Legal Ethics at the National Labor Relations Board

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The Office of the General Counsel is committed to ensuring that the National Labor Relations Board’s unfair labor practice investigations and trials comply with relevant ethics requirements. To that end, former General Counsel Arthur Rosenfeld launched an extensive program to address ethics issues of particular importance to the labor bars. The program’s focus was on the so-called “skip counsel rules” that arise under the ABA’s Model Rule 4.2 and its equivalents in the states. M.R. 4.2 generally prohibits an attorney from communicating directly with a represented person about the subject of the representation without prior consent from the person’s attorney or legal authorization to do so. Skip counsel issues arise before the NLRB when a party is an organization represented by counsel. In this context, Board agents have to determine whether certain categories of witnesses are considered to be represented by the organization’s counsel, and are therefore “clients.” These witnesses include current and former supervisors, agents, and third-party witnesses.

The General Counsel’s office has taken several important steps to assist its attorneys and agents in understanding and complying with relevant skip counsel requirements, including: (1) promulgating ethics policies, (2) training Board agents to understand both general skip counsel issues and the Agency’s skip counsel policies, and (3) providing for Board attorneys and agents to receive ethics advice from the Agency’s headquarters when appropriate.

The Agency’s skip counsel policies appear in Section 10058 of the Unfair Labor Practice Casehandling Manual, which is found on the Agency’s website at www.nlrb.gov. The guidelines in the manual are general policies applicable to all Board
attorneys, regardless of where they are licensed and practicing, as well as to field examiners. The guidelines are intended to make sure that Board attorneys do not violate ethics requirements. The policies direct Board agents in the field to call Special Litigation at headquarters for assistance when jurisdiction-specific skip counsel issues arise.

As the Office of the General Counsel has developed the Agency’s ethics program, there have been challenges in applying the skip counsel guidelines to situations that are unique to NLRB cases and NLRB casehandling. The Office of the General Counsel has continued to make its skip counsel policies available to the public as they are developed.

As part of his ethics program, former General Counsel Rosenfeld also created a rulemaking committee to examine the feasibility of having the Agency promulgate its own ethics rules. General Counsel Meisburg is continuing Mr. Rosenfeld’s program. It must be emphasized that the General Counsel’s Office is in the beginning phase of this project. The Board has not as yet considered the matter. If the Agency ultimately decides to launch its own ethics rules, it would do so through Notice and Comment Rulemaking. The remainder of this paper will examine some of the numerous complicated and interrelated issues that are being examined in connection with the rulemaking project, and offer some thoughts by the General Counsel and his staff about why the Agency may want its own code of ethics, and how it could go about implementing one.

By way of background, the rulemaking project developed because of a concern that there is no uniform version of Rule 4.2 to govern Board agents’ contacts with
witnesses – the skip counsel issues described above. Because NLRB field attorneys are licensed in many jurisdictions and ethics requirements vary from jurisdiction to jurisdiction, Board agents are subject to different interpretations of Rule 4.2.

At the present time, when the Agency must determine whether a former or current supervisor/agent of a represented organization is considered represented by an organization’s attorney, the Agency’s Special Ethics Counsel at headquarters in Washington, D.C. engages in a complex legal analysis under the relevant jurisdictions’ versions of M.R. 8.5 (Disciplinary Authority; Choice of Law) to determine which jurisdiction or jurisdictions would assert disciplinary authority over the contact and then, as a choice-of-law matter, which jurisdictions’ version(s) of the skip counsel rule would apply.

This Rule 8.5 analysis looks at the licensing jurisdiction of the Agency attorney conducting the investigation, or if the investigation is being conducted by a field examiner, the licensing jurisdiction of the first attorney in the line of supervision. Also relevant are the versions of Rule 8.5 in effect in the jurisdiction where the contact will occur, and in the location of any eventual trial. Ethics conflicts analyses are complicated by the lack of uniformity in the versions of Rule 8.5 that have been adopted by the state bars.

