10050–10070 INVESTIGATION

10050 Objective of the Investigation and Role of Board Agent

The purpose of the investigation is to ascertain, analyze, and apply the relevant facts and law in order to arrive at the proper disposition of the case. The case may be as simple as ascertaining whether certain statements were made and, if so, whether they constitute violations of Section 8(a)(1) or 8(b)(1)(A). Or, the case may be as complex as ascertaining whether the parties' overall conduct over the course of protracted contract negotiations violated Section 8(a)(5) or 8(b)(3). In either situation, the Board agent is required in the course of the investigation to:

- Identify the appropriate theory of the case
- Prepare and modify, as necessary, an investigative strategy to obtain material evidence
- Execute the investigative strategy
- Perform necessary legal research
- Analyze the facts and law
- Make recommendations to the Regional Director as to the disposition of each element of the case and
- Effectuate, to the extent assigned to do so, the Regional Office determination

The planning and organization of Board agents' approach to each case must be guided, at least in part, by the application of the principles set forth in the Agency's Impact Analysis program. Sec. 11740. Thus, Board agents should prioritize and balance their casework to ensure the time goals set for the disposition of each case are met to the extent possible. Appropriate supervisory direction should be sought.

As impartial investigators, Board agents should identify themselves as agents of the Board to all witnesses and parties, should explain the purpose of the investigation and should avoid conveying a prosecutorial image. Although Board agents should not provide advice to the parties and must remain neutral throughout the investigation, Board agents should freely identify and discuss the theories underlying the charge with both parties. This is particularly true with respect to individual charging parties who do not typically have any expertise in Agency law and procedures. Throughout the investigation, Board agents should assertively seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision on the case.

10051 Guidance for High Quality Investigations

In order to consistently maintain the highest quality investigations, Regional Offices and Board agents should routinely consult this Manual, the Rules and Regulations, Board and Court decisions, and OM and GC memoranda. In particular the Agency's quality committee periodically reviews field office performance in the various facets of casehandling throughout the country and issues memoranda recommending practices for ensuring the highest quality investigations. See OM Memos 06-16, 06-91, 07-84 and subsequent memoranda. Regional Offices and Board agents should be guided by these recommendations in conjunction with their own experience and should follow the practices set forth in the memoranda.

10052 Preliminary Review and Contacts

10052.1 Initial Review of Charge and Preparation for Investigation

Upon receipt of an unfair labor practice assignment for investigation, the Board agent should follow the procedures set forth below.

- Review the charge form to assure that it is correct on its face, i.e., that the charge contains the correct and full name of the parties and that the text corresponds to the sections of the Act alleged to have been violated

- Review Regional Office records to determine whether there is any relevant history of charges or petitions involving the parties

- Initially consider whether the Agency has jurisdiction over the dispute giving rise to the charge and

- Perform preliminary legal research on issues raised in the charge to become familiar with the appropriate areas of the law

10052.2 Statute of Limitations/Section 10(b)

The Board agent, with appropriate supervision, must make an initial assessment as to whether the charge is filed in a timely manner with respect to Section 10(b) of the Act. Section 10(b) provides that no complaint may issue on matters occurring over 6 months prior to the filing of a charge and the service of a copy of the charge on the charged party, unless the charging party is prevented from filing because of service in the armed forces. Board agents should be alert to 10(b) issues and promptly advise charging party of such issues and provide an opportunity to amend the charge as appropriate. The following considerations apply to determining application of Section 10(b):

- The 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice, unless the aggrieved party has failed to

exercise "reasonable diligence" which would have discovered the unfair labor practice. See, e.g., *Concourse Nursing Home*, 328 NLRB 692, 693–694 (1999); *R. G. Burns Electric*, 326 NLRB 440, 441 (1998).

- If the individual is in the armed forces, the 6-month period commences on the day of discharge from the service. See Section 10(b) of the Act.

- "Closely related" amendments to a charge relate back to the initial 10(b) period. *Ross Stores,* 329 NLRB 573 (1999). *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988).

- In circumstances where the charging party is attempting to reopen a dismissed case by the filing of an untimely charge, see Sec. 10123.

- In cases where the charged party has engaged in "fraudulent concealment," the 10(b) period begins to run from the date the charging party obtains actual notice of the event giving rise to the charge. *Brown & Sharp Mfg. Co.*, 312 NLRB 444 (1993); *Kanakis Co.,* 293 NLRB 435 (1989).

- In cases where the Board views the violation as continuing in nature, Section 10(b) does not preclude further processing. *Chesapeake & Potomac Telephone Co.,* 259 NLRB 225 (1981), enfd. 687 F.2d 633 (2d Cir. 1982).

If the Regional Office determines that the charge was filed untimely, it is appropriate to promptly solicit withdrawal.

10052.3 Initial Telephone Contact with Charging Parties

At the earliest possible date consistent with other casehandling priorities, the Board agent should:

- Determine the appropriate charging party representative to contact. Sec. 10058.

- Contact the charging party or, if appropriate, the charging party representative by telephone and inquire about the allegations of the charge, the background, the facts and the names of witnesses. Such a conversation should be sufficiently detailed to permit the Board agent to gain a preliminary understanding of the case.

The Board agent should at that time schedule an appointment to obtain an affidavit from the charging party and/or its witnesses. The Board agent should emphasize that it is imperative for the charging party to bring all relevant documents to the interview and should assist the charging party in identifying those documents. The Board agent

should also ask the charging party to assist in scheduling other witnesses in a manner which will allow adequate time to conduct the interviews. Sec. 10054.1.

