activities have been found to be unfair labor practices,[205] though the employer is almost always the sole party named a respondent by the Board.[206] What authority does the NLRB have to discipline or disbar practitioners before it? Under its general rulemaking powers,[207] the Board, like any other federal administrative agency, is empowered to promulgate rules governing admission, conduct and discipline—including disbarment—of practitioners before it.[208] But

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labor practices. NLRB v. Stemun Mfg. Co., 423 F.2d 737 (6th Cir. 1970).

[204] Many attorneys explicitly work as "labor consultants," but this distinction makes no difference for purposes of the law.

[205] *See* notes 171-83 and accompanying text *supra*. Representative cases include Easy-Heat Wirekraft, Div. of Bristol Products, Inc., 238 N.L.R.B. No. 224, 99 L.R.R.M. 1681 (1978) (attorney offered employer help to 20-year-old employee committee shortly after union lost representation election; violation of § 8(a)(2)); Roadway Express, Inc., 170 N.L.R.B. 1446, 68 L.R.R.M. 1075 (1968) (attorney told union after representation election that union was wrong and certification was therefore unlawful despite pre-election decision on this issue by Regional Director; attorney did not respond to NLRB Supplemental Notice to Show Cause; violation of LMRA § 8(a)(5)); NLRB v. Neuhoff Bros. Packers, Inc., 375 F.2d 372 (5th Cir. 1967), *enforcing* 151 N.L.R.B. 916, 58 L.R.R.M. 1524 (1965) (attorney-labor consultant coercively interrogated employees about union activities during preparation for unfair labor practice proceeding; violation of LMRA § 8(a)(1)).

[206] *See* notes 187-89 and accompanying text *supra*.

[207] 29 U.S.C. § 156 (1976).

[208] Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926); Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953); Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

The Board is not specifically empowered or directed by statute to do so, as is true of some other agencies. *E.g.*, 31 U.S.C. § 52(f) (1976) (practitioners before General Accounting Office); 38 U.S.C. §§ 3401-3405 (1976) (representatives of claimants before the Veterans Administration); 42 U.S.C. § 406 (1976) (repre-

the Board has exercised this authority sparingly, regulating practitioners in only three areas.[209] One of these governs practitioner behavior at Board hearings:

> Section 102.66
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> (d)(1) Misconduct at any hearing before a hearing officer or before the regional director or the Board shall be ground for summary exclusion from the hearing.
>
> (2) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.[210]

Despite the broad discretion afforded agencies in devising internal rules, a court will not imply agency authority over practitioners when the agency has not established such authority through rules. The NLRB discovered this the hard way when a federal court held that the Board could not disbar an employer's lawyer who had physically assaulted a Board lawyer at a hearing.[211] The court held that, since only section 102.66 then existed, the Board could at most exclude the attorney from the hearing.[212] The Board added section 102.66(d)(2) two months later and has since disciplined practitioners for physical threats or altercations at hearings.[213] But such behavior can hardly serve as effective grounds to control attorneys and consultants whose behavior—at least during Board proceedings—is more genteel, but whose overall demeanor insofar as the Board and its processes are concerned is contemptuous.

The few cases defining the reach of the Board's authority over practitioners are limited to conduct which either takes place at the hearing or is closely connected with it. In one case, two at-

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sentatives of OASDI claimants before the Department of Health, Education and Welfare); 43 U.S.C. § 1464 (1976) (representatives of claimants before the Department of the Interior).

[209] These areas are hearings in representation cases, 29 C.F.R. §§ 102.66(d)(1) & (2) (1979), unfair labor practices and other related proceedings, *id.* §§ 102.44, 102.72(b), 102.86 and 102.90, cases during a Board employee's tenure, *id.* at §§ 102.119, 102.120, and ex parte communications among parties, their representatives and Board personnel. *Id.* §§ 102.126-34.

[210] *Id.*

[211] Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[212] *Id.* at 140.

[213] *E.g.*, Ovalwood Dish Corp., 118 N.L.R.B. 947, 40 L.R.R.M. 1285 (1957); Herbert J. Nichol, 111 N.L.R.B. 447, 35 L.R.R.M. 1489 (1955); Robert S. Cahoon, 106 N.L.R.B. 831, 32 L.R.R.M. 1568 (1953).

torneys were suspended from Board practice for six months when they took Board files from a hearing room, photocopied them elsewhere and later offered them in evidence during cross-examination.[214] But the Board has also held that exclusion from a hearing does not bar a person from engaging in other activity related to a case.[215] To reach attorneys and other consultants under its current rules, then, the Board apparently must prove an abuse of the litigative process, such as a refusal to honor a subpoena,[216] subornation of perjury or similar conduct.

If this is the case, the Board has not pursued its authority to its best advantage. For example, when an employer engages in the type of frivolous litigation justifying an extraordinary remedy, as in *Tiidee Products*,[217] the Board could take action against both the employer and the practitioner who actually pressed the bogus claims. The Board has not done so,[218] however, leaving practitioners free to engage in these tactics again in later proceedings. Given the widely recognized abuse of the labor laws by parties who litigate solely in order to delay, Board passivity in this regard is very costly and most unnecessary.

Even when specific acts of misconduct have been alleged, the Board has failed to act. In one case the Board's General Counsel alleged that an employer's attorney was guilty of subornation of perjury and various ethical violations. But the Administrative Law Judge asserted that he was "unable to sit in judgment on the professional ethics of the attorney in question" and suggested that such complaints be directed instead to the state bar disciplinary board.[219]

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[214] Roy T. Rhodes, 152 N.L.R.B. 912, 59 L.R.R.M. 1209 (1965).

[215] Ovalwood Dish Corp., 119 N.L.R.B. 1666, 41 L.R.R.M. 1375 (1958).

[216] *See* NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 225 (8th Cir. 1970), indicating that the NLRB General Counsel's noncompliance with a Board order to produce materials may implicate § 102.44.

[217] *See* notes 201-02 and accompanying text *supra*.

[218] See, e.g., Koval Press, Inc., 241 N.L.R.B. No. 189, 101 L.R.R.M. 1086 (1979); J.P. Stevens & Co., Inc., 239 N.L.R.B. 738, 100 L.R.R.M. 1052 (1978), *review denied, transferred* 592 F.2d 1237 (4th Cir. 1979); John Singer, Inc., 197 N.L.R.B. 88, 80 L.R.R.M. 1340 (1972).

[219] W. C. McQuaide, Inc., 220 N.L.R.B. 593, 603 n.14, 90 L.R.R.M. 1345 (1975). *See also* Southern Florida Hotel & Motel Ass'n, 245 N.L.R.B. No. 49, 102 L.R.R.M. 1578 (1979) (employer counsel's unprofessional and unseemly remarks, including comments claiming senility of administrative law judge, are totally inappropriate and uncalled for, but no further disciplinary action other than strong disapproval is necessary).

In order to deal effectively with misconduct by practitioners, the Board must either enforce its present regulations or, better still, use its rulemaking authority to expand their reach. The Board might examine the procedures established under the Securities and Exchange Commission's Rule 2(e),[220] which regulates attorneys and other professionals who engage in securities work:

> *Suspension and disbarment.* (1) The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. Secs. 77a to 80b-20) or the rules and regulations thereunder.

While NLRB and SEC practice differ in certain respects,[221] provisions comparable to Rule 2(e)(ii) and (iii) are needed. The Board should not permit attorneys and other consultants who are regularly involved in employer labor law violations to represent parties in Board proceedings.[222]

No doubt the Board must proceed cautiously here. Control over practitioners should not be a law enforcement mechanism, but a protective one.[223] Any rule must respect the rights of parties to choose their own representatives[224] and must be exercised

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[220] 17 C.F.R. § 201.2(e)(1) (1979). Rule 2(e) was promulgated under general SEC authority to "make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter. . . ." Securities Exchange Act § 23(a)(1), 15 U.S.C. § 78w(a)(1) (1976). This authority is similar to that granted to the NLRB by the LMRA. 29 U.S.C. § 156 (1976).

