NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BENCH BOOK

An NLRB Trial Manual

October 2015

Judge Jeffrey D. Wedekind
Editor

FOREWORD

A handbook for NLRB trial examiners or administrative law judges has existed in various forms since the earliest days of the National Labor Relations Act. The *Bench Book* was first published in 2001, and has been updated periodically since. Judge Jeffrey Wedekind edited both the 2010 edition and the current 2015 edition.

The *Bench Book* is designed to provide NLRB judges with a reference guide during trials when other resources are unavailable. However, it is also a useful tool for all trial practitioners before the Board. It represents an effort to set forth Board precedent and other rulings and authorities on certain recurring procedural and evidentiary issues that may arise during an NLRB trial. It is not a digest of substantive law. Nor should it be cited as precedent, or be considered a substitute for issue-specific research. A good source for such research is the NLRB's *Classification Outline and Index* (also known as CITENET, the Board's website search database of Board cases) particularly in Chapter 596 "Procedure in ULP Proceedings," in Chapter 737 "Evidence," and in Chapter 700 "General Legal Principles."

The basic sources that govern Board trials are the National Labor Relations Act (the Act), the Administrative Procedure Act (APA), the Board's Rules and Regulations and Statements of Procedure, and Board decisions. The Board also applies, so far as practicable, the Federal Rules of Evidence (FRE), and frequently seeks guidance from the Federal Rules of Civil Procedure (FRCP). All citations to the FRE and FRCP in the *Bench Book* have been updated to reflect the most recent amendments effective December 1, 2014.

The *Bench Book* includes references to unpublished Board orders, unappealed administrative law judges' decisions, and other Board documents that are not binding precedent. It also includes citations to some of the two-Member Board decisions that issued from January 1, 2008–March 29, 2010, and the recess-Board decisions that issued from January 4, 2012–August 4, 2013. The decisions, which are marked with an asterisk (*), lack precedential weight and should be cited, if at all, with caution, unless they have been reaffirmed. See ***New Process Steel, L.P. v. NLRB***, 560 U.S. 674 (2010) (holding that the two-Member Board lacked authority to issue its decision in that case); and ***NLRB v. Noel Canning***, --- U.S. ---, 134 S.Ct. 2550 (2014) (holding that the appointments of Members Sharon Block, Richard Griffin, and Terence Flynn during a 3-day intrasession recess were invalid). However, they may provide useful guidance in evaluating similar issues and factual situations.

Note that this edition of the *Bench Book* includes a number of organizational changes from previous editions. The most significant change is to former Chapter 13 (now Chapter 16) on Evidence. The chapter is now organized in the same way as the FRE, and follows the same numbering system, so that the federal rules and treatises on evidence can be cross-referenced more easily. Another significant change is that former Chapter 11 on Miscellaneous Procedural Matters has been deleted. The matters addressed there have been placed in other chapters, including four new chapters on Motions and Special Appeals (Chapter 10), The Hearing Record (Chapter 12), Board Precedent and Relitigation of Issues (Chapter 13), and Supplemental or Related Proceedings (Chapter 14). Given the now widespread availability and use of electronic search tools, the index and the table of authorities have also been deleted. A search can be performed by pressing the "Ctrl" and "F" keys together and typing the search word(s) in the box.

Robert A. Giannasi
Chief Administrative Law Judge

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CHAPTER 1. MODEL STATEMENTS, ORDERS, AND OATHS

§ 1–100 Opening Statement by Judge

The following is a suggested opening statement:

> The hearing will be in order. This is a formal trial before the National Labor Relations Board in _____, Case _____.
> [If consolidated with an objections-to-election case, add: "consolidated with Case_____ for hearing on objections to election."]
>
> The administrative law judge presiding is _____. I am assigned to the _____ office of the Division of Judges. Any communications should be addressed to that office, and any requests for extensions of time should be addressed to the [Chief Judge or Deputy or Associate Chief Judge] in that office.
>
> Will counsel and other representatives of the parties please state their appearances for the record. For the General Counsel . . . [the Charging Party] . . . [the Respondent].
>
> If settlement discussions are desired at any time during the trial, I will be glad to grant a reasonable recess for that purpose. Trial developments sometimes change attitudes and make settlement possible. Accordingly, I am advising you now, before I have heard any of the testimony that I intend to offer opportunity for settlement discussions at two specific stages of the trial: first, at the conclusion of the General Counsel's case and, second, at the conclusion of the trial. If by inadvertence I overlook the matter, please call it to my attention.
>
> I invite you to bear in mind, as the trial proceeds, that opportunities for discussion of settlement will be available at all times on request.
>
> Mr./Ms. _____ [the General Counsel's attorney] please introduce the pleadings and other formal papers. I will dispose of any preliminary motions after those are in evidence.

The judge may also want to ask if the appearance sheet is completed.

§ 1–200 Closing Statement by Judge

The following is a suggested closing statement:

> I will prepare and file with the Board my decision in this proceeding. A copy will be served on each of the parties.
>
> You are reminded to refer to the Board’s Rules and Regulations for information regarding the filing of briefs and proposed findings for my consideration, and regarding procedures before the Board after the issuance of a judge's decision.

Now that all the evidence is in, you have a better opportunity to assess your chances regarding the outcome of the issues than you had at the outset of the trial. All parties should carefully weigh the risks entailed and decide whether an amicable settlement of the issues might not offer a more satisfactory solution. Settlement may be arranged now or at any time before I issue my decision.

I will allow until [date no more than 35 days from the close of the trial] for the filing of briefs and any proposed findings and conclusions. Briefs should be filed directly with the Judges Division office in _____, regardless of whether they are mailed or e-filed.

Any request for an extension of time for the filing of briefs must be made in writing to the [Chief Judge or Deputy or Associate Chief Judge] in that office and served on the other parties. The positions of the other parties regarding the extension should be obtained and set forth in the request. It is the policy of the Division of Judges to grant discretionary extensions only when they are clearly justified. Requests for extensions must contain specific reasons and show that the requesting party cannot reasonably meet the current deadline.

There being nothing further, the trial is now closed. Off the record.

§ 1–300 Sequestration Order

A full discussion of Board precedent with respect to separating, excluding, or sequestering witnesses is set forth in **CHAPTER 11**, Sequestration of Witnesses, below. The following is a model sequestration set forth in ***Greyhound Lines***, 319 NLRB 554 (1995):

Counsel has invoked a rule requiring that the witnesses be separated, or sequestered. This means that all persons who are going to testify in this proceeding, with specific exceptions that I will tell you about, may be present in the courtroom only when they are giving testimony.

The exceptions are alleged discriminatees, natural persons who are parties, representatives of non-natural parties, and a person who is shown by a party to be essential to the presentation of the party's cause. They may remain in the courtroom even if they are going to testify, or have testified. Alleged discriminatees including charging parties, however, may not remain in the courtroom when other witnesses on behalf of the General Counsel or the Charging Party are giving testimony regarding the same events that the alleged discriminatees will be expected to testify about.

The rule also means that from this point on until the trial is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the trial is completed.

Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including the showing of transcripts, inform a witness about the content of the testimony given by a preceding witness, without express permission of the administrative law judge. The exception is that counsel

for a party may inform the counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side to prepare for rebuttal of the testimony.

I expect counsel to police the rule and to bring any violation of it to my attention immediately. It is the obligation of counsel to inform potential witnesses who are not now present in the courtroom of their obligations under the rule.

It is also recommended that, as witnesses leave the witness stand upon completion of their testimony, they be reminded that they are not to discuss their testimony with any other witness or potential witness until the trial is completed.

The following is a shortened version of the ***Greyhound*** order:

A sequestration order is being issued in this proceeding. This means that all persons who expect to be called as witnesses in this proceeding, other than a person designated as essential to the presentation of a party's case, will be required to remain outside the courtroom whenever testimony or other proceedings are taking place.

A limited exception applies to witnesses who are alleged discriminatees in this matter. They may be present in the courtroom at all times, other than when witnesses for the General Counsel or a charging party are giving testimony regarding the same events that the alleged discriminatees are expected to testify about.

The sequestration order also prohibits all witnesses from discussing with any other witness or any possible witness the testimony he/she has already given or will give.

Likewise, counsel for a party may not disclose to any witness the testimony of any other witness. Counsel may, however, inform his/her own witness of the content of testimony given by any opposing party's witness to prepare to rebut that witness's testimony.

It is the responsibility of counsel to see that they and their witnesses comply with this sequestration rule.

The judge may also ask if there is a person essential to the presentation of any party's cause, to be designated to remain in the courtroom during the trial.

§ 1–400 Witness Oath

Examination is under oath. NLRB Rules and Regulations, Sec. 102.30. The oath should be administered to each witness in a manner calculated to impress the witness with the duty to testify truthfully.

A solemn affirmation instead of an oath is acceptable. See FRE 603 and FRCP Rule 43(b). If a witness is unwilling to either swear or affirm on the basis of religious conviction, any formula of words that can reasonably be construed as a promise or undertaking to testify truthfully will suffice. See ***Union Starch & Refining Co.***, 82 NLRB 495, 496 (1949); and ***Ferguson v.***

C.I.R., 921 F.2d 588 (5th Cir. 1991). But see ***Gordon v. State of Idaho***, 778 F.l2d 1397 (9th Cir. 1985) (witnesses need not "swear" or "affirm" or raise their right hand, but their alternative statement must indicate that they understand they can be prosecuted for perjury for failing to tell the truth, i.e. that they are testifying under penalty of perjury).

Parties with witnesses who are unwilling to swear or affirm should bring this to the judge's attention before the oath is administered.

The traditional oath is:

> Do you swear that your testimony at this trial will be the truth, the whole truth, and nothing but the truth, so help you God?

A typical affirmation substitutes "affirm" for "swear" and omits "so help you God" or any similar religious reference:

> Do you affirm that your testimony at this trial will be the truth, the whole truth, and nothing but the truth?

Some judges add or substitute a reference that a witness may be prosecuted for perjury for failing to tell the truth. For example:

> Do you swear or affirm, under penalty of perjury, that your testimony in this proceeding will be the truth, the whole truth, and nothing but the truth [so help you God]?

Following the oath or affirmation, the witness should be asked to give his/her name to the court reporter, and to spell it if necessary.

§ 1–500 Interpreter's Oath

The following is a suggested interpreter's oath:

> Do you solemnly swear that you are fluent in both English and _____ [foreign language] and that you will faithfully and truly, to the best of your skill, knowledge, and ability, translate the questions asked of the witnesses and the answers given by those witnesses during the trial, so help you God?

CHAPTER 2. THE TRIAL JUDGE

§ 2–100 Designation

Section 102.15 of the Board's Rules states that the complaint shall contain "a notice of hearing before an administrative law judge." Similarly, Section 101.10(a) of the Board's Statements of Procedure states that a "designated administrative law judge presides over the hearing."

The administrative law judge is designated by the Chief Judge or Deputy or Associate Chief Judge in the appropriate office, "as the case may be." NLRB Rules and Regulations, Sec. 102.34. The designation "is a matter for administrative determination by the Board with which the parties have no concern." ***East Texas Steel Castings Co.***, 116 NLRB 1336, 1337 (1956), enfd. 255 F.2d 284 (5th Cir. 1958).

§ 2–200 Ex Parte Communications

§ 2–210 Basic Prohibition

Once designated, the judge is prohibited from ex parte communication with any of the parties to the proceeding. NLRB Rules and Regulations, Secs. 102.126 and 102.128(e). Nor shall any person "knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person." Id., Sec. 102.131.

An ex parte communication is any "oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." Id., Secs. 102.127(b) and 102.129. The prohibition continues "until the issues are finally resolved by the Board." Id., Sec. 102.128.

Even communications with the judge regarding inadvertent errors in a judge's decision may be considered improper if the errors are substantive. See ***Wilco Business Forms***, 280 NLRB 1336 n. 2 (1986) (representative of the General Counsel notified an Associate Chief Judge of the omission of two employees' names from the decision's list of laid off employees, prompting the deciding judge to issue an errata adding the names). See also ***Today's Man***, 263 NLRB 332, 333 n. 3 (1982) (Board's Executive Secretary treated as a prohibited ex parte communication a letter from the respondent's counsel to the judge requesting deletion of certain language from the judge's decision).

§ 2–220 Exceptions to Basic Prohibition

Not every off-the-record communication between the judge and the parties is prohibited. Section 102.130 of the Board's Rules lists a number of ex parte communications that are permitted. These include:

Communications regarding matters that a judge is authorized to handle ex parte (Sec. 102.130(a)). This includes applications for subpoenas. NLRB Rules and Regulations, Sec. 102.31(a); and ***Blake Construction Co.***, 245 NLRB 630 n. 1 (1979), enfd. in part 663 F.2d 272 (D.C. Cir. 1981). Thus, a party may submit a subpoena application to a judge outside the presence of other parties and, further, without service on them of a copy of the application.

Communications regarding status of case (Sec. 102.130(b)). See, e.g., ***Care Manor of Farmington***, 314 NLRB 248 n. 2 (1994) (judge did not make an improper ex parte communication by calling counsel for the General Counsel to advise that he would be presiding and to request that counsel notify the respondent's counsel of that fact, as there was no evidence that a prohibited topic was discussed).

Communications to which all parties agree, or on which the judge formally rules, may be made ex parte (Sec. 102.130(c)). See, e.g., ***Kendick Engineering***, 244 NLRB 989 n. 2 (1979) (rejecting respondent's claim that judge improperly had an ex parte off-the-record conversation with the General Counsel during the trial, as the conversation occurred with respondent's assent).

Communications proposing settlement or agreement for disposition of any or all issues may be made ex parte (Sec. 102.130(d)).. See, e.g., ***Sanford Home for Adults***, 253 NLRB 1132 n. 1 (1981) (judge did not engage in improper ex parte communication by meeting privately with counsel for the General Counsel and the Regional Director to discuss settlement possibilities, as there was no evidence that the conversation, which occurred with respondent's knowledge on the heels of a settlement discussion with all parties, in any way involved the merits of the complaint allegations), enfd. 669 F.2d 35 (2d Cir. 1981); and ***Sumo Airlines***, 317 NLRB 383 n. 1 (1995) (judge's alleged statement to the discriminatees about a pending settlement offer did not constitute an improper ex parte communication, as there was no evidence that the communication in any way involved the merits of the complaint allegations).

Communications between the trial judge and fellow judges. It is not a prohibited ex parte communication for the trial judge to consult with fellow judges concerning a legal or procedural issue in a case. See ***Pioneer Hotel, Inc. v. NLRB***, 182 F.3d 939, 944 and n. 2 (D.C. Cir. 1999). In that case, the court rejected the respondent's contention that the ALJ engaged in an improper ex parte communication by consulting with a colleague on the correct procedure for handling a motion to amend the complaint to add a new allegation. The court noted that 5 U.S.C. § 557(d)(1)(A) and Section 102.126 of the Board's Rules only prohibit communications with "interested person[s] outside the Agency," and that 5 U.S.C. § 554((d)(1) only prohibits communications with "a person or party on a fact in issue."

See also Rule 2.9(A)(3) of the ABA Model Code of Judicial Conduct (2011 Edition), which states: "A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter."

§ 2–230 Procedure When Prohibited Communication Received

Oral communications. If the communication is oral, the judge should refuse to listen, inform the communicator of the prohibition and advise the communicator to put what he or she has to say in writing, with copies to all parties. If the communication was completed, the judge should prepare a memorandum stating its substance and place it "on the public record of the proceeding," with copies to be served "on all other parties to the proceeding and on the attorneys of record for the parties." NLRB Rules and Regulations, Sec. 102.132(a) and (b).

Written communications. If the communication is written, the judge should place it "on the public record of the proceeding," with copies to be served "on all other parties to the proceeding and on the attorneys of record for the parties." Ibid.

In both of those situations, parties have 14 days after mailing of the copies, to file with the judge and serve "on all other parties, a statement setting forth facts or conclusions to rebut those contained in the prohibited communication," after which the "responses shall be placed in the public record of the proceeding, and provision made for any further action, including reopening of the record which may be required under the circumstances." Id., Sec. 102.132(b).

It is not clear what steps should next be taken by the judge. Section 102.133(a) of the Board's Rules does provide that when "the nature and circumstances of a prohibited communication . . . are such that the interests of justice and statutory policy may require remedial action, the Board, administrative law judge, or Regional Director, as the case may be, may issue to the party making the communication a notice to show cause, returnable before the Board within a stated period of not less than 7 days from the date . . . why the Board should not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication or knowingly causes a prohibited communication to be made should be dismissed, denied, disregarded, or otherwise adversely affected on account of [the] violation." Succeeding subsections of Section 102.133 set forth actions to be taken by the Board, but make no provision for further action by a judge who issues the notice to show cause.

§ 2–300 Duties of Trial Judge

The administrative law judge's basic duty is "to inquire fully into the facts . . . whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint." NLRB Rules and Regulations, Sec. 102.35(a). Specific powers of administrative law judges are enumerated in Section 102.35(a)(1)–(a)(13) of the Board's Rules, several of which are discussed below.

To regulate the course of the trial (Sec. 102.35(a)(6)). The judge should direct the hearing so that it "may be confined to material issues and conducted with all expeditiousness consonant with due process," ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950), and ensures that the proceeding "take[s] place in a dignified atmosphere, free of threats and intimidation," ***Altemose Construction Co. v. NLRB***, 514 F.2d 8, 12–13 (3d Cir. 1975). See also FRE 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth, (2) avoid wasting time, and (3) protect witnesses from harassment or undue embarrassment").

In doing so, "whether certain lines of inquiry or responses of witnesses should be curtailed rests within [the judge's] sound discretion. ***American Life Insurance and Accident Co.***, 123 NLRB 529, 530 (1959). However, the judge "must guard against expediting a hearing by limiting either party in the full development of its case." ***Indianapolis Glove***, above. See also ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955) (trial examiner improperly "cut off lines of inquiry and limited the response of witnesses to such an extent that the development of the case may have been hampered"); and ***Boetticher & Kellogg Co.***, 137 NLRB 1392 n. 1, 1398–1399 (1962) (trial examiner improperly barred respondent from cross-examining a General Counsel witness because respondent refused his direction to conduct cross examination before the charging party union had questioned the witness).

In proper circumstances, however, the judge may place time limits on a party's presentation of its case. ***Dickens, Inc.***, 355 NLRB 255, 256 (2010); ***University Medical Center***, 335 NLRB 1318, 1318 n. 1, 1343 (2001), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003); and

***Teamsters Local 122 (August A. Busch & Co. of Massachusetts*)**, 334 NLRB 1190, 1193, and 1255 (2001) (also ordering litigation costs for delaying trial).

See also **§§16–102.1** and **16–403,** below.

If appropriate or necessary, to exclude persons or counsel from the trial for contemptuous conduct (Sec. 102.35(a)(6)). Although Section 102.38 provides that "any person shall have the right to appear at [the trial] in person, by counsel, or by other representative," the right of parties and counsel to appear at trials is not unlimited. Indeed, the same section states that "the participation of any party shall be limited to the extent permitted by the administrative law judge." See also Section 102.177(a) of the Board's Rules ("misconduct at any hearing before an administrative law judge . . . shall be ground for summary exclusion from the hearing"), discussed in **§6–610**, Exclusion of Counsel, below.

To hold conferences for the settlement or simplification of issues (Sec. 102.34(a)(7)). See **§7–100**, Conference Calls, and **§9–220**, Promoting Settlement at Pretrial Conference, below.

To rule on procedural requests and motions (Sec. 102.35(a)(8)). This authority is addressed more fully below in **Chapter 10**, Motions and Special Appeals (discussing, inter alia, motions to dismiss and for summary or default judgment, and motions to reopen the record). See also **§3–230 (**motions for a bill of particulars), **§3–400,** et seq. (motions for consolidation and severance), **§3–740** (motions for deferral to grievance arbitration), **§5–400,** et seq. (motions to change the date or location of the hearing)**,** and **§8–415** (motions for a protective order).

To approve stipulations of fact (Sec. 102.35(a)(9)). See **§10–100**, Motions for Decision Based on Stipulated Record, below.

To make and file decisions (Sec. 102.35(a)(10)). "After hearing for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision." NLRB Rules and Regulations, Sec. 102.45(a). See also NLRB Statements of Procedure, Sec. 101.11(a). Thus, in ***Machinists Lodge 1129 (Sunbeam Appliance Co.)***, 216 NLRB 630 (1975), the Board held that the judge erred in granting the respondent's posthearing motion to transfer the case directly to the Board for issuance of a decision over the objections of the General Counsel and the charging party. See also **§15–700**, Contents of Judge's Decision, below.