10052.4 Questionnaires

In limited circumstances, questionnaires may be used as a helpful initial screening device. If the witness is represented, the questionnaire should be sent to the attorney or other representative. A questionnaire may assist in directing the course of the investigation and, in some situations, may obviate the need for further investigation. As issues of literacy, English fluency, ability and willingness to complete a narrative may affect the accurate completion of a questionnaire, caution should be exercised in relying upon the responses. Absent extraordinary circumstances, a case should not go to trial without sufficient sworn testimony received in affidavit form setting forth the evidence to support the complaint.

Questionnaires may also assist in cases where there is a large number of witnesses from whom similar types of evidence is needed, for instance, when authenticating authorization cards (Sec. 10066.1) and in salting and refusal to hire successor cases.

10052.5 Initial Contact with Charged Parties

After obtaining a preliminary understanding of the case from the initial contact with the charging party, it is often helpful for the Board agent to telephone the appropriate charged party representative, as set forth in Sec. 10058, to make certain inquiries. The Board agent should broadly describe the allegations of the charge and solicit the charged party's position. Sufficient details regarding such position should be sought to enable the Board agent to examine the charging party regarding the charged party's position. The charged party should be informed that the investigation is at its earliest stages and that it will be advised of any additional developments. It is often helpful to also request that the charged party submit a written statement of position. Additionally, in an appropriate case, the Board agent should seek to schedule an interview with the charged party's witnesses.

Early contact with the charged party frequently leads to a prompt resolution of the charge, which experience has shown is beneficial to all parties and the public interest. Thus, prompt determination of a nonmeritorious charge ends the dispute in a cost effective and efficient manner, without the need for a protracted investigation. On the other hand, prompt determination of a meritorious charge provides an opportunity for a timely remedy before resolution becomes more costly or more difficult.

10052.6 Strategy for Investigation

Following the initial contacts with the parties, the Board agent, with appropriate supervision, should develop a strategy for the investigation, which normally would include:

- Identification of specific allegations and issues
- The theory of the case

- Areas of inquiry
- Areas of legal research
- A list of witnesses to contact
- A list of documents to obtain
- Approaches to reluctant witnesses
- Appropriate remedies, including consideration of 10(j) relief
- A schedule in which the above tasks will be completed

The strategy should be reviewed and revised on an ongoing basis in order to adjust to developments in the investigation.

10052.7 Identification of Issues

Although the charging party should be asked to specify the allegations of the charge and the facts in support of them, many individual charging parties and others do not possess the knowledge or expertise to identify all possible issues. While the Board agent must remain neutral and not be an advocate for either party, the agent should provide assistance in identifying issues. In this regard, the Board agent should candidly apprise the charging party of any potential issues and provide the charging party an opportunity to amend the charge in a timely fashion, if necessary, in order to pursue additional allegations. Sec. 10062.

10052.8 Legal Research

As soon as the Board agent recognizes that a case raises legal issues with which the agent is not thoroughly familiar, the agent must, with appropriate supervision, begin to research the appropriate case law and Agency procedural memos. It is necessary for the Board agent to be knowledgeable in the areas of the law raised by the investigation in order to properly direct the investigation, adduce all necessary evidence and develop a thorough understanding of the case.

10052.9 Injunctive Relief Under Section 10(j)

As part of the initial review of the case, the Board agent should be alert to the possible appropriateness of injunctive relief under Section 10(j) of the Act. Such relief may be requested by the charging party or considered by the Regional Office on its own initiative. Sec. 10310. If 10(j) relief is being seriously considered, the charge must be classified as a category III case under Impact Analysis and given the highest priority and the charged party must be so notified in writing. Sec. 11740. In such circumstances, the Board agent, when initially meeting with the charging party's witnesses, generally must obtain evidence as to whether injunctive relief is "just and proper."

10052.10 Repeat Violators-New Charge Filed (Contempt)

When a charge is filed against a respondent named in, or subject to, an outstanding court judgment, the question of possible contempt action should be examined.

If the charge is meritorious and the allegations are arguably encompassed by the provisions of the judgment, the case should be referred to the Contempt Litigation and Compliance Branch for consideration. Secs. 10590.1, 10590.3, and 10590.4, Compliance Manual. The Regional Office should not proceed administratively to issue complaint or to settle the case without the authorization of the Contempt Litigation and Compliance Branch.

10052.11 Electronic Notice Posting

In certain cases, it may be appropriate to seek electronic notice posting in addition to a traditional posting where the charged party customarily communicates with its employees or members electronically and/or where the charged party utilized its e-mail and/or intranet systems in committing an unfair labor practice. Accordingly, the Board agent should investigate the related facts and circumstances during the initial investigation. OM Memo 06-82 and Sec.10132.4(b). Such an inquiry should include testimony and documentation regarding:

- The existence of the charged party's intranet and the frequency and types of postings included on that site

- The existence of the charged party's e-mail system, use of that system to make broadcast e-mails to groups of employees or members and the subject matters covered by such

- The number and accessibility of traditional notice-posting areas at the worksite and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices.

Of course, the Regional Office should solicit the parties' positions as to the propriety of electronic notice posting in addition to the traditional posting sites.

10052.12 Social Security Numbers

In order to protect the privacy rights of individuals, Regional Offices should not include social security numbers on any document that is or may become public, unless required to do so. Thus, social security numbers should be omitted from documents such as affidavits, proofs of claim and compliance specifications, as well as any attachments thereto. To the extent it is necessary to identify claimants by social security numbers in any such document only the last four digits of the social security numbers should be used, i.e., XXX-XX-____. Board agents should, however, make notations in the case files of potential claimants' social security numbers.

Social security numbers may be used in documents and correspondence sent to claimants, employer respondents and the Social Security Administration and in inquiry

letters to the Internal Revenue Service, state agencies and outside contractors when searching for missing claimants.

