

Third-party Representational Relationships and the Potential for Inherent Coercion in Federal Labor Law Cases

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Introduction

An attorney-client relationship must be a consensual one. Consider the following scenarios. An NLRB Regional Office is investigating an alleged unlawful discharge and issues an investigatory subpoena to the only eyewitness to the misconduct that forms the basis for the employer's defense. The witness, a rank-and-file employee, appears for her subpoena accompanied by the employer's counsel, who asserts that he represents the witness for the limited purpose of her interview. When asked by the Board agent to verify the attorney-client relationship, the witness appears confused and looks to the attorney for an answer. She signs the proffered representation agreement, but offers that she never met the attorney or spoke with him prior to the interview and does not know his name.

Contrast the situation where an analogous employee witness, upon receipt of an investigatory subpoena, contacts his employer and questions whether an attorney should accompany him to his interview. The employer responds that the witness could go to the interview alone, retain an attorney and pay for that attorney, or accept representation by the employer's attorney at no cost. That conversation is followed by a phone call from the employer's attorney who reiterates the available options and explains, among other things, that the joint representation of employer and employee could involve a conflict-of-interest that would necessitate the attorney's withdrawal. The employee agrees to the joint representation and meets the attorney prior to the interview.

Congress enacted Section 7 of the National Labor Relations Act (“NLRA” or “Act”) to empower workers in the face of a real economic disparity between the employer and the employee. The following remarks are representative:

The employee has no economic power. The employer holds in his hand the welfare, perhaps even the right to live not only of the employee but of his family. His economic power can be enforced . . . through channels and by means often almost impossible, if not absolutely impossible, to detect. He has many methods of exercising economic power. The employee has none. S. REP. NO. 573 on S., 1958, 74th Cong., 1st Sess., reprinted in, WAGNER ACT LEGISLATIVE HISTORY, at 2381.

In this context, where the legislative history demonstrates that the NLRA was premised on an assumption of an inherently adversarial relationship between management and labor, and where the Act seeks to ensure employees the exercise of their Section 7 rights free from employer coercion, this paper examines whether party counsel’s representation of nonsupervisory fact witnesses may be inherently coercive and therefore inconsistent with the objectives of federal labor law.

The Agency’s present policy respecting party counsel’s representation of a nonsupervisory fact witness (i.e., a “third-party witness”) is set forth in Section 10058.4(c) of the General Counsel’s Unfair Labor Practice Casehandling Manual. Giving due to the purposes of Model Rule 1.7 and its state equivalents, the Manual instructs that when party counsel claims to represent a third-party witness, the Regional Office should seek to determine if the attorney-client relationship is consensual. Board agents are looking for a genuine and informed attorney-client relationship. In other words, one in which the attorney, if accused of malpractice, would defend his conduct without questioning the existence of the attorney-client relationship itself. To that end,

in addition to requiring a notice of appearance from the attorney,¹ the Manual also instructs that when party counsel claims to represent a third-party witness, the Region should also obtain a Designation of Attorney or Representative from the witness.² Pursuant to the Manual's provision, if upon the submission of these documents the Regional Office is satisfied that the relationship is true and consensual, then "the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present."

This paper posits that because of the imbalance of power between employer and employee and the unique nature of federal labor law, courts' traditional reliance on conflict-of-interest ethics rules, including state versions of Model Rule 1.7 (Conflict of Interest: Current Clients) may be insufficient to ensure that employees have made a fully informed choice to be represented by company counsel during NLRB investigations and trials. The typical employee witness is inexperienced in legal matters and may feel pressured to accept representation by company counsel. Whether being questioned about the formation of the attorney client relationship, or about matters relevant to the case, an employee may be reluctant to reveal information detrimental to the employer when interviewed by a Board agent in the presence of employer's counsel. This paper explores this idea as well as possible alternative measures the Agency might pursue to

¹ Section 10058.1(b) of the Manual sets forth a mandatory notice of appearance requirement. Specifically, the Manual states: "*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."

² The purpose of the Designation of Attorney or Representative, Form NLRB 4943, is to help ensure that the asserted representational relationship is valid and consensual. See NLRB Division of Operations-Management Memorandum 13-02 (October 3, 2012).

try to insulate employees from the inherent coercion that may be present despite the efforts of even the best intentioned counsel.³

An Attorney-Client Relationship must be Consensual and a Client must give Informed Consent to a Joint Representation

An organization's counsel represents the organizational entity, and not the individual employees/agents.⁴ Because the attorney-client relationship is a consensual one even when the client is an organization, an organization cannot assert automatic and presumptive representation over all past and present employees and agents.⁵ Rather, Model Rule 4.2 (Communication with Person Represented by Counsel) creates a presumption as to which individuals are included in the consensual attorney-client relationship between the organization and its attorney.⁶ As to those "third-party" witnesses who do not fall within Rule 4.2's presumption of representation, including the rank-and-file employee fact witnesses in the above scenarios, "an attorney-client

³ Although the focus of the paper is on company counsel's joint representation of the company and nonsupervisory employee fact witnesses, the same analysis would apply to union counsel's joint representation of the union and union members who are fact witnesses. Thus, the Supreme Court has recognized that employee witnesses can face the threat of reprisals from their union. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 240 (1978).

⁴ See M.R. 1.13 (Organization as Client).

⁵ ABA Formal Op. 95-396 (July 28, 1985); Terra Intern., Inc. v. Mississippi Chemical Corp., 913 F.Supp. 1306, 1317 (N.D.Iowa 1996); Michaels v. Woodland, 988 F.Supp. 468, 472-474 (D.N.J. 1997)(and cases cited therein); Schmidt v. Norfolk & Western Railway Co., 1994 WL 1030994, slip op. at 1-2 (Va.Cir. Ct. 1994). See also The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 2005-3 (Feb. 4, 2005)("[B]lanket representation of a corporation and all its current and former employees would in many instances be fraught with impermissible conflicts of interest for the corporate lawyer").