[221] The relevant distinction is that non-professionals are entitled to represent parties before the Labor Board. *See* note 242 *infra*. Thus, a "qualifications" requirement would not be appropriate in all NLRB cases.

[222] Such consultants as Gladys Selvin and Rayford T. Blankenship regularly appear before the Board despite repeated findings of their active participation in employer violations. The NLRB recently denied a United Auto Workers motion to disbar Fred Long, of West Coast Industrial Relations Associates, Inc., for his anti-union activities. Catalina Yachts, 250 N.L.R.B. No. 48 (1980).

[223] *See* Touche Ross & Co. v. SEC, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,854 (2d Cir. 1979).

[224] *See* Backer v. Commissioner, 275 F.2d 141 (5th Cir. 1960).

in accordance with due process.[225] But the authority exists, and the Board would be wise to employ it.

d. Union Right to Information

Employer arrangements with consultants are often secret, with campaign planning and supervisor training undisclosed, leaving employees unaware that there is a "professional" effort at work to combat them and their union.[226] There is no question that the content of lawful employer-consultant dealings is entitled to confidentiality, just as is union-employee collaboration. But can a union compel disclosure of the basic facts of the consulting relationship itself other than by requesting the Department of Labor to enforce section 203(b) of the LMRDA?

Before a bargaining relationship arises, the employer has no duty to supply information to a union.[227] Before a union is on the scene at all, any employer-consultant arrangement for "preventive" measures would, of course, be completely within an employer's discretion not to disclose. And, during an organizing campaign, the period when the union would most benefit from knowledge of a consultant's involvement, the union has the least ability to discover it. Practically speaking, this rule stakes employers and their consultants to a significant head start in battling union formation.

The union may seek access to this information in several ways. If the consultant must report its arrangement or agreement with the employer to the Department of Labor and does so, a union can learn about it by affirmatively requesting the information from the Department.[228] Thus unions must be aware of the reporting requirements, must make a regular practice of seeking this information from the Department (knowing only the name of the employer—not the name of the filing consultant) and must be supplied with the information in a timely fashion. These pose considerable hurdles to a union in the thick of an organizing drive.

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[225] *See* Great Lakes Screw Corp. v. NLRB, 409 F.2d 375 (7th Cir. 1969), *denying enforcement to* 164 N.L.R.B. 149, 65 L.R.R.M. 1236 (1967).

[226] *1 Hearings, supra* note 5, at 101-03, 119-20 (testimony of Nancy Mills); *3 Hearings, supra* note 10, at 156-57, 168-69 (statement of Robert Muehlenkamp).

[227] J. I. Case Co. v. NLRB, 253 F.2d 149, 155 (7th Cir. 1958).

[228] 29 U.S.C. § 435 (1976).

The union may have an opportunity to learn who is advising or guiding the employer if NLRB representation or unfair labor practice hearings are held before an election. Often the consultant or attorney actually handles the employer's case at the hearing, or this information is elicited from the evidence presented. Although access to NLRB investigatory files in unfair labor practice complaints via the Freedom of Information Act[229] is rarely permitted, this is a fast-changing area of the law marked by conflicting holdings as to what the Board must disclose and when.[230] At best, however, use of the Freedom of Information Act is presently an uncertain means to enable unions to learn of consultant activity.

Whether a union certified as the employees' bargaining agent has the right to obtain from an employer information concerning any such arrangements with consultants is unclear. The relevance standard for determining whether information must be provided has been broadly interpreted, and the information sought need only be of potential use to a union in carrying out its statutory duties and responsibilities.[231] Unions have been successful in obtaining information about supervisory, managerial and other non-union employees when it could be shown to affect the union's representation of its members.[232] The Board recently directed the Association of General Contractors—a trade association which conducts an aggressive program to teach its employer-members how to set up open-shop and "double-breasted" operations—to furnish unions with the names of all its members, including the open-shop operations.[233] In doing so the Board applied a broadly permissive standard, asserting the

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[229] 5 U.S.C. § 552 (1976).

[230] *Compare* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); Capitol Times Co. v. NLRB, 103 L.R.R.M. 2656 (E.D.Wisc. 1980); Anderson Greenwood & Co. v. NLRB, 604 F.2d 322 (5th Cir. 1979) *with* Nemacolin Mines Corp. v. N.L.R.B., 467 F. Supp. 521 (W.D.Pa. 1979). *See also* Note, *The Impact of the FOIA on NLRB Discovery Procedures,* 10 U. MICH. J. L. REF. 476 (1977).

[231] NLRB v. Acme Industrial Co., 385 U.S. 432, 437-38 (1967).

[232] *See, e.g.,* International Harvester Co., 241 N.L.R.B. No. 94, 100 L.R.R.M. 1588 (1979) (managerial and supervisory employees); Middleboro Fire Apparatus, Inc., 234 N.L.R.B. 888, 97 L.R.R.M. 1384 (1978) (successor employer's officers, directors and stockholders).

[233] Associated Gen. Contractors of Cal., 242 N.L.R.B. No. 124, 101 L.R.R.M. 1260 (1979); *See 1 Hearings, supra* note 5, at 428-33, 436-41 (statement of Robert A. Georgine).

union's right to determine for itself the significance and utility of the information sought.[234]

A union may be able to obtain information from an employer about consultant arrangements on the same theory. Bargaining, contract administration and the character of relations with the employer in general are highly dependent upon the nature of an employer's outside help. No confidentiality interest protects this information; even if the consultant is an attorney, the attorney-client privilege does not extend to the fact of the retainer, the client's identity, the condition of employment and the amount of the fee.[235] Unions may therefore be able to obtain this highly relevant information through a conventional approach.

C. Bar Discipline

The pervasive involvement of attorneys in every phase of union-busting activity[236] should deeply concern the organized bar. Bar discipline could be a major deterrent to attorney-consultant misconduct since the American Bar Associations's Code of Professional Responsibility[237] reaches beyond statutory violations. And where attorneys do break the law, bar discipline can be pursued in addition to other legal remedies regardless of their outcome.

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[234] Associated Gen. Contractors of Cal., 242 N.L.R.B. No. 124, at 9, 101 L.R.R.M. at 1262-63 (1979).

[235] *In re* Semel, 411 F.2d 195, 197 (3d Cir. 1969); Wirtz v. Fowler, 372 F.2d 315, 332-33 (5th Cir. 1966).

[236] *See* note 205 and accompanying text *supra*. *See also 1 Hearings, supra* note 5, at 33-35, 53-54 (testimony of Alan Kistler); *id.* at 45-50 ("Deunionizing," seminar by attorney Alfred T. Demaria, of Clifton, Budd, Burke & DeMaria, New York, N.Y.); *id.* at 190-94 (testimony of Stephen I. Schlossberg); *id.* at 310-13 (testimony of Robert Fox and J.C. Turner); *id.* at 419-21, 434-35 (statement of Robert Georgine); *2 Hearings, supra* note 38, at 3-21, 24-27 (testimony of R.V. Durham and affidavit of John Jones); *id.* at 201-02 ("Employee Relations for the Non-Union Employee," management seminar by attorney Howard Bernstein, of Pope, Ballard, Shepard & Fowle, Chicago, Ill.); *id.* at 204-09 ("Public Employee Unionism," management seminar by A. Samuel Cook, of Venable, Baetjer & Howard, Baltimore, Md.); Craver, *supra* note 142; *3 Hearings, supra* note 10, at 220-24 (statement of Vicki Saporta); RUB Sheet, *supra* note 10, Nos. 2, 4, 5 & 11 (Mar., May, June and Dec. 1979), *passim*.

[237] The American Bar Association Commission on Evaluation of Professional Standards is currently engaged in writing new Model Rules of Professional Conduct. Analysis is premature, however, given the frequency of revisions thus far.