If a document containing a social security number must be released to the public, the Regional Office should redact the number from the document. See OM Memo 04-16.

10054 The Investigation

Since the investigation serves as the basis for all action eventually taken in a case, it must reveal the totality of the circumstances, including relevant background information. Initially, wherever possible, the investigation should focus on interviews with the charging party and with witnesses offered by the charging party. While the charging party may suggest other witnesses or sources of information, the Board agent should contact those witnesses only if they appear to have material evidence, as it is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.

On the other hand, it is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge and all promising leads should be followed. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party.

Throughout the investigation, the Board agent should maintain a current record in the case file of the agent's activities and contacts.

10054.1 Responsibility of the Charging Party

(a) *Cooperation Required:* It is the responsibility of the charging party to comply with the Board agent's requests to:

- Identify the conduct claimed to be violative of the Act
- Meet with the Board agent at a reasonable time and place
- Fully cooperate in the preparation of an affidavit(s) by a Board agent
- Provide all relevant documents within its possession
- Comply with all other reasonable requests necessary to complete the investigation

In addition, institutional charging parties are responsible for presenting all witnesses within their control to the Board agent for the purpose of taking affidavits. However, if, despite reasonable and diligent efforts, the charging party is unable to present witnesses who possess relevant evidence, the Board agent should independently contact such witnesses, with the assistance of the charging party, where possible. Sec. 10054.3.

(b) *Lack of Cooperation:* The charging party should be ready to promptly submit evidence in support of the charge. If the charging party delays in presenting evidence

without good cause, the Board agent should send written notice to the charging party or to counsel of the obligation to promptly present evidence and of the duty to cooperate in the investigation. The notice should include a deadline for the submission of evidence and should advise that if the deadline is not met, the charge will be subject to dismissal for lack of cooperation, absent withdrawal.

10054.2 Charging Party Interview

(a) *Generally:* In Category II and III cases, the preferred method of obtaining affidavits is through a face to face meeting. See Sec. 11740 for a discussion of Category II and III cases. On the other hand, in Category I cases where the issues are generally more straightforward, telephone affidavits may be appropriate. Sec. 10060.

The affidavit should cover the topics set forth below and may be developed in the following order:

- Information relative to the identity of the affiant, the employer and the union if appropriate
- Job information
- Background information
- Chronological account of the events
- Other evidence, i.e., alleged disparate treatment, facts concerning disputed supervisory status of individuals, etc.
- Charging party's response to charged party's expected defenses
- Backpay and/or remedy information

During the course of the interview, the Board agent should probe the testimony of the witness as to statements which appear to be unreliable, improbable or contrived and seek documentation which would support or refute assertions made by the affiant. Indeed, all relevant and available documents should be obtained from the affiant during the interview. If necessary, specific arrangements should be made for submission of such documents immediately following the interview.

With respect to all aspects of the investigation, the Board agent should consider whether proffered evidence may be privileged. The Regional Office should direct any questions regarding possible privileges to the Special Litigation Branch.

The Board agent should also review with the affiant the identity of other witnesses, the degree of anticipated cooperation from them, when and where to reach the additional witnesses and other information which may be helpful to develop an approach to achieve cooperation of the witnesses. Such information should not be contained in the affidavit but rather memorialized in a file memorandum.

(b) *Backpay and Other Remedy Information:* During the initial investigation, unless the case is clearly nonmeritorious, the Board agent should inquire of each alleged discriminatee concerning interim earnings and search for work and should place this information in the file for use in settlement or compliance efforts. Further, the Board agent should obtain for the file the address, telephone number and other means of communicating with each alleged discriminatee. Potential discriminatees should be advised of their obligation to search for work and to report all interim earnings, inasmuch as a failure to do so may result in a loss or reduction of any backpay to which they might be entitled in the event that their case is found to be meritorious. They should also be advised to keep written records of their search for work and interim earnings. In potentially meritorious cases, the investigative file should contain for each alleged discriminatee information relevant to backpay and reinstatement, such as rate of pay, wage history, job classification and duties, job history, shift, average hours worked and, if possible, the name of a coworker similarly situated to each alleged discriminatee.

(c) *Identification of Other Parties and Derivative Liability:* The Board agent should also explore with the charging party whether any entities other than those already named in the charge may be liable to remedy the alleged unfair labor practices. Thus, in certain circumstances where an unnamed party, such as an alter ego, successor, partner, individual or trustee in bankruptcy, may be derivatively liable for remedying the alleged unfair labor practices, amendment of the charge should be sought to reflect such party as derivatively liable. Sec. 10062 and Sec. 10596, Compliance Manual. Prompt action, including the filing of a proof of claim, is particularly important when a party is in bankruptcy, since failure to file such a claim may preclude the Regional Office from obtaining a full remedy.

(d) *Supervisory Status:* The Board agent should fully explore the supervisory status of possible supervisors and alleged discriminatees whose supervisory status may be in dispute. GC Memo 07-05 sets forth comprehensive casehandling guidance regarding issues addressed by the Board in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), and related cases, including:

- The Board's definitions of certain terms and phrases contained in Section 2(11), including "assign," "responsibly to direct" and "the use of independent judgment"
- Quality of evidence necessary to meet the burden of proof to establish Section 2(11) status
- Status dependent on supervisory assignments made on a rotating basis

10054.3 Third-Party Witnesses

Witnesses who are not parties to the case or whose testimony cannot bind a party are often critical and necessary sources of information. These may include other employees, contractors, customers and suppliers of the employer, representatives of other labor organizations and representatives of other Government agencies, with the exception

of representatives of the Federal Mediation and Conciliation Service, who are prohibited from testifying in Board proceedings.