⁶ Valassis v. Samelson, 143 F.R.D. 118, 123 (E.D.Mi. 1992). Under M.R. 4.2 and its state equivalents, individuals may be presumed to be represented based upon their level of authority within an organization and/or their relationship to the subject matter of the case.

relationship cannot be created unilaterally or imposed upon the employees without their consent.” Brown v. St. Joseph County, 148 F.R.D. 246, 251 (N.D.Ind. 1993).⁷

Further, where a lawyer claims to represent both the company and an individual employee, Model Rule 1.7 requires that the lawyer first determine if there is a concurrent conflict of interest. (M.R. 1.7(a)). If so, the lawyer may still represent the client if the lawyer reasonably believes that he or she will be able to provide diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client in the same proceeding, and each affected client gives informed consent, confirmed in writing. (M.R. 1.7(b)).

Comment 18 to Model Rule 1.7 explains that “[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” Further, because the lawyer has “an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client’s interests,” the lawyer has to advise each client “that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.” (Comment 31). If applicable, the employee witness would have to be informed

⁷ The same analysis applies to a union’s counsel, who represents the union and not individual members. Although the economic coercion that is inherent in an employer-employee relationship is not present to the same extent in a relationship between a union and its members, a union is able to exert influence because of the financial benefits it offers to its members and its representation of them in controversies with their employer, such as grievances. For this reason, union counsel’s representation of a union member fact witness also may be inherently coercive.

that the employer will pay for the representation, and the attorney would have to assure the employee client that the duty of loyalty or independent judgment to the client would not be compromised. (Comment 13). The clients must also be told of the consequences that would ensue should a conflict develop after representation has been undertaken. (Comment 4). The consent must be confirmed in writing “in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.” (Comment 20). Finally, “[t]he requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.” (Comment 20). In sum, “the consent of each client must be informed, and therefore, the attorney will need to have a full-blown discussion with each client so that they can understand the situation facing them.”⁸

An employer has no right to interject its own counsel as the purported representative of its employees and no right to decide for its employees whether its interests conflict with theirs. U.S. v. Western Electric Co., Inc., 1990 WL 39129, slip op. at 1-2 n.4 (D.D.C. 1990). Instead, “[t]he existence of an attorney-client relationship is generally determined by principles of contract and agency . . . it is fundamentally

⁸ Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than The Model Rules Provide*, 23 IND.L.REV. 1, 36 (1990).

consensual, ‘existing only after both attorney and client have consented to its formation.’” Brown, 148 F.R.D at 250 (citations omitted). In accordance with these principles, as explained above, Section 10058.4(c) of the General Counsel’s Unfair Labor Practice Casehandling Manual advises Board agents in the Regional Offices to verify that the attorney-client relationship between party counsel and a third-party witness is a consensual one before permitting the attorney to be present at the interview.

Whether or not an attorney-client relationship exists is a question of fact. Harry A. v. Duncan, 330 F. Supp.2d 1133, 1142 (D.Mont. 2004). In Duncan, students who believed they had been videotaped in a high school locker room sued the school district and several current and former employees. The school district contended that a letter sent to all individuals employed at the relevant time asserting that they were represented by the school’s attorney established an attorney-client relationship because “no such employee has ever severed or modified that representation.” Id. at 1141. Finding that the employees had not manifested an intent to be represented, the court disagreed and explained that two factors weighed against finding an attorney-client relationship: (1) the potential for conflicts of interest, based on the possibility that employees could possess information that could damage the school’s case; and (2) the fact that the school’s counsel had never even spoken to the employees. Id. at 1142.

Similarly, in Brown v. St. Joseph County, in which a pretrial detainee at a county jail sued a hospital that was charged with his care, the court found that a representational relationship was not established by virtue of the fact that the firm representing the hospital’s liability insurer was also hired to represent current and

former hospital employees. In particular, the court found no evidence that the employees at issue had ever “sought legal advice, requested representation or shared confidential information with [the hospital’s] counsel regarding this litigation or any other matter.” Brown, 148 F.R.D. 250-251. ⁹

The first scenario described in the introduction, involving the witness who had never met the company attorney prior to her interview with a Board agent, raises the same concerns from the Agency’s perspective as in Duncan and Brown where the employers tried to impose attorney-client relationships upon employees who were not presumed to be represented by company counsel under M.R. 4.2, and who had not manifested an intent to be represented. Further, even in situations like the second scenario, where the attorney appears to have complied with Rule 1.7’s requirements regarding disclosure and informed consent, given the inherent imbalance of power in the employer/employee relationship, and the resulting potential for coercion by the employer, it can be difficult, if not impossible, for Board agents to assess whether an asserted attorney-client relationship between company counsel and a third-party employee witness is indeed consensual, or whether the employee was pressured into accepting representation.

Current Case Law vs. A Federal Agency’s Interest in Ensuring the Integrity of Testimony Obtained in Investigations

⁹ See also In re U.S. Dept. of Justice Antitrust Investigation CIDS Nos. 9683, 1992 WL 237318, slip op. at 2 (D.Minn. 1992)(company’s “blanket assertions of representation without proof of actually having conferred with each individual violates the individuals’ right to retain counsel of their own choosing”); U.S. v. Occidental Chemical Corp., 606 F.Supp. 1470, 1477 (W.D.N.Y. 1985) (court enjoined defendant and its law firm from sending letters to former employees extending offers of free representation, stating “the attorney-client relationship must, if it is established at all, come about at the initial request of the former employees”).