In practice, however, there is no evidence of bar concern with the unethical activities of attorney-consultants. The results of a recent survey of management attorney compliance with the LMRDA[238] dispels any notion that bar discipline currently operates as an effective deterrent.[239] Nevertheless, application of bar discipline to attorney-consultant activities may only await efforts by the NLRB, the Department of Labor,[240] unions, law-abiding management and labor attorneys and others[241] to initiate investigations by bar disciplinary committees.[242] A brief review of the Code of Professional Responsibility suggests some likely opportunities for such recourse.

When an attorney counsels or assists an employer-client in conduct which the attorney knows is illegal or fraudulent[243] or himself engages in any illegal conduct,[244] he is, of course, subject

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[238] Craver, *supra* note 142, at 632-39.

[239] If the prospect of criminal sanctions and the enforcement authority of the Department of Labor have been unable to deter the pervasive unreported persuader and information-retrieval activity by employers' lawyers disclosed by the instant survey, it is certainly fatuous to suggest that bar disciplinary committees will effectively regulate this area.

Id. at 627-28.

To be sure, the bar's failure to police labor law practitioners is symptomatic of more pervasive weaknesses in Code enforcement. *See generally* American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). But this does not, of course, excuse laxity in particular fields of practice.

[240] The Department reportedly is engaged in some notification of state bar associations. Taking Aim at Union-Busters, Business Week (Nov. 12, 1979).

[241] Note, for example, the suggestion by Rep. Ray Kogovsek (Colo.) that the House Labor-Management Subcommittee bring Hogg, Allen, Ryce & Norton, Coral Gables, Fla., to the attention of the American Bar Association Ethics Committee. *2 Hearings, supra* note 38, at 27.

[242] The bar should also be concerned with the unauthorized practice of law by non-attorney consultants who profess to give legal advice or to represent employers in proceedings where lay representatives are not permitted. Labor consultant Rayford T. Blankenship, for example, who has been found guilty of various unfair labor practices by the NLRB, *see* Plastic Film Prods. Corp., 238 N.L.R.B. No. 22, 99 L.R.R.M. 1216 (1978), and Meyer Stamping & Mfg. Co., Inc., 237 N.L.R.B. 1322, 99 L.R.R.M. 1205 (1978), has recently been charged with the unlawful practice of law in connection with work he performed for an Indiana company. Indiana v. Blankenship, CR No. 4 (Marion Super. Ct., Crim. Div., filed January 18, 1980).

[243] ABA CODE OF PROF. RESPONSIBILITY DR 7-102(A)(7).

[244] *Id.* DR 7-102(A)(8).

to discipline. Thus, an attorney who instructs an employer how to violate the law but who falls within the "advice" exemption from the LMRDA reporting requirements may be disciplined.

An attorney also runs afoul of the disciplinary rules if he knowingly uses perjured testimony or false evidence,[245] including the creation or preservation of known or obviously false evidence,[246] or if he knowingly misstates a fact.[247] For example, if a company dismisses pro-union employees and fabricates evidence for a later Board hearing on the matter, an attorney who participates in such conduct may be disciplined.

Another disciplinary rule proscribes the advance of "a claim or defense that is unwarranted under current law" unless done in a good faith effort to change existing law.[248] The Ethical Considerations explain that "a lawyer is not justified in asserting a position in litigation that is frivolous."[249] Tactics such as those used in *Tiidee Products*,[250] which elicited extraordinary remedies from the NLRB, would therefore appear to be included. In two recent cases, the Board found employers guilty of violations of section 8(a)(4)[251] of the LMRA for filing malicious prosecution suits against employees who had filed unfair labor practice charges.[252] If employer counsel assisted this unlawful conduct knowing its actual retaliatory purpose, they are presumably subject to the rule which forbids an attorney from filing a suit or taking any other action "when he knows or when it is obvious

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[245] *Id.* DR 7-102(A)(4). *See* W.C. McQuaide, Inc., 220 N.L.R.B. 593, 90 L.R.R.M. 1345 (1975) (allegation of NLRB General Counsel that employer's attorney engaged in subornation of perjury and unethical conduct should be directed to state bar association).

[246] ABA CODE OF PROF. RESPONSIBILITY DR 7-102(A)(6).

[247] *Id.* DR 7-102(A)(5).

[248] *Id.* DR 7-102(A)(2).

[249] *Id.* EC 7-4.

[250] *See* notes 201-02 and accompanying text *supra*.

[251] Section 8(a)(4) states: "[i]t shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . ." 29 U.S.C. § 158(a)(4) (1976).

[252] United Credit Bureau of America, Inc., 242 N.L.R.B. No. 138, 101 L.R.R.M. 1277 (1979), George A. Angle, 242 N.L.R.B. No. 112, 101 L.R.R.M. 1209 (1979); *cf.* Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979) (NLRB found employer guilty of a violation of § 8(a)(4); Seventh Circuit refused to enforce), *denying enforcement to* 239 N.L.R.B. 445, 99 L.R.R.M. 1652 (1978).

that such action would serve merely to harass or maliciously injure another."[253]

Disciplinary Rule 7-102(B)(1) requires an attorney to "call upon his client to rectify" a fraud perpetrated on a tribunal; if the client refuses, the attorney must reveal it himself unless the information is protected as a privileged communication. This exemption was recently advanced by two management labor attorneys charged with obstruction of NLRB proceedings, subornation of perjury and conspiracy to do the same during their representation of a Philadelphia clothing store in an NLRB hearing.[254] It is hardly in the best interest of the bar, however, to permit attorneys to claim "privileged communication" as a shield from legal recourse for labor law violations, particularly when they deliberately participated in the fraudulent or illegal conduct.

Attorney-consultant activity also raises important issues involving attorney solication of clients.[255] Employers who find

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[253] ABA CODE OF PROF. RESPONSIBILITY DR 2-110(B)(1).

[254] United States v. Steiner, Crim. No. 79-216 (E.D.Pa. 1979). The attorneys, Julius Steiner and Allan Dabrow, associates in the Philadelphia firm of Pechner, Dorfman, Wolffe, Rounick & Cabot, were ultimately acquitted, but the court ordered the U.S. Attorney to turn the trial transcripts over to the Pennsylvania bar disciplinary board for an investigation of the attorneys' conduct. "Labor Lawyers Acquitted But Face Pa. Discipline," *National Law Journal* (Dec. 10, 1979). The verdict did not, of course, resolve the merits of defendants' DR 7-102(B) claim.

Pechner, Dorfman partner Stephen J. Cabot has acquired a widely noted anti-union reputation. *See, e.g.*, Martin, "Labor Nemesis: When the Boss Calls in This Expert, the Union May Be in Real Trouble," *Wall St. J.* (Nov. 19, 1979) (profile of Cabot); Rouse, "'Pro-Employer' Not 'Anti-Union,'" *The Philadelphia Inquirer* (Aug. 20, 1979), at 6-B (interview with Cabot); Herman, "Bosses Learn Who Are Easiest Union Targets," *The Philadelphia Bulletin* (Sept. 21, 1979), at C-15 (report of management seminar on "Making Unions Unnecessary" conducted by Cabot). *See also* Cabot & Linn, *What Management Can Do During a Union Organization Campaign*, 22 PRAC. LAW. 13 (Mar., 1976); S. CABOT, LABOR MANAGEMENT RELATIONS ACT MANUAL (Warren, Gorham & Lamont, Inc. (1978)). Cabot was the employer attorney whom the NLRB General Counsel charged had suborned perjury and engaged in other professional misconduct in W.C. McQuaide, 220 N.L.R.B. 593, 90 L.R.R.M. 1345 (1975). *See* notes 219 and 245 and accompanying text *supra*.