To call, examine, and cross-examine witnesses and to introduce documentary and other evidence (Sec. 102.35(a)(11)). This section corresponds to FRE 614 and has generally been applied consistently therewith. Thus, a judge's decision to question witnesses, or even to call witnesses, is not improper. ***Hall Industries***, 293 NLRB 785 n. 1 (1989), enfd. mem. 914 F.2d 244 (3d Cir. 1990). See also ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994) (judges may "examine witnesses or interrupt questioning in order to clarify testimony or develop the record"), enfd. mem. 57 F.3d 1073 (7th Cir. 1995); ***Indianapolis Glove***, above ("it is appropriate for [the judge] to question witnesses in order to ascertain their credibility or to clarify their testimony"); and ***NLRB v. Honaker Mills***, 789 F.2d 262, 265 (4th Cir. 1986) (judge properly "attempted to obtain more specific statements from the witnesses to determine the weight that he should assign to their testimony").

However, the judge should avoid examining witnesses to the extent that the judge "takes out of the hands of either party the development of its case," ***Indianapolis Glove Co.***, above, or "appear[s] to assume the role of an advocate in attempting to impeach [the witnesses'] prior testimony," ***Better Monkey Grip Co.***, above.

The judge's failure to ask questions of a party witness is generally not grounds for reversal. See ***Advocate South Suburban Hospital v. NLRB***, 468 F.3d 1038, 1048 (7th Cir. 2006) ("[I]n an adversary legal system it is generally the attorney's duty to provide specific testimony. [The Respondent] cannot palm off on the ALJ its apparent failure to properly question [the witness]").

§ 2–400 Disqualification of Judge

§ 2–410 Grounds Asserted for Disqualification

"The functions of all administrative law judges . . . are conducted in an impartial manner," NLRB Statements of Procedure, Sec. 101.10(b). "It is essential not only to avoid actual partiality and prejudgment … in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1050).

The following are some of the grounds asserted by parties for disqualifying a judge.

Former representation of a party. Former service on the staff of the General Counsel's office is not grounds for disqualification. ***Heads & Threads Co.***, 261 NLRB 800 n. 1 (1982), enfd. in part 724 F.2d 282 (2d Cir. 1983). Nor is past representation of another party, at least if that representation was relatively remote in time. See ***Centeno Super Markets***, 220 NLRB 1151 n. 1 (1975) (8 or 9 years had passed by time of trial), enfd. 555 F.2d 442 (5th Cir. 1977), cert. denied 434 U.S. 1064 (1978). See also 5 C.F.R. § 2635.502(a) and (b)(1)(iv) (prohibiting any Agency employee from participating in a matter involving a party or representative of a party for whom the employee had served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee within the past year).

However, the judge should, of course, recuse himself or herself if the judge previously served as a lawyer or public official concerning the particular matter at issue or has publicly expressed in such capacity an opinion concerning the merits of the matter. See Rule 2.11 of the ABA Model Code of Judicial Conduct (2011 Edition) (also discussing other grounds for disqualification).

Prior disposition statistics. In ***Eldeco, Inc. v. NLRB***, 132 F.3d 1007, 1010 (4th Cir. 1997), the Fourth Circuit rejected the contention that the judge was biased because approximately 89% of the judge's decisions in the last 20 years were in favor of labor unions. The court stated that such statistics are "irrelevant," citing its earlier decision in ***Fieldcrest Cannon, Inc. v. NLRB***, 97 F.3d 65, 69 (4th Cir. 1996) ("To evaluate an ALJ's impartiality in this way amounts to judging his record by mere result or reputation, and in reality, such statistics tell us little or nothing").

Prior rulings against party. "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." ***Liteky v. U.S.***, 510 U.S. 540, 555 (1994). Thus, a judge who previously decided a case against a respondent is not disqualified from presiding over the remand of the case. ***NLRB v. Donnelly Garment Co***., 330 U.S. 219, 236–237 (1947). See also ***Waterbury Hotel Management v. NLRB***, 314 F.3d 645, 650–651 (D.C. Cir. 2003) (judge did not err in refusing to recuse himself simply because he had ruled against respondent's predecessor in an unrelated case). But see ***St. Mary's Nursing Home***, 342 NLRB 979, 980 n. 6 (2004) (judge's adherence to an erroneous ruling, after an initial remand, and allegations that the judge showed "irritation" and "impatience," warranted a second

remand to another judge to remove any suggestion of bias or prejudice), second remand decision affd. 240 Fed. Appx. 8, 10, 12–13 (6th Cir. 2007).

Criticisms of counsel, parties, or witnesses. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge"—however, the criticisms "*may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." ***Liteky***, 510 U.S. at 555.

It is generally not evidence of bias that the judge rebuked counsel for improper conduct. See ***U.S. v. Logan***, 998 F.2d 1025, 1029 (D.C. Cir. 1993), cert. denied 510 U.S. 1000 (1993) (judge "upbraided" counsel for flouting the judge's orders); and ***U.S. v. Mendoza***, 468 F.3d 1256, 1262 (10th Cir. 2006) (judge referred counsel to a bar disciplinary board). See also ***Merillat Industries***, 307 NLRB 1301, 1301–1302 (1992), where the Board rejected the charging party union's contention that the judge's actions in an unrelated case—questioning counsel for the General Counsel's professional integrity and thereafter withdrawing from that case and reporting the matter to the Regional Director—created the appearance of impartiality, even though the Board found that the judge's accusations were gratuitous and unwarranted).

But compare ***New York Times Co.***, 265 NLRB 353 (1982) (reversing and remanding case to another judge for a hearing de novo because the trial judge made unsupported statements "impugn[ing] the good faith of the Union and question[ing] whether the General Counsel and the Charging Party were abusing the Board's processes"); and ***Reading Anthracite Co.***, 273 NLRB 1502 (1985) (same, where the trial judge made "serious accusations" in a "hostile tone" to respondent's counsel, including telling the attorney that he would be "suborning perjury" if he attempted to ask certain questions of his witness, and accused the attorney, without any basis or justification, of engaging in "contemptuous and unethical conduct" by filing a motion for the judge's disqualification). See also ***Victor's Café 52, Inc.***, 338 NLRB 753, 756–757 (2002), where the Board cautioned judges against using intemperate language about a witness or counsel that "undermines the confidence of parties, representatives, and the public in the overall fairness and equity of the Board's treatment of parties. . .and ability to. . .render a fair judgment."

Comments about the merits and about evidence presented. A judge's opinions, formed "on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." ***Liteky***, 510 U.S. at 555. Thus, the Board has not viewed as improper opinions expressed by judges about a particular defense, after all evidence has been received, ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1018 (1994), enfd. mem. 57 F.3d 1073 (7th Cir. 1995), or opinions "regarding the ultimate merits of the case . . . in the context of suggesting the possibility of settlement." ***Roto Rooter***, 288 NLRB 1025 n. 2 (1988). See also ***NLRB v. Honaker Mills***, 789 F.2d 262, 265 (4th Cir. 1986) ("A judge's remarks that constitute mere expressions of a point of law are not sufficient to show personal bias or prejudice").

However, the Board has cautioned judges that it is "both advisable and prudent" to "refrain both on and off the record from making unnecessary remarks or comments to parties concerning the merits of their cases," ***Aerosonic Instrument Corp.***, 116 NLRB 1502, 1503 (1956). See also ***Center for United Labor Action***, 209 NLRB 814, 814–815 (1974) (finding bias where the judge expressed his view that some "allegations . . . did not constitute unfair labor practices" and, accordingly, intended to preclude introduction of "any evidence to support [the] allegations"); and

Reading Anthracite, above (finding bias where the judge made "statements throughout the hearing" creating "the impression that he had prejudged the ultimate issue in the case").

Gratuitous remarks. The Board has cautioned against making gratuitous remarks regarding witnesses or testimony, ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955), and matters "extraneous to the legal and factual issues," ***Teamsters Local 777 (Crown Metal)***, 145 NLRB 197, 198 n. 4 (1963), enfd. 340 F.2d 905 (7th Cir. 1964).

Suggestions to counsel regarding litigation strategy or tactics. Such suggestions are generally improper. See ***Reading Anthracite Co.***, above (judge suggested that the General Counsel "maintain a reasonably militant posture [regarding] the relevancy of . . . material"); and ***Thermoid Co.***, 90 NLRB 614 n. 2 (1950) (trial examiner allegedly suggested trial tactics to the General Counsel during a recess). But see ***Teamsters Local 722***, above, 314 NLRB at 1017 (no bias found where the judge suggested to counsel "a line of questioning" that "the judge might have accomplished . . . through his own questioning").

Participation in questioning witnesses. See **§2–300**, Duties of Trial Judge, above, regarding the authority of administrative law judges to call, examine, and cross-examine witnesses, and the limits to that authority.

Efforts to expedite trial. See **§2–300**, Duties of Trial Judge, above, regarding the authority of administrative law judges to regulate the course of trial, and the limits to that authority.

Copying from briefs. The Board discourages judges from extensively adopting and relying on partisan briefs. ***Fairfield Tower Condominium Assn.***, 343 NLRB 923 n.1 (2004). See also ***Waterbury Hotel Management***, above, 314 F.3d at 650–651. Indeed, where a judge, who had previously been warned against verbatim copying of briefs of the General Counsel and the Charging Party, did so again, the Board found that the judge's decision created the impression that he was not impartial and the judge had "failed to conduct an independent analysis of the case's underlying facts and legal issues." The Board therefore set aside the judge's decision and remanded the case to a new judge for an independent review of the record and preparation of a new decision. ***Dish Network Service Corp.***, 345 NLRB 1071 (2005). See also ***J.J. Cassone Bakery***, 345 NLRB 1305 (2005); and **§15–300**, Post-Trial Briefs, below.

§ 2–420 Disqualification Procedure

The provisions regarding disqualification of administrative law judges are set forth in Section. 102.37 of the Board's Rules. The judge "may withdraw . . . whenever he deems himself disqualified." And the parties can request the judge to withdraw "at any time following his designation and before filing of his decision." To move for disqualification, a party must file with the judge "promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification." If, in the judge's opinion, the affidavit is filed "with due diligence and is sufficient on its face," the judge "shall forthwith disqualify himself and withdraw from the proceeding." If the judge "does not disqualify himself . . . he shall so rule upon the record, stating the grounds for his ruling." See also NLRB Statements of Procedure, Sec. 101.10(b).

The foregoing provisions require a party seeking to disqualify a judge based on the judge's hearing conduct to file the motion with the judge before the judge issues a decision. See ***Al Bryant, Inc.***, 260 NLRB 128 n. 1 (1982) (judge erred in admonishing respondent's counsel for filing the recusal motion with him rather than with the Board), enfd. 711 F.2d 543 (3d Cir. 1983),

cert. denied 464 U.S. 1039 (1984). If a party fails to file the motion with the judge before issuance of the judge's decision, although aware of the asserted disqualifying facts, a subsequent motion for disqualification will be regarded by the Board as untimely. See ***Roto Rooter***, 288 NLRB 1025 n. 2 (1988); ***Central Mack Sales***, 273 NLRB 1268 n. 2 (1984); and ***Sanford Home for Adults***, 253 NLRB 1132 n. 1 (1981), affd. in relevant part 669 F.2d 35 (2d Cir. 1981).

For what constitutes "due diligence," see ***Manor West, Inc.***, 311 NLRB 655 n. 1 (1993) (finding that respondent's motion to disqualify filed with the trial judge 7 weeks after trial closed but well before the judge's decision issued was filed with due diligence and was not untimely).

CHAPTER 3. PLEADINGS

§ 3–100 The Charge

See Secs. 102.9–102.14 of the Board's Rules.

§ 3–110 General Principles

A charge may be filed by anyone: a labor organization, an employee, an employer, or any other individual or entity. See NLRB Rules and Regulations, Secs. 102.9 (a charge may be filed by "any person") and 102.1 (the term "person" has the same meaning set forth in Section 2 of the Act); and Sec. 2(1) of the Act ("The term "person" includes one or more individuals, labor organizations, associations, corporations, legal representatives, trustees, . . . or receivers"). See also ***Operating Engineers Local 39 (Kaiser Foundation),*** 268 NLRB 115, 116 (1983) ("The simple fact is that anyone for any reason may file charges with the Board."), enfd. 746 F.2d 530 (9th Cir. 1984).

A charge must be filed with the appropriate Regional Director or with the General Counsel. NLRB Rules and Regulations, Secs. 102.10 and 102.33. The venue of charge filing does not affect the Board's jurisdiction. ***Harris Corp.***, 269 NLRB 733, 734 n. 1 (1984), citing ***Allied Products Corp.***, 220 NLRB 732, 733 (1975).

§ 3–120 Filing and Service Under Section 10(b)

Under Section 10(b) of the Act, a charge must be both filed and served within 6 months of the alleged unfair labor practice. ***Dun & Bradstreet Software Services***, 317 NLRB 84, 84–85 (1995) (charge served on respondent 1 day late was untimely, even if the charging party received erroneous advice from the Board's regional office), affd. 79 F.3d 1238 (1st Cir. 1996). For a discussion of what constitutes service of the charge, see **Chapter 4**, Service of Documents, below.

The charge must also be signed. NLRB Rules and Regulations, Sec. 102.11. But an unsigned copy served on the charged party is adequate if the original filed with the Regional Office is signed. ***Freightway Corp.***, 299 NLRB 531 (1990). The Board has also held that the failure of a charging party to comply with the sworn acknowledgment or declaration requirements of Section 102.11 does not affect the timeliness of the filing of the charge. ***Alldata Corp.***, 324 NLRB 544, 544–545 (1997), enf. denied on other grounds, 245 F.3d 803, 807 (D.C. Cir. 2001).

See also **§3–600**, Section 10(b) Affirmative Defense, below.

§ 3–130 Sufficiency of the Charge

A charge is required before the Board can act. ***NLRB v. Kohler Co.***, 220 F.2d 3, 7 (7th Cir. 1955). But a charge is not a pleading and does not require the specificity of a pleading. It merely serves to initiate a Board investigation to determine whether a complaint should be issued. ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 307 (1959). A charge "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the matter." ***NLRB v. Louisiana Mfg. Co.***, 374 F.2d 696, 704–705 (8th Cir. 1967), quoting from ***NLRB v. Raymond Pearson, Inc.***, 243 F.2d 456, 458 (5th Cir. 1957).

§ 3–140 Withdrawal or Dismissal

Before the trial opens, a charge may be withdrawn only with the consent of the Regional Director. After the trial opens and evidence is introduced, but before the judge's decision issues, the charge may be withdrawn only with the consent of the judge. This usually occurs as part of the withdrawal of the complaint allegations approved by the judge pursuant to approval of a settlement agreement. Alternatively, the judge may order the matter remanded to the Regional Director, who may rule on the withdrawal of the charge. After the judge's decision issues, the charge may be withdrawn only with the consent of the Board. NLRB Statements of Procedure, Sec. 101.9.

The General Counsel retains unreviewable discretion to withdraw the complaint even after the trial opens if no evidence has yet been introduced. ***Sheet Metal Workers Local 28 (American Elgen)***, 306 NLRB 981, 981–982 (1992). After evidence has been introduced, however, the General Counsel must file a motion to withdraw a complaint allegation with the judge, who has discretion to grant or deny the motion. ***Sheet Metal Workers Local 162 (Lang's Enterprises)***, 314 NLRB 923 n. 2 (1994). See also **CHAPTER 9**, Settlements, below.

The dismissal of a charge by the Regional Director may be appealed to the General Counsel's Office of Appeals in Washington. Until the charge is finally dismissed by the Office of Appeals, it continues to exist during the appeals period. It is not time barred if it is reinstated during that period by the Regional Director, even though the reinstatement comes more than 6 months after the occurrence of the unfair labor practice. ***Children's National Medical Center***, 322 NLRB 205, 205 (1996); and ***Sioux City Foundry Co.***, 323 NLRB 1071, 1074 (1997), enfd. 154 F.3d 832, 837–838 (8th Cir. 1998). Compare ***Smithfield Packing Co.***, 344 NLRB 1, 10 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006) (where the General Counsel has denied the charging party's appeal of the Regional Director's dismissal of the charge, the charge cannot thereafter be reinstated pursuant to a motion for reconsideration after the 10(b) period).

See also **§3–650**, Revival of Withdrawn or Dismissed Charge, below, in the context of Section 10(b) of the Act.

§ 3–200 Complaint

The authority to issue complaints rests solely with the General Counsel. The disposition of charges, and the decision whether a complaint should issue or be litigated, is within the exclusive province of the General Counsel and is not subject to review. ***Vaca v. Sipes***, 386 U.S. 171, 182 (1967). See also ***Cincinnati Enquirer***, 298 NLRB 275 (1990), (judge erred by stating that the Regional Director was "without authority" to issue the complaint), review denied 938 F.2d 284 (D.C. Cir. 1991).

§ 3–210 Adequacy of Complaint

"The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." ***Curtiss-Wright Corp. v. NLRB***, 347 F.2d 61, 72 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." ***American Newspaper Publishers Assn. v. NLRB***, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953), quoting from ***NLRB v. Piqua Munising Wood Products Co.***, 109 F.2d 552, 557 (6th Cir. 1940). See also ***Artesia Ready Mix Concrete, Inc.***, 339 NLRB 1224, 1226 (2003), and **§3–230**, Bill of Particulars, below.

§ 3–220 Complaint Closely Related to Timely Charge

A complaint is not restricted to the precise allegations of the charge. The complaint may also allege matters related to and growing out of the charged conduct. ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 309 (1959). The test is stated in ***Redd-I, Inc.***, 290 NLRB 1115 (1988).

> If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge.

Id. at 1116, quoting with approval ***NLRB v. Dinion Coal Co***., 201 F.2d 484, 491 (2d Cir. 1952). See also ***Old Dominion Freight Line***, 331 NLRB 111 (2000).

In evaluating whether allegations are "closely related" under *Redd-I*, the Board considers:

1) Whether the untimely allegation involves the same legal theory as the timely charge.

2) Whether the untimely allegation arises from the same factual circumstances or sequence of events as the timely charge.

3) Whether the respondent would raise the same or similar defenses to both allegations.

See ***Nickles Bakery of Indiana***, 296 NLRB 927, 927–928 (1989). The first factor does not require that the untimely allegation involve the same section of the Act as the other alleged violations. And the relevant inquiry under the third factor is whether the timely and untimely allegations allege the same unlawful object, not whether the respondent merely claims different lawful reasons for taking the different allegedly unlawful actions. Id. at nn. 5 and 6.

Sufficient nexus has been found when the disputed charge and existing charge allegations "all occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union." ***Well-Bred Loaf***, 303 NLRB 1016 n. 1 (1991). See also ***Kentucky Tennessee Clay Co.***, 343 NLRB 931, 932 (2004) (8(a)(3) allegation that respondent discriminatorily reduced employee's hours was closely related to 8(a)(3) charge alleging that respondent discriminatorily disciplined and discharged the employee), enfd. 179 Fed. Appx. 153 (4th Cir. 2006). But see ***Carney Hospital***, 350 NLRB 627, 630 (2007) ("Mere chronological coincidence during a union campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign."); and ***SKC Electric, Inc.***, 350 NLRB 857, 858 (2007) (applying ***Carney Hospital***).

See also **§3–330**, Amendments and Section 10(b), and **§3–650**, Revival of Withdrawn or Dismissed Charge, below.

§ 3–230 Bill of Particulars

Bills of particulars are normally handled at the pretrial stage by the Chief Judge or Deputy or Associate Chief Judge in the appropriate office. They may, however, be raised at the beginning of a trial.

As a general matter, "a bill of particulars is justified only when the complaint is so vague that the party charged is unable to meet the General Counsel's case." ***North American Rockwell Corp. v. NLRB***, 389 F.2d 866, 871 (10th Cir. 1968). See also ***Lloyd A. Fry Roofing Co. v. NLRB***, 222 F.2d 938, 940 (1st Cir. 1955) (employer was not prejudiced by General Counsel's failure to furnish particulars regarding alleged 8(a)(1) interrogations and threats where the complaint identified the month of the alleged violations and the officials responsible); and ***Dal-Tex Optical Co.***, 130 NLRB 1313 n. 1 (1961) (employer's motion for particulars was properly denied where the complaint described the nature of the activity, the dates, and the names of the agents that committed the alleged acts).

The names of employees to whom an alleged Section 8(a)(1) violation was directed need not be pleaded, and a respondent is not entitled to disclosure of the names before the trial. See ***Walsh-Lumpkin Wholesale Drug Co.***, 129 NLRB 294, 295 (1960); and ***Storkline Corp.***, 141 NLRB 899, 902–903 (1963), enfd. in part 330 F.2d 1 (5th Cir. 1964). See also ***Pacific 9 Transportation, Inc***., 21–CA–116403, unpub. Board order issued June 11, 2015 (2015 WL 3643583, 2015 NLRB LEXIS 439). In that case, the judge ordered the General Counsel to disclose the identity of the driver or drivers allegedly interrogated given that the respondent had asserted, as an affirmative defense, that its drivers were independent contractors, the respondent had the burden of proving that defense with respect to the particular driver(s) involved, and the respondent would be expected to proceed with its defense as early as the first day of hearing. The Board reversed, noting that the respondent could request a continuance to prepare its defense, if needed. See also **§7–100**, below, discussing the Board's policy against pretrial discovery.