The D.C. Circuit has routinely struck down efforts by federal agencies to preclude counsel who represents multiple clients from attending witness interviews, finding that the agencies did not meet the heavy burden of proof required to override the right of a witness to be represented by a particular attorney. Specifically, the Court has held that because Sec. 6(a) of the Administrative Procedure Act (5 U.S.C. Sec. 555(a)) provides that any person summoned to appear before a federal agency is entitled to the assistance of counsel, then an agency may only exclude an attorney from its proceedings upon a showing of “concrete evidence” that the attorney’s presence would obstruct and impede the investigation. SEC v. Csapo, 533 F.2d 7, 11 (D.C.Cir. 1976); Professional Reactor Operator Soc. v. NRC, 939 F.2d 1047, 1051-1052 (D.C.Cir. 1991).

In SEC v. Csapo, the attorney exclusion issue arose in the context of the SEC’s investigation of alleged financial improprieties by the defunct Stirling Homex Corporation, and its issuance of a subpoena to Csapo who, as vice president of manufacturing, was “an important figure in the corporate life of Homex” and a target of the agency’s investigation. 533 F.2d at 8-9. Csapo’s attorneys had represented eight other witnesses in the investigation, including three individuals who were also principal targets facing individual liability.¹⁰ On this basis, the SEC informed Csapo that it intended to enforce its rarely applied witness sequestration rule to bar the attorneys from the hearing room during Csapo’s examination.¹¹ Csapo refused to testify under

¹⁰ These individuals included the former chairman of the board and chief executive officer; the former president, director, and chief operating officer; and the former general counsel, director, and executive vice president.

¹¹ The SEC’s rule basically provides that no witness or counsel shall be permitted to be present during the examination of any other witness called in the proceeding. 533 F.2d at 8 n.1. The rule applies only to

these circumstances, and the SEC commenced a subpoena enforcement proceeding. Both in the district court and on appeal, the SEC advanced two arguments to support the application of its sequestration rule. First, the SEC argued that “multiple representation increases the likelihood that subsequent evidence will be tailored, either consciously or unconsciously, better to conform with or explain what has come earlier.” 533 F.2d at 9. Second, the SEC raised the possibility that company officials had attempted to pressure other former employees of Homex to accept the attorneys’ services in order to present “a common front.” *Id.* at 9-10.¹² The district court judge offered to hold a hearing to resolve disputed factual issues related to the joint representation, but the SEC declined on the grounds that such collateral inquiries would delay and hinder its investigation. *Id.* at 10-12. Finding no concrete evidence of wrongdoing on the record before it, the district court conditioned enforcement of the subpoena upon Csapo’s right to be accompanied by counsel of his choice.

On appeal, the D.C. Circuit, affirming the application of the “concrete evidence standard,” found the SEC’s arguments speculative, and concluded that the “mere fact that a witness’ counsel also represents others who have been or are later to be questioned, is no basis whatsoever for concluding that presence of such counsel would obstruct the investigation.” *Id.* at 11. Emphasizing that Csapo had consented to the joint representation, the court further found that its conclusion that the SEC had not met its burden of proof was buttressed by Csapo’s status as a potential target of the SEC’s

that particular interview, and therefore the attorney can continue to represent the witness for purposes of the SEC proceeding.

¹² These individuals included former vice presidents, officers, and directors.

investigations who could therefore be subject to criminal sanctions, and who had already spent a substantial amount of money to hire the attorneys to represent him. Under these circumstances, the court found that the witness's choice of company counsel to accompany and advise him during his SEC interview was "a crucial one" that "should not needlessly or lightly be disturbed." *Id.* 533 F.2d at 12. However, the court left open the possibility that the SEC could come forward with "the requisite proof of its allegations." The court also stated that, if proved, the alleged professional impropriety, which it characterized as attorney "solicitation," could warrant disciplinary action. *Id.* at 12-13.

In Professional Reactor Operator Society v. NRC, the NRC sought judicial review of a rule allowing it to exclude a subpoenaed witness's counsel if the agency had a "reasonable basis" to believe that counsel's presence would obstruct, impede, or impair the investigation because of the attorney's representation of multiple interests. The NRC inspects licensed nuclear facilities to determine their compliance with legal requirements, including safety standards. When safety issues are uncovered, the agency's "primary investigative technique is to interview employees who might have information concerning the apparent wrongdoing." 939 F.2d at 1049. The agency had promulgated its attorney exclusion rule because of attorney admissions that in some cases employee testimony was being reported back to employers. The rule addressed the agency's concern that in some instances the presence of company attorneys impeded its investigations by "produc[ing] an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer." 939 F.2d at 1049. Relying on SEC v. Csapo, but making no factual distinctions between the

witnesses involved in the cases, the Court refused to apply the lesser “reasonable basis” standard to the NRC based upon the importance of its statutory mission absent an express instruction from Congress to do so. Id. at 1052.

The Fourth Circuit addressed similar issues in Reich v. Muth, 34 F.3d 240 (4th Cir. 1994), which concerned OSHA’s investigation of an accident that occurred during the inspection of a ship’s fire extinguishing equipment. The Secretary of Labor on behalf of OSHA moved in district court to enforce subpoenas that were issued to employees of the company that had been hired by the ship’s operator to assist in the inspection and repair of the fire extinguishing system. Further, the Secretary requested that the company’s attorney be disqualified from attending the interviews of two employees, and appealed the district court’s denial of that request.¹³

Without citing either a specific burden of proof or the earlier D.C. Circuit cases, the Fourth Circuit agreed that disqualification was not warranted. In reaching this conclusion, the court relied on the facts that the witnesses had waived potential conflict problems, there was no indication that they were being coerced into the representation, and they did not have individual liability exposure. Further, the Court was “disturbed by the implication that the attorneys involved here are merely shills for [the employer], “ and was not impressed by the Secretary of Labor’s arguments that company counsel’s presence at the interviews would have a chilling effect “that, if the Secretary is to be believed, heralds the next ice age.” 34 F.3d at 245-246. The Court concluded that

¹³ The motion for disqualification was based on a statutory provision allowing the Secretary of Labor “to question privately any such employer, owner, operator, agent, or employee.” 34 F.3d at 245. Although the Secretary initially asked that the attorney be precluded from representing the witnesses, the request was revised to ask only for the ability to question the witnesses outside of the attorney’s presence.