[255] The bar should be alert to solicitation and other conduct stirring up anti-union business through efforts which ostensibly satisfy but in fact pervert the principles established by the Supreme Court in *In re* Primus, 436 U.S. 412 (1978). In that case an attorney was disciplined for offering free legal assistance to a prospective client on behalf of the American Civil Liberties Union.

themselves confronted with a union organizing drive are often contacted by consultants who offer their services to defeat the union.[256] An attorney-consultant who does this would appear to violate DR 2-103(A), which prohibits an attorney from soliciting employment by a layperson who has not sought his advice regarding employment of a lawyer.[257]

It is common for attorney-consultants to conduct well-advertised seminars and publish instruction manuals and other guides on how to prevent, defeat or de-certify unions.[258] These seminars are commonly sponsored by private, profit-making consultant organizations and conducted by management attorneys experienced in anti-union tactics. Presentations and promotional material emphasize that employers should use the offered instruction and employ professional help when they do so. Since seminars are clearly aggressive "how-to" sessions—not dispassionate educational forums for laypersons or lawyers—Disciplinary Rule 2-104(A)(2) appears to forbid participating attorneys from thereafter accepting employment from

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The Supreme Court held, however, that in so acting she enjoyed First and Fourteenth Amendment protections because "her actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU, rather than to derive financial gain" either for the organization or for herself, *id.* at 422, 426-32, and implicated no evils of solicitation which the state had a right to prevent, *id.* at 426. Union-busting attorneys, then, may try to operate under the guise of a non-profit association. Although the Court warned that sham arrangements would not be protected, *id.* at 428 n.20, it is up to the bar and labor to be vigilant here. *Cf.* UAW v. National Right to Work Legal Defense and Educ. Foundation, Inc., 590 F.2d 1139 (D.C.Cir. 1978) (non-profit legal organization financed in part by employers not subject to LMRDA reporting requirements; fund is not controlled by employers and operates as buffer between interests of employer and those of employee clients).

[256] *1 Hearings, supra* note 5, at 35-36 (letter from Mid America Employer Relations Association ("MERA"), a division of West Coast Industrial Relations Association, to employer offering MERA's services to help employer remain "union-free," sent after union filed representation election petition); *see also* letter from Industrial Relations Consultants to employer offering post-election services for collective bargaining or "long range preventive labor relations" (on file with author).

[257] The rule is consistent with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (attorney approached auto accident victims and succeeded in securing them as clients; bar may constitutionally discipline attorney for in-person solicitation of clients for pecuniary gain under circumstances likely to pose dangers the state has right to prevent).

[258] *See* note 19 and accompanying text *supra.*

their employer pupils.[259]

Similarly, since seminars are often marked by descriptions of the speaker's own past efforts fighting unions,[260] a lawyer may be within the ambit of DR 2-104(A)(4), which forbids him to accept resulting employment if he either emphasized his own experience or reputation or undertook to give individual advice. In addition, seminar promotional material describing featured attorneys as "specializing" in labor law and anti-union matters[261] may violate the rule which discourages such claims.[262]

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[259] ABA CODE OF PROF. RESPONSIBILITY DR 2-104(A)(4) states, in part:

> (A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
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> . . . (2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

[260] *See, e.g., 1 Hearings, supra* note 5, at 205-27 (transcript of tape recording of seminar by Fred Long).

[261] *See, e.g.*, "The Process of Decertification," *reprinted in 1 Hearings, supra* note 5, at 51, which states: "[t]he conference will be conducted by Alfred T. DeMaria, Partner with the labor law firm of Clifton Budd Burke & DeMaria. Mr. DeMaria specializes in combatting union organizational campaigns and in developing programs to keep companies operating in a union-free environment."

[262] ABA CODE OF PROF. RESPONSIBILITY DR 2-105 provides:

> Limitation of Practice
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> (A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].
>
> (3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance

Bar restrictions on these activities can serve an important role in regulating the union-busting industry. These restrictions, if carefully devised, should not interfere with First Amendment interests. Union-busting seminars and other communications leading to employment relationships enjoy less constitutional protection than other expression because they are essentially commercial transactions in which speech is "an essential but subordinate element."[263] In any case, the current neglect by the bar encourages a disregard of ethical standards that fuels the fast-growing union-busting industry.

D. Federal Criminal Law

When consultants lie to or commit fraud upon the NLRB or any other federal agency, or influence their employer clients to do so, the Department of Justice can prosecute them under one or more sections of the federal criminal code. Little-used at present in labor cases, criminal sanctions wield a potentially strong *in terrorem* impact on consultant lawlessness.

Title 18, Section 1001 of the United States Code prohibits certain dishonest statements and submissions to federal agencies,[264] and the Justice Department has proceeded under section 1001 in connection with NLRB proceedings.[265] The crime consists of five

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with the rules prescribed by that authority.

[263] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978). Note, however, that this area of the law is undergoing current ferment. *See, e.g.*, discussion in ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, "Tentative Draft No. 6.," Model Rules of Professional Conduct.

[264] 18 U.S.C. § 1001 (1976) provides:

> Statements or Entries Generally
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> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[265] *See, e.g.*, United States v. Krause, 507 F.2d 113 (5th Cir. 1975) (false unsworn response by union official during NLRB fact-finding hearing following petition for election). *See also* Bryson v. United States, 396 U.S. 64 (1969); Sells v. United States, 262 F.2d 815 (10th Cir. 1958), *cert. denied*, 360 U.S. 913 (1959) (false non-Communist affidavits filed by union officers). Although § 1001 also reaches statements made to the Department of Labor, § 209 of the

elements—a statement, falsity, materiality, intent and agency jurisdiction—[266] which the courts have interpreted broadly.[267] Accordingly, the Department of Justice can prosecute a consultant whenever the consultant himself engages in direct, dishonest contact with the Board.

Section 1505[268] may also apply to certain other consultant activity. That section prohibits anyone from "corruptly" endeavoring to influence either witnesses in any agency proceeding or the administration of the law under which the proceeding is held.[269]

LMRDA already provides for prosecution and penalties for false statements and nondisclosure of material facts. *See* notes 146-47 and accompanying text *supra*.

[266] United States v. Lange, 528 F.2d 1280, 1287 (5th Cir. 1976).

[267] A statement is covered whether it is written, oral, sworn or unsworn, United States v. Krause, 507 F.2d 113, 117 (5th Cir. 1975), whether or not it is required by law to be made, United States v. Olin Corp., 465 F. Supp. 1120, 1130 (W.D.N.Y. 1979), and regardless of the context or proceeding so long as the statement "substantially impair[s] the basic functions entrusted by law" to the agency. United States v. Krause, 507 F.2d 113, 117-18 (5th Cir. 1975). An example is misrepresenting facts to an investigator when the facts are peculiarly within the declarant's knowledge. *Id.* at 118. Thus, the statute reaches consultant statements to Board agents during unfair labor practice investigations. A statement is material if it tends to influence or has the capacity of influencing a tribunal's decision. United States v. Voorhees, 593 F.2d 346, 349 (8th Cir.), *cert. denied*, 441 U.S. 936 (1979). No actual loss or damage to the government need result. United States v. Godel, 361 F.2d 21, 24 (4th Cir.), *cert. denied*, 385 U.S. 838 (1966). Agency jurisdiction has been found to include the investigatory as well as adjudicatory stages. United States v. Krause, 507 F.2d 113, 117 (5th Cir. 1975).

[268] 18 U.S.C. § 1505 (1976).

[269] Section 1505 provides, in relevant part:

> *Obstruction of proceedings before departments, agencies, and committees*
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> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or . . .
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any commit-

Like section 1001, section 1505 is a flexible provision with a broad reach. Since it is not confined to adjudicatory proceedings, it covers every step in an NLRB action, including the investigatory stage after a party has filed an unfair labor practice charge but before a complaint is issued.[270] It is clear that section 1505 reaches any attempt to influence anyone who the party expects will be a witness, even if the person is not subpoenaed or does not actually testify.[271] Falsifying records in anticipation of an agency subpoena[272] and filing false documents afterward[273] are thus culpable actions. Section 1505 can be used, then, to reach consultants who do not themselves communicate with Board or other government personnel but who advise and coach their employer clients to deceive the government or to file false statements or documents at any stage of a Board inquiry.