Nor is the General Counsel required to plead evidence or the theory of the case in the complaint. ***McDonald's USA, LLC***, 362 NLRB No. 168 (2015); ***Artesia Ready Mix Concrete, Inc.***, 339 NLRB 1224, 1226 n. 3 (2003); ***Boilermakers Local 363 (Fluor Corp.)***, 123 NLRB 1877, 1913 (1959); and ***North American Rockwell***, above, 389 F.2d at 871.

A rough rule of thumb is that a complaint should allege the 4 Ws: who committed the act, what was done, when was it done, and where. See also Sec. 102.15 of the Board's Rules, which sets out what is required in a complaint.

§ 3–300 Amendments to Complaints

§ 3–310 Who May Seek and Who May Grant Amendments

After the trial opens, the complaint may only be amended on motion by the General Counsel. Thus, the judge may not amend the complaint over the General Counsel's objection or in a manner inconsistent or contrary to the General Counsel's motion. ***GPS Terminal Services***, 333 NLRB 968, 968–969 (2001). Nor may the judge find a violation on a theory that the General Counsel has expressly disclaimed, ***Mid-Atlantic Regional Council of Carpenters (Goodell, Devries, Leech & Dann, LLP),*** 356 NLRB No. 19 n. 2 (2010).

The judge also may not find a violation based on an allegation or theory that has been asserted only by the charging party. See, e.g., ***GTE Automatic Electric***, 196 NLRB 902, 903 (1972) (judge erred by granting the charging party's motion to amend the complaint to allege an 8(a)(3) discharge); ***Winn-Dixie Stores***, 224 NLRB 1418, 1420 (1976), (judge erred in finding that the respondent engaged in surface bargaining as claimed by the charging party, as the General Counsel had not acquiesced in expanding the complaint's 8(a)(5) allegations to include that allegation), enfd. in part 567 F.2d 1343 (5th Cir. 1978); ***Zurn/N.E.P.C.O.***, 329 NLRB 484 (1999)

(judge properly refused to consider charging party's theory that respondent's hiring policy was unlawful on its face, as the General Counsel argued only that it was unlawfully applied); and ***Kimtruss Corp.***, 305 NLRB 710, 711 (1991) (judge erred in finding an 8(a)(1) violation based on the charging party's theory as well as the General Counsel's theory). See also ***Weigand v. NLRB***, 783 F.3d 889, 895 (D.C. Cir. 2015); and ***Operating Engineers Local 150 v. NLRB***, 325 F.3d 818, 830 (7th Cir. 2003) (General Counsel, not the charging party, controls the issues raised in the complaint). But see ***Service Employees Local 32BJ v. NLRB*****,** 647 F.3d 435, 446 (2d Cir. 2011), remanding ***AM Property Holding Corp***., 355 NLRB 721 (2010), reaffg. 352 NLRB 279 (2008) (Board erred in refusing to consider alternative theory of violation urged by the charging party simply because that theory had not been alleged by the General Counsel; Board has authority to consider such a theory if it is closely related to the subject matter of the complaint and was fully litigated).

However, as discussed in **§ 6–400**, below, charging parties may submit, and the judge may consider, evidence regarding an appropriate remedy different from the remedy sought by the General Counsel.

§ 3–320 When Amendments Are Allowed

Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon [terms that] may seem just" during or after the hearing until the case has been transferred to the Board. See also ***Folsom Ready Mix, Inc***., 338 NLRB 1172 n. 1 (2003). Although this provision affords the judge "wide discretion" to grant or deny a motion to amend, in exercising that discretion the judge should consider: "(1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated." ***Rogan Bros. Sanitation, Inc***., 362 NLRB No. 61, slip op. at 3 n. 8 (2015).

See also **§ 3–330,** Amendments and Section 10(b), discussing allegations occurring more than 6 months before the motion to amend but within 6 months of the charge; and **§ 3–340,** De Facto Amendment—Unpleaded But Fully Litigated, discussing when the judge may find a different violation even without a motion to amend the complaint.

<u>During trial</u>. In ***Rogan Bros***., above, the Board held that the first and third of the above factors supported allowing the General Counsel to amend the complaint during the trial to add a single-employer allegation. Although the General Counsel had stated at the outset of the hearing that no such allegation was being made, the General Counsel subsequently filed the motion to amend during a 2-month adjournment, before the General Counsel rested, and the allegation was thereafter fully litigated. Accordingly, the Board found that the judge did not abuse his discretion in granting the General Counsel's motion.

See also ***Amglo Kemlite Laboratories***, 360 NLRB No. 51, slip op. at 5 (2014) (judge erred in denying General Counsel's motion, on the last day of 3-day hearing, to amend complaint to allege an 8(a)(1) threat of mass discharge, as the respondent did not object to the testimony at the time it was adduced and had the opportunity to examine both the witness and the official who made the remark, and the motion amended an existing complaint allegation, which alleged a similar threat on the same day, to conform to that evidence); and ***Pincus Elevator & Electric Co.***, 308 NLRB 684, 684–685 (1992) (judge abused her discretion by denying the General Counsel's motion during the hearing to add a *Johnnie's Poultry* allegation that respondent's counsel had improperly questioned employees about the case without giving assurances against reprisal, as the respondent's counsel had first introduced the subject employee statement; the

allegation was fully litigated; and the respondent had therefore suffered no prejudice), enfd. mem. 998 F.2d 1004 (3d Cir. 1993).

Compare ***Latino Express, Inc***., 358 NLRB No. 94, slip op. at 1 n. 3 and JD. at n. 2 (2012), reaffd. 361 NLRB No. 137 (2014) (judge did not abuse his discretion in denying, as "inexcusably late and prejudicial," the General Counsel's motion, at the end of the second day of the 3-day hearing, to amend the complaint to allege that respondent unlawfully issued subpoenas to employees seeking union-related pamphlets, letters, emails, and other documents in their possession).

At close of trial. In ***Stagehands Referral Service***, 347 NLRB 1167 (2006), the Board affirmed the judge's denial of a motion to amend the complaint at the end of the hearing. In that case, the complaint alleged that the union had discriminatorily failed to refer a single discriminatee, and the General Counsel sought to add an allegation that the entire hiring hall operation was unlawful because no objective criteria were applied. The Board found that the amendment would not have been "just" because: (1) the respondent had not been given notice that the hiring hall operation would be placed in issue; (2) the General Counsel did not move to amend as soon as the evidence came to light, but only after the respondent had rested; and (3) it could not be assumed that the respondent's handling of the case would have been unchanged, as the lack of objective criteria had little or no bearing on the union's decision not to refer the discriminatee. Id. at 1171.

Compare ***Bruce Packing Co.***, 357 NLRB No. 93, slip op. at 3 (2011), revd. in relevant part 795 F.3d 18 (D.C. Cir. 2015). In that case, the General Counsel moved to amend the 8(a)(3) complaint to add an 8(a)(1) promise-of-benefits allegation. As in *Stagehands Referral Service*, the General Counsel made the motion at the end of the hearing, after the respondent had rested, even though the relevant testimony had been elicited from one of the General Counsel's employee witnesses the day before. The ALJ denied the motion, citing the lateness of the motion and the General Counsel's delay in making it. The Board, however, held that the judge should have granted the motion because the issue had been fully litigated. The Board noted that respondent had called the supervisor, who denied making the promise, and respondent failed to identify any other evidence or defense that it would have presented if the motion to amend had been made earlier.

The D.C. Circuit reversed, finding that the late amendment was prejudicial and denied respondent due process. The court noted that, had respondent been given earlier notice of the allegation, it "could have attacked [the employee's] credibility on this specific aspect of the conversation, cross-examined her to expose any inconsistencies in her testimony, or explored the issue more fully with [the supervisor] and other witnesses." The court rejected the Board's argument that respondent had a burden in these circumstances to identify with specificity the testimony or defenses it could have presented to defeat the allegation.

After trial. In ***Desert Aggregates***, 340 NLRB 289, 292–293 (2003), the Board denied the General Counsel's posthearing motion to amend the complaint to allege an additional 8(a)(1) statement by a manager. (The motion was made in the General Counsel's posthearing brief and the judge failed to rule on it.) The Board found that respondent did not have fair notice that the manager's statement would be alleged as a violation because the manager's testimony about the statement emerged incidentally during the General Counsel's cross-examination, and, consequently, was not fully litigated. See also ***Sheet Metal Workers Local 91 (Schebler Co.)***, 294 NLRB 766, 774–775 (1989) (affirming judge's denial of the General Counsel's posthearing request to amend the complaint to allege an additional 8(b)(3) violation), enfd. in part and remanded in part 905 F.2d 417 (D.C. Cir. 1990).

Compare ***Roundy's Inc.,*** 356 NLRB No. 27 (2010), enfd. 674 F.3d 638, 646–647 (7th Cir. 2012). In that case, the complaint alleged that the respondent had unlawfully prohibited union representatives from handbilling at several of its stores. Although the General Counsel asserted only a disparate treatment theory at trial, the General Counsel's posthearing brief also argued that the respondent had failed to show that it had a sufficient property interest to exclude the handbillers. The judge found that the General Counsel had asserted this new theory too late. The Board, however, remanded for the judge to take evidence on the property-interest issue, noting that it was the respondent's burden to establish a sufficient property interest and that it would be unnecessary to reach the disparate treatment theory if the respondent lacked a sufficient property interest to exclude the handbillers. The judge thereafter reopened the hearing, found a violation at most of the respondent's stores under the property-interest theory, and the Board affirmed on that basis.

Obviously, the relevant factors identified by the Board can only be considered and applied if the General Counsel specifies exactly what is being added to or amended in the complaint. Thus, nonspecific, open-ended motions to conform the pleadings to the proof should be rejected.

§ 3–330 Amendments and Section 10(b)

A complaint may be amended to allege conduct outside the 10(b) period if the conduct occurred within 6 months of a timely filed charge and is "closely related" to the allegations of the charge. ***Fry's Food Stores***, 361 NLRB No. 140, slip op. at 2 (2014), citing ***Redd-I, Inc***., 290 NLRB 1115 (1988). For a discussion of the *Redd-I* "closely related" test, see **§ 3–220,** Complaint Closely Related to Timely Charge, above.

§ 3–340 De Facto Amendment—Unpleaded But Fully Litigated

Judges occasionally must decide whether it is appropriate to find a violation in the absence of a specific allegation in the complaint. This typically arises in three situations: (1) where the conduct was alleged as a violation, but of a different section of the Act; (2) where the conduct was alleged as a violation, but on a different theory; and (3) where the conduct was not alleged as a violation at all.

In ***Pergament United Sales***, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), a case involving the first situation, the Board stated that the test is whether the issue "is closely connected to the subject matter of the complaint and has been fully litigated." With respect to whether an issue has been "fully litigated," the Board stated that this "rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made."

This same test has since been applied in the other two situations as well. See cases cited below. See also ***Service Employees Local 32BJ v. NLRB***, 647 F.3d 435, 447 (2d Cir. 2011) (noting, in remanding for the Board to properly apply the *Pergament* rule, that "the Board has applied this rule to a variety of circumstances"). Nevertheless, the judge should be careful to identify which of the three situations is presented. See **Massey Energy/Mammoth Coal***,** 358 NLRB No. 159, slip op. at 10 n. 36 (2012), where the Board majority, in finding liability based on an unalleged theory, rejected as "inapposite" cases cited by the respondent and the dissent that involved unalleged violations.

Violations of different section of the Act.

For cases involving this situation, see ***Pergament***, above (judge properly found that respondent's refusal to hire employees violated 8(a)(4) rather than 8(a)(3) as alleged, as both involved the lawfulness of the respondent's motivation for failing to hire the employees, no party objected to the General Counsel's introduction of the evidence relevant to the 8(a)(4) issue, and the respondent's personnel director corroborated that evidence and admitted that the employees were not hired because of the pending NLRB charges); ***KenMor Electric Co.***., 355 NLRB 1024 (2010) (finding that employer's job application referral system violated 8(a)(1) rather than 8(a)(3) as alleged), enf. denied in relevant part sub nom***. Independent Electrical Contractors of Houston, Inc., v. NLRB***, 720 F.3d 543 (5th Cir. 2013); and ***Airborne Freight Corp.***, 343 NLRB 580, 581 (2004) (finding that supervisor's alleged 8(a)(1) and (3) statements and refusal to transfer an employee both also violated 8(a)(4)).

Violations based on a different theory

For cases involving this situation, see ***Hawaiian Dredging Construction Co***., 362 NLRB No. 10, slip op. at 2 n. 6 (2015) (Board found an 8(3) discharge violation under a *Wright Line* theory even though the General Counsel did not clearly advance that theory at the hearing or except to the ALJs finding that the discharges did not violate 8(a)(3) on that theory, noting that the respondent's posthearing brief to the judge had analyzed the alleged 8(a)(3) discharges under *Wright Line*); ***Space Needle, LLC***, 362 NLRB No. 11, slip op. at 4 (2015) (finding that supervisor's statements to an employee violated 8(a)(1) on the ground that they were coercive, regardless of whether they constituted an unlawful interrogation as alleged in the complaint); **Federal Security, Inc***., 359 NLRB No. 1, slip op. at 5, n. 35 (2012) (finding that respondent's state court lawsuit was unlawful on a preemption theory even though the General Counsel asserted only a retaliatory-motive theory); *****Massey Energy/ Mammoth Coal***, above (finding liability on a single-employer theory even though that theory was not specifically alleged); and ***Parexel Int'l, LLC***, 356 NLRB No. 82 (2011) (finding 8(a)(1) discharge violation based on a "preemptive strike" theory rather than the alleged "retaliation" theory). See also ***AKAL Security, Inc.***, 354 NLRB 122, 125 (2009), reaffd. 355 NLRB 584 (2010) (judge's application of *Burnup & Sims* instead of *Wright Line* to find violation did not deny respondent due process as respondent clearly anticipated that *Burnup & Sims* could apply and litigated accordingly); and ***Facet Enterprises v. NLRB***, 907 F.2d 963, 969–975 (10th Cir. 1990) (upholding Board's finding of a refusal-to-bargain violation based on a direct-dealing theory even though the alleged refusal to bargain was based on a theory of attempted unit splitting).

But compare ***Springfield Day Nursery***, 362 NLRB No. 30, slip op. at 2–3 (2015) (holding that the judge improperly found an 8(a)(5) violation based on a unilateral-change theory where only an 8(d) contract-modification theory was alleged in the complaint, litigated at the hearing, and addressed in the General Counsel's posthearing brief); ***Baptist Hospital of East Tennessee***, 351 NLRB 71 n. 5 (2007) (declining to address whether the employer violated 8(a)(5) under an 8(d) contract-modification theory, as the General Counsel only pursued a unilateral-change theory); ***Lamar Advertising of Hartford***, 343 NLRB 261, 265 (2004) (rejecting General Counsel's attempt, on exceptions to the judge's decision, to "expand" the theory underlying the alleged 8(a)(4) violation, as the "necessary predicates" for finding a violation on the different theory were not litigated). See also ***Buonadonna ShopRite,*** 356 NLRB No. 115 (2011); and ***Laborers Local 190 (VP Builders, Inc.)***, 355 NLRB 532, 534 (2010) (General Counsel's representations would reasonably have led the respondent to believe that it would not have to defend itself on the basis of the unalleged theory).

Violations based on unalleged conduct,

For cases involving this situation, see ***Irving Ready-Mix, Inc***., 357 NLRB No. 105, slip op. at 23 n. 13 (2011) (finding that unalleged but admitted statements by manager violated 8(a)(1) where the complaint alleged that other statements by the same manager during the same phone conversation violated 8(a)(1)); ***Hi-Tech Cable Corp.***, 318 NLRB 280 (1995) (finding that unalleged statements by two managers violated 8(a)(1) where the complaint alleged other 8(a)(1) violations, including an interrogation by one of the same managers in the same conversation, and the respondent did not object to the testimony about the statements, cross-examined the witnesses and presented its own witnesses to testify about them, and addressed their legality in its posthearing brief), enfd. in part 128 F.3d 271 (5th Cir. 1997); and ***Meisner Electric, Inc.***, 316 NLRB 597, 597 (1995) (finding that an unalleged statement by the respondent's foreman violated 8(a)(1) where the complaint alleged other unlawful statements by the same foreman in the same speech and the foreman raised the issue and admitted making the statement while testifying on direct examination by the respondent's counsel), affd. mem. 83 F.3d 436 (11th Cir. 1996).

But compare ***Piggly Wiggly Midwest,*** 357 NLRB No. 191, slip op. at 2 (2012) (8(a)(5) refusal to provide certain information was not fully litigated, even though respondent presented evidence on the issue, as the respondent had no reason, in the absence of a complaint allegation or amendment, to attempt to substantiate its previous response to the union that it was impossible to provide the information as requested); ***Dilling Mechanical Contractors***, 348 NLRB 98, 105 (2006) (8(a)(3) refusal to hire was not fully litigated, even though the parties presented evidence regarding the underlying conduct, as that evidence was also relevant to the 8(a)(1) complaint allegation that the respondent had breached an earlier settlement agreement, the violations involved different burdens of proof, and none of the parties argued that the conduct violated 8(a)(3) in their posthearing briefs); ***Desert Aggregates***, 340 NLRB 289, 292–293 (2003) (manager's unalleged statement during a captive-audience meeting was not fully litigated where the manager's testimony regarding his statement "emerged incidentally," during General Counsel's cross-examination, and the General Counsel's failure to move to amend the complaint during trial may have hindered the respondent in presenting exculpatory evidence); and ***Champion International Corp.***, 339 NLRB 672 (2003) (finding that litigation of alleged 8(a)(5) unilateral-change violation did not establish that the parties also fully litigated unalleged 8(a)(5) direct-dealing violation). See also ***Teamsters "General" Local 200***, 357 NLRB No. 192 (2011) (judge's actions led respondent to reasonably believe that it would not have to defend against additional 8(b)(1)(A) allegation).

Unnamed Discriminatees

Situations sometimes also arise where the judge must decide whether it is appropriate to find a violation and/or grant a remedy with respect to an unnamed discriminatee. "Where the General Counsel has alleged and proven discrimination against a defined and easily identified class of employees, the Board, with court approval, has found it appropriate to extend remedial relief to all members of that class, including individuals not named in the complaint," leaving "the question of precisely which individuals comprise the class [to be] considered at the compliance stage of the case." ***Iron Workers Local 433 (Reynolds Electrical)***, 298 NLRB 35, 35–36 (1990) (citations omitted), enfd. mem. 931 F.2d 897 (9th Cir. 1991). See also ***Denholme & Mohr, Inc***., 292 NLRB 61 n. 1 (1988) (judge properly found that a previously unnamed discriminatee's discharge violated the Act—even though the complaint specifically named the other three discriminatees and the General Counsel indicated that the unnamed, fourth discriminatee had chosen not to participate—as the sole issue at hearing was whether the group of employees as a whole, rather than individually, were discriminatorily discharged).

Compare *__Merchants Bldg. Maintenance__, 358 NLRB No. 67 (2012) (rejecting General Counsel's request, in refusal to hire case, to grant a remedy to a previously unnamed discriminatee where: (1) the complaint specifically named 22 other individual discriminatees and did not include "with others unknown" or similar catch-all language; (2) the General Counsel reasonably should have known about the additional discriminatee; and (3) the General Counsel did not request a remedy for the additional discriminatee until the case reached the Board), and cases cited therein at n. 12.

§ 3–400 Consolidation and Severance

§ 3–410 General Principles

Before issuance of a complaint, the General Counsel or Regional Director has exclusive authority to consolidate or sever cases. After a complaint issues and before a trial opens, the Regional Director retains authority to consolidate or sever on his or her own motion. NLRB Rules and Regulations, Sec. 102.33(a)–(d).

After issuance of a complaint and before a trial opens, the Chief Judge or Deputy or Associate Chief Judge in the appropriate office has the authority to consolidate or sever cases on motion of any party. After a trial has opened, a motion for consolidation or severance is made to and ruled on by the trial judge. Id., Secs. 102.33(d), 102.24, 102.25, and 102.35(a)(8). Whether to grant or deny the motion is within the judge's discretion, "considering such factors as the risk that matters litigated in [an earlier trial] will have to be relitigated in [a second trial] and the likelihood of delay if consolidation, or severance, is granted." ***Service Employees Local 87 (Cresleigh Management)***, 324 NLRB 774, 775–776 (1997).

