

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 13-02

October 3, 2012

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Designation of Attorney or Representative Form

Attached to this memorandum is Form NLRB-4943, titled "Notice of Designation of Attorney or Representative." This Designation Form should be used when an attorney who represents an organizational party to a case also claims to represent a third-party witness as an individual. Section 10058.4(c) of the General Counsel's Unfair Labor Practice Casehandling Manual provides that when an attorney who represents an organizational party to a case also claims to represent a third-party witness as an individual, both the attorney and the witness should be directed to provide written notice that the attorney represents the witness, including the filing of a Notice of Designation of Attorney or Representative from the witness and a specific Notice of Appearance (Form NLRB-4701) from the representative.<sup>1</sup>

The purpose of the Designation Form is to assist the Region in determining whether the attorney-client relationship is consensual, which is a prerequisite for the relationship to be valid. See Brown v. St. Joseph County, 148 F.R.D. 246, 250 (N.D.Ind. 1993) ("[t]he existence of an attorney-client relationship is generally determined by principles of contract and agency . . . . [I]t is fundamentally consensual, 'existing only after both attorney and client have consented to its formation'" (citations omitted). Pursuant to the Manual's provision, if the Regional Office is satisfied that the relationship is true and consensual, then "the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present."

In addition to the party counsel/third-party witness context, the Designation Form may be used, together with the Notice of Appearance, Form NLRB-4701, in any other instance where a Regional Director has concerns as to whether an asserted attorney-client relationship is consensual.

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<sup>1</sup> Section 10058.1(b) of the Manual states that an attorney or other representative who wishes to represent a party or a witness in a specific case must file a specific Notice of Appearance, Form NLRB-4701, with the Regional Director. An attorney who is organizational counsel represents the organizational entity, and not the individual employees/agents. Model Rule 4.2 (Communication with Person Represented by Counsel), the skip counsel rule, and state versions of that rule create a presumption as to which individuals are included in the consensual attorney-client relationship between the organization and its attorney. "Third-party witnesses" are individuals who do not fall within Rule 4.2's presumption of representation. Thus, an organizational counsel who also represents a third-party witness should be told to file a notice of appearance on behalf of the organization, and a separate notice of appearance on behalf of the third-party witness who is individually represented.

Regions may give the Designation Form to the attorney, or directly to the witness.<sup>2</sup> However, Designation Forms must be completed in full by the third-party witness.

Any questions regarding the form or its use should be directed to Special Ethics Counsel Lori Ketcham.



A.P.

Attachment

cc: NLRBU

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<sup>2</sup> If organizational counsel has claimed to represent a third-party witness and/or submitted a notice of appearance on behalf of the third-party witness, and the Region gives the Designation Form directly to the witness, any ex parte communications should be limited to stating that the witness should complete the Designation Form in full if he or she is represented for purposes of the case. If there is an asserted representational relationship, communication about the substance of the case would implicate ABA M.R. 4.2 ("Communication with Person Represented by Counsel"), the "skip counsel rule," and should be avoided.

National Labor Relations Board  
**NOTICE OF DESIGNATION OF ATTORNEY  
OR REPRESENTATIVE**

CASE NO.

To: Regional Director,

I, \_\_\_\_\_, the undersigned, hereby designate  
\_\_\_\_\_, whose name and address appear below,  
as my attorney/representative in this proceeding.

This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

FULL NAME OF WITNESS
SIGNATURE OF WITNESS <i>(please sign in ink)</i>
DATE

NAME OF ATTORNEY/REPRESENTATIVE
<input type="checkbox"/> REPRESENTATIVE IS AN ATTORNEY
MAILING ADDRESS
EMAIL ADDRESS
TELEPHONE NUMBER