If witnesses offered by the charged party are not supervisors or agents, Board agents should exercise caution in evaluating the appropriate location for interview. For instance, interviews with employees of the charged party at its facility should be avoided. Sec. 10054.4

Third-party witnesses also have a right to be represented by their individual attorney or other representative but normally should not be interviewed in the presence of a representative of a party to the case. For further discussion and exceptions, see Sec. 10058.4.

Due to a variety of circumstances, including fear, bias or disinterest, the Board agent often faces significant challenges in fulfilling the responsibility of obtaining a complete and truthful affidavit from third party witnesses.

(a) *Cooperative Witnesses:* If it is anticipated that a prospective witness will cooperate, the Board agent should arrange an appointment at a mutually convenient time and place.

(b) *Reluctant Witnesses:* If it is anticipated that a witness may be reluctant to cooperate, the Board agent should carefully consider whether initial contact by telephone would be effective in obtaining the witness' cooperation. Thus, in certain circumstances, an unannounced personal visit by the Board agent may be most effective. However, if a witness is represented by an attorney or other representative for the purpose of giving testimony in the case under investigation, arrangements for an interview of such a witness must be made through the attorney or other representative.

Upon meeting the witness, the Board agent should carefully assess the witness' sympathies in the case, reason(s) for the reluctance, if any, and the approaches which are likely to result in cooperation. For instance, if the witness fears reprisal from one of the parties to the case, informing the witness of the confidentiality and protection afforded witnesses under the Act may be helpful.

(c) *Refusal to Swear to Affidavit:* When a witness refuses to swear to an affidavit, the Board agent should seek to have the witness sign or initial the affidavit without taking an oath. Sec. 10060.7.

(d) *Uncooperative Witnesses:* If all informal efforts fail to achieve cooperation, the Regional Office should assess whether issuance of an investigative subpoena is appropriate. Regional Directors and their designees are authorized to issue subpoenas ad testificandum and duces tecum to third-party witnesses whenever the evidence sought would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means. Sec. 11770 and GC Memo 00-02.

10054.4 Subsequent Charged Party Contact and Interview

If consideration of the charging party's evidence and the preliminary information from the charged party suggests a prima facie case, the appropriate charged party representative should be contacted to provide additional and more complete evidence.

Sec. 10058. The Board agent should seek a meeting with the charged party in order to take affidavit testimony from individuals identified by the Board agent and supervisors or agents offered by the charged party in support of its position. With respect to those witnesses offered by the charged party who are not supervisors or agents and are thus third-party witnesses (Sec. 10054.3), Board agents should exercise caution in evaluating the appropriate location for such interviews. For instance, interviews with employees of the charged party at its facility should be avoided.

The arrangements for the presentation of the charged party's evidence and position should be documented in a letter from the Board agent to the charged party's representative setting forth the due date for the presentation of the information. If the charged party declines to provide witnesses for the Board agent-prepared affidavits, the letter should also state that the Board agent's request for such had been rejected and that such refusal constitutes less than full cooperation. See Sec. 10054.5 and GC Memo 07-06.

When communicating with the appropriate charged party representative to obtain evidence, Board agents should relate the basic contentions that have been advanced with regard to all violations alleged. For example, when the charging party's evidence points to a prima facie 8(a)(1) violation involving threats of discharge, the Board agent normally would disclose such information as the general nature of the conduct (e.g., threat of discharge), the general locale, the identity of the supervisor involved, and the date of the conduct. Although such disclosure may be a decisive factor resulting in the charged party's full cooperation, the degree of disclosure should be commensurate with the level of cooperation anticipated from the charged party. Since the identity of a witness should be protected, the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness.

Particularly when the case includes pivotal questions of law, the Board agent should candidly disclose the legal theories under consideration and invite the charged party to file a statement of position or memorandum of law regarding such matters, provided it is submitted consistent with the time goals for the case.

Board agents should probe the testimony of charged party witnesses to the same degree as charging party witnesses. Sec. 10054.2.

10054.5 Full and Complete Cooperation by Charged Party

(a) *Cooperation Defined:* It is Agency policy that full and complete cooperation, as that term is used in EAJA litigation, from a charged party includes, where relevant, timely providing all material witnesses under its control to a Board agent so that the witnesses' statements can be reduced to affidavit form and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation. Unless the Board agent is certain that the charged party will extend full and complete cooperation, the Board agent should document in a letter to the appropriate charged party representative details of the Regional Office's request for such cooperation, including a deadline for compliance.

(b) *Lack of Cooperation:* If the charged party fails to provide full and complete cooperation, the Regional Office may, depending upon a careful assessment of all the circumstances:

- Decide the case on the basis of all evidence obtained
- Issue investigative subpoena(s) to obtain relevant and necessary evidence
- If the charged party is not represented by an attorney, contact and obtain sworn testimony from material witnesses. Sec. 10058.3(c)
- If the charged party is represented by an attorney, contact and obtain sworn testimony from material witnesses in the limited circumstances set forth in Secs. 10058.2 and 10058.5

10054.6 Conditional Position Statements

Pursuant to OM 99-35, Regional Offices should ensure that docketing letters specifically inform charged parties that the evidence and statements of position submitted by the parties will be used without qualification or condition. See also Federal Rules of Evidence 801(d)(2)(C).

10054.7 HIPAA's Privacy Rule Disclosure Procedures for Medical Information

Before attempting to secure medical information, Board agents should consult OM Memos 07-60 and 08-34, which contain a comprehensive treatment of issues relative to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

HIPAA and a set of implementing regulations promulgated by the Department of Health and Human Services, known as the Privacy Rule, establish a legal protocol governing the use and disclosure of individually identifiable health information from "covered entities". Covered entities include most doctors and other health care providers, health plans and health care clearinghouses that transmit health information electronically. "Health care provider" is further defined to include a "provider of health and mental services…and any other person who furnishes, bills, or is paid for health care."