In compliance proceedings, see Sec. 102.54(b) of the Board's Rules regarding consolidation of complaint and related compliance specifications.

§ 3–420 Consolidation

The Board generally disfavors piecemeal litigation. Thus, the General Counsel is expected to consolidate all pending charges into one complaint and litigate all known issues in one case. See ***Peyton Packing Co.***, 129 NLRB 1358, 1360 (1961) (where General Counsel had alleged and litigated certain conduct as an 8(a)(1) violation in an earlier proceeding, that same conduct could not be alleged and litigated as an 8(a)(5) violation in a separate proceeding); and ***Jefferson Chemical Co., Inc.***, 200 NLRB 992 n. 3 (1972) (where, notwithstanding a broad 8(a)(5) refusal-to-bargain charge, the General Counsel had alleged only a narrow unilateral change violation in an earlier proceeding and disavowed any allegation of general bad-faith bargaining, the General Counsel could not subsequently allege and litigate in a separate proceeding a surface bargaining violation based on events occurring before the hearing had opened in the earlier proceeding).

However, this is not a "blanket rule" that requires consolidation into one proceeding of all charges filed against the same respondent that arise during the pendency of that proceeding. See ***Maremont Corp. World Parts Division***, 249 NLRB 216, 216–217 (1980) (no bar to litigating allegation in separate proceeding where the General Counsel learned of the alleged violation just 6 days before the hearing in the earlier proceeding and the judge in that proceeding denied the General Counsel's motion on the first day of hearing to add the allegation to the complaint); and ***Harrison Steel Castings Co.***, 255 NLRB 1426, 1426–1427 (1981) (no bar to litigating allegation where the underlying charge was not filed until after the hearing in the earlier proceeding closed, the allegation was "not intertwined with" those in the earlier proceeding, and there was no

evidence that the General Counsel knew about or should have discovered the alleged violation during the earlier proceeding). ***Frontier Hotel and Casino***, 324 NLRB 1225 (1997) (no bar to litigating allegation where it involved a "discreet act" that did not occur until well after the lengthy hearing in the earlier proceeding opened).

Indeed, in ***Cresleigh Management***, above, the Board found no bar even where the complaint was issued before the hearing on the complaint in the earlier proceeding. The Board stated that, "even when the General Counsel fails to consolidate cases that normally should be consolidated," dismissal is improper "in the absence of a showing of prejudice to a party." 324 NLRB at 776. Accord: ***U-Haul of Nevada, Inc.***, 345 NLRB 1301, 1302 (2005), enfd. 490 F.3d 957 (D.C. Cir. 2007).

§ 3–430 Severance or Bifurcation

As indicated above, a judge has the authority, after a trial opens, to sever cases previously consolidated by the Regional Director. See, e.g., ***Adair Standish Corp.***, 283 NLRB 668, 669–671 (1987) (affirming judge's order granting the charging party's motion, over the respondent's objection, to sever the technical 8(a)(5) test-of-certification case from the 8(a)(1), (3), and (5) case), enfd. mem. 875 F.2d 866 (6th Cir. 1989), cited with approval in ***Storer Cable TV of Texas***, 292 NLRB 140 (1988). But see ***Quaker Tool & Die, Inc.***, 169 NLRB 1148 (1968) (trial examiner erred in sua sponte issuing an order after the close of the hearing severing two 8(a)(5) allegations that related to the same alleged unilateral action and had been fully litigated at the hearing).

Occasionally, a respondent may seek to sever and/or bifurcate litigation of particular issues raised by the complaint. For example, if the respondent is challenging the Board's jurisdiction or asserting a Section 10(b) limitations defense, it may seek to have such issues addressed before the unfair labor practice allegations are litigated. This likewise appears to be a matter within the ALJ's discretion. See ***Asociacion Hospital del Maestro***, 317 NLRB 485, 490 (1995) (Board denied respondent's appeal of judge's denial of its motion to bifurcate the trial and litigate respondent's Sec. 10(b) statute of limitations defense before the merits); and ***Gulfport Stevedoring Assn.***, 15-CA-096939, unpub. Board order issued Sept. 9, 2013 (2013 WL 4782797, 2013 NLRB LEXIS 593) (denying respondent's motion to dismiss without prejudice to renewing its jurisdictional arguments, and any request to bifurcate the hearing, before the ALJ). See also ***NLRB v. Chapa De Indian Health Program, Inc.***, 316 F.3d 995, 1002 (9th Cir. 2003) (noting that the ALJ denied the respondent's motion to sever); and ***Saginaw Chippewa Indian Tribe of Michigan v. NLRB***, 838 F.Supp.2d 598, 606 (E.D. Mich. 2011), citing ***Myers v. Bethlehem Shipbuilding Corp.***, 303 U.S.41, 51 (1938) (mere holding of unfair labor practice hearing is not irreparable harm).

But see ***U.S. Gypsum***, 284 NLRB 4, 8 (1987). In that case, the General Counsel set aside a settlement agreement because of the respondent's alleged postsettlement unfair labor practices, and issued a complaint containing both the postsettlement allegations and the presettlement allegations. The judge ruled that the postsettlement allegations would be litigated and decided before litigating the presettlement allegations because there would no basis to set aside the settlement and litigate the presettlement allegations if the postsettlement allegations were without merit. (See **§ 9–800**, Setting Aside Settlement Agreements, below.) The Board, however, granted the General Counsel's special appeal, and directed the judge to permit the introduction of all evidence relating to all the consolidated cases for hearing.

Relevant factors to consider may include the anticipated length of the trial on the jurisdictional, 10(b), or other threshold issue and the remaining issues; whether the same witnesses will be testifying on all issues; and the possible adverse impact on the memory and availability of witnesses if litigation of the remaining issues is delayed. Compare FRCP 42(b) (authorizing federal courts to order a separate trial of one or more separate issues or claims "for convenience, to avoid prejudice, or to expedite and economize"), discussed in Gensler, **1 Federal Rules of Civil Procedure, Rules and Commentary Rule 42** (database updated March 2015); and ***Hoyt v. Career Systems Development Corp.***, 2010 WL 2653368, 2010 U.S. Dist. LEXIS 66957 (S.D. Cal. June 30, 2010) (denying defendant company's motion, in employment discrimination case, to bifurcate and litigate threshold issue of plaintiff's status as an independent contractor or an employee, given that the motion was not filed until 6 business days before trial and 17 of plaintiff's 20 witnesses would be testifying about both that issue and the substantive discrimination claims).

§ 3–500 Answer to Complaint

Section 102.20 of the Board's Rules sets forth the requirements for an answer. It provides that, if no answer is timely filed within 14 days after service, all allegations of the complaint are deemed to be admitted as true. It further provides that the answer must "specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial." See, e.g., ***Superior Technology***, 305 NLRB No. 121 (1991).

Although not identical, Section 102.20 is similar to FRCP 8. Thus, court decisions construing FRCP 8 may provide useful guidance in applying Section 102.20 where the Board has not specifically addressed the matter. See Gensler, **1 Federal Rules of Civil Procedure, Rules and Commentary Rule 8** (database updated March 2015); and ***State Farm Mutual Auto. Ins. Co. v. Riley,*** 199 F.R.D. 276, 277–280 (N.D. Ill. 2001) (discussing "common flaws" in responsive pleadings under Rule 8).

Sham responses. A response that the respondent is without knowledge may be stricken as a sham where the allegation involves the respondent's own conduct or is otherwise within its knowledge. See ***Information Processing SVC, Inc.***, 330 NLRB No. 95 (2000) (striking pro se respondent's responses to the service, jurisdictional, and supervisory allegations of the complaint), citing ***DPM of Kansas,*** 261 NLRB 220 n. 2 (1982). See also **§6–620** below, regarding the judge's authority to admonish or reprimand counsel for denying allegations without good cause and purely for delay.

Late Answer. Section 102.111(c) of the Board's Rules states that an answer to a complaint "may be filed after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would result." The rule further requires that the late answer be accompanied by "a motion that states the grounds relied on for requesting permission to file untimely," and that "the specific facts relied on to support the motion . . .be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts." See also ***SPCA in Cattaraugus County, Inc***., 360 NLRB No. 88 n. 5 (2014), citing ***Elevator Constructors Local 2 (Unitec Elevator Services Co***.), 337 NLRB 426, 428 (2002) (Board strictly adheres to affidavit requirement).

Amended Answer. Under Section 102.23 of the Board's Rules, a respondent may amend its answer at any time before trial. After the trial opens, the judge has the discretion to permit an amended answer. Motions to amend an answer, particularly when they come early in the trial

and there is no prejudice to the General Counsel, should probably be viewed favorably. See FRCP 15(a)(2) and ***Hylton v. John Deere Co.***, 802 F.2d 1011,1015 (8th Cir. 1986) (district court judge did not abuse his discretion by granting defendants in products liability case leave to amend their answer to respond to two allegations in amended complaint they had inadvertently failed to respond to). And see ***Baron Honda-Pontiac***, 316 NLRB 611 (1995) (because an allegation in the amended complaint was substantially unchanged from the denied allegation in the initial complaint, the Board did not deem the undenied allegation admitted).

However, in ***St. George Warehouse, Inc.***, 349 NLRB 870 (2007), the Board held that the judge did not abuse her discretion in denying the respondent's motion, on the second day of trial, to amend its answer to deny a supervisory-status allegation that it had previously admitted, assertedly by mistake. Motions to amend an answer have also been held untimely when made at the end of the respondent's case in chief. ***Oak Harbor Freight Lines, Inc***., 358 NLRB No. 41, JD. at 1 n. 2 (2012), reaffd. 361 NLRB No. 82 (2014) (denying motion to allege an additional affirmative defense). See also the additional cases cited in the sections below regarding affirmative defenses.

See also **§ 16–801.3**, Admission or Statement by Opposing Party, for discussion of the conclusive or evidentiary effect of admissions in pleadings.

Withdrawn Answer. Sometimes, pursuant to a settlement or for other reasons, a respondent may withdraw an answer. "The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the consolidated complaint must be considered to be true." ***Rock Technologies***, 346 NLRB No. 68, slip op. 1 (2006).

Motions for default judgment. In most cases in which no answer or an insufficient answer is filed, the General Counsel files a motion for default judgment directly with the Board pursuant to Section 102.24(b) of the Board's Rules. ***F.A. Ford Electrical Contracting, Inc***., 296 NLRB No. 84 n. 1 (1989). Motions for default judgment must be filed no later than 28 days before the scheduled trial and are filed with the Executive Secretary of the Board and not the Division of Judges. However, if for any reason the General Counsel fails to file a motion for default judgment within the time prescribed by Section 102.24(b), the motion may be filed with the judge. See **§10–300**, Motions for Summary and Default Judgment, below.

§ 3–550 Affirmative Defenses

Affirmative defenses must be pled in an answer or timely raised at the hearing. Affirmative defenses raised for the first time after the hearing are untimely and may be considered waived. See, e.g., ***EF International Language Schools, Inc***., 363 NLRB No. 20, slip op. at 1 n. 2 (2015) (defense that allegation is barred by Sec. 10(b) limitations period); and ***Springfield Manor***, 295 NLRB 17 n. 2 (1989) (defense that alleged discriminatee is a supervisor), and additional cases discussed in **§ 3–600** and **§§ 3–700** through **3–770**, below.

Defenses may be stricken if they are not recognized affirmative defenses in law or are irrelevant to the issues set for hearing. See, e.g., ***Harding Glass Co.***, 347 NLRB 1112, 1115 (2006) (granting General Counsel's motion to strike several of respondent's affirmative defenses to backpay specification on the ground that they were without merit as a matter of law), enfd. 500 F.3d 1 (1st Cir. 2007), cert. denied 128 S. Ct. 935 (2008); ***TNT Logistics, North America***, 346 NLRB 1301 n. 1 (2006) (upholding judge's pretrial order granting General Counsel's motion in limine to strike seven of the respondent's eight affirmative defenses on the ground that they raised irrelevant matters), enfd. 246 Fed. Appx. 220 (4th Cir. 2007); ***Tri-county Paving, Inc.***, 342

NLRB 1213, 1216 (2004) (striking defenses in refusal-to-hire case that challenged the alleged discriminatees' status as bona fide applicants); and additional cases discussed in **§ 3–700**, Other Affirmative Defenses, below. See also FRCP 12(f) (authorizing courts to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," either on its own or on motion by a party).

A defense should also be stricken if it is interposed to engage in a "fishing expedition" to discover evidence needed to support the defense. See ***Flaum Appetizing Corp***., 357 NLRB No. 162 (2011) (striking employer's affirmative defenses in backpay proceeding that the discriminatees were undocumented aliens as the employer failed, in response to motion for particulars, to articulate any factual support, or reason to believe it could obtain such factual support for the defenses), and cases cited therein.

The General Counsel is not required to anticipate and negate an affirmative defense in the complaint. See ***Flying Food Group, Inc.v. NLRB***, 471 F.3d 178, 183 (D.C. Cir. 2006), and cases cited there.

§ 3–600 Section 10(b) Affirmative Defense

Section 10(b) of the Act is a statute of limitations. It generally "extinguishes liability for unfair labor practices committed more than 6 months prior to the filing of the charge." ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 309 n. 9 (1959). For a complete analysis, see ***Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB***, 362 U.S. 411, 414–429 (1960).

Section 10(b) is not jurisdictional. It is an affirmative defense and, if not timely raised in the answer or at the hearing, it is waived. ***EF International Language Schools,*** above; ***Approved Electric Corp***., 356 NLRB No. 45 n. 1 (2010); ***Dayton Newspapers, Inc.***, 339 NLRB 650, 653 n.8 (2003), enfd. in part 402 F.3d 651 (6th Cir. 2005); ***Public Service Co.***, 312 NLRB 459, 461 (1993); and ***DTR Industries***, 311 NLRB 833, 833 n. 1 (1993), enf. denied on other grounds, 39 F.3d 106 (6th Cir. 1994).

§ 3–610 Computation of Section 10(b) Period

The Section 10(b) period commences only when a party has "clear and unequivocal notice of a violation." ***Leach Corp.***, 312 NLRB 990, 991–992 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). The burden of showing notice is on the party raising the 10(b) affirmative defense. Ibid.

The requisite notice may be actual or constructive, i.e., sufficient notice may be found if the party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., ***Castle Hill Health Care Center***, 355 NLRB 1156, 1191 (2010); and ***Moeller Bros. Body Shop***, 306 NLRB 191, 192 (1992). However, constructive notice will not be found where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct. ***A & L Underground***, 302 NLRB 467, 469 (1991). See also ***Cab Associates***, 340 NLRB 1391, 1392 (2003).

In ***Postal Service Marina Center***, 271 NLRB 397, 397–400 (1984), the Board held that the Section 10(b) period is computed from the date of the alleged unlawful act, rather than the date its consequences become effective. Thus, an employee who received notice that he would be terminated, but waited to file a charge until the termination became effective—more than 6 months from the date of the notice—was barred by Section 10(b) from filing the charge. The *Postal Service Marina* rule, however, is restricted to discriminatory discharge cases. It does not

apply in refusal to bargain cases. See ***Howard Electrical***, 293 NLRB 472, 475 (1989), enfd. mem. 931 F2d 63 (10th Cir. 1991); and ***Esmark, Inc. v. NLRB***, 887 F.2d 739, 746 n. 6 (7th Cir. 1989). See also ***Leach Corp.***, above, 312 NLRB at 991 n. 7 (the Sec. 10(b) period for an 8(a)(5) charge, involving a plant transfer and withdrawal of recognition, did not begin until a "substantial percentage" of employees had been transferred).

In computing the time, the day on which the unfair labor practice occurred is excluded. ***MacDonald's Industrial Products***, 281 NLRB 577, 577 (1986).

§ 3–620 Not a Rule of Evidence

Evidence may be admitted concerning events outside the 10(b) period if the evidence is used only as background and not to prove a time-barred unfair labor practice. ***Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB***, 362 U.S. 411, 414–429 (1960) ("earlier events may be utilized to shed light on the true character of matters occurring within the limitations period"). See also ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997) (admissible to shed light on the respondent's motivation).

However, when the conduct within the 10(b) period can be found to be an unfair labor practice only through reliance upon an earlier unfair labor practice, evidence of the earlier conduct cannot be used, because "it does not simply lay bare a putative current unfair labor practice," but "serves to cloak with illegality that which was otherwise lawful." ***Bryan Mfg.***, above, 362 U.S. at 417–418 (allegation that employer and union unlawfully maintained and enforced a facially lawful union security agreement outside the 10(b) period was barred because the allegation required the General Counsel to prove that the union lacked majority status, and that the agreement was therefore unlawful, at the time it was executed). See also ***Teamsters Local 27 (Combined Containair Industries)***, 209 NLRB 883, 883–884 (1974).

§ 3–630 Continuing Violations

Violations that are continuing in nature are not barred by Section 10(b). Thus, an allegation that an employer maintained an unlawful rule within the 10(b) period is timely, even if the respondent promulgated the rule outside the period. ***Control Services***, 305 NLRB 435 n. 2, 442 (1991), citing ***Alamo Cement Co.***, 277 NLRB 1031, 1036–1037 (1985). There is likewise no 10(b) bar to finding that a contractual provision was unlawfully maintained and enforced more than 6 months after the contract was executed. ***Central Pennsylvania Regional Council of Carpenters***, 337 NLRB 1030 (2002) (anti-dual shop clause), enfd. 352 F.3d 831 (3d Cir. 2003); ***Teamsters Local 293 (R. L. Lipton Distributing)***, 311 NLRB 538, 539 (1993) (shop steward superseniority clause). But see ***Bryan Mfg***., above.

Similarly, if the employer simply fails to abide by certain contract provisions, without repudiating the contract, each successive contract breach constitutes a separate unfair labor practice. However, if the charging party had received clear and unequivocal notice of the total contract repudiation before the 10(b) cutoff date, it is time barred from subsequently alleging contract violations within the 10(b) period. See ***Springfield Day Nursery***, 362 NLRB No. 30, slip op. at 3–4 (2015); ***Vallow Floor Coverings, Inc***., 335 NLRB 20 (2001); and ***A & L Underground***, 302 NLRB 467, 468–469 (1991), and cases cited there. See also ***Chambersburg County Market***, 293 NLRB 654, 655 (1989) ("a charge alleging an unlawful refusal to execute a bargaining contract is cognizable only when filed within 6 months").

§ 3–635 Backpay for Continuing Violations

Where a continuing violation is found, and the charging party did not know or have reason to know of the original violation, the usual make whole remedy from the date of the original violation is normally appropriate, i.e., backpay may be ordered beyond the 10(b) period, even in the absence of any fraudulent concealment. See ***Vallow Floor Coverings,*** above, 335 NLRB at 20–21 (ordering employer to pay backpay since 1991, even though the charge was not filed until 6 years later, in 1997).

§ 3–640 Fraud or Deception

Fraudulent concealment of facts of an unfair labor practice from a charging party tolls Section 10(b) as to both the violation and the remedy, unless the charging party failed to exercise due diligence. See ***Burgess Construction***, 227 NLRB 765, 766 (1977) (fraudulent concealment found where the respondent fraudulently and deceitfully assured the union it would no longer employ carpenters), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979), and cases cited there.

For the effects of fraud on the General Counsel, see the next section.

§ 3–650 Revival of Withdrawn or Dismissed Charge

As a general rule, the General Counsel may not revive a withdrawn or finally dismissed charge after the Section 10(b) period has run. ***Ducane Heating Corp.***, 273 NLRB 1389, 1390–1391 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986). There are, however, three exceptions to the general rule:

1) Fraudulent Concealment. If material facts have been concealed from the General Counsel, a dismissed or withdrawn charge may be revived. ***Kanakis Co.***, 293 NLRB 435, 435–437 (1989) (affidavit submitted to and relied on by the General Counsel in dismissing the charge was later discovered to have been perjured). Compare ***Brown & Sharpe Mfg. Co.***, 321 NLRB 924, 924–925 (1996), review denied 130 F.3d 1083, 1087 (D.C. Cir. 1997), cert. denied 524 U.S. 926 (1998) (finding no fraudulent concealment of material facts regarding alleged bad-faith bargaining because the General Counsel did not ask for or demand information about certain issues); and ***Benfield Electric Co.***, 331 NLRB 590, 591–592 (2000) (finding no fraudulent concealment where the attorney's position statement was not forthcoming about his client's true motive, but did not attempt to conceal material facts).

In ***Brown & Sharpe***, above, 321 NLRB at 924, the Board set forth the three elements that are required to establish fraudulent concealment. They are: (1) deliberate concealment, (2) of material facts, and (3) the injured party was ignorant of those facts without any fault or want of due diligence on its part. In ***Morgan's Holiday Markets***, 333 NLRB 837, 840–841 (2001), the Board clarified that "material facts" means concealed evidence that would, "as an objective matter, make the critical difference in determining whether or not there was a reasonable cause to believe the Act was violated."

