10058 Contacts with Represented Parties and Witnesses

All parties and witnesses are entitled to be represented by attorneys or by designated representatives who are not attorneys. The Agency's requirements regarding the filing of a notice of appearance are set forth in this section. The Agency's policies regarding contacts with represented parties and witnesses and guidance for compliance with those policies are also set forth in this section and may be revised as new developments occur. See also Secs. 11842 through 11844.

The Agency's policies have been formulated in consideration of both the ethical standards applicable to Agency attorneys as members of the bar, particularly the American Bar Association's Model Rule of Professional Conduct 4.2, the skip counsel rule (MR 4.2) (formerly Sec. 7-104(A)), and the Board's Rules and Regulations, while permitting vigorous and orderly administration of the Act. As a general rule, unless otherwise authorized by law, all attorneys, including Agency attorneys, must comply with the ethics codes adopted by their licensing State or States and/or those adopted by the state in which their contact with the witness occurs, and with the ethics codes adopted by the Federal courts before which they appear. Although ethics rules may vary from jurisdiction to jurisdiction, all State bar and Federal court ethics codes contain essential elements of MR 4.2.

MR 4.2 prohibits contact with a person whom an attorney knows to be represented by an attorney in the ULP case, without the prior consent of that attorney. As a matter of Agency policy, all Board agents, including field examiners, will be held to the same standards as attorneys. Further, because MR 4.2 does not apply to representatives who are not attorneys, at times the instructions contained herein for communicating with parties may differ significantly depending on whether the parties are represented by attorneys or by individuals who are not attorneys.

The interpretation of ethics rules varies from jurisdiction to jurisdiction and Agency attorneys who violate ethics rules may be subject to disciplinary sanctions. To ensure compliance with ethics requirements, Board agents should follow instructions and guidance provided by Special Ethics Counsel. In addition, the Regional Office must contact Special Ethics Counsel before engaging in ex parte contacts with:

- Current supervisors/agents of a party, represented by an attorney, who come forward voluntarily (Sec. 10058.2(b)(1)).
- Current supervisors of a party, represented by an attorney, who provided an affidavit during the investigation of a case as a nonsupervisory employee (Sec. 10058.2(b)(2)).
- Individuals whose supervisory/agency status remains unclear after preliminary contact (Sec. 10058.2(c)).
- Former supervisors/agents of a party represented by an attorney where agency-wide guidance has not authorized contacts (Sec. 10058.2(d)).

In addition, the Regional Office may contact Special Ethics Counsel for guidance in response to noncooperative conduct by either the charging party (Sec. 10058.5(a), the first option), or the charged party (Sec. 10058.5(b), the first option) with regard to access to current supervisors or agents. Special Ethics Counsel is available to provide guidance when unsettled skip counsel issues and other ethics issues arise, including but not limited to issues involving the inadvertent receipt of attorney-client privileged or other legally protected information.

In analyzing all jurisdiction-specific ethics questions, Special Ethics Counsel must determine which ethics rules govern the Regional Office's investigation of the case by:

- Examining the ethics rules of the licensing jurisdiction of the Board attorney conducting the investigation, or of the supervisory attorney if the investigation is being conducted by a field examiner;
- Examining the ethics rules of the situs of the contact and of any eventual trial; and

- Determining which jurisdiction(s) would assert disciplinary authority over the contact and, when appropriate, as a choice-of-law, which jurisdiction's ethics rules would apply.

If a case in which a skip counsel issue arose during investigation is appealed to the Office of Appeals or submitted to the Division of Advice, the Regional Office should note the following in its Comment on Appeal or Advice submission:

- The precise skip counsel issue or issues.
- How such issue(s) was/were resolved, with reference to any ethics guidance given by Special Ethics Counsel and inclusion of that guidance in the case file.
- Which jurisdiction or jurisdictions' ethics rules governed the investigation.
- Any witnesses the Regional Office either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Ethics Counsel's guidance distributed agency-wide.
- Whether the Regional Office was proffered a witness statement that it could not use in the investigation. Such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before sending the file with such statements to Appeals or Advice.