HIPAA and the Privacy Rule prohibit covered entities from disclosing individually identifiable health information unless the request complies with an applicable exception. As set forth below, there are two exceptions that most typically arise in NLRB investigations:

- Valid written authorization for disclosure of protected health care information from the individual. See medical and psychotherapy notes authorization patterns attached to OM Memo 08-34, which revise those patterns provided in OM Memo 07-60.

- Subpoenas which are subject to special requirements set forth in the Privacy Rule under its law enforcement standard, which applies to the Agency. The subpoena must:
  - Be specific and limited in scope
  - Seek only information that is relevant to a legitimate law enforcement inquiry, and
  - Request protected health care information only because de-identified health information could not reasonably be used

De-identified information is by definition not covered by HIPAA or the Privacy Rule restrictions because it is not protected health care information. Information is de-identified if:

- Identifiers such as name, street address, birth date, and social security number of the individual or of relatives, employers, or household members of the individual, are removed and
- "The covered entity does not have actual knowledge that the [remaining] information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. Section 164.514(b)(2)(ii)

The exceptions to, and procedures under, the Privacy Rule are complex and, therefore, Regional Offices should carefully comply with guidance provided in OM Memos 07-60 and 08-34. Of special concern is that willfully flouting HIPAA's disclosure rules could expose Board agents to "aiding and abetting" liability under HIPAA's criminal provisions and could also expose Board attorneys to sanctions for breach of the ethical responsibility to honor "legal restrictions on methods of obtaining evidence from third parties." See Model Rules of Prof'l Conduct R. 4.4 cmt. 1.

10054.8 Review and Completion of Investigation

Following completion of the affidavits and receipt of the evidence and positions of all parties and witnesses, the Board agent should carefully review the investigative file to identify any gaps or conflicts in the evidence in light of applicable legal precedent. The Board agent should make every reasonable effort to resolve any material issues, including credibility (see Sec. 10064) by re-interview of any party or witness for additional testimony and/or documents.

10056 Ability to Comply with Remedy

Unless the charge is clearly nonmeritorious, Board agents should be alert to, and continually assess, the charged party's ability to comply with any remedy which may be sought by the Agency. Any issues of potential inability to remedy the alleged unfair labor practices should be promptly and thoroughly investigated. Such investigation may be triggered by the circumstances set forth in Sec. 10600.2, Compliance Manual.

Following the investigation of these issues, it may be appropriate to seek protective relief (see Sec. 10594.2, Compliance Manual) or take other appropriate action,

such as to seek amendment of the charge to name other charged parties, including any alter ego, successor or individual, as derivatively liable for remedying the alleged unfair labor practices. Charging party and witnesses should be advised to notify the Board agent immediately of any significant change in the charged party's operation, identity or financial condition so that appropriate action can be taken.

10058 Contacts with Represented Parties and Witnesses

All parties and witnesses are entitled to be represented by attorneys or other representatives. The Agency's policies regarding contacts with represented parties and witnesses and guidance for compliance with those policies are set forth in this section and may be revised as new developments occur.

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 (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.

Since the interpretation of ethics rules varies from jurisdiction to jurisdiction and may result in disciplinary sanctions against Agency attorneys who violate ethics rules, the Regional Office must contact the Special Litigation Branch in the circumstances set forth in Secs. 10058.2(b) and (d), 10058.4(c), and the first of the options set forth in Secs. 10058.5(a) and (b).

For jurisdiction-specific ethics questions, Special Litigation must determine which ethics rules govern the Regional Office's investigation of the case. Specifically, in determining the relevant ethics rules for purposes of a Rule 4.2 analysis, Special Litigation examines 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. Also relevant are the ethics rules of the situs of the contact and of any eventual trial. Special Litigation first determines which jurisdiction(s) would assert disciplinary authority over the contact and second, as a choice-of-law matter, 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 Litigation 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 Litigation'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.

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 Litigation. 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 of the dismissal of a charge or Advice in connection with a case submitted to Advice, the relevant ethics rules to be followed 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.

10058.1 Notice for Receipt of Documents/Notice of Appearance

(a) *Notice for Receipt of Documents:* An attorney or other representative may submit to a Regional Office 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. Such a notice should be honored by the Regional Office for the 12-month period specified.

If an individual wishes to represent a party in a specific case, a specific Notice of Appearance, Form NLRB-4701, or its equivalent, must be filed with the Regional Director.

(b) *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.

- Even absent such consent from the attorney, the Regional Office should serve on the party certain documents as set forth in Sec. 11842.3. Further guidance in this regard is provided in Secs. 11842 through 11844.3.

- If the party's 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.

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:* 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 the Special Litigation Branch before interviewing or taking a statement from such a witness.

(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. The Special Litigation Branch 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 Litigation 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 the Special Litigation Branch before conducting such interviews.

(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 the Special Litigation Branch.

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 nonattorney. 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 not represented by an attorney and cooperation is being extended to the Regional Office in its investigation, the party's 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 and its representative, if any

- The party and such representative make the individual to be interviewed available with reasonable promptness so as not to delay the investigation and

- During the interview the party and such representative do not interfere with, hamper or impede the Board agent's investigation

(b) *Uncertain Supervisory/Agency Status:* Where the party is 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's 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's 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 notice to the Regional Office that a third-party witness is 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 contact and obtain consent from the attorney before contacting or interviewing the witness. If the attorney refuses to consent, the Board agent cannot proceed to either contact or interview the witness, 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 also 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. 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 the Special Litigation Branch 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 the Special Litigation Branch 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 the Special Litigation Branch 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. Sec. 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. If a Regional Office has a question

about the application of this rule, any waiver or whether any exception applies, it should contact the Special Litigation Branch.