2) Noncompliance with Informal Settlement Agreement. If charges are withdrawn or dismissed as a consequence of an informal settlement agreement approved by the Agency, and the respondent does not comply with the terms of the settlement, Section 10(b) does not bar revival of the charges. Settlements are subject to an implicit condition that they will be carried out

and that unfair labor practices will not be resumed. See ***Sterling Nursing Home***, 316 NLRB 413, 416 (1995).

3) Closely Related to Current Complaint. If a viable and timely charge exists and the General Counsel seeks to add allegations that were contained in a previously withdrawn or dismissed charge, the closely related test applies. ***Redd-I, Inc.***, 290 NLRB 1115, 1115–1116 (1988). See also ***Sonicraft, Inc. v. NLRB***, 905 F.2d 146, 148–149 (7th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); and ***Pioneer Hotel, Inc. v. NLRB***, 182 F.3d 939, 944–945 (D.C. Cir. 1999), enfg. in part 324 NLRB 918, 918 n. 1 (1997). And see **§3–220**, Complaint Closely Related to Timely Charge, and **§3–330**, Amendments and Section 10(b), above.

Finally, the general rule set forth in ***Ducane*** prohibiting revival of dismissed charges does not apply to a charge that has not been finally dismissed, but is pending before the General Counsel on appeal. See **§3–140**, Withdrawal or Dismissal, above.

§ 3–700 Other Affirmative Defenses

§ 3–710 Misconduct of Charging Party

Alleged misconduct of a charging party is ordinarily not a defense to an unfair labor practice. See ***Carpenters Local 621 (Consolidated Constructors)***, 169 NLRB 1002, 1003 (1968), enfd. 406 F.2d 1081 (1st Cir. 1969); and ***Plumbers Local 457 (Bomat Plumbing and Heating)***, 131 NLRB 1243, 1245–1247 (1961), enfd. 299 F.2d 497 (2d Cir. 1962).

But if, as a legal matter, proof of misconduct could affect the unfair labor practice findings, an affirmatively pleaded defense to that effect must be heard. This applies even though the misconduct was the subject of a charge that was dismissed by the General Counsel. ***Hotel & Restaurant Employees Local 274 (Warwick Caterers)***, 269 NLRB 482, 482–483 (1984). See also ***Chicago Tribune Co.***, 304 NLRB 259, 259–261 (1991) (bad-faith bargaining by the union may be raised as a defense to bad-faith bargaining by the respondent, even though the General Counsel dismissed the charge of union bad-faith bargaining). Compare ***Greyhound Lines***, 319 NLRB 554, 555–557 (1995) (affirmative defense based on alleged union misconduct was stricken because no nexus was shown between alleged misconduct and the respondent's refusal to bargain, which was the subject of the complaint).

Alleged charging party misconduct may also be relevant to the remedy. See ***Laura Modes Co.***, 144 NLRB 1592, 1596 (1963); and ***Allou Distributors***, 201 NLRB 47, 47–48 (1973) (finding that union violence warranted withholding the normal bargaining order and instead directing an election). Compare ***Cascade Corp.***, 192 NLRB 533 n. 2 (1971) (distinguishing *Laura Modes*), enf. denied on other grounds 466 F.2d 748 (6th Cir. 1972); and ***Maywood Plant of Grede Plastics***, 235 NLRB 363, 365–366 (1978) (provocation must be weighed), enfd. as modified 628 F.2d 1 (D.C. Cir. 1980).

§ 3–720 Laches

Apart from the restrictions of Section 10(b) of the Act, the Board generally does not apply the doctrine of laches to itself or the General Counsel. See ***Entergy Mississipi, Inc.***, 361 NLRB No. 89 (2014) (considerable delay by Board in issuing backpay specification does not warrant a reduction in the backpay award even assuming the delay contravenes the APA), citing ***NLRB v. J.H. Rutter-Rex Mfg. Co***., 396 U.S. 258 (1969). See also ***Midwest Terminals of Toledo***, 362 NLRB No. 57, slip op. at 1 n. 1 (2015) (rejecting defense even though supervisor allegedly made

the 8(a)(1) statement over 4 years before the hearing commenced and he no longer worked for the company and was unavailable as a witness); ***United Electrical Contractors Assn.***, 347 NLRB 1, 2–3 (2006) (denying motion to dismiss complaint against members of employer association, notwithstanding the General Counsel's "inordinate and inexcusable" 5 ½ year delay in naming them as respondents, given the absence of any showing of prejudice); and ***Human Development Assn.***, 348 NLRB 677 (2006) (rejecting defense despite 13-year delay between enforcement of the Board's remedial order and issuance of the compliance specification), enfd. 275 Fed. Appx. 64 (2d Cir. 2008).

But see ***Garvey Marine, Inc.***, 328 NLRB 991, 995–997 (1999); and ***Wallace International of Puerto Rico***, 328 NLRB 29 (1999) (Board considers passage of time as a factor in evaluating whether to issue a *Gissel* bargaining order.)

§ 3–730 Inadequate Investigation/Compliance with Casehandling Manual

Due process claims are tested not by analysis of the investigation, but by analysis of complaint allegations. Therefore, the adequacy of General Counsel's investigation may not be litigated in the unfair labor practice trial. ***Redway Carriers***, 274 NLRB 1359, 1371 (1985). See also ***Laborers Local 135 (Bechtel Power Corp.),*** 301 NLRB 1066, 1068 n. 19 (1991) (citing same rule in compliance proceeding).

Respondents may also argue that the General Counsel failed to follow the NLRB Casehandling Manual. However, the Casehandling Manual provides guidance only and is not binding on the General Counsel or the Board. See ***Hempstead Lincoln Mercury Motors Corp.,*** 349 NLRB 552 n. 4 (2007); and ***Offshore Mariners United***, 338 NLRB 745, 746 (2002), and cases cited therein.

But see **§ 6–203**, 'Skip Counsel' Violations, below.

§ 3–740 Deferral to Grievance Arbitration

It is well settled that deferral to the grievance and arbitration machinery of the collective-bargaining agreement is an affirmative defense that must be timely raised in the answer to the complaint or at the trial. ***Babcock & Wilcox Construction Co***., 361 NLRB No. 132, slip op. at 10 (2014). Therefore, the respondent's assertion of this defense after the trial closes is untimely. ***SEIU United Healthcare Workers–West***, 350 NLRB 284 n. 1 (2007), enfd. 574 F.3d 1213 (9th Cir. 2009); ***Milford Manor Nursing & Rehabilitation Center***, 346 NLRB 50, 51 (2005); and ***Master Mechanical Insulation***, 320 NLRB 1134 n. 2 (1996). See also ***Wisconsin Bell Telephone***, 346 NLRB 62, 64, n. 8 (2005) (although respondent raised deferral as an affirmative defense in its answer, it waived the argument by failing to raise the issue subsequently at the hearing or in its brief to the judge).

Burden of proof. The burden is on the moving party to prove that prearbitral deferral is warranted. See, e.g., ***Regency Heritage Nursing & Rehabilitation Center***, 360 NLRB No. 98 (2014); and ***Rickel Home Centers***, 262 NLRB 731 (1982). The Board has found prearbitral deferral appropriate when the dispute arises within the confines of a long and productive bargaining relationship; there is no claim of animosity to the exercise of employee statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute; the employer has asserted its willingness to arbitrate the dispute; and the dispute is eminently well suited to resolution through arbitration. See ***Wonder Bread***, 343 NLRB 55 (2004), citing ***Collyer Insulated Wire***, 192 NLRB 837, 839 (1971), and

United Technologies Corp., 268 NLRB 557 (1984). In its 2014 decision in ***Babcock & Wilcox***, above, the Board added that, with respect to future cases involving 8(a)(3) and (1) allegations, the parties must have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement in that particular case.

With respect to postarbitral deferral, the Board has gone back and forth regarding who has the burden. In ***Olin Corp*.,** 268 NLRB 573, 574 (1984), the Board overruled precedent and held that the party opposing deferral has the burden of demonstrating that the standards for deferral have not been met, i.e. the party opposing deferral must show that the contractual issue is not factually parallel to the unfair labor practice issue; that the arbitrator was not presented generally with the facts relevant to resolving that issue; and/or that the award is "clearly repugnant" to the Act. However, in ***Babcock & Wilcox***, above, the Board again reversed course and held that, as with prearbitral deferral, the burden of proving that postarbitral deferral is appropriate in future 8(a)(3) and (1) cases is properly placed on the party urging deferral. The Board held that postarbitral deferral in such cases is appropriate only if the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the proponent of deferral demonstrates that the parties presented the statutory unfair labor practice issue to the arbitrator, the arbitrator considered the statutory issue or was prevented from doing so by the party opposing deferral, and Board law reasonably permits the award, i.e. the arbitrator's decision constitutes a reasonable application of the statutory principles that would govern a Board decision**.**

As indicated, ***Babcock & Wilcox*** applies only prospectively, i.e. it does not apply to 8(a)(3) and (1) cases pending at the time of the Board's December 15, 2014 decision. Indeed, the Board stated that where current contracts do not authorize arbitrators to decide unfair labor practice issues, the new deferral standards will not apply until those contracts expire or the parties agree to present particular statutory issues to the arbitrator. However, if a contract already provides for arbitration of unfair labor practice issues or the parties have explicitly authorized the arbitrator to consider such issues in a particular case, the Board will apply the new criteria in those cases. Slip op. at 14.

Procedure. The judge should evaluate whether deferral is warranted before evaluating the merits of the complaint allegations. See ***Olin Corp*.**, 268 NLRB 573,574 (1984), overruled on other grounds by *Babcock & Wilcox*, above. The judge appears to retain the discretion, however, whether to bifurcate litigation of the deferral and unfair labor practice issues. See *****Sheet Metal Workers Local 18* (*Everbrite, LLC)***, 359 NLRB No. 121, slip op. at 3 (2013) ("The Board has long held that . . . a deferral defense and the merits may be addressed in the same hearing . . ."); ***Cargill, Inc*.**,17-CA-088608, unpub. Board order issued Jan. 3, 2014 (2014 WL 31718, 2014 NLRB LEXIS 5) (judge did not abuse her discretion in ruling that the scheduled unfair labor practice hearing, which was anticipated to last only about 1–2 days, would proceed, and that evidence should be presented with respect to both the deferral issue raised by respondent and the merits of the complaint); and ***Bunge Milling, Inc*.**, 33-CA-15997, unpub. Board order issued Dec. 30, 2011 (2011 WL 6886279, 2011 NLRB LEXIS 770) (judge did not abuse his discretion by requiring the parties to submit prehearing briefs on whether the Board should defer to an arbitrator's decision and award).

If the facts relevant to the deferral issue are undisputed, it may be appropriate to address the issue without a hearing, either on a stipulation of facts or a motion to defer. See, e.g.,*****IAP World Services***, 358 NLRB No. 10 (2012) (Board affirmed judge's decision dismissing/deferring the case pursuant to the parties' stipulation of facts); *****Certainteed Corp*.**, Case 8-CA-73922, unpub. Bd order issued Feb. 28, 2013 (2013 WL 772784, 2013 NLRB LEXIS 132) (Board granted respondent's prehearing motion to dismiss/defer); ***Southern California Edison Co***, 310 NLRB

1229 (1993) (same), rev. denied 39 F.3d 1210 (D.C. Cir. 1994); and ***Specialized Distribution Management, Inc.***, 318 NLRB 158 (1995) (Board found that the judge properly deferred/ dismissed the complaint pursuant to the respondent's pretrial motion). See also § 10–200, Motions to Dismiss, below. But see ***BCI Coca-Cola Bottling Company of Los Angeles***, 361 NLRB No. 75 (2014) (judge should have held evidentiary hearing to determine whether grievance settlement was repugnant to the Act).

As indicated in the cases cited above, if the motion for pre or postarbitral deferral is granted, the complaint should be dismissed. However, if the motion is for prearbitral deferral, the decision should note that the Board retains jurisdiction for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of the Board's decision, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) deferral to the arbitration award is unwarranted.

§ 3–750 Prior Settlement

A settlement agreement generally disposes of all issues unless the prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. ***Hollywood Roosevelt Hotel Co.***, 235 NLRB 1397 (1978). This so-called "settlement bar" rule is likewise an affirmative defense and is waived if not timely raised in the pleadings or at the trial. See ***Richard Mellow Electrical Contractors Corp.***, 327 NLRB 1112, 1112–1113 (1999). See also **§9–620**, Reservation Clauses: Settlement Bar Rule, and **§13–400**, Reliance on Settlements**,** below.

§ 3–760 Section 8(g) Notice

A respondent's assertion that the union failed to give notice under Section 8(g) of the Act is an affirmative defense. Therefore, raising the issue for the first time in a post-trial brief to the judge is untimely. ***Vencare Ancillary Services***, 334 NLRB 965, 968–969 (2001), enf. denied on other ground, 352 F.3d 318 (6th Cir. 2003).

CHAPTER 4. SERVICE OF DOCUMENTS

§ 4–100 In General

Service is a concept distinct from filing. That is, filing refers to receipt "by the Board or the officer or agent designated to receive" a pleading or other document. NLRB Rules and Regulations, Sec. 102.111(b). Service is "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 314 (1950). See also ***NLRB v. O'Keefe & Merritt Mfg. Co.***, 178 F.2d 445, 447 (9th Cir. 1949) ("a form of notice reasonably calculated to give a defendant knowledge of proceedings and an opportunity to be heard").

The NLRA, the Board's Rules, and, to a degree, the Board's Statements of Procedure, specify the requirements for service under the Act. Therefore, those provisions, rather than the Federal Rules of Civil Procedure, govern service of process in Board proceedings. ***Control Services***, 303 NLRB 481, 481–482 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).

§ 4–200 Methods of Service

Under the Board's Rules, as amended in 1995 (60 FR 56233), the following methods of service can universally be utilized by Regional Directors and by parties, including counsel for the General Counsel after complaint has issued, except to the extent indicated:

Personal service. NLRB Rules and Regulations, Secs. 102.14(a) (charges), 102.113(a)–(d) (complaints and amendments, compliance specifications and amendments, subpoenas, administrative law judges decisions, and other documents), and 102.114(a) (papers "by a party on other parties").

Registered or certified mail. Id., Secs. 102.14(a) (charges), 102.113(a)–(d), and 102.114(a), as above.

Regular mail. Id., Secs. 102.14(a) (charges); 102.113(d) ("documents" other than complaints and amendments, compliance specifications and amendments, subpoenas, and administrative law judges decisions, if served "by the Agency"); and 102.114(a) ("papers by a party on other parties").

Private delivery service. Id., Secs. 102.14(a) (charges); 102.113(d) ("documents" other than complaints and amendments, compliance specifications and amendments, subpoenas, and administrative law judges decisions, if served "by the Agency"); and 102.114(a) ("papers by a party on other parties").

Service by fax. Other means of service are permitted, including by facsimile transmission, but "only with the consent of the party being served." This applies equally to counsel for the General Counsel after complaint has issued, except to the extent Sections 102.113(a) or (c) provide otherwise with respect to service of complaint amendments, compliance specifications, and subpoenas. Id., Sec. 102.114(a).

When a document and other papers are filed by fax with the Agency, a party shall serve copies "on all parties in the same way as used to serve the office where filed, or in a more expeditious manner," and faxes "shall be used for this purpose whenever possible." If a party

refuses to accept service by fax, or if a party cannot be served by fax, the "party shall be notified personally or by telephone of the substance of the [faxed] document, and a copy of the document shall be served by personal service or overnight delivery service." Id., Sec. 102.114(h).

E-mail Service. Section 102.114(i) of the Board's Rules requires e-mail service on the other parties, if possible, for documents e-filed with the Agency. If the other party does not have the ability to receive e-mail service, the other party shall be notified by telephone of the substance of the e-filed document and a copy shall be served by personal service no later than the next day, by overnight delivery, or, with the permission of the other party, by facsimile transmission.

§ 4–300 Failure of Service

A party's failure to make timely service on other parties is a basis for either "rejection of the document," or for "[w]ithholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond." NLRB Rules and Regulations, Sec. 102.114(c).

Ordinarily, the Board has been reluctant to reject a document due to lack of timely service. See ***Cameron Iron Works***, 235 NLRB 287, 287–288 (1978), enf. denied on other grounds 591 F.2d 1 (5th Cir. 1979); ***Our Way, Inc.***, 244 NLRB 236 n. 1 (1979) (General Counsel's failure to serve timely filed exceptions); and ***Terpening Trucking Co.***, 271 NLRB 96 n. 1 (1984) (respondent's failure to serve exceptions on the charging party). The Board has been particularly reluctant to do so if a party is unrepresented and if filing of that document otherwise complies with the Rules. See ***Tri-Way Security***, 310 NLRB 1222, 1223 n. 5 (1993) (answer to complaint); and ***Acme Building Maintenance***, 307 NLRB 358, 359 n. 6 (1992). However, in ***Active Metal Mfg.***, 316 NLRB 974, 974–975 (1995), a self-represented respondent's timely-filed answer was rejected for failure to serve the charging party where there had been "repeated efforts by the Region to apprise the Respondent of its obligations under our Rules," but service was never made.

When service is attempted by fax, "failure to timely file or serve a document will not be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was offline or busy or unavailable for any other reason." NLRB Rules and Regulations, Sec. 102.114(f).

§ 4–310 Efforts to Frustrate Service

"[T]he Board has long held that a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service will not be permitted to defeat the purposes of the Act". ***SMC Engineering & Contracting***, 324 NLRB 341, 341 (1997) (complaint). Accord: ***Apex Electrical Services***, 356 NLRB No. 172, slip op. at 1 n. 3 (2011) (compliance specification).

§ 4–400 Who Must Be Served

Complaints and amendments, compliance specifications and amendments, and "other documents" of the General Counsel "shall be served upon all parties." NLRB Rules and Regulations, Section 102.113(a) and (d). Administrative law judges decisions also "shall be served upon all parties." Id., Sec. 102.113(b).

"Subpoenas shall be served upon the recipient." Id., Sec. 102.113(c).

Pleadings filed by a private party must be served on the other parties. Id., Secs. 102.21 (answers to complaints); 102.26 (request for special permission to appeal and the appeal, oppositions, and responses); 102.56(a) (answers to compliance specifications); and 102.42 (briefs).

A request for special permission to appeal a ruling by an administrative law judge, as well as the appeal and any statements in opposition or other responses, must be served on the other parties and the administrative law judge. Id., Sec. 102.26.

When service is required, it must be made on attorneys or representatives who have "entered a written appearance in the proceeding" on behalf of parties. But when "a party is represented by more than one attorney or representative, service upon any one of [the] persons in addition to the party shall satisfy [the] requirement." Id., Sec. 102.113(f).

§ 4–500 Determining Date of Service

"The date of service," specified in Section 102.112 of the Board's Rules, is as follows:

Personal service: the day "delivered in person."

Mail: "the day when the matter served is deposited in the United States mail." See ***Electrical Workers IUE (Spartus Corp.)***, 271 NLRB 607 (1984).

Private delivery service: "the date the document was tendered to the delivery service," as shown by a record provided by the delivery service.

Fax: "the date on which the fax is received." See ***Hardesty Co.***, 336 NLRB 258, 259 (2001) (presumption of employer's receipt of union's faxed information request was supported by fax confirmation report, which was not rebutted by testimonial denial of employer's lawyer at trial), enfd. 308 F.3d 859 (8th Cir. 2002).

§ 4–600 Proof of Service

For "Complaints, orders and other process and papers of the Board, its member, agent, or agency," Section 11(4) of the Act provides: "The verified return by the individual [making the service] setting forth the manner of . . . service shall be proof of the [service], and the return [postal service] receipt or telegraph receipt . . . when registered or certified and mailed or when telegraphed . . . shall be proof of service."

For other parties, and for pleadings and other documents, the Board's rules specify some methods of proof of service:

Personal service: "the verified return by the individual" serving the document. NLRB Rules and Regulations, Sec. 102.113(e).

Registered or certified mail: "the return [postal service] receipt." Id., Secs. 102.113(e) and 102.114(b).

Telegraph: the "telegraph receipt." Id., Sec. 102.113(e).

Private delivery service: "the receipt from [the] service showing delivery." Id., Sec. 102.114(b).

Delivery to a principal office or place of business: "verified return by the individual" serving the document. Id., Sec. 102.113(e).

"However, these methods of service are not exclusive; any sufficient proof may be relied upon to establish service." Id., Secs. 102.113(e) (the Agency), and 102.114(b) (parties). For example, the Board has held that service of a complaint by certified mail can be established by affidavit rather than the return post-office receipt. ***CCY New Worktech, Inc***., 329 NLRB 194 (1999).