The Justice Department has also proceeded against labor consultants under section 1622,[274] which prohibits the subornation of perjury. The elements of this crime are similar to those of section 1505, though this section requires that the suborned perjury (which includes an oath requirement) actually be committed.[275] Therefore, section 1622 covers a narrower range of unlawful consultant activity than does section 1505.

While the federal labor laws have generally not been applied to reach consultants who commit or encourage unfair labor practices,[276] these provisions of the federal criminal statutes can be

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tee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"Corruptly" means with intent to obstruct a proceeding. *See* United States v. Abrams, 427 F.2d 86, 90 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970).

[270] Rice v. United States, 356 F.2d 709, 712-16 (8th Cir. 1966). *See also* United States v. Browning, Inc., 572 F.2d 720, 722-25 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978) (Bureau of Customs investigation is a "proceeding" under § 1505; term has achieved broad meaning in administrative agency context).

[271] Stein v. United States, 337 F.2d 14, 21-22 (9th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965); United States v. Batten, 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965).

[272] United States v. Tallant, 407 F. Supp. 878, 888 (N.D.Ga. 1975).

[273] United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976).

[274] 18 U.S.C. § 1622 (1976) provides: "[W]hoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

[275] *See, e.g.*, United States v. Tanner, 471 F.2d 128, 135 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

[276] *See* Sections II(B)(2)(b), "Agency Theory," and II(B)(2)(b), "NLRB Re-

used whenever the NLRB either will not or cannot proceed. They may also be used to supplement Board charges, since the mild penalties for unfair labor practice violations lack the deterrent and punitive qualities of criminal sanctions. Again, however, it will take the vigilance of unions and others to bring culpable consultant behavior to the attention of the Department of Justice.

E. Employee Rights of Privacy

Individual privacy became a leading civil liberties issue during the 1970's, fueled by the explosive growth and use of information technology, by indiscriminate disclosures among government agencies and private companies and by specific abuses in various investigatory arms of federal, state and local governments.[277] Individual privacy rights in the workplace are of principal concern because they pose problems different from those in the public sector, where state involvement is more directly affected by emerging constitutional privacy theory.

Tactics used by consultants in both "preventing" unions before they appear and in defeating them later in representation elections commonly involve violations of any civilized notion of personal privacy. For example, sophisticated psychological and social-science analysis is a favorite tool for screening applicants by first supposedly predicting receptivity to union organization and thereafter indoctrinating employees and structuring their work environment so as to minimize the likelihood of union activity.[278] Then, during representation elections, the well-organized consultant directs the employer and its supervisors to keep track of the activities and attitudes of each employee.[279] Employer freedom to maintain and examine personnel files and consultant access to them are therefore essential to these anti-union manipulations.

One available response to such consultant conduct is legisla-

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medial Authority," *supra*.

[277] *See generally* U.S. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977); *id.*, Appendix 3: Employment Records (1977); R. SMITH, PRIVACY: HOW TO PROTECT WHAT'S LEFT OF IT (1979); J. SHATTUCK, RIGHTS OF PRIVACY (1977); A. WESTIN, PRIVACY AND FREEDOM (1967); *2 Hearings, supra* note 38, at 307-40.

[278] *See* notes 24-27 and accompanying text *supra*.

[279] *See* note 110 and accompanying text *supra*.

tion which restricts the content of personnel files and third party access to them while granting access rights to employees. Six states have enacted laws controlling private sector personnel files;[280] in the rest, employers appear able to proceed freely.

The Michigan statute[281] is the most far-reaching, but even it falls far short of what is necessary to halt employer and consultant abuses. While the Michigan law authorizes employee access, copying rights and limited opportunities to amend the files, information excepted from employee access includes names of job references, staff planning materials, medical reports which are otherwise available to the employee, personal information about a third person, if disclosure would be an unwarranted invasion of privacy, and certain investigatory matters.[282] Employers cannot gather or record information about an employee's "associations, political activities, publications, or communications of nonemployment activities," but information about on-premises activity during working hours which interferes with the employee's or another employee's performance of his duties may be collected.[283] The Act provides for a civil damages remedy of up to $200.00 costs and attorney's fees for "willful and knowing violations."[284]

It is easy to see potential loopholes in such a statute as applied to the activities of a consultant. The Michigan law contains no actual restrictions on third-party disclosure but merely mandates notification of disclosure to employees when the employer reveals disciplinary information.[285] Whether or not recording union activities is permissible is unclear. Employers remain free to make access an onerous and slow procedure. Finally, penalties are light, and employee plaintiffs must satisfy a high standard of proof.

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[280] *1 Hearings, supra* note 5, at 160-71. The states are California, Connecticut, Maine, Michigan, Oregon and Pennsylvania.

Several states have statutory access controls for public employee files. *1 Hearings, supra* note 5, at 507, 556 (testimony of John H.F. Shattuck). Federal employees enjoy broad access rights under the Privacy Act of 1974, 5 U.S.C. § 552a (1976).

[281] Bullard-Plawecki Employee Right to Know Act, MICH. COMP. LAWS ANN. § 423.501-.512 (1978).

[282] *Id.* § 423.501-.505, .507, .509 (1978).

[283] *Id.* § 423.508 (1978).

[284] *Id.* § 423.511 (1978).

[285] *Id.* § 423.506 (1978).

As more states[286] and perhaps the federal government[287] consider personnel file legislation, they should be encouraged to draft their statutes with consultant practices in mind.[288] Public opinion studies indicate that the sentiments of employees and employers differ sharply toward the desirability and content of statutory personnel file controls.[289] Even if strongly protective statutes are enacted, unscrupulous employers and consultants may seek to avoid them by maintaining dual file systems.[290] Nevertheless, since popular concern about privacy is likely to remain high, labor has a significant interest in advancing such legislation to meet the intrusive conduct of union-busters and protect employee rights.

F. Tortious Interference Doctrine

The common law doctrine of wrongful interference with con-

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[286] Similar bills are pending in at least six states: Illinois, Indiana, Maryland, Massachusetts, New York and Washington. *1 Hearings, supra* note 5, at 161 (statement of Michigan Chapter, American Civil Liberties Union).

[287] It has been suggested that a federal access statute be enacted, perhaps as an amendment to the National Labor Relations Act. *2 Hearings, supra* note 38, at 135 (testimony of Alan Westin).

[288] Factors to consider include (1) which employers and employees to cover, (2) when, where and how to permit employee access, (3) access for employee representatives, including labor unions, (4) controls on third party disclosures, (5) restrictions on information which can be gathered and recorded, (6) copying rights, (7) correction rights, (8) right to add to files, (9) maintenance and destruction of old information, (10) data exchange within firms, (11) content of initial job applications and interviews, (12) criminal and other investigations, (13) individual remedies and (14) penalties. *See generally 1 Hearings, supra* note 5, at 153-59 (statement of Michigan Chapter, American Civil Liberties Union).

[289] A poll by Louis Harris & Associates found that employees favored such legislation by 65 to 35 percent; employers were opposed by 64 to 33 percent. Eighty-three percent of the employees favored prior notification in the event of any employer release of information to others. *1 Hearings, supra* note 5, at 447 (testimony of Louis Harris). *See also id.* at 554-81 (testimony of John H.F. Shattuck); *2 Hearings, supra* note 38, at 125-52, 318-34 (testimony and article by Alan F. Westin). In Michigan, heavy lobbying by the business community weakened the original bill. *1 Hearings, supra* note 5, at 121.