10060 The Affidavit

The face-to-face affidavit taken by a Board agent is the "keystone" of the investigation and is the preferred method of taking evidence from witnesses, particularly in category II and III cases. Affidavits set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case. In taking an affidavit, the Board agent should record the testimony of the witness as accurately and in as much detail as is possible and appropriate. See also Secs. 10051 and 10054.2.

10060.1 Non-Board Affidavits or Statements

Except in category I cases or other situations determined appropriate by Regional management, when affidavits or statements have been prepared and submitted by non-Board personnel (e.g., by the charging party), the witnesses should be re-interviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials.

10060.2 Avoid Group Interviews

Even though a number of witnesses might have knowledge of the same incident, group interviews and mass affidavits should be avoided. The degree to which concerted questioning may serve to eliminate minor discrepancies is usually outweighed by the "corrective'' pull on each participating witness and by the possibility that any such witness will fail to make an individual contribution that would be offered if interviewed privately.

10060.3 Achieving Confidence

Initially, Board agents should introduce themselves and explain the purpose of the interview. Board agents must clearly convey their complete neutrality, that they are merely seeking the truth and otherwise create an atmosphere conducive to achieving confidence. Board agents should develop a rapport with the witness, and, if appropriate, should appeal to the witness' sense of civic pride and remind the witness that the ability of the Agency to enforce the law is dependent upon their full cooperation.

10060.4 Site of Interview

Board agents should select interview sites which:

- Maximize privacy
- Enhance cooperation
- Avoid locations where employees might be unlikely to provide full and candid testimony, e.g., charged party's facility
- Avoid circumstances which could result in the interview being used as a pretext for a general employee or membership meeting and

- Provide a safe and appropriate environment for the Board agent and witness

10060.5 Assurances of Confidentiality

Affidavits taken by Board agents should contain the following statement regarding confidentiality:

> I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed unless it becomes necessary for the Government to produce the affidavit in connection with a formal proceeding.

An affidavit may be disclosed pursuant to Sec. 102.118(b), Rules and Regulations (Jencks Act) after a witness has testified in a Board proceeding and in some instances the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a Motion for Summary Judgment). Where the witness has particular concerns about the consequences of providing an affidavit, the Board agent should explain that the Act proscribes retaliation against witnesses by either employers or labor organizations. Where the witness expresses a willingness to testify truthfully but wishes to avoid the appearance of favoring one side, the Regional Office should consider issuance of an investigative subpoena.

Board agents should not tell a witness that it will never be necessary to testify or that the Agency could provide "protection" under all circumstances.

10060.6 Testimony Reduced to Writing

The testimony should be reduced to writing at an appropriate time during the interview. Generally, the Board agent should review the witness' testimony before reducing it to writing. The witness should understand that the Board agent is memorializing the facts as the witness knows them and that the witness will be asked to sign and swear to the truth of what is being said. Affidavits should be written in the first person. Although they need not be verbatim, they should, to the degree possible, contain language used by the witness.

A typical affidavit opens with "I [name] being first duly sworn upon my oath, hereby state as follows.'' It then recites the confidentiality assurances and sets forth the witness' employer, home address, phone number, fax number, and e-mail address, if any. The affidavit concludes with "I have read this statement [have had this statement read to me], consisting of _____ pages, including this page, I fully understand its contents and I certify that it is true and correct to the best of my knowledge and belief." When completed, the witness should read the affidavit or, if necessary, the Board agent or other individual should read the affidavit to the witness. The witness should be encouraged to make or point out any necessary corrections and should initial each page and each correction and sign the affidavit.

10060.7 The Oath

After the witness has read and, if necessary, corrected the affidavit, the Board agent should formally administer the oath. Section 11(l) of the Act. With both individuals' right hands upraised, the Board agent should ask, "Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?''

Upon receiving an affirmative answer, the Board agent should complete and sign the jurat—"Subscribed and Sworn to Before me at _____ this _____ day of _____,'' in the presence of the witness.

If the affiant refuses to execute the affidavit under oath, the affiant should be advised of the option to affirm and sign the affidavit. Finally, if the affiant declines to sign the affidavit, the Board agent should prepare a file memo outlining the circumstances of the interview and the reasons for the refusal to sign.

10060.8 Translation/Certification of Affidavits Taken in a Foreign Language

When an affidavit is taken in a foreign language and the Regional Office has it translated into English, the translator should add the following certification at the end of the affidavit:

> I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translation is an accurate translation of the attached [insert name of foreign language that was translated] language original affidavit.
>
> _____ _____
>
> Date [Type name of translator]

10060.9 Copies of Affidavits

The Board agent, on request, should give a copy of the signed affidavit to the witness and obtain written acknowledgement of receipt. Except as set forth below, prior to the hearing, copies of affidavits should not be given to persons other than the respective affiants. For production of affidavits during the hearing, see Sec. 10394.7. Copies of affidavits may be provided to counsel or other representative in the following circumstances:

- When a party to the case is represented by counsel or other representative and a witness who is an agent of such party, or the counsel or other representative, makes a written request to provide a copy of the affidavit to their counsel or representative

- When a witness who is not a supervisor or an agent of any party provides a written designation of counsel or other representative and the witness or

counsel or other representative makes a written request that a copy of the witness' affidavit be provided to that counsel or representative

When an unrepresented affiant requests that a copy of his/her affidavit be provided to a counsel or other representative who also represents a party to the case, that request will normally not be honored. However, Regional Directors have discretion to honor such a request when they deem it appropriate.