A relatively simple Rule 8.5 analysis could involve a Board attorney who is licensed and practicing in Maryland, and who wants to interview a former supervisor who was a participant, or “actor,” in the alleged discriminatory conduct that is under investigation. For the first example, consider a witness and a company that are both located in Washington, D.C., which is where the contact and any eventual trial would
take place. Under its version of M.R. 8.5, which tracks the ABA’s Model Rule 8.5, Maryland would assert disciplinary authority over the Maryland-licensed attorney.\(^1\) As a choice-of-law matter, Maryland would apply either the ethics rules of the jurisdiction where the relevant tribunal sits, or the rules of the jurisdiction where the attorney’s conduct (for example, the interview) takes place or, if different from the location of the interview, the rules of the jurisdiction where the attorney’s conduct would have its predominant effect.\(^2\) In this example the choice-of-law provisions each point to the same place - Washington, D.C., a jurisdiction that permits ex parte contacts with former supervisors, including both “actors” and fact witnesses.\(^3\) The result changes, however, if the witness and the company are in Maryland. Under Rule 8.5(b), Maryland would now apply its own version of Rule 4.2, which prohibits ex parte contacts with former supervisors who were “actors” in the alleged unlawful conduct.\(^4\)

\(^1\) Maryland’s Rule 8.5(a) provides in pertinent part, “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”

\(^2\) Rule 8.5(b) states in pertinent part that as a choice-of-law matter the following ethics rules apply:

1. for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

2. for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct . . . .

\(^3\) D.C. Bar Legal Ethics Comm. Op. No. 287, 1999. Note that Washington, D.C.’s version of Rule 8.5 states in pertinent part that Washington, DC asserts disciplinary authority over attorneys licensed in that jurisdiction regardless of where they are practicing. In the above example, the attorney is licensed only in Maryland. Note also that although Washington, D.C. has adopted new ethics rules effective February 1, 2007, its version of Rule 8.5, unlike the ABA’s Model Rule, continues to assert disciplinary authority only over attorneys licensed in that jurisdiction, and not over attorneys who provide or offer to provide legal services therein.

\(^4\) Rogosin v. Mayor and City Counsel of Baltimore, 164 F.Supp.2d 684, 687 (D.Md. 2001). See also Sharpe v. Leonard Stulman Enterprises, 12 F.Supp.2d 502 (D.Md. 1998)(court permitted plaintiff’s contacts with former employees of a landlord accused of discrimination on the grounds that they were not actors in the case and their positions were not such that their statements or actions would be imputed to the defendants, and for the further reason that the former employees did not possess confidential information); Zachair, Ltd. V. Driggs, 965 F.Supp. 741, 753 (D.Md. 1997), aff’d on unrelated grounds, 141 F.3d 1162 (4th Cir. 1998)(court disqualified plaintiff’s counsel and suppressed the evidence obtained from
These two scenarios demonstrate that even though the NLRB has a national practice, the scope of permissible ex parte contacts allowable for investigations and pretrial preparation will vary depending upon the location of the interview and the Board attorney assigned to the case. It is hoped that the Agency’s promulgation of its own ethics rules might help alleviate that problem, and thus put all parties to an Agency proceeding on a level playing field. This hope is bolstered by new developments in State Bar ethics rules that may increase the chances that State Bars will defer to the ethics rulings of government agencies with their own rules of practice. In brief, the choice-of-law provisions that prevailed under the 1995 version of Model Rule 8.5(b)(1), if read literally, allowed state bars to defer to the “skip counsel” rules of another jurisdiction only if that jurisdiction is a “court.” In contrast, the new 2002 version of Model Rule 8.5(b)(1) substitutes “tribunal” for “court,” a term that would encompass an agency adjudicatory body that is not in the strictest sense a “court.”

In terms of the examples involving the Maryland-licensed attorney, regardless of whether that individual was preparing for an unfair labor practice proceeding in Washington, D.C. or in Maryland, if the Agency had its own ethics rules, those rules would apply under Maryland’s version of Rule 8.5(b)(1), which tracks the ABA’s Model Rule and states that “for conduct in connection with a matter pending before a tribunal,” the relevant ethics rules are “the rules of the tribunal.” To the extent that states are like Maryland and have adopted and are adopting the 2002 version of Model Rule 8.5, it is hoped that there is a greater likelihood that state bar and disciplinary officials will defer to a federal agency’s own rules of practice when processing complaints concerning ex parte contacts with defendant’s former general counsel who was involved in the actions for which the plaintiff sought recourse).
practitioners before that agency.\textsuperscript{5} It is further hoped that a uniform version of Rule 4.2 adopted as the law of the Agency “tribunal” would, if recognized by state bars, facilitate the Agency’s ability to address skip counsel issues and conduct prompt and uniform unfair labor practice investigations.

