ASHLEY E. TREMAIN
Founding Partner, Tremain Artaza PLLC
Board Certified in Labor & Employment

Awards & Certifications:

- Ashley is the only Plaintiff-side Employment litigation attorney named to the Super Lawyers' "Up-and-Coming 100" list for 2017.
- Ashley is also the only Plaintiff-side Employment litigation attorney named to the Super Lawyers' "Up-and-Coming 50 Women" list for 2017.
- Texas Super Lawyers "Rising Star" (2013, 2014, 2015, 2016, 2017)
- Listed in "Best Lawyers in America" for Employment Law: Individuals (2016, 2017, 2018)
- TBLS Board Certified: Labor & Employment
- Tremain Artaza PLLC is listed by U.S. News as a "Best Law Firm" in the DFW area for Employment Law: Individuals (2017 and 2018)

Memberships & Activities:

- Dallas Bar Association, Labor & Employment Section (Member of the Council)
- National Employment Lawyers Association
- Texas Employment Lawyers Association (Past Board Member)
- DFW - NELA (Past Board Member)
- American Inns of Court - Higginbotham Inn
- College of the State Bar of Texas
- TBLS Society of Dallas-Fort Worth

Speaking Engagements:

- Plaintiff's Counsel Roundtable (MCHRA Employment Law Conference, 2017)
- Technology Ethics (Plano Bar Assoc., 2016)
- Technology Ethics (Dallas Bar Assoc., Solo & Small Firm Section, 2016)
- "FMLA, ADA, and the ACA" (State Bar of Texas, L&E Section, 2015)
- "Technology in Practice" (DFW-NELA Luncheon, 2015)
- "Practice Management" (TELA Annual Conference, San Antonio, 2015)

- "Protect Your Company From FMLA Liability" (The Noble Group, 2014)
- "Ethics Issues in Employment Law" (Tarrant County Bar Association, 2013)
- "Managing Your Practice" (Employment Law 101, 2013)
- "Ethics Issues in Employment Law" (DBA Labor & Employment Section, 2013)
- "Employment Law in Texas" (Texas Business Show with Martin Birnbach, 2012)
- "The No Contact Rule" (TELA Annual Conference, 2012)
- "Retaliation Update" (SBOT Labor & Employment Law Institute, 2012)
- "Implicit Bias in the Courtroom" (Higginbotham Inn of Court, 2012)
- "Common Employer Mistakes in FMLA Implementation" (NELA Annual Conference, 2012)
- "Common Mistakes in FMLA Implementation" (DFW NELA CLE Luncheon, 2012)
- "Substantive FMLA Claims (Course Materials Only) (Current Developments in Employment Law: 19th Annual Advanced Course, Santa Fe, NM 2012)
- "Quantifying Subjective Performance Assessments" (TELA Annual Conference, Guatemala 2011)
- "Surviving Back-to-Back Trials" (DFW-NELA CLE Luncheon, 2011)

Education:

Washington University School of Law (St. Louis, MO)

• Honor Scholar Award (Top 10% of class during final year of law school)
• Dean's List
• CALI Awards (Top Grade in Class) for "Censorship & Free Expression"
• CALI Awards (Top Grade in Class) for "Legacy of Bush v. Gore"
• Saul Lefkowitz National Moot Court Team: 2007-08
- Winner: National Award for Best Brief)

Marquette University (Milwaukee, WI)

• Honors B.A.
• Majors: Psychology and Criminology/Law
• Honor Societies: Pi Gamma Mu (Social Sciences), Psi Chi (Psychology Honor Society), Phi Alpha Theta (History)
• MENSA

RULE 4.02:
Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not:

- ☐ communicate or cause or encourage another to communicate
- ☐ about the subject of the representation
- ☐ with a person, organization or entity of government
- ☐ the lawyer knows to be represented by another lawyer
- ☐ regarding that subject,

unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes:

(1) those persons:

- ☐ presently
- ☐ having a managerial responsibility with [the] organization or entity of government
- ☐ that relates to the subject of the representation, or

(2) those persons:

- ☐ presently
- ☐ employed
- ☐ by such organization or entity **and**
  - ☐ whose act or omission
  - ☐ in connection with the subject of representation
  - ☐ may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comments:

1. Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government.

2. Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party.

Consent may be implied as well as expressed, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel.

Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government.

Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government.

Finally, it does not prohibit a lawyer from furnishing a "second opinion" in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.

3. Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

4. In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity

vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved.

This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f).

Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

Defining the Perimeters of the No-Contact Rule

BY ASHLEY E. TREMAIN

The "no contact" rule is one of the most misunderstood rules governing the practicing litigator. The source of the rule is Texas Disciplinary Rule of Professional Conduct 4.02, which prohibits contact with represented parties.

Rule 4.02 is enforced by the State Bar of Texas—it is not a rule of civil procedure. There should be no difference in the application of Rule 4.02 between state and federal courts. In fact, the Northern District of Texas specifically defines "unethical behavior" warranting disciplinary action as conduct "that violates the Texas Disciplinary Rules of Professional Conduct."

When an attorney represents a corporate or governmental entity, some individuals are automatically "represented" as a result. Those individuals may not be contacted by opposing counsel. Section (c) of Rule 4.02 clearly defines the individuals that are considered "represented," and therefore off-limits: (1) those persons presently having a managerial responsibility…that relates to the subject of the representation, or (2) those persons presently employed…and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

While section (c)(2) is expressly limited to "employees," section (c)(1) arguably includes non-employees such as partners, board members and contractors—so long as they have "managerial responsibility…that relates to the subject of the representation." The second qualification is important—the mere possession of "managerial authority" does not bring an individual within the scope of the rule. The authority must "relate to the subject of the representation." For example: a custodial manager who saw the CFO assault the V.P. of Sales does not have managerial authority "that relates to the subject of the representation," and may be contacted by opposing counsel.

All former employees, as well as individuals "presently employed…whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue," are expressly excluded from coverage. *See Comment 4, Tex. Disc. R. Prof. Cond. 4.02.*

Many practitioners equate the perimeters of the "no contact" rule with the "control group" test. The "control group" test is used to determine who is a "representative of the client" for purposes of determining whether the attorney-client privilege applies. As an initial matter, the Texas Supreme Court abandoned the "control group test" long ago. More importantly, this is *not* the test to determine who is "represented" under Rule 4.02.

If, however, an attorney learns privileged information through communication with a witness not covered under Rule 4.02, he or she may be disqualified from the case—even if Rule 4.02 was not violated. As a best practice, attorneys communicating with witnesses exempted from Rule 4.02 should ensure that they do not request potentially privileged information, and remind witnesses not to disclose such information. Certain witnesses, due to their former positions with the entity, are particularly likely to have information protected by Rule 503. Particular caution should be exercised in attempts to communicate with these witnesses.

Attorneys representing corporate or governmental entities should also observe some "best practices" surrounding Rule 4.02. First, attempts to represent all current employees will expose the attorney to disqualification under Rule 1.06 (Conflicts of Interest), and should be avoided. Many employees are likely to have interests that are "materially and directly adverse" to the interests of the represented entity—particularly if there is any possibility that the employee will testify against the entity.

Second, entities should refrain from prohibiting communications between employees and an individual who has sued the entity. This exposes the entity to claims under the NLRA (making it unlawful to interfere with employees' rights to engage in concerted activities for the purpose of mutual aid or protection). The NLRA is not limited to unionized entities, and it protects communications with former employees. Corporate counsel should tread lightly with attempts to restrict communication between employees and opposing counsel.

The "no contact" rule is designed to protect corporate and governmental entities from undue interference with the attorney-client relationship, and to facilitate efficient discovery from unrepresented fact witnesses. A clear understanding of what is—and is not—prohibited by this rule is essential for effective discovery practice in Texas. **HN**

Professional Ethics Committee For the State Bar of Texas
Opinion 653

SITUATION:
A party to a lawsuit is a licensed attorney, but does not any other parties in this legal dispute. lawsuit. He wants to discuss settlement with the opposing party without seeking the consent of the lawyer for the opposing party.

ANSWER:
Rule 4.02(a) prohibits a lawyer who is representing a client from communicating concerning the subject of the representation with a party who is represented by counsel. Rule 4.02(a) does not prohibit communications between the parties, so long as a party's lawyer "does not cause or encourage the communication without the consent of the lawyer for the other party." See Comment 2 to Rule 4.02.

Professional Ethics Committee For the State Bar of Texas
Opinion 474

SITUATION:
In a legal dispute between an individual Plaintiff and a municipality, the Plaintiff's counsel telephones a City Council member to express his disapproval of the City's settlement offer.

ANSWER:
This is a violation. Rule 4.02 prohibit communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation. Section (c)(1) of the Rule defines an "organization or entity of government" to include "those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation."

Professional Ethics Committee For the State Bar of Texas
Opinion 600

SITUATION:
Is a lawyer for a Texas governmental agency required to ensure that the agency's enforcement officers do not communicate directly with a person who is represented by a lawyer except with such lawyer's consent?