10058.1 Notice of Appearance/Notice for Receipt of Documents

(a) *Notice of Appearance:* Regional Offices should provide parties Form NLRB-4701 with the service of all charges filed. Upon receipt of a completed Form NLRB-4701, or its equivalent, signed by an attorney or other representative, or sent electronically through the Agency's website (see Sec. 11846.4), all communications with the party should be through such attorney or representative, except:

- If the party's representative is an attorney, the Regional Office may communicate with and/or serve documents on the party with the consent of the attorney. See Sec. 11842.3.
- Even absent such consent from the attorney, the Regional Office should serve on the party certain documents as set forth in Secs. 11842.3(a), (b), and (c). Further guidance in this regard is provided in Secs. 11842 through 11844.
- If the party's designated representative is not an attorney, the Regional Office may serve documents and other correspondence on both the representative and the party but should otherwise communicate with the party and its supervisors/agents in accordance with the guidelines set forth in Secs. 10058.3 and 10058.5. See also Secs. 11842.4(a), (b), and (c) and 11844.

(b) *Notice of Appearance Required to Establish Representational Relationship:* If an attorney or other representative wishes to represent a party or a witness in a specific case, a specific Notice of Appearance, Form NLRB-4701, or its equivalent, must be filed with the Regional Director.

(c) *Notice for Receipt of Charges and Petitions:* An attorney or other representative may submit to a Regional Director an Annual Notice for Receipt of Charges and Petitions (Form NLRB-4702), or its equivalent, for all matters involving a particular client coming before the Regional Office. Additionally, an attorney or other representative may submit a request for a national notice to the Division of Operations Management. All such requests for notices under this provision will be honored for the fiscal year in which the request is made. See OM 13-39.

10058.2 Supervisors/Agents of Parties Represented by Attorneys

The following policies apply to contacts by Board agents, whether attorneys or field examiners, with supervisors or agents of a party represented by an attorney. For situations where a party is not represented by an attorney, i.e., where MR 4.2 does not apply, see Sec. 10058.3.

(a) *Current Supervisors/Agents of Party:* Where the Regional Office has been advised that a party is represented by an attorney, a Board agent must contact and obtain consent from the party's attorney before initiating contact with or interviewing a current supervisor or agent, except for the circumstances described in (b), (c), and (e) below. Absent such circumstances, if the party's attorney refuses to make a current supervisor/agent available for questioning, the Board agent cannot proceed with the interview. The Regional Office may, however, exercise any of the appropriate options set forth in Sec. 10058.5 respecting uncooperative conduct by parties.

(b) *Current Supervisors/Agents Who Come Forward Voluntarily and Current Supervisors Who Provided Evidence as a Nonsupervisory Employee:*

(1) Current Supervisors/Agents Who Come Forward Voluntarily: If current supervisors or agents come forward voluntarily and indicate that they do not wish to have the party's attorney present, the Regional Office must contact Special Ethics Counsel before interviewing or taking a statement from such a witness.

(2) Current Supervisors Who Provided Evidence as Nonsupervisory Employees: If a current supervisor of a party, represented by an attorney, provided evidence as a nonsupervisory employee prior to promotion, a Regional Office may initiate *ex parte* contacts to inquire about the individual's changed status. After the preliminary interview and before gathering any additional information from, or conducting a pretrial interview with, such witness, the Regional Office must contact Special Ethics Counsel.

(c) *Uncertain Supervisory/Agency Status:* In cases involving individuals whose supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent cannot proceed with the interview without the consent of the party's attorney.
- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.
- If the Regional Office concludes that the individual is a supervisor or agent of a party, the Board agent may not resume the interview without the consent of the party's attorney.
- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing or obtaining consent from the party's attorney.

(d) *Former Supervisors/Agents:* Jurisdictions have differing approaches with respect to ex parte communications with former supervisors or agents of a party represented by an attorney. Special Ethics Counsel will authorize Regional Offices to contact and interview witnesses ex parte where permitted by the applicable jurisdiction(s). If the proposed interview would occur in a jurisdiction and under circumstances in which Special Ethics Counsel's guidance distributed agency-wide has authorized such contacts, prior clearance is not required before interviewing former supervisors or agents of a represented party without consent of the party's attorney. In all other cases, the Regional Office must contact Special Ethics Counsel before conducting such interviews. See Sec. 10058.7 regarding limitations on privilege.

(e) *Supervisors/Agents as Charging Parties and Alleged Discriminatees:* When current or former supervisors or agents of the charged party are charging parties or alleged discriminatees named in a charge, Board agents may contact and interview them about matters relating to their claim, without contacting or obtaining consent from the charged party's attorney.

If the Regional Office has any questions about the application of the above guidance, it should contact Special Ethics Counsel.

10058.3 Supervisors/Agents of Parties Not Represented by Attorneys

The following policies apply to contacts by Board agents with supervisors or agents of a party either not represented or represented by a designated representative who is not an attorney. For situations where a party is represented by an attorney, i.e., where MR 4.2 applies, see Sec. 10058.2.