[290] Among the problems encountered by the Michigan ACLU since the Michigan statute went into effect on January 1, 1979, is that "[c]ompanies who use psychological evaluation testing from outside firms have denied that there are any notes or test results kept by them or by the outside testing firm." *1 Hearings, supra* note 5, at 159 (report of Michigan Chapter, American Civil Liberties Union).

tractual relations[291] also holds some promise as a basis for litigation against certain consultant practices. It offers flexibility not only of theory but of forum, opening both federal and state courts to unions and employees who would fight consultant-inspired attacks. But whether or not this doctrine is viable for this purpose awaits "litigating elucidation."[292]

Prior to the Norris-LaGuardia Act, courts applied this ancient doctrine against labor unions to enjoin strikes and to enforce "yellow dog" contracts whereby workers contracted with their employer not to join a union.[293] Now, however, the doctrine poses fewer dangers to organizational efforts, except in the case of inter-union "raiding"[294] and may in fact be useful in protecting collective bargaining agreements from union-busters.

The tort has essentially four elements: (1) a valid contract between plaintiff and a third party, in effect at the time of defendant's wrongful conduct; (2) defendant's procurement of the third party's breach of the contract; (3) intentionally and (4) with resultant damage to the plaintiff.[295] Analysis of these elements in the consultant context illuminates the doctrine's potential utility for unions and employees in their legal struggle against union-busters.

The doctrine reaches nearly all legal contracts[296] and should thus be applicable to collective bargaining agreements. In some jurisdictions the related doctrine of wrongful intereference with prospective advantage protects even precontractual relations,[297] such as at the negotiation stage, though more restrictive standards of proof may apply to the wrongfulness of defendant's means or intent.[298] In addition, in most jurisdictions even voida-

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[291] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 762-774A (1979) [hereinafter cited as RESTATEMENT].

[292] International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

[293] W. PROSSER, *supra* note 291, at 941, 944 and cases cited therein.

[294] Union-raiding itself is proscribed among AFL-CIO affiliates. Constitution of the AFL-CIO, Article 20.

[295] Hannigan v. Sears, Roebuck & Co., 410 F.2d 285, 291 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969).

[296] RESTATEMENT, *supra* note 291, § 766, comment d; W. PROSSER, *supra* note 291, at 931, 962.

[297] RESTATEMENT, *supra* note 291, § 766B; W. PROSSER, *supra* note 291, § 130; Morse v. Swank, Inc., 459 F. Supp. 660, 667 (S.D.N.Y. 1978), and cases cited therein.

[298] *See, e.g.*, Susskind v. Ipco Hospital Supply Co., 49 A.D.2d 915, 373

ble contracts and contracts terminable at will are protected, the central concern being the property interest in future business relations.[299] Therefore, if a union can prove the consultant's improper procurement of the employer action, it should be no defense that the employer followed the statutory procedures in terminating or modifying an agreement[300] or acted after a union loss in a properly conducted representation or deauthorization election.[301]

The second element, procurement, probably does not require an actual breach[302]—a substantial impairment or modification of the contract may suffice.[303] Moreover, the "inducement" element comprehends both gross and subtle means of interference if

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N.Y.S.2d 627, 629 (2d Dept. 1975) (no actual contract necessary for action to lie if defendant interfered with precontractual negotiations by fraudulent, deceitful or illegal means).

[299] W. PROSSER, *supra* note 291, at 932; RESTATEMENT, *supra* note 291, § 766, comments f and g; *e.g.*, Alpha Distrib. Co. of Cal. v. Jack Daniel Distillery, 454 F.2d 442, 450 (9th Cir. 1972), *cert. denied*, 419 U.S. 842 (1974); Zelinger v. Uvalde Rock Asphalt Co., 316 F.2d 47, 50 (10th Cir. 1963); A.S. Rampell Inc. v. Hyster Co., 3 N.Y.2d 369, 375-77, 165 N.Y.S.2d 475, 480-82 (1957).

[300] 29 U.S.C. § 159(d) (1976).

[301] 29 U.S.C. §§ 159(c) & 159(e) (1976).

[302] *See, e.g.*, Alpha Distrib. Co. of Cal. v. Jack Daniel Distillery, 454 F.2d 442, 449 (9th Cir. 1972) ("an action may lie even though no actual breach of contract was induced"), *cert. denied*, 419 U.S. 842 (1974). *But see* Jack L. Inselman & Co. v. FNB Financial Co., 41 N.Y.2d 1078, 1080, 396 N.Y.S.2d 347, 349 (1977) ("[i]n order for the plaintiff to have a cause of action for tortious interference of contract, it is axiomatic that there must be a breach of that contract by the other party . . ."). The tort and contract actions are separate if no breach is required.

[303] *E.g.*, Hannigan v. Sears, Roebuck & Co., 410 F.2d 285, 291 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969):

> [T]here is no legally significant distinction between unabashed third party conduct which induces one party to outrightly repudiate and breach its contract with another and subtle third party conduct which achieves essentially the same result through the equally questionable means of coercing a contractual modification. Both approaches are equally tortious in nature and similarly interfere with the contractual relationships of others.
>
> To distinguish between conduct which directly causes a breach of contract and unjustifiable coercive conduct which effects the same result *without a breach* would overly limit the significance of the tort of inducing breach of contract and invite today's superior economic forces to freely interfere with contractual relationships without fear of legal reprisal. [Emphasis in original.]

committed with the requisite state of mind.[304]

The defendant is also liable if his wrongful conduct prevents plaintiff from performing his own contractual obligation.[305] Thus, if a consultant intentionally and improperly undermines employee support of the union, the union may be prevented from carrying out its representational functions, a failure which may lead an employer to dishonor the bargaining agreement as well.

Numerous cases have involved interferences with exclusive employment and distributorship contracts, where the defendant contracted with a third party knowing that the contract was incompatible with the previous agreement between the third party and the plaintiff.[306] The employer-union relationship is analogous, since the exclusive representation rights accorded by the LMRA[307] and the Railway Labor Act[308] strictly protect the collective bargaining authority of the incumbent union for the duration of the agreement. Thus a consultant who contracts with an employer to decertify a union or otherwise disrupt the employer's relationship with a union does so with the knowledge and intention that the collective bargaining agreement cannot be fulfilled.

The third element, intent, requires only that the defendant know of the contract and deliberately act detrimentally to plaintiff's rights thereunder.[309] Defendant's motive is important only insofar as it establishes a justification defense to the allegation of improper interference.[310] A court may apply a balancing test, weighing factors such as the nature of defendant's conduct, his motive, plaintiff's interests which are interfered with, the inter-

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[304] *Id.*; RESTATEMENT, *supra* note 291, § 766, comments h and k; W. PROSSER, *supra* note 291, at 936.

[305] RESTATEMENT, *supra* note 291, § 766A, comment c.

[306] *E.g.*, Alpha Distrib. Co. of Cal. v. Jack Daniel Distillery, 454 F.2d 442, 450 (9th Cir. 1972), *cert. denied*, 419 U.S. 842 (1974); Cincinnati Bengals Inc. v. Bergey, 453 F. Supp. 129, 145-46 (S.D.Ohio 1974); Robey v. Sun Record Co., Inc., 242 F.2d 684, 687 (5th Cir. 1957).

[307] 29 U.S.C. § 159(a) (1976).

[308] 45 U.S.C. § 152 Ninth (1976).

[309] W. PROSSER, *supra* note 291, at 928; Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202, 205 (5th Cir. 1974); Grammenos v. Zolotas, 356 Mass. 594, 597, 254 N.E.2d 789, 790-91 (1970).

[310] *See, e.g.*, Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1383-85 (5th Cir. 1977) (no justification for inducing breach because defendant's sole purpose was to eliminate competitor).

ests defendant seeks to advance by his conduct, the social interests involved, the proximity of defendant's conduct to the interference and the relations between the parties.[311]

The final element, damage, might be satisfied by a union plaintiff's lost dues income.[312] Employee plaintiffs might allege the loss of prospective wages, benefits and other privileges which collective bargaining might have obtained. Employer reductions or withdrawals of any benefits following a successful union-busting effort would, of course, offer clear proof of damage.