“[s]tandard rules of ethical practice remain in effect, and are well suited to the proper handling of the dangers the Secretary prognosticates.” 34 F.3d at 245-246.

NLRB Cases are Different Because the Inherent Coercion in Third-Party Representational Relationships is Inconsistent with the Objectives of Federal Labor Law

The potential for coercion is present from the moment that individual representation by company counsel becomes an option for an employee. Indeed, the typical employee witness in an unfair labor practice case is inexperienced in legal matters and does not have access to legal advisers. Especially in these circumstances, the employee is likely to “feel under extreme pressure to cooperate and will no doubt view the discussion with the corporate attorney in which his consent is sought as a corporate request that he do so.”¹⁴ Indeed, what the Secretary of Labor argued to the Fourth Circuit in Reich v. Muth is equally applicable to employees facing interviews by Board agents: if the employee does not consent to be represented by employer counsel, “he risks having the employer think him disloyal.” Reich v. Muth, 34 F.3d at 28.

The potential for coercion builds as the employee witness contemplates testifying in the presence of company counsel. As explained above, an attorney who has complied with Model Rule 1.7’s disclosure requirements will have informed the

¹⁴ Tate, at 39-40 citing In re Grand Jury Investigation, 436 F.Supp. 818, 821 (W.D.Pa. 1977)(finding that where individual being asked for consent is employee and employer is prospective defendant, “[m]erely informing [employee] of the existence of a potential conflict and seeking a waiver from [the employee] does not adequately deal with the problem of multiple representation in this situation. [The employee’s] ‘waiver’ is likely a function in large part of one’s natural hesitancy to alienate the employer rather than a product of a free and unrestrained will.”); United States v. Garafola, 428 F.Supp. 620, 624 (D.N.J. 1977)(questioning the validity of an individual’s consent to joint representation where a stronger party thrust his own attorney upon that individual), *aff’d sub nom.*, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

employee witness that any relevant testimony will be transmitted to the employer.¹⁵ In reliance on its finding that “[o]n at least some occasions . . . company attorneys have taken the position that they ‘would relate to the company all that took place in the interviews,’” the NRC argued in Professional Reactor Operator Society v. NRC that the attorney’s presence at interviews resulted in “an inherent coercion on the interviewee not to reveal to the NRC information that is potentially detrimental to his employer.” 939 F.2d at 1049 (citation omitted). Moreover, even if an employee has not been explicitly informed about the “information sharing” aspect of a joint representational relationship, what the Secretary of Labor argued in Reich v. Muth is again applicable to employees facing interviews by Board agents. The employee witness will implicitly understand “the most direct impediment to an employee speaking freely: the sure knowledge on the employee’s part that the employer will know every word the employee says.” Reich v. Muth, 34 F.3d at 26 n.27.¹⁶ The employee witness thus faces a Hobson’s choice: “[i]f he permits the employer’s presence, he may either alienate the employer by speaking candidly about matters that could prove inculpatory to the employer or avoid alienating the employer by withholding accurate information.” Reich v. Muth, 34 F.3d at 28.

¹⁵ See Frontline Communications Intern., Inc. v. Sprint Communications Co., 232 F.Supp.2d 281, 288 (S.D.N.Y. 2002)(“When an attorney represents an employer and an employee jointly, the employee cannot reasonably expect the attorney to keep any information from the employer”).

¹⁶ One commentator has suggested that “the existence of a long-standing relationship, where the lawyer has an expectation of continuing work for the company, suggests that the lawyer is likely to favor the interests of the company over the interests of the individual, even if only unconsciously.” Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 518 (1998).

Although the D.C. Circuit refused in Professional Reactor Operator Society v. NRC to make distinctions regarding attorney exclusion on the basis of the importance of an agency's statutory mission, the fact remains that federal labor law is indeed different in significant respects. Indeed, its uniqueness was recognized by the Supreme Court in NLRB v. Robbins Tire and Rubber Co.:

The danger of witness intimidation is particularly acute with respect to current employees-whether rank and file, supervisory, or managerial-over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, *due to the "peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's or-in some cases-the union's capacity for reprisal and harassment."* Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (CA3 1976). Accord, NLRB v. Hardeman Garment Corp., 557 F.2d 559 (CA6 1977).

437 U.S. 214, 240 (1978)(emphasis added).¹⁷

For NLRB investigations and trials, the coercion that is inherent in any employer-employee relationship by virtue of the employer's superior economic position, while unsuccessfully relied upon by the NRC and the Secretary of Labor in cases involving government investigations into workplace safety, is exacerbated because of the very nature of unfair labor practice cases. This fact makes federal labor litigation under the NLRA unique. The Act guarantees employees the ability to exercise their Section 7 rights free from employer retaliation, harassment, or coercion. Unfair labor practice charges seeking to enforce those rights are routinely filed by or on behalf of

¹⁷ As indicated, the arguments made herein may also be applicable to joint representations regarding union counsel. See n.1, above.

nonsupervisory employees against their employer, thus creating an adversarial relationship that compounds the inherent coercion that is already present because of the employment relationship. In this context, where the employer is the charged party and employees are the alleged victims, and in order to avoid liability under the Act, an employer may try to exercise its “intense leverage” to intimidate witnesses. Robbins Tire, above. The recognition that federal labor litigation possesses this distinctive and significant potential for witness intimidation by employers has resulted in protections being afforded to witnesses in NLRB proceedings. These protections, described below, are intended to insulate witnesses from coercion and/or threats of reprisal.