Where service of documents is permitted by regular mail, the failure of the postal service to return the documents is sufficient to establish actual receipt. See, e.g., ***Apex Electrical Services***, 356 NLRB No. 172, slip op. at 1 n. 3 (2011), citing ***Lite Flight, Inc***., 285 NLRB 649, 650 (1987), enfd. 843 F.2d 1392 (6th Cir. 1988).

Whether service is made by the Agency or by a private party, the person making service "shall submit a written statement of service . . . stating the names of the parties served and the date and manner of service"; however, "failure to make proof of service does not affect the validity of service." NLRB Rules and Regulations, Sec. 102.114(e). Thus, the absence of such a statement will not invalidate service, nor preclude other methods of proof of service. The Board has long held that procedural requirements regarding proof of service should be liberally construed. See ***Control Services***, 303 NLRB at 481–482 (1991). For example, in ***G. W. Truck***, 240 NLRB 333, 334–335 (1979), proof of a charge's service was based upon testimony by a Board agent, supported by her written description, "almost contemporaneous with service," of what had occurred when she served the charge.

§ 4–700 Special Aspects of Service of Particular Documents

§ 4–710 Charges and Amended Charges

As discussed in **§3–120**, above, under the proviso to Section 10(b) of the Act, a charge must be both filed and served within the 6-month limitations period. However, as indicated in **§4–200** above, under the Board's rules service of a charge may be made by personal service, by registered, certified, or regular mail, by private delivery service, by fax with "the permission of the person receiving the charge," or "by any other agreed upon method." And, as indicated in **§4–500** above, service by mail is effective on the day the document deposited in the mail. Thus, if timely deposited in the mail, the charge does not have to be actually received by the charged party within the 6-month period. ***Laborers Local 264 (D & G Construction Co.),*** 216 NLRB 40 n. 1, 43 (1975), affd. in relevant part 529 F.2d 778, 781–785 (8th Cir. 1976).

The charging party, not the Regional Office, is responsible for assuring timely service of a charge. ***Dun & Bradstreet Software Services***, 317 NLRB 84, 85 (1995), affd. 79 F.3d 1238, 1250 (1st Cir. 1996). Although the Regional Office will normally serve a copy of the charge on the charged party, this is merely a courtesy and does not relieve the charging party of its service obligation. NLRB Rules and Regulations, Sec. 102.14(a) and (b), and Statements of Procedure, Sec. 101.4.

Technical defects in the manner of service will not necessarily invalidate the service. See ***Control Services***, above, 303 NLRB at 481–482 (1991) ("when charges have in fact been

received, technical defects in the form of service do not affect the validity of the service"). For example, service of an unsigned copy of a charge was held adequate in ***Freightway Corp.***, 299 NLRB 531 (1990).

Further, the "failure to make timely service of a charge on a respondent will be cured by timely service within the 10(b) period of a complaint on the respondent, absent a showing that the respondent is prejudiced by [the] circumstances." ***Buckeye Plastic Molding***, 299 NLRB 1053 (1990).

Where there are multiple charged parties, service on only one of them is sufficient if they are:

Alter egos. ***BMD Sportswear Corp.***, 283 NLRB 142 n. 1 (1987), enfd. mem. 847 F.2d 835 (2d Cir. 1988); and ***NLRB v. O'Neill***, 965 F.2d 1522, 1528–1529 (9th Cir. 1992), cert. denied 509 U.S. 904 (1993).

Single employers. ***Il Progresso Italo Americano Publishing Co.***, 299 NLRB 270 n. 4, 289 (1990).

Joint employers. ***Whitewood Maintenance Co.***, 292 NLRB 1159, 1169 n. 29 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991).

Joint bargaining representatives. ***Electrical Workers IUE (Spartus Corp.)***, 271 NLRB 607 (1984). See also ***United Electrical Contractors Assn.***, 347 NLRB 1, 1–2 (2006) (service of charge on multi-employer association amounts, under agency principles, to service on each of its members).

Only charged parties must be served. Thus, a copy of a charge need not be served upon the labor organization that is asserted to be a party to an allegedly unlawful collective-bargaining contract, or which is asserted to be unlawfully dominated, assisted, or supported, as long as no remedial order is sought against the labor organization. ***Meyers Bros. of Missouri, Inc.***, 151 NLRB 889, 893 n. 1 (1965) ("the limitations clause of Section 10(b) relates only to the Board's power to issue complaints and thus limits the Board in proceeding against 'Respondents' as distinguished from 'parties'"). See also ***General Molds & Plastics Corp.***, 122 NLRB 182, 186 (1958).

§ 4–720 Complaint and Notice of Hearing

Complaints must be "served on all other parties." NLRB Rules and Regulations, Sec. 102.15. Thus, in contrast to charges, a copy of the complaint and notice of hearing must be served on the party to a collective-bargaining contract that would be invalidated by the remedial order. ***Consolidated Edison Co. of New York v. NLRB***, 305 U.S. 197, 218–219 (1938).

§ 4–730 Compliance Specifications

"[T]he Regional Director may issue and serve on all parties a compliance specification in the name of the Board." NLRB Rules and Regulations, Sec. 102.54(a).

Service of a compliance specification upon the respondent's attorney of record is sufficient. ***Star Grocery Co.***, 245 NLRB 196, 197 (1979); and ***Cera International Corp.***, 272 NLRB 1360, 1360 n. 2 (1984). This is so, even if the attorney no longer represents the

respondent, unless notice has been given to the Regional Director of discontinuance of representation. ***Hopkins Hardware***, 280 NLRB 1296, 1297 (1986).

§ 4–740 Answers to Complaints and to Compliance Specifications

Answers to complaints. Section 102.21 of the Board's Rules provides that, "immediately upon the filing" of its answer, the respondent shall serve a copy on the other parties. As set forth in **§4–300**, "Failure of Service," above, although the Board is reluctant to reject an answer for failure to make service on other parties, particularly if filed by an unrepresented respondent, it will do so if the respondent has ignored repeated efforts to encourage it to make proper service.

Answers to compliance specifications. Section 102.56(a) of the Board's Rules provides that "each respondent alleged in the specification to have compliance obligations shall" file an answer and "immediately serve a copy" on the other parties.

§ 4–750 Subpoenas

It is not necessary to establish actual receipt of the subpoena by the recipient; "proof that it was mailed is sufficient to prove service." ***Best Western City View Motor Inn***, 327 NLRB 468, 468–469 (1999). Moreover, "an attorney's affirmation of service" will suffice as proof of service, even "without submission of the postal [service] return receipt card." Ibid. See also **§8–120**, Service of Subpoena, below.

CHAPTER 5. TIME AND PLACE OF TRIAL

§ 5–100 Before Trial Opens

Section 102.15 of the Board's Rules requires that a complaint contain "a notice of hearing" at a fixed date and "a time not less than 14 days after the service of the complaint." "Except in extraordinary situations the hearing is . . . usually conducted in the Region where the charge originated." NLRB Statements of Procedure, Sec. 101.10(a).

Generally, before trial, the Regional Director issuing a complaint may extend the date of the trial or change the trial's location. But when there are less than 21 days before the scheduled trial date and a party objects to a postponement, motions to reschedule the trial should be filed with the Division of Judges, which rules only on whether to grant the motion to extend the trial date. NLRB Rules and Regulations, Sec. 102.16(a). See also ***Carriage Inn of Steubenville***, 309 NLRB 383 (1992). The "Regional Director issuing the complaint shall retain the authority to order a new date for hearing and retains the responsibility to make the necessary arrangements for conducting such hearing, including its location and the transcription of the proceedings." NLRB Rules and Regulations, Sec. 102.16(b).

§ 5–200 After Trial Opens

The notice of hearing that accompanies complaints typically provides that the trial will commence on the date set by the Regional Director and continue "on consecutive days thereafter." However, as discussed in **§ 2–300** (Duties of Trial Judge), above, after a trial opens the administrative law judge designated to conduct it possesses authority to "regulate the course of the hearing." NLRB Rules and Regulations, Sec. 102.35(a)(6). This includes the "discretion" to continue the trial "from day to day, or adjourn [it] to a later date or to a different place, by announcement . . . at the hearing . . . or by other appropriate notice." Id., Sec. 102.43. See also ***Abrahamson Chrysler-Plymouth***, 225 NLRB 923 n. 1 (1976) (ALJ did not abuse her discretion in denying respondent's several motions for continuances at the beginning of the first and second days of hearing and at the close of the General Counsel's case), enfd. mem. 559 F.2d 1226 (7th Cir. 1977), and cases cited below.

§ 5–300 Requests for Continuance to Obtain Counsel

Typically, two situations are presented: (1) when an unrepresented party is seeking a continuance to obtain counsel or other representative; and (2) when the party's counsel or representative is unavailable on the trial date.

To Obtain Counsel. When a party seeks a continuance to obtain counsel, a balance must be struck between the right of parties to be represented at the trial, NLRB Rules and Regulations, Sec. 102.38, and the principle that "proceedings must proceed with the utmost dispatch," ***NLRB v. American Potash & Chemical Corp.***, 98 F.2d 488, 492 (9th Cir.), cert. denied 306 U.S. 643 (1939). In striking that balance in particular situations, several relevant considerations have been identified:

1) The length of time since the complaint issued, during which the party had an opportunity to obtain counsel. See ***K & L Fire Protection Systems***, 306 NLRB 988 n. 1 (1992) (judge reasonably denied request at the hearing for a 2-week continuance to obtain approval from the bankruptcy court to retain counsel, as the complaint had been outstanding for more than 6 months).

2) Whether a continuance has already been granted to allow the party to obtain counsel. See ***Peter Vitalie Co***., 310 NLRB 865 n. 1 (1993) (judge reasonably denied motion where the respondent had already requested and been granted a prior 6-week postponement); and ***Crusader-Lancer Corp.***, 144 NLRB 1309 n. 1 (1963) (trial examiner did not commit prejudicial error by denying motion where a request for a 1-week continuance for the same purpose had previously been granted).

3) Efforts shown by the moving party to obtain counsel. See ***K & L Fire Protection Systems***, above (noting that the respondent's application to bankruptcy court for authorization to appoint an attorney was not made until 3 days before the hearing); and ***Peter Vitalie Co.***, above, (noting that, after receiving the prior continuance, the respondent "elected to do nothing except seek 'another eleventh hour postponement'").

Unavailability of chosen counsel on trial date. In striking a balance in this area, the following relevant considerations have been identified:

1) Reason for unavailability. See ***Mississippi Valley Structural Steel Co. v. NLRB***, 145 F.2d 664, 665–667 (8th Cir. 1944) (trial examiner should have granted respondent's request for a postponement at the start of the hearing due to illness of counsel who was the only attorney conversant with case). But see ***Quicken Loans, Inc***., 28-CA-146517, unpub. Board order issued August 14, 2015 (2015 WL 4910611; 2015 NLRB LEXIS 609) (judge did not abuse his discretion by denying counsel's second postponement request due to medical problems where judge had informed counsel when granting the first postponement that, if he could not proceed on the new hearing date, he should prepare alternative counsel).

2) When the conflicting commitment was made. See ***Hijos de Ricardo Vela, Inc.***, 194 NLRB 377 n. 1 (1971) (trial examiner justifiably denied request where the conflicting commitment—to bargain on behalf of another client—was made "long after the notice of hearing" and "indeed only shortly before the scheduled hearing date"), enfd. 475 F.2d 58 (1st Cir. 1973).

3) Length of continuance contemplated. See ***Wittek Industries***, 313 NLRB 579 (1993) (judge properly denied request where no alternative trial date was proposed and corporate counsel, who had some familiarity with the circumstances leading to the discharge of the alleged discriminatees, was available to try case).

4) Complexity of facts and issues. See ***Franks Flower Express***, 219 NLRB 149, 149–150 (1975) (judge did not abuse his discretion by denying second postponement request where the case was "neither a complicated nor lengthy proceeding" and respondent was represented at the hearing by a member of the same firm who presumably had knowledge of the issues as framed by the pleadings), enfd. mem. 529 F.2d 520 (5th Cir. 1976).

5) Whether it is the first request for a continuance. See ***Quicken Loans,*** above; and ***Franks Flower Express***, above.

6) Availability of substitute counsel. Compare ***Mississippi Valley Structural Steel Co. v. NLRB,*** above; with ***NLRB v. Glacier Packing Co.***, 507 F.2d 415, 416 (9th Cir. 1974) (judge did not abuse his discretion in denying request for postponement due to counsel's conflicting legal engagements where other attorneys in the firm were qualified to handle the case), ***Wittek Industries***, above, and ***Franks Flower Express***, above.

§ 5–310 Length of Continuance to Obtain Counsel or Substitute Counsel

In the following cases, the Board found that the time granted to obtain counsel or substitute counsel was reasonable in length: ***Peter Vitalie Co.***, above (40 days to secure counsel); ***Franks Flower Express***, above (5 days to secure substitute counsel); ***Wittek Industries***, above (1 day for counsel to be available); and ***NLRB v. Glacier Packing Co.***, above (4 hours to secure substitute counsel from same firm after pretrial denials of requests for further continuances).

§ 5–320 When Counsel or Party Leaves Trial After Request Is Denied

When a continuance has been properly denied, it is not improper to go forward with the trial without the presence of counsel. ***NLRB v. Glacier Packing Co.***, above; and ***NLRB v. Hijos de Ricardo Vela, Inc.***, 475 F.2d 58, 61 (1st Cir. 1973). See also ***Ethan Enterprises, Inc.***, 342 NLRB 129 n. 2 (2004) (approving judge's decision to proceed with hearing after departure of respondent's attorney, following adverse ruling, where the attorney agreed to notify respondent that hearing would proceed in his absence), enfd. 154 Fed. Appx. 23 (9th Cir. 2005). And see **§6–350**, Absence of Respondent's Attorney, below.

§ 5–400 Motions for Continuance to Prepare a Defense

The judge has discretion to grant or deny respondent a continuance to prepare its defense. ***Spiegel Trucking Co.***, 225 NLRB 178, 179 n. 9 (1976), (judge did not abuse his discretion in denying respondent's request for a postponement to investigate the allegations described in the General Counsel's opening statement and to procure witnesses, as the complaint had adequately apprised respondent of the alleged violations), enfd. mem. 559 F.2d 188 (D.C. Cir. 1977). See also ***East Bronx Health Center***, 271 NLRB 898 n. 1 (1984) (judge properly denied respondent's motion for a 10-day adjournment at the close of the General Counsel's case, as the hearing had previously been postponed at respondent's request, providing respondent an additional 2 months to prepare its case, and respondent failed to adequately explain why another postponement was necessary).

§ 5–500 Motions for Continuance Because of Unavailable Witness

Obviously, there will be circumstances where a continuance may be appropriate due to the temporary unavailability of an important witness. However, the following are circumstances where a judge's denial of a continuance has been upheld:

1) Existence of prior notice that witness would be necessary. ***Quebecor Group, Inc.***, 258 NLRB 961 n. 1 (1981) (witness was named as supervisor in complaint); and ***Don't Stop***, 298 NLRB 961, 962 (1990) (complaint named witness as sole actor who committed unfair labor practices).

2) Failure to show steps taken to ensure presence of witness. ***Batchelor Electric Co.***, 254 NLRB 1145 n. 1 (1981), enfd. mem. 716 F.2d 903 (6th Cir. 1983).

3) Failure to show that whereabouts of witness are unknown or that witness is otherwise unavailable. ***Quebecor Group, Inc.***, above.

4) Failure to provide supporting details to explain absence of witness. ***Skyline Builders, Inc.,*** 340 NLRB 109 (2003); ***Riverdale Nursing Home***, 317 NLRB 881 (1995); and ***Florida Coca-Cola Bottling Co.***, 31 NLRB 21 n. 2 (1996).

5) Witness simply chose to do something other than attend the trial. ***Greenpark Care Center***, 236 NLRB 683 n. 3 (1978) (the witness chose to leave the country on vacation despite "ample notice" of the trial date from the notice of hearing issued almost 2 months before the trial date); and ***Don't Stop***, above (witness "chose not to be present at the hearing because it was his considered business judgment that his presence at the hearing was less important than a meeting with a major customer").

6) Failure to claim the presence of a witness was actually needed to present the respondent's defense. ***Stevens Ford***, 272 NLRB 907 (1984), enfd. in part 773 F.2d 468, 476–477 (2d Cir. 1985).

7) Failure to indicate when witness would become available. ***Sarkes Tarzian, Inc.***, 157 NLRB 1193, 1194 n. 3 (1966).

8) Failure to take advantage of reasonable alternative arrangements to avoid continuance. ***Somerville Cream Co.***, 95 NLRB 1144, 1146 (1951) (General Counsel offered to move trial temporarily to the home of the assertedly incapacitated respondent witness), enfd. 199 F.2d 257 (1st Cir. 1952).

§ 5–600 Motions to Change Location of Hearing

In ***Flame of Miami, Inc.***, 159 NLRB 1103, 1105 (1966), the Board held that it was "clearly reasonable" for the trial examiner to deny a motion to transfer the hearing from Miami to New York, where some of the respondents were located, as the unlawful conduct took place in Miami and the respondents failed to show that holding the trial in Miami was unreasonable or burdensome. Compare ***Altemose Construction Co. v. NLRB***, 514 F.2d 8, 12 (3rd Cir. 1975) (ALJ committed reversible error by denying respondent employer's motion to move to another location because of the "mob atmosphere" outside the federal building where the hearing was being held).

Guidance may also be found in court decisions applying 28 U.S.C. Sec. 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . ."). Such decisions indicate that the trial judge has "broad discretion" in ruling on such motions. ***SEC v. Savoy Industries, Inc.***, 587 F.2d 1149, 1154 (D.C. Cir. 1978), cert. denied 99 S.Ct. 1227 (1979). Relevant factors include the plaintiff's choice of location, the availability and convenience of witnesses, parties, and counsel, the location of the documentary evidence, the place or situs where the material events occurred, and the possibility of delay and prejudice if transfer is granted. "The burden is on the moving party to demonstrate that the balance of factors weighs heavily in favor of transfer and that transfer would not merely shift inconvenience from one party to another." ***Graham v. United Parcel Service***, 519 F.Supp.2d 801, 809 (N.D. Ill. 2007) (denying employer's motion to transfer employee's ADA and ERISA action from the Eastern to the Western Division of the Northern District of Illinois), citing, e.g., ***In re National Presto Industries, Inc***., 347 F.3d 662 (7th Cir. 2003) (upholding trial judge's denial of employer's motion to transfer SEC enforcement action from the Northern District of Illinois to the Western District of Wisconsin, even though the only factor favoring the former venue was the convenience of the SEC and its staff). See also ***Carlile v. Continental Airlines, Inc***., 953 F.Supp. 169 (S.D. Tex. 1997) (denying

employer's motion to transfer employee's discrimination action from Galveston to Houston, Texas).

CHAPTER 6. APPEARANCES AT TRIAL

§ 6–100 Representation at Trial

"Any party shall have the right to appear at [the trial] in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence." NLRB Rules and Regulations, Sec. 102.38. See also NLRB Statements of Procedure, Sec. 101.10(a). There is no requirement that the representative be a lawyer.

§ 6–110 Respondent Not Represented by Counsel

There is no constitutional or statutory right for the respondent to have an attorney appointed to represent it at government expense. ***Betra Mfg. Co.***, 233 NLRB 1126 n. 2 (1977), enfd. mem. 624 F.2d 192 (9th Cir. 1980), cert. denied 450 U.S. 996 (1981); and ***Golden Hours Convalescent Hospitals***, 200 NLRB 279, 280 n. 5 (1972). It is sufficient that the self-represented respondent is accorded a full and fair opportunity to present its case and cross-examine witnesses. ***American Cleaning Co.***, 291 NLRB 399 n. 1 (1988). See also ***Father & Sons Lumber v. NLRB***, 931 F.2d 1093, 1096–1097 (6th Cir. 1991) (there is no constitutional or statutory basis to overturn a Board decision on the ground that the respondent was denied the effective assistance of counsel), enfg. 297 NLRB 437, 437 (1989).

An unrepresented respondent also has no right to receive personal instruction from the judge. Indeed, the Board has stated that the judge should not "act as advocate of those who appear" without representation, because to do so "would seriously erode [the judge's] neutral position at the hearing". ***Air Transport Equipment***, 190 NLRB 377, 377 n. 2 (1971), enfd. mem. 486 F.2d 1394 (2d Cir. 1972) See also ***McKaskle v. Wiggins***, 465 U.S. 168, 183–184 (1984) (pro se defendant has no "constitutional right to receive personal instruction from the trial judge on courtroom procedure" and judge is not required to "take over the chores . . . that would normally be attended to by trained counsel), citing ***Faretta v. California***, 422 U.S. 806, 834 n. 46 (1975). However, as long as the judge remains impartial, he or she may answer procedural questions or explain basic rights. See ***Air Transport***, above; ***Dickens, Inc.***, 355 NLRB 255, 257 (2010) (judge instructed unrepresented respondent regarding which areas of testimony would be relevant); and ***Quality Asbestos Removal***, 310 NLRB 1214, 1215 (1993) (judge informed the respondent's nonlawyer representative, its owner, that she could ask to see any statements of the Government's witnesses when they had completed their direct examination).