A viable claim against a consultant under this doctrine gives rise to a variety of possible remedies. Compensatory damages may include recovery for both the loss of contractual benefits and emotional distress.[313] As a further deterrent to a consultant, he may be held liable for the entire loss, even though the injured party may also have a remedy against the actual contract breaker.[314] Punitive damages may also be awarded if the circumstances warrant,[315] and injunctive relief is available if the general requirements of equitable relief are met.[316]

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[311] RESTATEMENT, *supra* note 291, §§ 767(a)-(g). This inquiry may become an important legal battleground in the consultant context. A union may argue that national labor policy explicitly favors collective bargaining and workers' free exercise of organizational rights and that the consultant intends to eliminate both, usually by illegal means. The consultant's likely justification claims are less apparent but would probably center on the employer's rights, such as his statutory and constitutional rights of expression. A mere statement of truthful information which actually exerts no other influence or pressure may be privileged as "advice." W. PROSSER, *supra* note 291, at 934-35; RESTATEMENT, *supra* note 291, § 772. *Cf.* discussion of "advice-persuasion" distinction in the LMRDA, Section II(A) (1), " 'Advice' and 'Persuasion': Reconciling Sections 203(a)(4), (a)(5), (b)(1) and (c)," *supra*.

[312] See Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976) (weakening of ability to organize and represent employees is sufficient injury to give unions standing to sue under antitrust laws).

[313] RESTATEMENT, *supra* note 291, §§ 774A(1)(a) and (c).

[314] The two are considered joint wrongdoers, and even a judgment against the contract breaker, if unsatisfied, is no defense to the tortious interference claim, though actual payments by the contract-breaker will reduce the amount recoverable against the tortfeasor. *Id.* § 774A(2) and comment e; W. PROSSER, *supra* note 291, at 948.

[315] Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1388-89 (5th Cir. 1977); Hannigan v. Sears, Roebuck & Co., 410 F.2d 285, 293-94 (7th Cir. 1969).

[316] Meyer v. Washington Times Co., 76 F.2d 988, 992-93 (D.C. Cir. 1935); Savoy Record Co., Inc. v. Mercury Record Corp., 108 F. Supp. 957, 959 (D.N.J. 1952); RESTATEMENT, *supra* note 291, § 766, comment u.

Unions may have to overcome the claim that, because consultant conduct is arguably subject to section 7 or 8 of the LMRA, state and federal courts must defer to the jurisdiction of the NLRB.[317] On the other hand, under section 301[318] of the LMRA, federal *and* state courts enjoy broad jurisdiction over the enforcement of collective bargaining and other labor contracts, even where the underlying conduct complained of also constitutes an unfair labor practice.[319] Whether or not wrongful consultant interference is a literal violation of the contract, the enforcement of agreements is strongly implicated. The courts might be willing to fashion a body of law parallel to the wrongful interference doctrine to further the policy favoring collective bargaining and stable labor-management relationships.

G. Public Funding

Although public subsidization of consultant and other anti-union activity has only recently gained public attention,[320] there is nothing to suggest that this little-understood phenomenon is new or involves an insignificant amount of public funds. Available evidence suggests that research and remedial action in this area are long overdue.

Federal funds pay for consultant and other anti-union activity via statutory subsidies in health, legal services and job training programs. In Massachusetts, for example, the State Rate-Setting Commission audited state hospitals and disallowed their expenditure of $256,892 of Medicaid funds for payments to a leading union-busting firm, Modern Management, Inc. (then called Melnick, Mickus & McKeown).[321] The Commission noted that be-

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[317] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The Board's resolution of a consultant's agency status when he is not in direct contact with employees affects this question; a preemption defense is more likely to succeed if the Board in fact exerts authority over consultants directly, rather than merely their employee clients. *See* Section II(B)(2)(a), "Agency Theory," *supra*.

[318] 29 U.S.C. § 185 (1976).

[319] William E. Arnold Co. v. Carpenters District Council of Jacksonville and Vicinity, 417 U.S. 12 (1974); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962).

[320] *See generally 2 Hearings, supra* note 38, at 170-305 (testimony and submissions of Jules Bernstein, Charles McDonald and Anthony Carnevale).

[321] *Id.* at 188-98 (memorandum and letter, Commonwealth of Massachusetts Rate Setting Commission). Modern Management, Inc., was involved with at

cause "audit techniques rely heavily on sampling, it is certain that these results do not represent the full penetration of Melnick, Mickus & McKeown in the industry."[322] While the Commission's decision rested on the hospital's noncompliance with the state regulation governing reimbursement for consultant costs rather than on substantive grounds,[323] the state legislature subsequently enacted a law prohibiting the use of state funds by hospitals for persuader activities for or against unionization.[324] The U.S. Department of Health and Human Services has since revised its Medicare Provider Reimbursement Manual to preclude providers from using Medicare money to finance persuader costs, whether incurred through their own efforts or through consultants.[325] But there are few federal statutory prohibitions

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least fourteen hospitals in fighting union organization during this period. *Id.* Federal funding for its services was also reported at Day Care Services for Children, Inc., Milwaukee, Wisconsin, using Headstart Funds. *Id.* at 301 (testimony of Anthony Carnevale).

[322] *Id.* at 188.

[323] *Id.* at 188-98.

[324] The Massachusetts statute provides, in relevant part:

> No hospital shall receive reimbursement or payment from any governmental unit for amounts paid to employees, as salary, or to consultant or other firms, as fees, where the primary responsibility of the employees or consultants is, either directly or indirectly, to persuade or seek to persuade the employees of the hospital to seek or oppose unionization. Attorney's fees for services rendered in dealing directly with a union, in advising hospital management of its responsibilities under the National Labor Relations Act, or for services at an administrative agency or court or for services by an attorney in preparation for the agency or court proceeding shall not be deemed to be support or opposition to unionization.

MASS. GEN. LAWS ANN. ch. 6A § 32 (West Cum. Supp. 1980).

[325] 2180. REIMBURSEMENT FOR COSTS INCURRED IN RELATION TO UNION ACTIVITIES

2180.1 *Persuasion of Employees.*—Costs incurred for activities directly related to influencing employees regarding their right to organize or not to organize and to form a union or to join an existing union are not related to patient care and, therefore, are not allowable costs. Such costs are unallowable whether such activities are performed directly by the provider or through an independent contractor, consultant or outside attorney.

> EXAMPLE: The costs applicable to a consultant who furnishes literature opposing union membership for provider employees or furnishes training to provider management to oppose employee membership in labor organizations are not allowable costs.

2180.2 *Collective Bargaining.*—Reasonable expenses incurred by a provider for collective bargaining and related activities are allowable costs. Contract negoti-

against such funding.[326]

Direct subsidization occurs in other forms. Under the Intergovernmental Personnel Act,[327] which was enacted to improve state and local government administration, the federal government funds the management side of labor relations training.[328] Federal funds may also be involved when higher educational institutions conduct campaigns and sponsor seminars to instruct private and public entities how to prevent or defeat union organizing efforts.[329]

Federal reimbursement of anti-union costs incurred by private employers who perform government contracts is another incalculable dimension of this public funding phenomenon. In one well-documented instance, the United Automobile Workers discovered during a representation election campaign at Rockwell International Corporation that the company charged the costs of employee time spent in "captive audience" meetings to its contracts with the Department of Defense.[330] In response to the union's protest, the Defense Contract Audit Agency stated:

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ations and any procedures which flow from enforcement of contract terms, whether in a collective or individual setting are necessary to maintain the continued operation of the provider and, thus, are a precondition for the delivery of health services.

EXAMPLE: The cost of the services of management's representative in collective bargaining activities is an allowable cost.

Reprinted in 2 Hearings, supra note 38, at 347. The American Hospital Association opposes this provision. *1 Hearings, supra* note 5, at 488 (testimony of Thomas M. Kerr).