10060.10 Telephone Affidavits

In category I cases, telephone affidavits are generally appropriate. In category II and III cases, face-to-face interviews are the preferred method for obtaining affidavits, although instructions may change due to budgetary considerations. OM Memos 99-75 and 06-54. As to the latter categories of cases, Board agents may take telephone affidavits only with supervisory authorization and should prepare file memoranda setting forth the justification. When a telephone affidavit is taken, the Board agent interviews the witness by telephone, prepares a written affidavit and then sends the affidavit by mail, e-mail or facsimile to the witness for reading, correction, and signature. In all circumstances, the Board agent should instruct the witness to:

- Read the affidavit carefully
- Make any necessary corrections
- Initial all changes and each page
- Sign and date the affidavit and
- Return the affidavit to the Regional Office promptly.

Where appropriate, the Board agent should make arrangements to contact the witness after the witness has received and reviewed the affidavit. At that time, the Board agent should administer the oath after the affiant has made any changes, but before he/she signs it. The Board agent should then ask, "Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?" To accurately reflect that the affidavit has been taken and sworn by telephone, the Board agent should use the following jurat language, "Subscribed and Sworn to before the Board Agent by Telephone on (date)," followed by the signature line and the Board agent's name. The date of the jurat should be the date the Board agent administers the oath and the location of the affidavit should reflect the location of the witness. The witness should then be instructed to immediately return the affidavit to the Regional Office. See GC Memo 07-06.

In the alternative, the Board agent may administer the oath by telephone during the interview process or may change the normal concluding paragraph of the affidavit so that instead of the witness certifying that the affidavit is true and correct to the best of the witness' knowledge and belief, it provides: "I state under penalty of perjury that the foregoing is true and correct."

10062 Amendments to the Charge

10062.1 Preparation

A charge is amended by typing "Amended'' (or "Second Amended,'' "Third Amended'') before the word "Charge'' on the regular charge form and by rewriting the contents of the charge to include the desired changes.

10062.2 Service of Copies

Copies of amended charges must be served on the charged party and other interested parties and appropriate counsel and other representatives for whom service is necessary. Service may be by regular mail and proof of service should be placed in the file. Sec. 11842.

10062.3 Assistance

The charging party, prior to Regional Office action, may file an amended charge. Board agents should, upon request, assist charging parties with the filing of such amendments. Sec. 10012.2.

10062.4 Filed after Dismissal

An amendment received after dismissal of a charge should be docketed as a new charge and assigned a new number.

10062.5 Allegations not Contained in Charge

Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents, with appropriate supervision, must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found. For example, the charge should allege the type of conduct, such as:

- Interrogation
- Threats of discharge
- Threats of violence
- Mass picketing

If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge. The charging party should also be advised that failure to file the amended charge may affect the Regional Office determination of the case and that any complaint can cover only matters closely related to the allegations of the charge.

10062.6 Amend to Correct Names and Delete Allegations

The Board agent should seek an amended charge when necessary to correct the names of parties or alleged discriminatees or to delete allegations which the Regional Office determines are without merit. With respect to amending charges after a Regional Office decision to issue a complaint, see Sec. 10264.1.

10064 Credibility Resolutions in Investigations

Regional Offices are expected to resolve factual conflicts only on the basis of compelling documentary evidence and/or an objective analysis of the inherent probabilities in light of the totality of the relevant evidence. In order to reduce credibility conflicts and permit administrative resolution of certain factual conflicts, the following observations may be helpful.

Factual conflicts may arise from a misunderstanding of the Board agent's questions or from the nature of the questions asked or the lack of specificity in the answers given. Asking the question in plain language may help resolve the conflict. Board agents should obtain factual details rather than the opinions and conclusions of the witnesses. Probing into details is appropriate in order to determine the reliability of a witness' memory. Board agents should stress the need for witnesses to testify to the specific language used in critical conversations, such as those involving 8(a)(1) or 8(b)(1)(A) statements. When a witness is contradicted regarding relevant testimony and further interview of the witness might help resolve the issue(s) administratively, the Board agent should re-interview the witness.

Third-party witnesses may often be helpful in providing evidence to assist in an administrative resolution of factual conflicts or credibility disputes. Thus, Regional Offices should, where appropriate, contact such witnesses and consider issuance of an investigative subpoena where necessary.

If, after applying the principles set forth above, the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the Regional Office's merit determination, a complaint should issue, absent settlement.

10066 Remedial Bargaining Order Cases

The Regional Office should be aware that cases that involve a possible remedial bargaining order, such as *Gissel* type cases (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), present special investigation concerns, particularly with respect to proof of majority status.

10066.1 Authenticity of Cards or Other Documents

In all cases where an employer's alleged unfair labor practices are sufficient to require a remedial bargaining order, the Regional Office must determine the authenticity of authorization cards or other proof of majority status before issuance of a complaint seeking such an order. Thus, the Regional Office should obtain evidence from the charging party regarding the facts and circumstances concerning the solicitation and

procurement of cards or other documents (e.g., a petition), including the names of solicitors, such as union agents, who can authenticate such cards or other documents. Thereafter, the Regional Office should obtain affidavits from such persons relating to the cards or other documents that they can authenticate.

Alternatively, and particularly where a question concerning the circumstances of the signing arises, individual card signers may also be contacted and an affidavit taken from each of them. If the card signers are so numerous that it is not possible or practical to take an affidavit from each one, a questionnaire mailed to each card signer should be considered. Responses to such questionnaires would determine the particular witnesses from whom affidavits should be taken. Where, despite diligent effort, the Regional Office cannot locate card signers or qualified witnesses, it may be necessary to use expert testimony to determine the validity of the cards. Whatever the method, it is incumbent on the Regional Office in every case to undertake whatever investigation is reasonably required to determine the validity of the cards.