An employee’s act of testifying on behalf of another is protected concerted activity under the NLRA that is entitled to be free of employer coercion. NLRB v. Coca Cola Bottling Co. of Buffalo, Inc., 811 F.2d 82, 88 (2d Cir. 1987).¹⁸ The protections afforded by the Act are intended to guarantee that workers do not feel compelled by the fear of employer retaliation to misrepresent their own knowledge or beliefs on matters relevant to the Act. See generally NLRB v. Retail Store Employees Union, Local 876 Retail, 570 F.2d 586, 590 (6th Cir 1978) (the purpose of Section 8(a)(4) is to ensure that all persons with information about unfair labor practices be completely free from coercion against reporting them to the Board; coercing employees to give untrue testimony just as surely undermines the integrity of Board proceedings as does coercing employees to give no testimony at all). In fact, the Board has found violations of

¹⁸ The court in Coca Cola Bottling Co. held that an employee’s testimony pursuant to a subpoena in a state criminal case on behalf of a fellow union activist accused of strike misconduct should be considered “voluntary” and was therefore protected concerted activity under the NLRA.

Section 8(a)(1) of the Act based on an employer's offer to provide free company counsel to non-supervisory employees during Board investigations. See S.E. Nichols, Inc., 284 NLRB 556, 582 (1987), *enfd. in rel. part* 862 F.3d 952 (2nd Cir. 1988), and Midwest Television, Inc. D/B/A KFMB Stations, 349 NLRB No. 38, slip op. at 1, 15 (2007). As the administrative law judge explained in Nichols, “[t]he most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being ‘advised’ by the employer’s counsel.” 284 NLRB at 582.

In view of the protections afforded under the NLRA, and based on a recognition that witnesses in labor litigation are especially susceptible to retaliation, coercion, or influence by the company, the Agency's rules do not provide for general pre-hearing discovery. By extension of the policies that justify this practice, the Supreme Court in Robbins Tire refused to require the Agency to make a particularized showing in any given case that the release of witness statements prior to an unfair labor practice hearing and pursuant to the Freedom of Information Act would interfere with the proceeding. Id. at 236-237. Instead, the Court upheld the Agency's policy preventing parties in unfair labor practice proceedings from obtaining, in advance of the hearing, copies of statements collected during the investigation from potential witnesses. As the Court explained, to require the statements to be turned over prior to the hearing would “disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.” Robbins Tire, 437 U.S. at 236. This delicate balance would be impaired by what the Court characterized as the obvious

risk of turning over witness statements prior to trial, i.e., that employers would intimidate employee witnesses “in an effort to make them change their testimony or not testify at all.” *Id.* at 239. To accommodate this concern, and in recognition of the unique nature of federal labor law, the Agency’s “Jencks” rule provides that a witness’ pretrial statement will be furnished to a litigant, to be used in cross-examination, only after the General Counsel has called the witness on direct. 29 C.F.R. 102.118(b)(1). That rule is founded upon the need “to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship.” NLRB v. Lizdale Knitting Mills, Inc., 523 F.2d 978, 980 (2d Cir. 1975).

Both the D.C. Circuit in SEC v. Csapo and the Fourth Circuit in Reich v. Muth expressed concern about the possibility of coerced attorney-client relationships, but were willing to accept at face value the witnesses’ expressions of consent. In their efforts to reconcile the government’s interest in the integrity of investigations with the right of the witness to be represented by counsel of choice, each decision also demonstrated a willingness to rely on ethics rules and ethics procedures to resolve issues arising out of joint attorney-client relationships, including the potential that the relationship was the product of coercion. We argue below, however, that due to the unique nature of federal labor law litigation, and the enhanced potential for witness intimidation in NLRB cases, the results of the D.C. Circuit and Fourth Circuit cases should be revisited; that the protections of Model Rule 1.7 are less likely to be effective in ensuring that NLRB witnesses have given informed consent to a joint representation by company counsel; and that an alternative is needed.

One Alternative would be for Board Agents to be able to Question Third-Party Witnesses Ex Parte about their Representational Relationships with Company Counsel; Another Alternative would be a Rule Precluding Such Relationships

The sophistication of the client is a legitimate factor that must be considered in determining the effectiveness of client consent to a conflict.¹⁹ SEC v. Csapo presented an extreme example of highly sophisticated clients who the court found had consented to joint representation -- i.e., executives of the highest level, including an attorney -- and who would likely be capable of understanding the nuances of joint attorney-client representations.²⁰ Further, the fact that they were *former* employees of an organization that was in fact defunct would, if anything, make them less susceptible to the pressure from their employer to accept joint representation to present a “common front.” Despite the obvious differences between these witnesses, including Csapo, and the employees who worked at nuclear facilities in Professional Reactor Operator Society v. NRC, the D.C. Circuit simply concluded in the NRC case that “the path we follow in this case is marked out for us by SEC v. Csapo.” 939 F.2d at 1051. No distinction was made between the legally sophisticated former executive clients in Csapo and the currently employed nuclear reactor employees whom the NRC contended would be subject to coercion if their employer’s counsel were present to relay their testimony back to their employer. At the other end of the spectrum from the clients in Csapo, the typical employee fact witness in an unfair labor practice proceeding is more analogous to the

¹⁹ The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2004-02, “Representing Corporations and their Constituents in the Context of Governmental Investigations. See also n.12 above.