[326] The Comprehensive Employment and Training Act specifically bars use of funds for "unionization, or antinunionization activities." 29 U.S.C. § 825(g) (Supp. II 1978). The Domestic Volunteer Service Act states that the agency ACTION cannot expend funds "directly or indirectly . . . to finance labor or antilabor organization or related activity." 42 U.S.C. § 5044(d) (1976). The Legal Services Corporation Act contains a more detailed prohibition on the use of Corporation funds. 42 U.S.C. § 2996f(b)(5) (1976). Nevertheless, in response to recent organizational activity among legal services workers, legal services offices have hired management counsel and paid them with federal funds in aggressive attempts to prevent unionization. Letter from James S. Braude, National Organization of Legal Services Workers, to Alan Kistler, Director, AFL-CIO Department of Organization and Field Services (on file with author).

[327] 5 U.S.C. §§ 3371-3376 (Supp. II 1978).

[328] *2 Hearings, supra* note 38, at 258-65 (statement of Anthony Carnevale).

[329] *Id.* at 179-81 (statement of Jules Bernstein).

[330] *Id.* at 229-31 (letter from National Engineers and Professional Association, UAW, to Senator Harrison A. Williams). The UAW estimated that these costs exceed one million dollars. *Id.* at 230.

> Judged by a standard of reasonableness, an anti-union stance on the part of an employer should not be assumed to be unreasonable. Such an attitude may be taken for a sound business purpose. An employer may oppose a union for reasons of economy, as a result of a concept of a more efficient operation, or because of an honest belief that the employer is a better guardian of its employees' welfare than would be a union.[331]

Further correspondence revealed that government regulations did not require contractors to submit a month-by-month breakdown of such expenses,[332] so that the government could not even audit this practice. Moreover, the Department of Defense refused to consider the issue while union objections to the representation election were pending before the NLRB.[333]

The absence of intra-governmental coordination in this area is demonstrated by the fact that the NLRB learned only by accident of a Department of Defense practice permitting reimbursement of contractors for expenses and liabilities incurred in suits brought against them by federal agencies.[334] The Board takes the position that such arrangements contradict national labor law policy:

> The anomaly of another Federal Agency absorbing the liabilities and costs incurred by private litigants who have violated the National Labor Relations Act clearly frustrates the Act's meaning and intent. Thus, employers who are committed to a policy of interfering with the protected rights of their employees are encouraged to violate those rights since their conduct is free from economic sanc-

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[331] Quoted *id.* at 172 (testimony of Jules Bernstein). This was an interpretation of the federal procurement regulations which covered labor relations costs. According to these regulations: "Costs incurred in maintaining satisfactory relations between the contractor and employee, including costs of shop stewards, labor management committees, employee publications, and other related activities are allowable." Federal Acquisition Regulation 31.205-21.

[332] *2 Hearings, supra* note 38, at 220 (letter from Air Force Major General Dewey K.K. Lowe, Director, Procurement Policy, to Howard M. Knee, Schwartz, Steinsapir, Dohrmann and Krepack).

[333] *Id.* The NLRB ultimately set aside the election due to campaign misconduct by Rockwell. Rocketdyne Div. of N. Am. Space Operations of Rockwell Int'l 055, 235 N.L.R.B. 1159, 98 L.R.R.M. 1077 (1978).

Unions have reported other instances of federal contractors providing their anti-union drives with money. *See, e.g., 2 Hearings, supra* note 38, at 255 (statement of Charles McDonald: employment of 3M by defense contractor General Dynamics Corp.).

[334] *2 Hearings, supra* note 38, at 241 (letter from NLRB General Counsel John S. Irving to Air Force Brig. General James W. Stansberry, Acting Deputy Assistant Secretary of Defense).

> tions. In addition to the danger of increasing the severity and number of unfair labor practices, the above-described cost-plus arrangements can only enhance the benefits which private litigants believe they can secure from delay, will discourage the settlement of meritorious cases, and will encourage the litigation of frivolous contentions and defenses.[335]

Given the billions of dollars that flow annually from the government to providers of benefits, contractors and other private entities, the public funding of anti-union activity is a problem of potentially enormous proportions. Since statutory and regulatory controls remain haphazard and uncoordinated, the General Accounting Office should undertake a comprehensive review of agency practices. In light of the prevailing budgetary concerns, such an effort would likely garner considerable support. Unions should use the Freedom of Information Act[336] to discover funding arrangements and disbursements whenever an entity that contracts with the federal government engages in anti-union activity.

Meanwhile, legislation has been suggested to prohibit such expenditures altogether.[337] In addition, the Office of Federal Procurement Policy is currently drafting new Federal Acquisition Regulations. These should prohibit contractors from spending federal funds either for or against unionization and from using those funds to defend unfair labor practice charges.

On the state level, a well-known pattern involves local Chamber of Commerce chapters which receive public funds to promote industrial development. A suit filed against one such chapter alleged that public funds were used in its efforts to lure only non-union business and to engage in surveillance of local union activities. The suit was settled, with the Chamber promising to set up accounting and notice procedures for its use of public funds.[338] It is uncertain as yet how this example fits into the broader context; the basic research on state and local funding of

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[335] *Id.* at 244 (letter from John S. Irving to Secretary of Defense Donald H. Rumsfeld).

[336] 5 U.S.C. § 552 (1976).

[337] *1 Hearings, supra* note 5, at 498-500 (letter from Thomas M. Kerr to Fred Feinstein).

[338] *2 Hearings, supra* note 38, at 186-87 (statement of Jules Bernstein). *See also* "Fair Measure," 7 Southern Exposure, No. 1 (Spring 1979) (Chamber of Commerce and power structure in Greenville, South Carolina).

private efforts to suppress union organization remains to be done.

CONCLUSION

Strong employer antipathy toward unions has created a great demand for labor relations consultant services. But many consultants appear to perceive the law not as a system which has attempted to humanize, rationalize and democratize labor relations, but as a set of rules to be bent, evaded and broken if necessary. Consultants have encouraged improper conduct by otherwise law-abiding employers, while staying largely beyond the law's reach. To answer the questions posed recently by the House Subcommittee on Labor-Management Relations,[339] these new union-busters do not share the assumptions underlying the federal labor statutes; rather, they emphatically reject them.

The response to these union-busting consultants demands creativity on many fronts. The explosive growth of the industry and its brazen efforts to cripple the attempts of working people to achieve mutual aid and protection through unionism signal a long struggle ahead. This article has sought to explore the current state of the law and to suggest how it can be applied or modified to meet and overcome the growing menace of union-busting. Such an effort can succeed only if labor, government, responsible employers and the public recognize the potential danger—the destruction of a labor relations system that has managed over the past 45 years to regulate and place under rule of law the basic economic antagonisms between labor and capital.

Ironically, as AFL-CIO President Lane Kirkland has suggested, in America it appears to be the capitalists who are the active champions of class warfare.[340] The growth of the employer consulting industry bears out his point. And what if in the months and years ahead, capital continues so vehemently in search of a union-free environment? The employers' dream may be an American nightmare.

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[339] *See* note 43 and accompanying text *supra*.

[340] Address by Lane Kirkland, "Work in America: The Decade Ahead," symposium in Harriman, N.Y. (May 24, 1978).

APPENDIX

EMPLOYER AND CONSULTANT REPORTING UNDER LMRDA

Report	Fiscal Year 1960[1]	'61	'62	'63	'64	'65	'66	'67	'68	'69	'70	'71	'72	'73	'74	'75	'76	'77	'78	'79	TOTAL
Employer Reports (LM-10)	70	128	425	388	425	320	100	76	57	38	33	35	48	37	20	37	124	41	40	204	2646
Labor Relations Consultants:																					
Agreement and Activities Reports (LM-20)	56	339	24	134	130	85	85	52	46	31	37	35	41	45	106	70	102	163	159	159	1899
Receipts and Disbursements Reports (LM-21)	NA[2]	NA[2]	32	NA[2]	30	15	25	4	3	12	40	25	26	31	32	30	14	22	19	35	473[3]
																					5018

[1]September 14, 1959, through June 30, 1960

[2]Not available by year

[3]Total includes 78 reports filed during FY 1960, 1961 and 1963

Source: Office of Labor-Management Standards Enforcement, Labor Management Services Administration, U. S. Department of Labor