If the Agency does engage in ethics rulemaking, it would be against the backdrop of states’ resistance to relinquishing regulatory authority over attorneys. For this reason, the rulemaking committee examined the ethics and misconduct rules promulgated by other federal entities to try to understand what went wrong with those projects and how the NLRB could avoid making the same mistakes. For example, there was a consensus among the ethics experts who spoke to the committee that federal entities that have attempted to promulgate ethics rules outside of the “mainstream,” as represented by the ABA’s Model Rules, have encountered effective resistance from courts and from state bar and disciplinary officials.

This is what happened to the Department of Justice, which was unsuccessful in its efforts, beginning in 1994, to promulgate a version of the skip counsel rule applicable only to U.S. attorneys. DOJ’s rule was more liberal than the versions in effect in almost all jurisdictions, and was therefore considered a threat to states’ regulatory authority.\textsuperscript{6}

\textsuperscript{5} Pennsylvania has adopted the 2002 version of M.R. 8.5.

\textsuperscript{6} See 28 C.F.R. pt. 77. For example, as to current employees, the DOJ rule prohibited ex parte contacts only with a “controlling individual,” defined as “a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization’s legal position in the proceeding or investigation of the subject matter.” See 28 C.F.R. § 77-10(a) (1994), reprinted in U.S. ex rel O’Keefe v. McDonnell Douglas Corp, 961 F. Supp. 1288, 1293 (E.D. Mo. 1997). By contrast, under the ABA’s standard in Comment 4 to the 1995 version of M.R. 4.2, the ban on ex parte communications extended to “persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.”
Similarly, the U.S. Judicial Conference Standing Committee on Rules of Practice and Procedure was not successful in its effort, beginning in 1997, to promulgate ten core Federal Rules of Attorney Conduct to govern federal court practice. One of them was a controversial skip counsel rule that permitted government attorneys to question a wider range of witnesses ex parte than non-government attorneys, and that applied even to nongovernment attorneys a test that was more generous than the most recent version of M.R. 4.2. The rule prohibited ex parte contacts by government lawyers in civil or criminal law enforcement matters with individuals “known by the government lawyer to be a current member of the control group of the represented organization.” As to non-government lawyers, the rule prohibited ex parte contacts with those persons in the control group, as well as with those individuals “whose acts or omissions in the matter may be imputed to the organization under applicable law,” and with those persons “whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.” For both categories of attorneys, the “control group” test placed a smaller group of managerial employees within the skip counsel rule’s protection than did the 1995 version of M.R. 4.2.

Most recently, the United States Patent and Trademark Office has been engaged in rulemaking to update its existing ethics rules, which are based on the 1985 ABA Model Code. The notice and comment period generated a significant number of comments criticizing the proposed skip counsel rule for setting forth a different standard from that of the most recent ABA Model Rule. As a result, PTO is revising its proposed rules.

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8 Also controversial for going beyond the “norm” was the Federal Trade Commission’s (FTC’s) decision to apply the Gramm-Leach-Bliley Act to lawyers. That act sets forth privacy notification requirements for financial institutions, which the FTC interpreted to include attorneys “significantly engaged in financial activities.” On April 30, 2004, a district court in Washington, D.C. granted summary judgment in favor of the ABA and the New York State Bar Association, both of which opposed the FTC’s efforts to apply the act to lawyers. That decision was affirmed. See New York State Bar Ass’n v. F.T.C., 2004 WL 964173 (D.D.C. Apr. 30, 2004), judgment affirmed American Bar Ass’n v. F.T.C., 430 F.3d 457 (D.C. Cir. Dec. 6, 2005).
The rulemaking committee also learned from examining unsuccessful efforts at federal rulemaking that claims of federal preemption of state ethics rules have not succeeded in the past and are not likely to do so in the future. For example, the courts uniformly rejected DOJ’s contention that its version of Rule 4.2 preempted local court rules. Consider also the SEC’s experience in issuing ethics rules pursuant to the 2002 Sarbanes-Oxley Act (15 U.S.C. § 7245), that detail a lawyer’s obligations when representing an issuer in a securities matter (17 C.F.R. pts. 205, 240, 249). In passing the Sarbanes-Oxley Act, Congress intended that the states could impose additional standards on corporate attorneys, but that, if state rules and SEC rules conflict, the SEC rules would control. State bar and disciplinary officials from Washington and California have, however, expressed reluctance to defer to the federal requirements.