²⁰ In fact, if these individuals were still employed, they would, in all likelihood, be considered “represented” under M.R. 4.2

employees in NRC: unsophisticated in legal matters, economically dependent on the employer, and therefore more susceptible to being coerced into accepting representation by company counsel and having their testimony influenced by counsel's presence.

The cases also reflect confusion about how to reconcile employee choice of counsel and federal agencies' investigatory interests. In the SEC case, the witness, Csapo, was the target of a criminal investigation and faced personal liability. Under those circumstances, the D.C. Circuit found that his choice of company counsel, whom he had hired and paid for himself at considerable expense, was "a crucial one" that "should not needlessly or lightly be disturbed." 533 F.2d at 12.²¹ Taking a different approach, the Fourth Circuit in Reich v. Muth found that any danger from counsel's joint representation of the company and its employees was minimized because the employees *did not* have individual liability. 34 F.3d at 245. This conclusion may have been a result of the court's focus on the attorney's ability to represent the interests of both clients.²² What do these cases mean for joint representation of NLRB witnesses, who do not face personal liability? Under the D.C. Circuit's cases, individual liability does not necessarily determine the outcome since that factor was not even discussed in

²¹ The liability factor was not discussed in the subsequent D.C. Circuit case involving the NRC, although it is another factor to consider in balancing an agency's investigatory interests with a witness's interest in counsel of choice. The facts of NRC are closer to our Agency's than Csapo.

²⁰ Accord The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2004-02, "Representing Corporations and their Constituents in the Context of Governmental Investigations" (noting that in a hypothetical investigation of securities law violations, an employee in the corporation's maintenance department who merely overheard comments regarding the need to alter the corporation's financial statements would have no reason for concern about personal liability, and therefore a disinterested lawyer would easily conclude that a single lawyer could competently represent the interests of both the corporation and the maintenance worker).

the NRC case, which presented a completely different category of witnesses than the executive who faced personal criminal liability in SEC. Under the Fourth Circuit's reasoning, the NLRB witnesses' representation by company counsel is not crucial. Although seemingly inconsistent, what these approaches have in common is that neither adequately safeguards an employee from employer coercion to accept the joint representation, nor recognizes the detrimental effect that a coerced representational relationship could have on an agency's investigation.

In an employment case, Rivera v. Lutheran Medical Center, 866 N.Y.S.2d 520 (Sup. Ct. Kings Cty., Oct. 16, 2008), the New York court expressed some sensitivity to the factors at play when an employer's counsel seeks to represent third-party witnesses in litigation against the employer. The plaintiff, Rivera, brought an action for retaliatory and discriminatory discharge against his former employer, Lutheran Medical Center (LMC), and its vice president. The defendants' law firm (Morgan Lewis & Bockius, LLP) contacted two former employees and two current employees who had been identified as witnesses and offered to represent them at LMC's expense. Each agreed to the representation, and each executed a retainer letter. The plaintiff contended that none of the witnesses would be presumed to be represented by company counsel under New York's version of Rule 4.2, as interpreted in Niesig v. Team 1, 76 N.Y.2d 363 (1990), and that the law firm had solicited the representations to prevent the plaintiff from executing his right to interview the witnesses ex parte. The court agreed and ordered that the law firm be disqualified from representing the third-party witnesses, stating:

These witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in

this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court. 866 N.Y.S.2d at 526.

Thus, although the Rivera decision upheld the balance struck by the New York Court of Appeals in Niesig, which found that rank-and-file fact witnesses are not presumptively represented by organizational counsel, the disqualification that it imposed was based on a finding that the law firm violated the predecessor to New York Rule of Professional Conduct 7.3(a), which prohibits a lawyer from in-person solicitation of clients.²³ In a recent ethics opinion, the New York County Lawyers' Association described a situation "meaningfully distinguishable from the one addressed in *Rivera*," and in which party counsel's representation of a third-party witness would not constitute improper solicitation. NYCLA Opinion 747, *4 (2014). Although premised on Rule 7.3(a), the Opinion emphasized the potential for conflicts of interest to arise in this context, cautioning that to be ethical, organizational counsel's representation of a third-party witness would have to be in the best interest of the employee client, not the organization.

Specifically, the Opinion explained that to establish a representational relationship in good faith, the lawyer should initially interview the employee as a non-

²³ The Rivera court found that the plaintiff had not met his burden of demonstrating that the law firm had an inherent conflict of interest in representing both LMC and the third-party witnesses. 866 N.Y.S.2d at 525.

client to learn potentially relevant information because it is only after obtaining such information that the lawyer would be in a position to determine whether the employee would benefit from legal representation. Further, the Opinion cautioned that:

[E]stablishing a lawyer-client representation solely to benefit the corporate client may be impermissible from the perspective of the individual, who may be misled regarding the need for a lawyer or who may be burdened by a representation that exclusively benefits the employer. If the representation is established in bad faith, it may also be impermissible from the perspective of the opposing party, who may be disabled by Rule 4.2 from communicating directly with the represented employee.²⁴

In addition to determining whether the employee could benefit from representation, the Opinion explained that information obtained in the initial interview should also enable the lawyer to determine whether a joint representational relationship is permissible under Rule 1.7, and if so to make the disclosures that are required under that rule in order to obtain the employee's informed consent to the joint representation. The Committee's emphasis on the purpose of organizational counsel's initial meeting with the employee is consistent with case law which, in determining whether an asserted attorney-client relationship between party counsel and a third-party witness is consensual, considers whether the attorney had actually conferred with the employee and considered his or her best interests and the potential for conflicts. See Harry A. Duncan, 330 F.Supp.at 1133, and Brown v. St. Joseph County, 148 F.R.D. at 246.