(a) *Current Supervisors/Agents:* Where the party is either unrepresented or not represented by an attorney and cooperation is being extended to the Regional Office in its

investigation, the party or its representative should be contacted and afforded the opportunity to make available for interview any current supervisor or agent of the party. This policy will normally apply in circumstances where:

- The Regional Office is receiving cooperation from the party or its representative, if any
- The party or such representative makes the individual available for interview with reasonable promptness so as not to delay the investigation and
- During the interview the party or such representative does not interfere with, hamper or impede the Board agent's investigation

(b) *Uncertain Supervisory/Agency Status:* Where the party is either unrepresented or not represented by an attorney and a witness' supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent should not proceed with the interview without affording the party or its representative the opportunity to be present if such party is cooperating.
- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.
- If the Regional Office concludes that the individual is a supervisor or agent of a party and the party is cooperating, the Board agent should not resume the interview without affording the party or its representative the opportunity to be present.
- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing the party or its non-attorney representative.

(c) *Party Not Cooperating:* If the party not represented by an attorney is not cooperating in the investigation within the meaning of Secs. 10054.1, 10054.5, and 10058.3(a), the Board agent may contact and obtain sworn testimony from individuals regardless of their supervisory or agency status without informing the party or its representative.

(d) *Former Supervisors/Agents of Parties:* Board agents may initiate contact with former supervisors and agents of parties who are not represented by an attorney and obtain affidavits from such individuals without informing the party or its representative. However, where the party is represented by an attorney, see Sec. 10058.2(d).

(e) *Current Supervisors/Agents Come Forward Voluntarily:* Where the party is not represented by an attorney, Board agents are also free to interview and obtain an affidavit from current supervisors or agents who come forward voluntarily and indicate that they do not wish to have the party or its representative present, without informing the party or its representative.

10058.4 Third-Party Witness and Attorney/Representative

Witnesses who are not supervisors or agents of a party (herein third-party witnesses) have a right to be represented in Board agent interviews, as set forth herein. Thus, following a Notice of Appearance (see Sec. 10058.1) to the Regional Office that a third-party witness wishes to be represented in the proceeding before the Agency, Board agents should follow the procedures described below.

(a) *Witness Represented by Nonparty Attorney:* Where the Regional Office has notice that a third-party witness is represented by an attorney who does not represent a party, Board agents must interview the witness in the presence of that attorney unless they contact and obtain consent from the attorney to interview the witness ex parte. If the attorney refuses to produce the witness or consent to an ex parte interview, the Board agent cannot proceed absent issuance of an investigative subpoena with notice to the attorney.

(b) *Witness Represented by Nonparty Representative:* Where a third-party witness is represented by an individual who is not an attorney and who does not represent a

party, such representative should be afforded the opportunity to be present for the interview, so long as the representative's presence does not unduly delay or hamper the interview. If the presence of the representative unduly delays or hampers the interview, the Board agent may attempt to continue the interview without the representative or terminate the interview. In addition, the Regional Office may issue an investigative subpoena to the witness and exercise its discretion, considering all the circumstances, whether to give notice to the representative and/or allow the representative to be present at the interview.

(c) *Third-Party Witness and Party Attorney/Representative:* Longstanding Board policy provides that the attorney or other representative of a party to the case will not normally be allowed to be present at an interview of a witness who is not a supervisor or agent of that party. If the witness insists on the party attorney or representative being present, the Regional Office should exercise discretion whether to proceed with such an interview. If the Regional Office declines to proceed with the interview of the witness in the presence of such attorney or other representative, the Regional Office may issue an investigative subpoena to the witness without notice to the party's attorney or representative. Alternatively, the Regional Office may permit the witness to submit documentary evidence or a statement that, if timely submitted, will be considered.

If, however, it is asserted that an attorney of a party to a case actually represents a third-party witness as an individual, both the attorney and the witness should be directed to provide written notice that the attorney represents the witness, including the filing of a Designation of Representative and a specific Notice of Appearance.

Even with a Notice of Appearance, if the circumstances raise questions as to whether a consensual attorney-client relationship exists or whether the attorney's interactions with an employee witness were consistent with employee Section 7 rights,

including the dictates of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), or if the Regional Office has a substantial basis to believe that the presence of an attorney of a party would impede the Agency's investigation, the Regional Office should consult with Special Ethics Counsel on how to proceed. See also Sec. 10058.6, regarding the Board's rules requiring attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the Courts.