10 In an opinion dated July 26, 2003, the Washington Bar concluded that there was no conflict between state and federal ethics requirements because the SEC regulation “authorizes but does not require revelation of client’s confidences and secrets.” Slip op. at 5. Citing, however, the lack of case law on whether Sarbanes-Oxley preempts state ethics rules, the opinion concluded that, “an attorney who takes action contrary to this Formal Opinion cannot as a defense against [a state ethics] violation fairly claim to be complying in good faith with the SEC Regulations.” (Note that effective September 1, 2006, Washington amended its version of M.R. 1.6 (Confidentiality of Information) to permit disclosures to mitigate or rectify substantial injury to financial interests). In a public statement addressing the 2003 opinion, the SEC set forth its preemption argument. The SEC contended, inter alia, that state law is preempted even when the agency regulation permits, but does not compel, the conduct that the state law prohibits “because its prohibition removes the flexibility provided by the agency’s regulation.” www.sec.gov/news/speech/spch072303gpp.htm (citation omitted). The Corporations Committee of the Business Law Section of the State Bar of California responded to the SEC’s statement. That Committee, inter alia, questioned the SEC’s authority to adopt its rules, queried whether the SEC’s rules would preempt state laws and rules, and stated that the bar has no power to refuse to enforce state statutes on the basis of federal preemption “unless an appellate court has so ruled.” www.dwalliance.com/sbar/SEC.PDF.

On the other hand, the North Carolina Bar has concluded that a North Carolina attorney may, without violating the North Carolina Rules of Professional Conduct, disclose confidential information as permitted by the SEC’s rules even if such disclosure would not otherwise be permitted under North Carolina’s ethics rules. The bar, citing Fidelity Federal v. de la Cuesta, 458 U.S. 141 (1982), was governed by the principle that “[a] federal regulation validly promulgated carries the force of federal law, with no less preemptive effect than federal statutes.” The bar concluded that unless and until the Fourth Circuit Court of Appeals or the U.S. Supreme Court determined that the SEC rules were not validly
Despite these setbacks, the time may be right for the promulgation of federal agency ethics rules that follow the Model Rules and that work within the context of M.R. 8.5 rather than relying on claims of federal preemption. At this early stage of the NLRB’s rulemaking project, there is not yet Board authorization to adopt any rules. However, the rulemaking committee has been examining the 58 rules that comprise the ABA’s Model Rules of Professional Conduct to determine which, if any, to recommend for inclusion if the NLRB adopts its own ethics rules. In this regard, there is precedent for government agencies adopting rules governing only some of the subjects covered by the Model Rules, and for tailoring the Model Rules and/or the Comments to meet the adopting entity’s needs. The number of rules that the NLRB would adopt, should it engage in ethics rulemaking, would depend on what the Agency ultimately hopes to accomplish with its rules.

To the extent that rulemaking would be intended only to remedy the skip counsel problem described above, the Agency would probably adopt all of the Model Rules that are implicated in the Agency’s skip counsel analyses. For example, as shown in the above scenarios involving the Maryland-licensed attorney, M.R. 8.5, which is concerned with disciplinary authority and choice-of-law issues, plays a primary role in the Agency’s skip counsel analyses. Skip counsel issues implicate several other ethics rules including M.R. 4.3, titled “Dealing with Unrepresented Person,” and M.R. 4.4, titled promulgated, the bar would assume valid promulgation and, therefore, preemptive effect. 2005 Formal Ethics Opinion 9 (January 20, 2006).

11 For example, the Federal Rules project, discussed above, involved ten proposed “Federal Rules of Attorney Conduct” that loosely followed the corresponding Model Rules. In addition, the Patent and Trademark Office currently has 38 disciplinary rules based on the 1985 ABA Model Rules, but both the rules and comments have been revised to conform to the agency context and to agency needs. The Executive Office for Immigration Review has 15 rules regulating professional conduct of outside practitioners.
“Respect for Rights of Third Persons.” In particular, even if a witness is not represented by an attorney and can be contacted ex parte, M.R. 4.3 would prohibit the attorney from giving legal advice to that witness, and M.R. 4.4, which protects the evidentiary rights of third parties, would prohibit the attorney from obtaining from the witness attorney-client privileged information that belongs, for example, to the witness’s employer.

Going beyond skip counsel issues, Agency officials will have to decide whether adoption of other Model Rules would be beneficial to the Agency and its statutory mission. For example, adoption of the series of Model Rules detailing a lawyer’s obligations as an advocate such as M.R. 3.1, titled “Meritorious Claim and Contentions,” and M.R. 3.2, titled “Expediting Litigation,” would put parties to Agency proceedings on clear notice that dilatory conduct is unethical, and is something that is being considered.