In NLRB cases too, employers often pay for the representation of third-party employee witnesses. In a recent case involving an employer's provision of counsel, the Supreme Court of New Jersey framed the issue as "whether, and under what

²⁴ Opinion 747 * 2.

circumstances, a lawyer may represent a client when the fees and costs incurred are being paid by another.” That case, In the Matter of the State Grand Jury Investigation, 983 A.2d 1097, 1105 (2009), involved an employer/contractor facing a grand jury inquiry that focused on the company and three of its employees. Unlike in the SEC case where the targeted witness paid for his own representation by company counsel, the New Jersey company arranged for counsel for its employees, and entered into four separate retainer agreements with four separate lawyers, none of whom represented the company in the grand jury matter. Three of the attorneys represented, respectively, the three targeted employees, and the fourth was retained to represent all nontargeted current and former employees of the company. The State of New Jersey appealed the denial of its motion to disqualify counsel, claiming that the company’s selection and payment of attorneys to represent its employees/grand jury witnesses for purposes of an investigation for which it was the putative target created a per se conflict of interest.

Although the issue before it arose in the context of a criminal grand jury investigation in which some of the employee clients were targets, the court’s analysis seemingly has broader applicability. Thus, the court explained as a threshold matter that “[r]egardless of the setting – whether administrative, criminal or civil, either as part of an investigation, during grand jury proceedings, or before, during and after trial – whether an attorney may be compensated for his services by someone other than his client is governed in large measure by RPC 1.8(f) and, to a lesser extent, RPC 1.7(a)

and RPC 5.4(c).” *Id.* at 1099.²⁵ Synthesizing the requirements set forth in those rules, the court held that a lawyer may represent a client but accept payment, directly or indirectly, from a third party provided that each of six conditions is satisfied. In particular, the court interpreted New Jersey’s ethics rules to require that to avoid the representation of adverse interests, there cannot be a current attorney-client relationship between the lawyer and the third-party payor. *Id.* at 1105-1106.²⁶ Because the company had fully complied with the court’s test, the court rejected the State’s argument that there was a per se conflict of interest, denied the motion for disqualification, and concluded that the company’s retention and payment of separate counsel for its employees complied with relevant ethics rules. If applicable to administrative proceedings, the case would suggest that company counsel could not represent third-party witnesses unless the witnesses were paying their own attorneys fees and costs.

To the extent the D.C. Circuit and the Fourth Circuit relied on the possibility of attorney disciplinary proceedings to sort out the competing interests implicated when an employer’s counsel represents employees who are fact witnesses, bar referrals would likewise not safeguard the NLRB’s interests because bar sanctions could not undue the

²⁵ The reference is to New Jersey’s Rules of Professional Conduct: 1.7(a)(2) (Conflict of Interest: Current Clients); 1.8(f) (Conflict of Interest: Current Clients: Specific Rules), including third-party payors; and 5.4(c) (Professional Independence of Lawyer).

²⁶ In addition, the court required that the client give informed consent to the representation; the third-party payor be prohibited from directing, regulating or interfering with the lawyer’s professional judgment in representing the employee client; the lawyer be prohibited from communicating with the third-party payor concerning the substance of the representation of the client; the third-party payor make prompt payment to the lawyer; and the third-party payor should not be relieved of its obligation to pay without leave of court.

“tactical advantage” that an employer gains when its attorney represents third-party witnesses in NLRB investigations. Although state disciplinary officials can sanction attorney conduct, they cannot rectify any incomplete or untruthful testimony that agencies, including the NLRB, may have received as a result of representational relationships being forced on rank-and-file employee fact witnesses. See Robbins Tire, 437 U.S. at 239-240 (in rejecting the respondent’s argument that employers would be deterred from improper intimidation of employees who provide statements to the NLRB by the possibility of an 8(a)(4) charge, the Court stated, “the possibility of deterrence arising from *post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding.”).

It is difficult for Board agents to procure evidence that would establish that company counsel’s presence causes harm to the investigation. As explained above, due to the asserted attorney-client relationship, counsel is present when Board agents seek to verify that the witness gave informed consent to the representation, and the witness’s testimony may be less than forthcoming. Perhaps the Agency should be able to question the witness outside of the presence of counsel about nonprivileged matters concerning the formation of the attorney-client relationship to make sure that the relationship was not forced upon the employee. If satisfied that the relationship is indeed consensual and in compliance with relevant ethics rules, then counsel would be

permitted to be present before the witness is questioned about substantive matters relevant to the case.²⁷

With respect to those occasions like that in the first scenario, when company counsel meets a witness for the first time moments before the witness' testimony and produces a representation agreement which is hastily signed but not read, this procedure would better allow the Agency to gather the concrete evidence that the court requires to justify attorney exclusion. Moreover, this ex parte questioning would be consistent with the Agency's practice of conducting preliminary interviews outside the presence of counsel to determine if a witness who is an employee or agent of an organization is presumed to be represented under Rule 4.2.²⁸ Rule 4.2's anti-contact prohibitions apply only when an attorney knows that a potential witness is represented in the matter to be discussed. A preliminary interview could provide a mechanism for trying to assess, as a threshold matter, whether an asserted representational relationship is in fact consensual and therefore valid.

²⁷ This approach differs from the agencies' efforts in SEC v. Csapo, Professional Reactor Operator Society v. NRC, and Reich v. Muth to prevent counsel from attending the witnesses' substantive interviews.