If, however, the Regional Office is satisfied that there is a consensual attorney-client relationship, that the attorney has not violated the employee witness's Section 7 rights, and that the presence of the attorney would not impede the investigation, then the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present. Where appropriate, the Regional Office may issue an investigative subpoena with notice to the attorney. If, on the other hand, the attorney consents to an interview without the attorney's presence, the Board agent may proceed to interview the witness.

If it is asserted that a non-attorney representative of a party also represents a third-party witness as an individual, the Regional Office may exercise its discretion whether or not to conduct the interview in the presence of such non-attorney representative. Alternatively, the Regional Office may issue an investigative subpoena to the witness without notice to the non-attorney representative.

10058.5 Response to Uncooperative Conduct by Parties

(a) *Charging Party:* If the charging party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charging party, its attorney or representative has interfered with, unduly delayed, or

impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact Special Ethics Counsel to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s).
- Dismiss all or part of the charge for lack of cooperation.
- Decide the case on the basis of the evidence otherwise obtained.
- In limited circumstances, such as when the rights of others may be dependent upon the testimony or evidence from a charging party, issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative.
- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(b) *Charged Party:* If the charged party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charged party, its attorney or representative has interfered with, unduly delayed, or impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact Special Ethics Counsel to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s).
- Decide the case on the basis of the evidence otherwise obtained.
- Issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative.
- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(c) *The Use of Subpoenas in the Above Circumstances:* An investigative subpoena for an interview under oath with notice to the attorney or other representative in the circumstances set forth above in (a) or (b) permits the Regional Office to conduct the interview in a formal setting by questions and answers. Sec. 11770.2.

10058.6 Misconduct by Attorneys or Party Representatives

The Board's Rules require attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the courts. See 102.177, Rules and Regulations and OM-97.2. Where appropriate, a Board agent should advise an attorney or other representative of the Board's Rules requiring that their conduct conform to the above noted standard.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations, OM 97-2 and OM 01-80. The range of consequences for violations of the Board's ethical and professional standards and for other misconduct include:

- Suspension and/or disbarment from practice before the Agency and/or other sanctions for misconduct of an aggravated character. Sec. 102.177(d), Rules and Regulations.
- Summary exclusion from a hearing for misconduct at a hearing before an Administrative Law Judge, hearing officer, or the Board. Sec. 102.177(b), Rules and Regulations.
- Notification to the appropriate state bar(s), with additional notice to the ABA National Lawyer Regulatory Data Bank, of any disciplinary sanctions imposed on an attorney pursuant to the Board's Rules.
- Referral of the allegations to the state bar(s) in which an attorney practices, rather than pursuing action under the Board's misconduct Rules.

10058.7 Attorney-Client Privilege

Ethics rules generally prohibit eliciting attorney-client privileged information, absent an appropriate waiver by the client. When an organization is represented by an attorney, the relevant privilege exists between the organization and the attorney and, therefore, certain individuals, although 2(11) supervisors or 2(13) agents, may not be able to effectively waive the organization's privilege. Even if ex parte contacts with former managers, supervisors, or employees of an organization are appropriate (see Sec. 10058.2(d)), it is not appropriate to obtain from them attorney-client privileged

information that belongs to the organization, absent either a waiver by a current officer or manager of the organization or an exception to the applicability of the privilege. If a Regional Office has a question about the application of this rule, any waiver or whether any exception applies, it should contact Special Ethics Counsel.

10058.8 Skip Counsel Issues in Advice and Appeals Cases

If a case in which a skip counsel issue arose during investigation is appealed to the Office of Appeals or submitted to the Division of Advice, the Regional Office should note the following in its Comment on Appeal or Advice submission:

- The precise skip counsel issue or issues.
- How such issue(s) was/were resolved, with reference to any ethics guidance given by Special Ethics Counsel and inclusion of that guidance in the case file.
- Which jurisdiction or jurisdictions' ethics rules governed the investigation.
- Any witnesses the Regional Office either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Ethics Counsel's guidance distributed agencywide.
- Whether the Regional Office was proffered a witness statement that it could not use in the investigation. Such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before sending the file to Appeals or Advice.

If, while the case is in Appeals or Advice, any party proffers a witness who is a former or current supervisor/agent of an organization represented by counsel, Appeals or Advice will assess the appropriate course of action and, if necessary, consult with Special Ethics Counsel. See generally OM Memo 05-63. As a choice-of-law matter, for purposes of considering ethics obligations of attorneys in Appeals in connection with an appeal or in Advice in connection with a case submitted to Advice, the relevant ethics rules are those that governed the Regional Office's investigation of the case. See generally OM Memo 05-63 and also Secs. 10122.8 and 11750.1.