Another example of a rule that could be of use to adopt is M.R. 5.5, the “unauthorized practice rule.” The Agency could adopt a version of that rule setting forth who may practice before the NLRB. There is precedent for this, as several federal agencies have rules of practice. An NLRB rule could provide, for example, that individuals do not have to be attorneys to practice before the Agency; that Agency attorneys who do not practice before the Board, such as headquarters attorneys who do not try unfair labor practice cases, may belong to the state bar of any jurisdiction; and that both outside practitioners and Agency attorneys may practice before the Agency if they are licensed to practice in any jurisdiction. It seems that adoption of an agency practice rule could serve as a reference point from which bar and disciplinary officials

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12 For example, the Internal Revenue Service and the Executive Office of Immigration Review each have statutes or rules authorizing attorneys who are licensed in any state to practice before their tribunals. The Patent and Trademark Office has a procedure, expressly authorized by statute, whereby attorneys (and nonattorneys) are licensed to appear before that agency.
could conclude that attorneys licensed in any jurisdiction are authorized to appear before the NLRB.\textsuperscript{13}

On a related note, since the NLRB permits nonattorneys to practice before it, a question to be considered is whether the Agency should take steps to ensure that a “nonattorney” is not actually a “disbarred attorney.”\textsuperscript{14}

Of course a critical issue is to whom any rules adopted would apply. Should they apply to both Board attorneys and private attorney practitioners? It seems only fair that they should, particularly if one of the Agency’s goals through rulemaking is to put all parties on a level playing field. What about the Agency’s field examiners? Several factors seem to weigh in favor of applying at least some Agency ethics rules to them, even though they are not attorneys. Agency field examiners’ lines of supervision often include attorneys and always end with the General Counsel; the Agency’s supervisory attorneys are responsible for ethics violations by field examiners in accordance with M.R. 5.3, which discusses an attorney’s responsibilities regarding nonlawyer assistants; and all Board employees have access to ethics advice from Special Litigation.

A more difficult question is whether the rules should apply to outside non-attorney practitioners. One of the possibilities that has been raised is whether, consistent with the Agency’s current practice under its misconduct rule, Rule 102.177, only the Model Rules that could be characterized as “misconduct rules” (i.e., those aimed at conduct that denigrates the decorum of the tribunal) should apply to outside practitioners.

\textsuperscript{13} See generally Augustine v. Department of Veterans’ Affairs, 429 F.3d 1334, 1340 (Fed. Cir. 2005) (court, citing Supremacy clause, held that state could not regulate practice before the MSPB, even though that agency did not have procedures for admitting counsel to practice before it).

\textsuperscript{14} See generally Benninghoff v. Superior Court, 2006 WL 213827, slip op. at 4 (Cal.App.4Dist., Jan. 30, 2006) (California statute prohibiting the unauthorized practice of law permits a true layperson to practice law when authorized pursuant to a statute or court rule, but a “defrocked lawyer . . . may not practice law at all”).
non-attorney practitioners when they participate in unfair labor practice and
representation cases before the NLRB.

Integral to any ethics rules that are adopted, the Agency would have to delineate
the procedures that would apply for investigating and disciplining Agency employees,
and outside practitioners. As a federal agency and an employer, the NLRB has specific
procedures that are applicable only to Agency employees, who are bound by more rules
and regulations than are nonemployees. Perhaps those employee-specific procedures
should continue to apply because employee misconduct and ethics matters may be
better dealt with within the confines of the employer-employee relationship, which offers
a broader and more draconian range of disciplinary options than are available to
nonemployees. In addition, the Agency could continue to use the procedure set forth in
Rule 102.177 for investigating and disciplining outside practitioners. All this is yet to be
decided.

The above discussion touches upon only some of the many complex and
interconnected issues that have arisen and that are being assessed in determining
whether ethics rulemaking is viable for the NLRB and if so, how it should work. Despite
the magnitude of the issues presented and past problems with federal rulemaking, the
tide may be turning in favor of federal regulation of federal attorneys, particularly for an
agency with a nationwide practice like the NLRB. The General Counsel is hopeful that
a successful rulemaking project would expedite resolution of ethics issues that arise
during unfair labor practice investigations, subject Board agents to uniform ethics
requirements, and put all parties to Agency proceedings on a level playing field.