§ 6–200 Ethical Issues Involving Representation

§ 6–201 Attorney as Witness

The Board will not police the canons of ethics of the various bar associations. When, for example, a party's trial lawyer takes the stand as a witness, any objection that the attorney's testimony should be stricken as a violation of the canons of ethics should be overruled. ***Operating Engineers Local 9 (Fountain Sand Co.)***, 210 NLRB 129 n. 1 (1974). Accord: ***Wells Fargo Armored Service Corp.***, 290 NLRB 872, 873 n. 3 (1988). See also ***Page Litho, Inc.***, 311 NLRB 881, 881 n. 1 (1993) (citing *Wells Fargo* and disavowing judge's statement that counsel was precluded ethically from appearing as a witness), enf. denied in part on other grounds mem. 65 F.3d 169 (6th Cir. 1995). But see **§§ 6-202** and **6-203**, below.

§ 6–202 Conflicts of Interest

Courts clearly have the authority, derived from their "inherent power to preserve the integrity of the adversary process," to disqualify counsel due to a conflict of interest under the canons of ethics. See ***Hempstead Video, Inc. v. Village of Valley Stream***, 409 F.3d 127, 132–133 (2d Cir. 2005). See also ***Paul E. Iacono Structural Engineer, Inc. v. Humphrey***, 722 F.2d 435 (9th Cir. 1983). The Board has the similar authority to protect its own processes. See ***Mack Trucks***, 277 NLRB 711 n. 1 and 715–723 (1985). See also ****Stericycle, Inc***., Case 32-CA-24230, unpub. Board order issued Jan. 28, 2010 (Board permitted the respondent employer to present evidence at the unfair labor practice hearing regarding whether counsel for the union should be disqualified due to a conflict of interest). But see **§6–201**, Attorney as Witness, above.

For situations where a party's attorney is a former Board lawyer, and is therefore subject to the postemployment restrictions currently set forth in Section 102.119 of the Board Rules, see ***Hillview Convalescent Center***, 266 NLRB 758 (1983) (Board stated that it would order former Board attorney to terminate his participation if he was still doing so, as it would violate the Board's post-employment rules, but reversed judge's conclusion that entire law firm should also be disqualified under the circumstances presented).

With respect to alleged conflicts involving counsel for the General Counsel, see ***AM Property Holding Corp.***, 350 NLRB 998, 1008 (2007) (counsel for the General Counsel, whose prior law firm had represented the charging party, had no conflict under applicable Federal statutes and regulations because she had not served as an attorney for the law firm in the last year); and ***Terrace Gardens Plaza, Inc***., 315 NLRB 749 n. 1 (1994) (rejecting respondent's contention, in a test-of-certification refusal-to-bargain proceeding, that counsel for the General Counsel should be disqualified because she served as the hearing officer in the underlying representation case and investigated contemporaneous charges brought by the employer against the union that had previously represented the employees), enfd. 91 F.3d 222 (D.C. Cir. 1996).

In consolidated "C" and "R" cases (when a complaint case is consolidated with objections or challenged ballots in a representation case), established Board law permits counsel for the General Counsel to switch to a neutral as the Regional Director's representative for the objections/ballots portion of the case. ***Freuhauf Corp.***, 274 NLRB 403, 405–406 (1985). The procedure generally has been upheld by the courts. See, for example, ***Beaird-Poulan Division v. NLRB***, 649 F.2d 589, 597–598 (8th Cir. 1981); and ***Barrus Construction Co. v. NLRB***, 483 F.2d 191, 194–195 (4th Cir. 1973).

§ 6–203 "Skip Counsel" Violations

Where it is alleged that the General Counsel improperly interviewed a supervisor or agent of the respondent employer or union without the presence of respondent's counsel, the judge should evaluate the circumstances to determine if such a "skip counsel" violation occurred and the appropriate evidentiary sanction or remedy, if any, for the violation. See ***Success Village Apartments, Inc***., 347 NLRB 1065 (2006) (Board rejected the respondent employer's contention that a former manager's affidavit was improperly admitted into evidence, as the respondent failed to establish that the former manager's affidavit was improperly obtained); and ***Operating Engineers, Local 17 (Hertz Equipment Rental Corp.)***, 335 NLRB 578 (2001) (Board found that, under the circumstances, the Region's investigator properly took an affidavit of the respondent union's organizer and agent without the presence of respondent's counsel, and therefore rejected the respondent's contention that the complaint should be dismissed and the case reassigned to another Region for a new investigation).

For an overview of this issue, see Lori Ketcham, *Skip Counsel Issues in NLRB ULP Investigations*, 16 No. 1 Prof. Law. 18, 20 (2005).

§ 6–300 Failure of Party to Appear at Trial

§ 6–350 Absence of Respondent's Attorney

When the respondent has filed an answer, but its lawyer or representative fails to appear at the trial, the judge should hear the General Counsel's evidence and issue a decision. ***Beta Steel Corp.***, 326 NLRB 1267 n. 3, 1268 (1998); ***Quality Hotel***, 326 NLRB 83 n. 4 (1998); and ***Bristol Manor Health Care Center***, 295 NLRB 1106 n. 1 (1989), enfd. mem. 915 F.2d 1561 (3d Cir. 1990).

Of course, if the answer previously filed by respondent is found insufficient, a default or summary judgment may be appropriate. See **§§ 3–500**, and **10–300**.

§ 6–400 Rights of Charging Parties and Discriminatees

Charging Parties. NLRB Rules and Regulations, Section 102.38, provides that "Any party shall have right" to appear at the trial, "to call, examine, and cross-examine witnesses," and to introduce evidence, "except that the participation of any party shall be limited to the extent permitted by the administrative law judge."

Charging parties have a right to participate in the trial regardless of whether they are represented by counsel. The "better practice" is for the judge to specifically offer the unrepresented charging party the opportunity to question each witness, although the failure of the judge to do so does not represent a denial of due process. ***Cowin & Co.***, 322 NLRB 1091 n. 1 (1997).

Under Section 102.118(b)(1) of the Board's Rules, the charging party also has the right to see the affidavits of respondent witnesses in the General Counsel's file for cross-examination. ***Senftner Volkswagen Corp.***, 257 NLRB 178 n. 1, 186–187 (1981), enfd. 681 F.2d 557 (8th Cir. 1982). See **§16–613.1**, Jencks Statements, below.

As discussed in **§§ 3–200** and **3 –310**, above, the General Counsel has exclusive authority over the issuance and prosecution of unfair labor practice complaints under Section 3(d) of the Act, and the charging party therefore has no right to introduce evidence in support of an allegation or theory not asserted by the General Counsel.

However, the responsibility for fashioning an appropriate remedy rests with the Board under Section 10(c) of the Act. Thus, the charging party may introduce, and the judge may consider, evidence supporting a remedy not sought by the General Counsel. See ***Kaumagraph Corp.***, 313 NLRB 624, 624–625 (1994) (judge erred by refusing to allow the charging party to introduce evidence to support a restoration and reinstatement remedy for the respondent's alleged unlawful transfer of operations). However, the requested remedies must be consistent with the General Counsel's complaint and theory of the case. ***ATS Acquisition Corp.***, 321 NLRB 712 n. 3 (1996) (judge erred in awarding backpay at the request of the charging party as the complaint did not allege unlawful unilateral changes in terms and conditions of employment).

With respect to compliance matters, the General Counsel does not act on his own initiative, but as agent of the Board in effectuating the remedy. Therefore, the charging party is

entitled to appeal to the Board the General Counsel's decision regarding a compliance issue. ***Ace Beverage Co.***, 250 NLRB 646, 647 (1980) (cutoff date for reinstatement). See also ***Page Litho, Inc.***, 325 NLRB 338, 338–339 (1998). This does not mean, however, that the charging party is entitled to raise and litigate issues before the judge, contrary to the backpay specification. The charging party should make its appeal directly to the Board from the General Counsel's decision regarding the specification. See NLRB Rules and Regulations, Sec. 102.53(c); and ***John Cuneo, Inc.***, 276 NLRB 75, 77 (1985), affd. in part and remanded in part 792 F.2d 1181 (D.C. Cir. 1986). .

Discriminatees. The failure of a discriminatee to appear or testify at the trial does not preclude the judge or the Board from finding a violation regarding that employee. ***Riley Stoker Corp.***, 223 NLRB 1146, 1146–1147 (1976) (Board reversed judge who dismissed an 8(a)(3) violation because the employee abstained from appearing at the trial), enfd. in part mem. 559 F.2d 1209 (3d Cir. 1977).

See also **§11–400**, below, regarding exclusion of charging parties and discriminatees from portions of the hearing pursuant to a sequestration order.

§ 6–500 Intervention at Trial

Section 102.29 of the Board's Rules permits "any person" to file a motion with the judge to intervene in the trial. The motion should be in writing, unless it is made orally at the trial, and should "state the grounds upon which [the] person claims an interest." The judge shall rule on the motion and "may permit intervention . . . to [the] extent and upon such terms as . . . deem[ed] proper." For useful guidance in evaluating the timeliness of such motions, see **7C Fed. Prac. & Proc. Civ. § 1916** (3d ed. Database updated April 2015) (discussing timeliness of motions to intervene in federal court actions under FRCP 24).

Section 10(b) of the Act states that any person may be allowed to intervene and present testimony "in the discretion" of the judge or Board. Based on this language, the courts have held that the issue of intervention is subject to the discretion of the judge or Board and will not be disturbed absent abuse or prejudice. ***Auto Workers v. NLRB***, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968); and ***Semi-Steel Casting v. NLRB*****,** 160 F.2d 388, 393 (8th Cir. 1947).

The Board has held that intervention should be permitted in certain situations. For example, benefit fund trustees should be permitted to intervene where the complaint alleges that the employer violated 8(a)(5) by failing to make benefit fund payments. See ***Camay Drilling Co.***, 239 NLRB 997, 998–998 (1978). In that case, the judge concluded that the trustees would have no interest in the trial until a backpay proceeding was held. The Board disagreed, finding that because of the fiduciary obligations imposed on the trustees by ERISA, they are "interested parties" under the Administrative Procedure Act (APA) and are entitled to intervene to safeguard assets of the trust fund. See also ***Operating Engineers Local 12 (Griffith Co.)***, 212 NLRB 343, 345 (1974), revd. on other grounds 545 F.2d 1194 (9th Cir. 1976), cert. denied, 434 U.S. 854 (1977), where the judge permitted fund trustees to appear in an 8(b)(4)(ii)(B) and 8(e) case alleging that the respondent union unlawfully maintained a clause prohibiting subcontracting to employers who were delinquent in making payments to the funds.

The Board has likewise held that an employer association is properly permitted to intervene under Section 10(b) where it is party to the collective-bargaining agreement with the

union and the complaint allegations against the employer-member of the association turn in part on the contract. See ***Sterling Furniture Co***., 94 NLRB 32 n. 1 (1951).

However, in ****Affinity Medical Center***, Cases 8-CA-90083 et al., unpub. Board order issued April 30, 2013 (2013 WL 1809351, 2013 NLRB LEXIS 292), final decision and order issued 362 NLRB No. 78 (2015), the Board held that the judge did not abuse his discretion in denying a motion filed by two employees to intervene in a post-certification refusal-to-bargain proceeding. The Board had previously denied the same employees' motion to intervene in the post-election objections proceeding on the ground that individual employees do not have standing to file objections. See *unpub. order Board order issued Jan. 11, 2013 (2013 WL 143371, 2013 NLRB LEXIS 13). The judge cited the Board's previous order, as well as the lack of factual or legal support for the employees' objections to the election, in denying the motion to intervene. On appeal, the Board additionally noted that, under Section 102.9 of the Board's Rules, the employees were free at any time during the applicable limitations period to file an unfair labor practice charge alleging that the conduct at issue violated the Act.

See also ***Latino Express, Inc***., 360 NLRB No. 112 n. 2 (2014), reaffirming unpub. Board order issued Nov. 27, 2012 (2012 WL 5942293) (judge did not abuse his discretion in denying a decertification petitioner's request to intervene in an 8(a)(5) case alleging that the employer bargained in bad faith and unlawfully withdrew recognition from the union); ***Hotel Del Coronado***, 345 NLRB 306, 306 n. 1, 308 n. 1 (2005) (judge denied an employee's motion to intervene in an 8(a)(5) case to urge that a neutrality agreement entered into between respondent's predecessor and the union was improper; but both the judge and the Board, on later exceptions, permitted the employee to file an amicus brief); and ***McKinney v. Southern Bakeries, LLC***, 2014 WL 2812257, 2014 U.S. Dist. LEXIS 85022 (W. D. Ark. June 23, 2014) (court denied antiunion employee's motion to intervene in 10(j) injunction proceeding to oppose the Board's request for an interim bargaining order against the employer, as the employer would adequately represent his interests in the proceeding and his proffered defenses to the complaint were not legally relevant).

But see ***Washington Gas Light Co***., 302 NLRB 425 n. 1 (1991) (Board affirmed judge's ruling permitting employee to intervene to represent his own interests in 8(a)(5) dues-checkoff case, but not the interests of other employees absent evidence that they requested or authorized him to do so); ***Taylor Bros., Inc.***, 230 NLRB 861 n. 1 (1977) (judge granted motion, over General Counsel's objection, to permit 10 employees to intervene in 8(a)(5) case for the limited purpose of any remedy that might issue regarding the bargaining status of the union); ***J. P. Stevens & Co.***, 179 NLRB 254, 255 (1969) (judge granted motion, over GC's objection, and permitted 114 employees to intervene in 8(a)(5) case to challenge the validity of their authorization cards), enfd. 441 F.2d 514 (5th Cir. 1971), cert. denied 404 U.S. 830 (1971); and ***Spruce Pine Mfg.***, 153 NLRB 309 n. 1 (1965) (judge granted motion by 64 employees to intervene in 8(a)(5) case), enfd. in part 365 F.2d 898 (D.C. Cir. 1966). See also ***Novelis Corp***., 3–CA–12193, unpub. Board order issued Sept. 12, 2014 (2014 WL 4545621, 2014 NLRB LEXIS 701) (judge did not abuse his discretion in granting limited intervention to four antiunion employees with respect to the 8(a)(5) *Gissel* bargaining order remedy requested in the complaint; the judge's order permitted the employees to cross-examine witnesses called by the other parties and to file a posthearing brief, but not to call witnesses absent a showing that the respondent company had not adequately addressed a relevant issue).

Whether and to what extent employees should be permitted to intervene to contest the allegations and remedial order in other circumstances (such as an 8(a)(3) discrimination case) is unclear. The full Board addressed this issue, albeit by unpublished order, in ***Boeing Co.***, 19-CA-32431, unpub. order dated June 20, 2011 (2011 WL 2451725, 2011 NLRB LEXIS 308). In that

case, the General Counsel alleged that Boeing had discriminatorily transferred work from its facilities in the Pacific Northwest to a new facility in South Carolina, and requested as a remedy that the work be returned. Three employees at the South Carolina plant filed a motion with the judge to intervene. The employees sought either unlimited intervention, or, alternatively, the right to file a posthearing brief. The judge denied the motion in its entirety. However, on special appeal, the full Board reversed the judge in part. Noting that the judge had subsequently granted 16 state attorneys general the right to file a posthearing amicus brief, the Board held that the employees had articulated a sufficient interest to grant them limited intervention to likewise file a posthearing brief in the matter.

For court cases addressing this issue in arguably analogous circumstances under FRCP 24, compare ***Donnelly v. Glickman***, 159 F.3d 405 (9th Cir. 1998) (cited by the judge in *Boeing*), which held that the district court did not abuse its discretion by denying a motion by male employees to intervene in female employees' class action discrimination suit, as "the proposed intervenors have no protectable interest in positions that they may have obtained due to specific discriminatory employment decisions," with ***Bridgeport Guardians, Inc. v. Delmonte***, 602 F.3d 469 (2d Cir. 2010), and ***Brennan v. New York City Bd. of Education***, 260 F.3d 123, 130 (2d Cir. 2001), which reversed district court orders and granted intevention to white employees to challenge any proposed order or settlement remedying alleged race discrimination.

§ 6–510 Necessary Parties

For a discussion of the application of FRCP 19 (required joinder of parties) to Board proceedings, see ***Expert Electric, Inc.***, 347 NLRB 18, 19 (2006) (holding that, even assuming FRCP 19 applies to Board proceedings, which is questionable, individual members of a multi-employer association were not necessary and indispensible parties to the 8(a)(5) refusal-to-bargain case against the association itself because the Board could accord full relief to the parties without the joinder of each individual member). Compare ***UPMC***, 362 NLRB No. 191, slip op. at 1 n. 2 and JD. at 27 (2015) (holding UPMC, the parent entity of the respondent companies, liable for certain of the Board's ordered remedies, even though the complaint did not allege that UPMC, as a separate entity, committed unfair labor practices, as UPMC had stipulated and consented to be bound by those portions of the Board's remedial order).

§ 6–520 Parties in Interest

A "party in interest" named in the complaint has the same rights as other named parties under Section 102.38 of the Board's Rules to notice and an opportunity to be heard, including presenting evidence and examining witnesses. See, e.g., ***Midwestern Personnel Services, Inc.***, 331 NLRB 348, 350 (2000); and ***U.S. Steel Corp.***, 280 NLRB 837 (1986). Thus, its position must also be considered in approving a settlement agreement, but only to the extent of its interest. See ***Haven Manor Health Related Facility***, 243 NLRB 39 (1979) (where union was party in interest only to 8(a)(2) allegations, its joining or becoming a party to settlement of 8(a)(1) and (3) allegations was unnecessary).

§ 6–600 Misconduct by Attorney or Representative

The judge has no authority to hold attorneys in contempt for engaging in misconduct during the trial such as interrupting other counsel, witnesses, or the judge, making derogatory comments to or about them, refusing to obey the judge's rulings, or engaging in other conduct that the judge believes is intended to unreasonably delay the trial.

However, the Board's Rules and precedents provide the judge various other methods to deal with such misconduct. Obviously, the judge should first point out to the offending party that the conduct is improper and will not be tolerated. If the conduct nevertheless persists, Section 102.177 of the Board's Rules ("Misconduct by Attorneys or Party Representatives") provides that the judge may: (1) exclude counsel from the hearing, (2) issue, after due notice, an admonishment or reprimand, and/or (3) refer the matter to the General Counsel for investigation and appropriate action.

§ 6–610 Exclusion of Counsel

Section 102.177(b) of the Board's Rules provides that "misconduct by any person . . . shall be grounds for summary exclusion from the hearing."

Although this option is within the judge's discretion, it should be used cautiously because it involves an interference with the respondent's right to counsel. See ***Great Lakes Screw Corp. v. NLRB***, 409 F.2d 375, 380–381 (7th Cir. 1969), where the court reversed the Board's affirmance of the judge's decision to exclude counsel, both because the judge and the Board did not provide detailed and specific references to the attorney's conduct that allegedly warranted exclusion, and because, in the court's view, counsel's conduct "f[e]ll short of being contemptuous." Thus, the judge should clearly specify the conduct that the judge considers inappropriate and warn the individual on the record that he or she will be excluded if the conduct continues. See, for example, the judge's warnings to counsel in ***Earthgrains Company***, 351 NLRB 733, 736 n. 14 (2007); and ***Baddour, Inc***., 281 NLRB 546 n. 2 (1986), enfd. mem. 848 F.2d 193 (6th Cir. 1988), cert. denied 488 U.S. 944 (1988).

If the person being excluded represents the respondent, it is appropriate, if not necessarily required, to adjourn the trial to permit the respondent to obtain new counsel or to appeal the judge's exclusionary ruling. See ***Great Lakes Screw Corp.***, 164 NLRB 149 n. 2 (1967), revd. and remanded 409 F.2d 375 (7th Cir. 1969).

For a good example of how to proceed both before and after excluding a respondent's representative from participating in the trial, see the judge's decision in ***USA Remediation Services, Inc.***, 5–CA–31524, JD–20–06 (March 15, 2006) (2006 WL 691192, 2006 NLRB LEXIS 89), slip op. at 15–20, adopted in the absence of exceptions May 16, 2006. See also the subsequent, related disciplinary proceeding, ***In re David M. Kelsey***, 349 NLRB 327 (2007) (issuing default judgment imposing 6-month suspension for the same conduct).