ANSWER:
No, this lawyer is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority. However, a lawyer for a governmental agency is not permitted to communicate directly with a

regulated person that is represented in the matter, or to cause or encourage such communications by other agency employees. The agency lawyer is also obligated to prevent such communications by employees over whom the lawyer has direct supervisory authority.

In re Users Sys. Services, Inc., 22 S.W.3d 331, 334 (Tex. 1999)

As we said recently in *In re EPIC Holdings, Inc.,* "[w]e have repeatedly observed that '[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.'" Technical compliance with ethical rules might not foreclose disqualification, and by the same token, a violation of ethical rules might not require disqualification.

Orchestratehr, Inc. v. Trombetta, 178 F. Supp. 3d 476 (N.D. Tex. 2016)

"…it is not clear, on this record, that Defendants' counsel actually violated the so-called non-contact rule…But the Court concludes that is not properly the issue here. Nor is the issue whether [witness] was employed by Orchestrate HR or its subsidiary."

Instead, the issue is whether [Ms. Doe], as Defendants' counsel, engaged in conduct that is sanctionable under the Court's inherent powers as a violation of the standards set by this Court for attorneys' conduct in litigation before it. And the Court determines that she has.

The evidence establishes that [Ms. Doe] had previously communicated with Plaintiffs' counsel concerning the legal representation and scheduling of depositions of current or former employees. Under this practice, [Ms. Doe] had been informed on at least one occasion that Plaintiffs' counsel represented one of Plaintiffs' former employee, and [Ms. Doe] specifically stated that she would not contact that former employee—Ms. Brown. But then she did just that and retained and directed a private investigator to contact Ms. Brown, inquire whether she was represented, and, if Ms. Brown did not report that she was represented, ask her questions concerning this case.

The Court notes that [Ms. Doe]'s co-counsel explained during the hearing that, when he discovered that there was an attempt to contact Ms. Brown, knowing that there was the previous email between Plaintiffs' counsel and [Ms. Doe] discussed above, he instructed that it stop. And he explained that this is why [Ms. Doe] advised Mr. Joy on January 19, 2016: "Please do not contact [Ms.] Brown until you hear otherwise from me." And, at the hearing, Defendants' counsel represented to the Court that Defendants, through their counsel, will not contact any known or perceived current or former employees of Plaintiffs or their subsidiaries without having first contacted Plaintiffs' counsel. *See* Dkt. No. 285 at 17-18, 23.

"…Even the Texas Disciplinary Rules of Professional Conduct allow an attorney to contact the former employees of the opposing party. Under Rule 4.02(a), a lawyer, in representing a client, may not communicate with a person or organization "the lawyer knows to be represented by another lawyer regarding that subject." Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a)…This prohibition extends to certain "persons presently having a managerial responsibility" in the organization or "presently employed by" the organization. Tex. Disciplinary Rules Prof'l Conduct R. 4.02(a) (emphasis added). But "this Rule does not prohibit a lawyer from contacting a former employee of a represented organization." Tex. Disciplinary Rules Prof'l Conduct R. 4.02 cmt. 4.…"Denial of access to such a person would impede an adversary's search for relevant facts...." Restatement (Third) of the Law Governing Lawyers § 100 cmt. g (Am. Law Inst. 2000).

If attorneys abuse their freedom by eliciting privileged or confidential information from fact witnesses, then their conduct is subject to Meador."

"…To the extent the fact witness discloses his past employer's privileged and confidential information, the factors outlined by *In re Meador,* 968 S.W.2d 346 (Tex.1998) (orig. proceeding), should guide the trial court's discretion regarding disqualification."

"… Relevant factors for the trial court's consideration include:

1) whether the attorney knew or should have known that the material was privileged;

2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;

3) the extent to which the attorney reviews and digests the privileged information;

4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

5) the extent to which movant may be at fault for the unauthorized disclosure;

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Meador, at 351–52."

BUT NOTE:
Defend Trade Secrets Act, Sec. 7(b)

(1) …An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

(A) is made--

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and
(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

(2) …An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual--

(A) files any document containing the trade secret under seal; and

(B) does not disclose the trade secret, except pursuant to court order.