²⁸ When an individual's supervisory or agency status is unclear, a Board agent may conduct a preliminary interview in order to clarify the witness's status prior to conducting a substantive interview about the merits of the case. See Sec. 10058.2(c) of the Unfair Labor Practice Casehandling Manual. Such clarification determines whether or not the witness is "represented" under Rule 4.2. See Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 76 (D.N.J. 2000)(applying New Jersey ethics law and permitting ex parte contacts to ascertain whether a potential witness is in fact represented). See also Snider v. Superior Court, 113 Cal. App. 4th 1187, 1193-94 (Cal. Ct. App. 2003)(emphasizing that attorneys who seek to interview company employees ex parte should pose questions at the outset of the contact that would determine whether the employee falls within the skip counsel rule's scope); Georgia Rule 4.2, Comment 4B (noting that in many instances the interviewing lawyer will not have sufficient information to determine whether or not the witness is considered represented by the organization's counsel, and advising the interviewing lawyer to explore that issue at the outset of the interview).

However, this measure may not go far enough to protect employee witnesses from coercion because it presents the same concerns as the Agency's current approach under Section 10058 of the Casehandling Manual. If an employee asserts in an ex parte interview that she does not want to be represented by company counsel, the employee's rejection of the attorney-client relationship will be transmitted back to the employer. Therefore, just like when the company's attorney is actually present for questions about representation, the witness will feel pressured to accept representation. Under these circumstances, the witness again finds herself testifying in the presence of company counsel and knowing that her testimony will be shared with her employer.

As an alternative, in view of the unique nature of federal labor litigation, which enhances the risk of employer coercion of employee witnesses, and thereby impairs the quality of the Agency's investigations, a rule precluding party counsel from representing a third-party witness may be warranted and, in fact, may be a logical extension of the Supreme Court's decision in Robbins Tire. Cf. In the Matter of the State Grand Jury Investigation, 983 A.2d at 1107 (permitting an employer to pay for legal representation for its employees only if the attorneys selected did not have a current representational relationship with the company).

Arguably company counsel's presence at the interview of an employee fact witness would present an even greater opportunity for coercion than would giving the employer copies of witness statements prior to the unfair labor practice hearing. As a representative of the employer, counsel's presence would enable an employer to shape the witness's testimony at a critical stage in the proceedings and before it was committed to writing and signed by the witness. In particular, the employer would have

a significant “tactical advantage,” (See Rivera, above) through access to and the opportunity to influence the content of the Region’s evidence even before the Regional Director, on behalf of the General Counsel, could make the determination about whether or not the charge has merit.

In circumstances where the attorney-client relationship is clearly not based on informed consent, as in the first scenario set forth in the introduction, counsel’s presence at the interview subverts the holding of Robbins Tire by failing to insulate the employee from pressure by the employer, thereby impairing the integrity of the Agency’s investigation. Moreover, even when it may appear, as in the second scenario, that the witness manifested an intent to be represented and understood the complexities of the joint representational relationship in accordance with the requirements of Model Rule 1.7, it may nevertheless be impossible to determine if that is really the case or if the employee has succumbed to pressure from the employer to accept the representation.

The Board long ago explained that, “[a]s the natural result of the employer’s economic power, employees are alertly responsive to the slightest suggestion of the employer.” 3 NLRB ANN. REP. 125 (1938). In other words, with respect to joint representation, employees may accept an employer’s offer of counsel because they perceive, either consciously or unconsciously, that the employer wants them to accept the offer and therefore that it is in their best interest to do so. Board agents thus find themselves caught up in a “Catch 22” situation because party counsel’s presence at the interview impedes the Agency’s ability to assess whether or not the witness wants to be represented and whether or not the joint representation is ethical. With counsel present, even the very best intentioned counsel, the witness may be less than candid in

answering questions about the formation of the asserted representational relationship.

Therefore, Board agents cannot make an informed decision as to whether the relationship is consensual.

Counsel's presence can seriously impede the Agency's ability to investigate unfair labor practice charges. The Board agent may never know whether the employee, if unrepresented and uncoached, would have testified adversely to the company's interests, thus presenting an actual conflict of interest that would make the joint representational relationship improper.²⁹ At a minimum, witnesses questioned in the presence of counsel will be less likely to make uninhibited and nonevasive statements, thus complicating the Agency's determination of the actual facts in a labor dispute. See Nichols, above. In addition, regardless of whether the witness's actual testimony is favorable or adverse to the organization, company counsel's recitation of that witness' testimony to the company would enable the company to "construct defenses which would permit violations to go unremedied." Robbins Tire, 437 U.S. at 241 (citations omitted).³⁰

²⁹ See U.S. Dept. of Justice Antitrust Investigation, 1992 WL 237318, slip op. at 3 (in rejecting the employer's blanket assertions of representation of its employees, the court noted that DOJ's investigation could reveal facts that would establish a conflict of interest between the employer and its employees) See also In re Cendant Corp. Securities Litigation, 124 F.Supp.2d 235, 243-44 (D.N.J. 2000) ("there is no doubt that representing a party and a witness adverse to that party-client would – by imputation – implicate [Ethics Rule 1.7]").

³⁰ The above procedures may be further justified, and distinguish the NLRB from the agencies in the D.C. Circuit and Fourth Circuit cases, because their application would not preclude parties or witnesses from providing the Agency with evidence in the form of non-Board affidavits. The longstanding Agency policy respecting the acceptance of such evidence affords parties and witnesses with due process protections, while ensuring that the Agency does not further any purported attorney-client relationships that are not based on true informed consent.

These alternative measures should be explored because the courts' current approach to joint representation cases does not adequately address the inherent coercion that is present when a company's attorney also represents a nonsupervisory fact witness. For the reasons explained, the potential for coercion is magnified in NLRB cases due to the unique nature of federal labor law. Although ex parte questioning of the witness about the background of the attorney-client relationship could help assess whether the relationship is consensual, this measure may not go far enough to protect employee witnesses from pressure to accept the employer's offer of counsel. Instead, a rule precluding party counsel from representing third-parties may be warranted to insulate employee witnesses from coercion and protect the Agency's investigatory interests.