In order to ensure authenticity, Regional Offices should place a date-stamp on the reverse side of cards or other documents when received. In addition, all undated cards should be stamped "UNDATED" in the space for the date.

10066.2 Payroll Records

In order to determine the names of all unit employees and the potential majority status of the union at the relevant time, the Regional Office should seek appropriate payroll records from the employer. If the employer refuses the Regional Office's request to submit such records and the Regional Office has been unable by alternative means to determine the names of all unit employees, it should issue an investigative subpoena for the payroll records and other relevant documents bearing on the unit issue.

10066.3 Evidence of Forgery

Whenever investigation as to the authenticity of authorization cards discloses evidence of forgery, the Division of Operations-Management should be notified for the consideration of referral to the Department of Justice for further appropriate action. Depending upon the circumstances, further processing of the case may be suspended pending advice from Operations-Management with respect to further handling of the case. GC Memo 00-03.

10067 Where Unlawful Union-Security Clause Disclosed

An investigation of a charge alleging a discriminatory discharge or refusal to hire may also disclose the existence of a union-security clause in a contract which is unlawful on its face without referring to any extrinsic evidence. The Regional Office should, absent settlement, allege the unlawful clause in a complaint, provided that the allegations of the charge are sufficiently broad. The Regional Office should so proceed even though the charging party will not amend and the matters specifically alleged lack merit.

Where, on the other hand, an apparently unlawful but unwritten union-security practice is found in such a case, the charging party should be informed of this fact; if the party refuses to amend, the Regional Office should not pursue that issue.

10068 Conclusion, Report, Decision and Implementation

10068.1 Review and Supplemental Investigation

Prior to presenting the case for Regional Office decision, the Board agent, with appropriate supervision, must carefully review the case file to be certain that all relevant evidence is contained therein, including that bearing on material credibility conflicts. If additional evidence is required, the agent must expeditiously obtain it prior to presenting the case for Regional Office determination. In addition, the Board agent must also complete legal research to address all issues raised by the case to the extent necessary to make reasoned recommendations as to the disposition of all issues.

10068.2 Report and Determination

Cases may be presented for Regional Office determination at the conclusion of an investigation either by written or oral report to the Regional Director or other Regional Office official, pursuant to Regional Office policy. The Regional Director has the final authority and responsibility to make all casehandling decisions within the Regional Office.

(a) *Written Report:* The formats for written reports vary but all require a recitation of the allegations of the charge, the facts of the case, identification of the issues in dispute, an analysis of the facts and law and a recommended disposition. The Regional Office determination should be memorialized in writing. See GC Memo 07-06 for guidance concerning length and organization of FIRs and other decisional documents.

(b) *Oral Agenda:* In lieu of a written report, a case may, depending upon Regional Office policy, be presented for determination orally to the appropriate designated Regional Office official. The presentation must contain the same elements described in (a) above and the determination should be memorialized in writing.

10068.3 Implementation of Determination

The Board agent normally is responsible for notifying the parties of the Regional Director's determination.

(a) *Meritorious Charge:* If the charge is determined to have merit, the Board agent must notify the parties and solicit settlement of the charge before complaint issues. Secs. 10124–10142.

(b) *Nonmeritorious Charges:* If no merit is found to the charge, the Board agent need inform only the charging party of the determination and the basis for it, and provide the charging party with an opportunity to withdraw the charge. Sec. 10120. If the charging party elects to withdraw, the charged party generally should not be informed of the Regional Office's determination. If the charging party declines to withdraw, the charge should be dismissed promptly. Sec. 10122.

(c) *Deferral Charges:* If the Regional Office determines that the charge should be deferred, the Board agent should inform the parties and take the necessary steps to implement the Regional Office's determination. Sec. 10118.

10070 Violations of Other Statutes and Misconduct

Persons who bring to the attention of any member of the Regional Office staff evidence of a possible violation of other Federal statutes, independent of our processes and not uncovered during the investigation of a case, should be referred to appropriate authorities.

When potential violations of other statutes are uncovered during an investigation, Regional Offices are not required to obtain clearance from the Division of Operations-Management before referring such conduct to the appropriate agency. However, when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury or obstruction of justice in connection with NLRB proceedings) and when referral of alleged unethical conduct of attorneys is involved, clearance from Operations-Management is required. Sec. 10058.6.

10070.1 Titles I-VI of Labor-Management Reporting and Disclosure Act

When possible violations of Titles I-VI of the Reporting and Disclosure Act are brought to the attention of a Board agent, the Regional Office should refer the matter to the nearest field office of the Office of Labor Management Standards, U.S. Department of Labor. The Region should notify the Division of Operations-Management of such referral.

10070.2 OSHA and MSHA

Certain conduct protected under the Act as union or concerted may also be protected under the Occupational Safety and Health Act and the Mine Safety and Health Act. Such situations arise most commonly in charges alleging retaliation for reporting safety concerns. The General Counsel has entered into agreements with both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) setting forth procedures for handling such overlapping jurisdiction. GC Memos 75-29, 76-14, and 79-4 and OM 80-10.

10070.3 Obstruction of Justice and Perjury

Board agents should be sensitive to acts of obstruction of justice or perjury by individuals involved in Board proceedings. The Regional Office should report immediately any acts of alleged obstruction of justice or perjury to the Division of Operations-Management. Appropriate cases will be referred by Operations-Management to the Department of Justice for its consideration.