ALSO REMEMBER:
Tex. Disc. Rule of Prof. Conduct 1.06

(b) ….a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

ALSO REMEMBER:
National Labor Relations Act, Sec. 7 & Sec. 8(a)(1)

Sec. 7: "….Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"

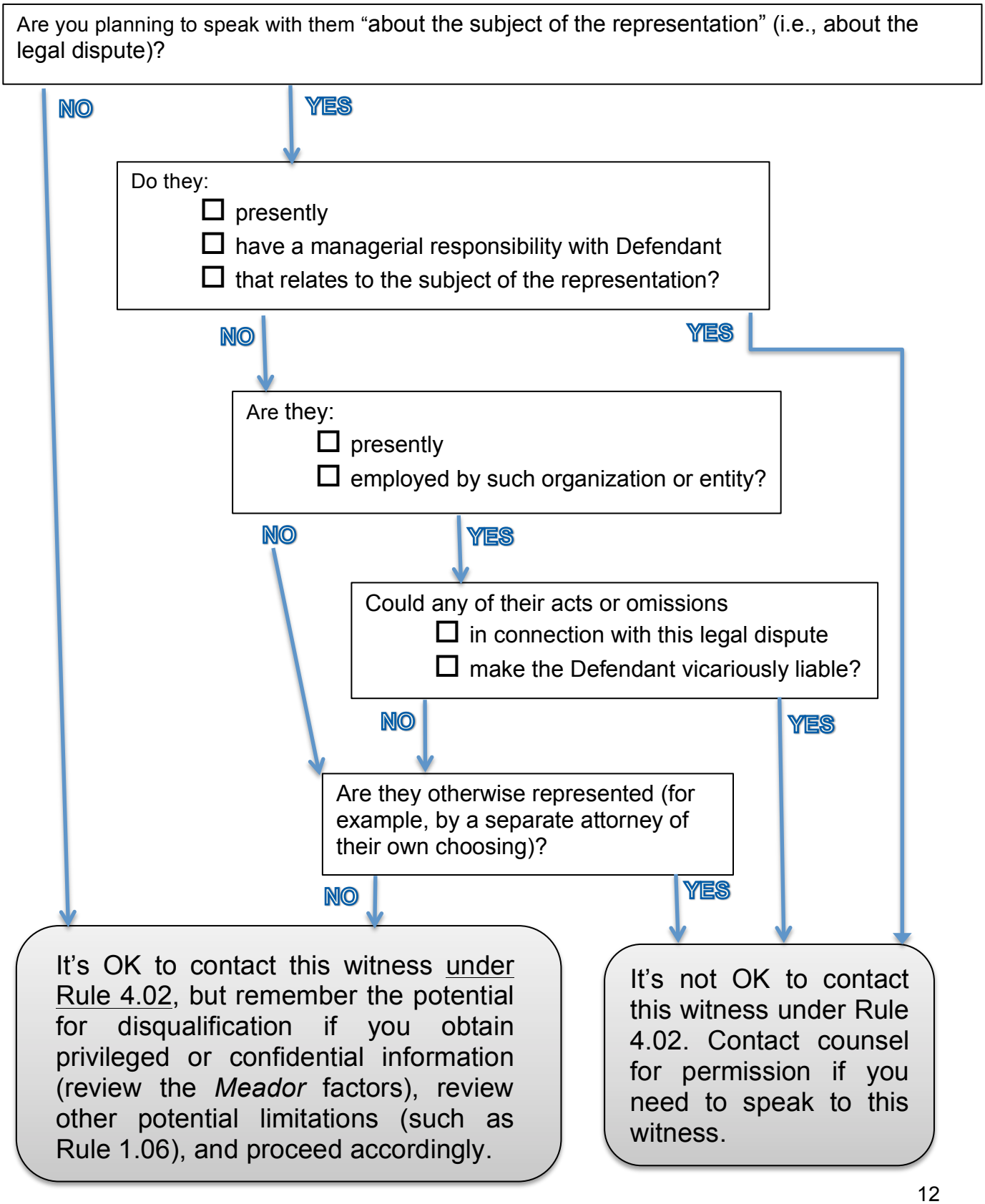
Sec. 8(a)(1): "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Sec. 7]."

See, e.g.: NLRB Case No. 16-CA-027886, against Advanced Facial Plastic Surgery Center, PA. In this case, the employer was found to have violated the NLRA by:

- "[t]elling or otherwise implying to employees that they have any need to be represented by an attorney in [the dispute]," and by
- "[s]ummoning employees to meet with an attorney for the purpose of representation in [the dispute]," and by
- "[p]aying for an attorney to represent employees [the dispute]."

I WANT TO SPEAK WITH A WITNESS

(either directly, or through a third person at my instruction)



I WANT TO PREVENT A WITNESS FROM SPEAKING WITH AN OPPOSING PARTY OR OPPOSING COUNSEL