For cases where the judge has excluded the charging party's representative, see ***Advance Waste Systems***, 306 NLRB 1020, 1032–1033 (1992) (representative excluded over the objection of the General Counsel and with assistance of Federal Protective Service); and ***State Bank of India***, 283 NLRB 266, 277–278 (1987). It is not clear whether an adjournment was requested or granted in either of these cases to permit the charging party to obtain a new representative. However, if an attorney for the charging party is excluded and the charging party requests an adjournment of the trial to obtain new counsel to appeal the exclusion ruling, the request should probably be granted. See ***Great Lakes Screw***, above.

A possible middle ground, which could avoid the postponement problem, is available when the offending party has co-counsel. In ***Baddour, Inc.***, above, the Board affirmed the judge's ruling that an attorney, who constantly interrupted witnesses, objected to questions the judge had previously ruled proper, and argued after his evidentiary rulings, should be precluded

from speaking or examining witnesses, but could remain in the room to assist co-counsel. The Board concluded that judge's ruling limiting the participation of the attorney was not improper.

§ 6–620 Authority to Admonish or Reprimand Counsel

Section 102.177(b) of the Board's Rules also authorizes judges and the Board to "admonish or reprimand, after due notice, any person who engages in misconduct at a hearing." See also ***675 West End Owners Corp.,*** 345 NLRB 324, 325 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008). A "formal admonition or reprimand declares conduct improper and cautions the offender that repetition of offense will result in more severe discipline." ***Sargent Karch***, 314 NLRB 482, 486 n. 14 (1994). But see ***Mail Contractors of America***, 347 NLRB 1158 (2006) (holding that judge's issuance in his decision of a "notice of potential admonishment, reprimand, or summary exclusion" stating that counsel's hearing conduct was unprofessional and, if repeated, could result in an admonishment, reprimand, or exclusion, was itself an admonishment or reprimand under Sec. 102.177), enf. denied on other grounds, 514 F.3d 27 (D.C. Cir. 2008).

The exclusion and formal-admonition remedies are not mutually exclusive and, in fact, in most cases, exclusion will also be accompanied by a formal admonition. See ***Advance Waste Systems***, above, and ***State Bank of India***, above.

Due notice required. The rule specifically requires "due notice" before an admonishment or reprimand is issued. Thus, the judge should be careful to give both advance notice and an opportunity to respond before issuing such discipline. See ***Mail Contractors of America***, above. One option would be to provide the representative notice during the hearing and an opportunity to respond in a posthearing brief before issuing the admonishment or reprimand.

As indicated above, Section 102.177(b) also authorizes the Board to issue an admonishment or reprimand after due notice. In light of this, some judges have simply recommended in the decision that the lawyer or representative be admonished or reprimanded by the Board. This procedure allowed the representative to address the issue on exceptions before such discipline was actually administered. However, the Board has not been receptive to this procedure. See ***675 West End Owners,*** above (holding that the judge should have either exercised her authority under 102.177(b) to issue the warning and reprimand herself, or referred the matter to the General Counsel for investigation under Section 102.177(e) [discussed below]).

Conduct warranting reprimand. Some examples of conduct found to warrant a formal reprimand, admonishment, or warning include: interrupting counsel, witnesses, and the judge and failing to follow the judge's instructions, ***Advance Waste Systems***, above; inappropriate or unprofessional comments about the judge, ***Maietta Contracting***, 265 NLRB 1279, 1279–1280 (1982), enfd. mem. 729 F.2d 1448 (3d Cir. 1984); profanity directed towards counsel and the judge, refusal to obey the judge's instructions, and accusing the judge of "taking money," ***State Bank of India***, above; violating the judge's witness sequestration order, ***Seattle Seahawks***, 292 NLRB 899, 908 (1989), enfd. mem. 888 F.2d 125 (2d Cir. 1989); and willfully taking frivolous positions at the trial to delay and abuse the Board's processes, ***Nursing Center at Vineland***, 318 NLRB 337, 344 (1995). Other examples include talking loudly, interrupting while witnesses are testifying, interposing baseless objections, and evading or disregarding the judge's rulings. ***675 West End Owners***, above. See also ***Government Employees (IBPO),*** 327 NLRB 676 (1999); and ***Alan Short Center***, 267 NLRB 886 n.1 (1983).

Frivolous answers. Note that a separate rule, Section 102.21, specifically provides for disciplinary action against an attorney or representative for willfully filing an answer that is without

good grounds to support it and is interposed for delay. This section has frequently been cited by the Board in cautioning and warning attorneys against engaging in misconduct. See, e.g., ***In re Konig***, 318 NLRB 337, 338 n.7 (1995); ***Graham-Windham Services***, 312 NLRB 1199 n. 2 (1993); ***Worldwide Detective Bureau***, 296 NLRB 148 n. 2 (1989); and ***M. J. Santulli Mail Services***, 281 NLRB 1288 n. 1 (1986). See also ****Uzi Einy***, 352 NLRB 1178 (2008) (6-month suspension imposed on nonattorney respondent representative for his misconduct in ***675 West End Owners Corp,*** above, including filing frivolous answers that denied allegations he knew to be true and had been established in previous Board proceedings).

It is a useful tool for judges to cite these cases when encountering obviously frivolous answers to complaint allegations. This should be done in conference calls, especially because very often these answers engender subpoenas and needless litigation. It is not uncommon for attorneys to suddenly amend their answers when confronted with the possibility of disciplinary action for needlessly litigating issues that are not really in dispute.

§ 6–630 Suspension of Counsel

The final and most severe remedy for misconduct is set forth in Section 102.177(d) of the Board's Rules, which states that misconduct "at any stage of any Agency proceeding, including but not limited to the trial," which is "of an aggravated character, shall be grounds for suspension and/or disbarment from practice before the Board."

Procedure for referral of allegations. Under Section 102.177(e), any person, including the judge, can file an allegation of misconduct with the investigating officer, the Associate General Counsel, Division of Operations Management, who has final, unreviewable authority to initiate disciplinary proceedings against an attorney or other representative.

The explanatory material that accompanied Section 102.177 when it was published in the Federal Register in 1996 indicated that the judge could recommend disciplinary action in his or her decision, which might then be referred by the Board to the investigating officer. 61 Fed, Reg, 65323, 65329, n. 12 (Dec. 12, 1996). However, the Board has expressed a preference in subsequent cases that the judge separately submit a recommendation for discipline directly to the investigating officer. See ***Earthgrains Co.***, 351 NLRB 733 n. 3 (2007); ***675 West End Owners Corp.***, 345 NLRB 324, 325–326 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008); and ***McAllister Towing & Transportation***, 341 NLRB 394, 398 n.7 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). See also ***Smithfield Packing Company, Inc.***, 344 NLRB 1, 19 n. 59 (2004) (agreeing with judge's recommendation to refer perjury and subornation of perjury allegations to the General Counsel, but noting that the judge had the authority to do so as well), enfd. 447 F.3d 821 (D.C. Cir. 2006).

Thus, disciplinary allegations and recommendations should normally be sent to the General Counsel by separate letter, not to the Board. See, e.g., ***David M. Kelsey***, 349 NLRB 327 (2007) (judge excluded respondent's representative from the hearing due to his misconduct, and thereafter, on the same day as his decision in the underlying case, sent a separate letter referring misconduct allegations to the General Counsel pursuant to Sec. 102.177, which ultimately resulted in representative's 6-month suspension).

Definition of "aggravated" misconduct. The Board's Rules do not define the term "aggravated" misconduct. But Section 102.177(a) states that attorneys and representatives "shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by these standards in interpreting and applying the

provisions of this section." See also the supplementary information accompanying the final rule published in the Federal Register, 61 Fed. Reg. 65323, 65327 (Dec. 12, 1996) (stating that such standards "may include the ABA Model Rules of Professional Conduct (and/or any other standards adopted by the ABA in the future), applicable state bar rules, and court decisions applying such rules").

The Board emphasized when it adopted Section 102.177 in 1996 that it was not changing the standard for "aggravated misconduct." Thus, it is instructive to examine case precedent before as well as after that date to determine the meaning of the term.

One of the most important factors appears to be the presence of prior disciplinary offenses. See ***Sargent Karch***, 314 NLRB 482, 486 n. 10 (1994), where the Board suspended an attorney from practice for 6 months for violating the judge's sequestration order. The Board noted that the attorney had been "formally admonished" for identical misconduct in a prior case, and cited Section 6.23 of the American Bar Association Standards for Imposing Lawyer Sanctions, which states that prior disciplinary offenses constitute an "aggravating" factor justifying increased discipline.

However, the Board made clear in ***Sargent Karch*** that it did not mean to imply that suspension would never be appropriate in the absence of a prior formal admonition or reprimand. The Board cited ***Matter of an Attorney***, 307 NLRB 913 (1992), where it approved a settlement calling for a 6-month suspension of an attorney for using profanity and verbally addressing opposing counsel in a rude, vulgar, and profane manner, even in the absence of prior disciplinary proceedings against him. See also ***David M. Kelsey***, 349 NLRB 327 (2007) (despite lack of prior discipline, Board issued default judgment and ordered 6-month suspension of respondent employer's nonattorney representative for his misconduct during the trial in ***USA Remediation Services, Inc.***, 5–CA–31524, JD–20–06 (March 15, 2006) (2006 WL 691192, 2006 NLRB LEXIS 89), adopted in the absence of exceptions May 16, 2006); and ****Uzi Einy***, 352 NLRB 1178 (2008) (6-month suspension imposed on nonattorney respondent representative for his misconduct in ***675 West End Owners Corp,*** above).

Length of suspension. Although 6 months appears to be a common sanction, longer suspensions have been ordered. See ***Stuart Bochner***, 322 NLRB 1096 (1997) (Board issued 2-1/2 year suspension to attorney who had lied to the judge in one proceeding and purposely delayed other proceedings by engaging in frivolous delaying tactics, including the failure to produce subpoenaed documents without filing a motion to revoke in three separate proceedings, filed answers that he knew or should have known were false in three proceedings, and had been previously admonished by the Board in ***Advance Waste Systems***, 306 NLRB 1020, 1032–1033 (1992) for interrupting counsel, witnesses, and the judge and for failing to follow the judge's instructions). See also ***Joel I. Keiler***, 316 NLRB 763, 766–770 (1995) (Board issued 1-year suspension to attorney who engaged in ad hominem comments and scurrilous characterizations of the General Counsel, as well as other conduct designed to obstruct and delay the Board's exercise of subpoena authority, despite the Board's previous expressions of disapproval with respect to his similar conduct in two prior cases), vacated by unpublished district court order dated February 3, 1998.

Although rare, the Board has also disbarred an attorney. See ***Kings Harbor Health Care***, 239 NLRB 679 (1978) (attorney had pleaded guilty in criminal proceeding to subornation of perjury in prior Board proceeding). See also ***Application and Motion of Horowitz***, 266 NLRB 755 (1983) (denying same attorney's subsequent request for reinstatement of right to appear before Board).

§ 6–640 Awarding Litigation Costs

The Board has also upheld the award of litigation costs against a party whose counsel has engaged in conduct deliberately designed to cause delay and draw out the litigation. See ***Teamsters Local 122 (August A. Busch & Co. of Massachusetts)***, 334 NLRB 1190, 1193, and 1255 (2001). See also ***Pacific Beach Hotel***, 361 NLRB No. 65, slip op. at 3 (2014); ***Camelot Terrace***, 357 NLRB No. 161, slip op. at 4–5 (2011); ***675 West End Owners Corp.***, 345 NLRB 324, 326, and 340 (2005); and cases cited there.

CHAPTER 7. PRETRIAL PROCEDURE

§ 7–100 Conference Calls

Pretrial conference calls typically address a variety of non-substantive procedural matters, including the parties' and the judge's expectations regarding the conduct of the trial (e.g. the number and scheduling of witnesses, the submission of exhibits, and the length of the trial), as well as the potential for reaching a settlement or stipulation of facts (see **§ 9–220**, below**)**. Accordingly, as the judge typically does not issue any final rulings on disputed issues during the calls, the calls are usually not transcribed by a court reporter. See ***Lewis Foods of 42nd Street, LLC***, 2–CA–093893 et al., unpub. Board order dated April 21, 2015 (2015 WL 1815276; 2015 NLRB LEXIS 294) (judge did not abuse her discretion in denying respondent's request to create an official record of a pretrial conference call where the judge did not intend to make any rulings on pending motions during the call). If issues arise during the calls, the judge may defer making any final rulings until after the hearing opens.

Occasionally, a conference call may be held after the hearing has officially opened, such as during a lengthy continuance or where the hearing had previously been opened only briefly by telephone or mail to address a particular pretrial issue (see **§ 12-200**, below). If the conference call is held to hear an oral motion or to rule on a motion, the call should be transcribed by a court reporter. However, as with pretrial conference calls, the judge retains the discretion not to have the call transcribed in other circumstances. See ***Lewis Foods of 42nd Street, LLC***, 362 NLRB No. 132 (June 26, 2015) (although the hearing had previously been formally opened, the judge did not abuse her discretion in denying respondent's request to transcribe scheduled conference calls regarding the manner and timeframe for producing subpoenaed documents, where the judge's letter to the parties scheduling the calls could not reasonably be read as contemplating the submission of oral motions during the calls).

§ 7–200 Pretrial Discovery

It is well established that pretrial discovery does not apply in Board proceedings. The Board, with court approval, has historically followed this rule to protect employees and other potential witnesses from reprisal or harassment and to avoid the delay and collateral disputes that often accompany discovery. See ***Offshore Mariners United***, 338 NLRB 745, 746 (2002); and ***David R. Webb Co***., 311 NLRB 1135 (1993), and authorities cited therein.

Thus, the judge may not order the General Counsel to provide the respondent with a witness list. See ***Beta Steel Corp***., 326 NLRB 1267, 1267–1268 (1998), enfd. mem. 210 F.3d 374 (2000); and ****Bashas', Inc.***, 352 NLRB 661 (2008). See also **§ 3–230**, Bill of Particulars, above. Nevertheless, the General Counsel in some instances may voluntarily provide the respondent with advance notice of the current employees or managers who may be subpoenaed to testify, in order to reduce the impact on the respondent's business and/or for other appropriate reasons. See, ****Bashas',*** above (noting that the General Counsel had done so and that, "Where appropriate, voluntary agreements of this character can aid the efficient administration of the Act."). In addition, the judge may rule on requests that the testimony of such witnesses be scheduled to minimize the burden on the respondent or the witnesses pursuant to the judge's general authority to regulate the course of the hearing under Section 102.35(a)(6) of the Board's Rules. See **§ 2–300**, Duties of Trial Judge, above.

§ 7–300 Depositions

A limited "good cause" exception exists to permit the taking of a deposition to preserve the testimony of one's own witness at the discretion of the Regional Director or the judge. NLRB Rules and Regulations, Sec. 102.30. ***Kenrich Petrochemicals v. NLRB,*** 893 F.2d 1468, 1483 (3d Cir. 1990), cert. denied 498 U.S. 981 (1990). But special circumstances must be shown. See ***David R. Webb Co.***, 311 NLRB 1135, 1136 (1993) (Board rejected respondent's request for permission to take depositions of discriminatees in compliance proceeding as its stated reasons "could apply to virtually any backpay proceeding"). See also ***December 12, Inc.***, 282 NLRB 475, 475 n. 1 (1986).

A respondent's failure to request permission to take a deposition was cited in ***Goya Foods of Florida***, 347 NLRB 1118, 1119–1120 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008). In that case, the judge had refused to admit into evidence a witness's deposition that had been taken pursuant to a separate state court action. The judge noted that the respondent failed to seek enforcement of its subpoena to have the witness testify in the Board proceeding. In affirming the judge's ruling, the Board noted, among other things, that the General Counsel had no opportunity to examine the witness in the state court proceeding, and that the respondent did not apply to the judge to permit deposing the witness with all parties in the Board proceeding present, as provided in Section 102.30 of the Board's Rules.

See also **§12–400**, Testimony by Videoconference, below.

CHAPTER 8. SUBPOENAS

§ 8–100 In General

§ 8–110 Application for Subpoena

Section 102.31 of the Board's Rules requires a written application for issuance of a subpoena. If the application is filed before trial, it should be filed with the Regional Director. If filed during the trial, it should be filed with the judge. As discussed in **§ 2–220**, above, the application may be made ex parte.

A judge must issue a subpoena and await a petition to revoke, even if the subpoena on its face seeks the production of unobtainable information. See ***Canova v. NLRB***, 708 F.2d 1498, 1503 (9th Cir. 1983), citing ***Lewis v. NLRB***, 357 U.S. 10, 14 (1958).. After the trial opens, if the judge is unavailable, as over a weekend, the Regional Director may issue a requested subpoena because the issuance is "virtually a ministerial act and involves no exercise of discretion." ***Free-Flow Packaging Corp.***, 219 NLRB 925, 926 (1975), enfd. in part 566 F.2d 1124 (9th Cir. 1978).

§ 8–120 Service of Subpoena

As discussed in **Chapter 4,** above, service of subpoenas may be made by personal service, by registered or certified mail, by telegraph, or by leaving a copy at the principal office or place of business of the person required to be served. NLRB Rules and Regulations, Sec. 102.113(c).

The last of these methods is satisfied if the subpoena is delivered by Federal Express or similar carrier. ***Offshore Mariners United***, 338 NLRB 745 (2002). It is not required that a subpoena be left with a person specifically authorized to accept service of subpoenas. See ***Packaging Techniques, Inc.,*** 317 NLRB 1252, 1253 (1995); and ***Control Services***, 303 NLRB 481, 483 n. 13 (1991) (leaving a copy of the subpoena with the receptionist at the respondent's principal place of business was effective service on the respondent's officer under Sec. 102.113(c), even if the respondent had not authorized the receptionist to accept such service), enfd. mem. 961 F.2d 1568 (3d Cir. 1992).

Any sufficient proof may be relied upon to establish that service was made. NLRB Rules and Regulations, Sec. 102.113(e). See also ***Best Western City View Motor Inn***, 327 NLRB 468, 468–469 (1999) (the attorney's affirmation of service is sufficient; it is not essential to provide a postal return-receipt card signed by the person subpoenaed).

The date of service is the day when the subpoena is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date it was tendered to the delivery service, or is delivered in person. NLRB Rules and Regulations, Sec. 102.112. See also ***Best Western City View Motor Inn***, above.

Note that a copy of the subpoena "shall" also be served on any attorney who has entered an appearance, but such service can be made "by any means of service permitted by these rules, including regular mail." NLRB Rules and Regulations, Sec. 102.113(f) (formerly Sec. 102.111(b)). See also ***Iron Workers Local 75 (Defco Construction),*** 268 NLRB 1453, 1456 n. 8 (1984) (declining to take adverse inference based on party's failure to comply with subpoena where, inter alia, subpoena was not served on party's attorney).

§ 8–125 Timing of Service of Subpoena

In ***McAllister Towing***, 341 NLRB 394, 397 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005), the Board rejected the respondent's contention that it was excused from producing subpoenaed documents at the outset of the hearing because the General Counsel did not serve the subpoenas, which contained a total of 60-paragraphs, until 2 weeks before the trial. The Board held that the respondent, "at the very least had an obligation to begin a good faith effort to gather responsive documents upon service of the subpoenas." See also **Voith Industrial Services, Inc*., Case 9-CA-75496, unpub. Board order issued August 27, 2012 (2012 WL 3679872, 2012 NLRB LEXIS 532) (granting General Counsel's special appeal and reversing judge's order quashing in part subpoena served 2 weeks before the hearing, as the respondent had "not submitted any evidence supporting its assertion that the time required to locate and review the documents would exceed 2 weeks"). See also **§ 8–620** (Failure to Produce Documents), below.

§ 8–130 Geographic Reach of Subpoena

Section 11(1) of the Act provides that the Board may require the attendance of witnesses from any place in the United States, its territories, or possessions.

§ 8–140 Fees and Mileage Required to be Paid

Witnesses subpoenaed for trial shall be paid the same fees and mileage that are paid witnesses in the Federal courts by the party who issued the subpoena. NLRB Rules and Regulations, Sec. 102.32; ***Zurn/N.E.P.C.O.***, 329 NLRB 484, 486–487 (1999). See also 28 U.S.C. Sec. 1821, and FRCP 45(b).

The failure of a respondent or charging party to provide fees and mileage with subpoenas at the time of service renders them "defective on their face," and it is the recipient's privilege not to comply with them. ***Rolligon Corp.***, 254 NLRB 22, 23 (1981). See also ***Champ Corp.***, 291 NLRB 803, 817 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991); and ***O.K. Machine & Tool Corp.,*** 279 NLRB 474, 479 (1986).

In contrast, the General Counsel need not advance the standard fees upon service of a subpoena. ***Zurn/N.E.P.C.O.***, above. See also ***Valentine Painting and Wallcovering, Inc***., 331 NLRB 883, 884 (2000) (rejecting respondent's objection that witness and mileage fees were not tendered with the General Counsel's subpoena, noting that the subpoena stated on its face that such fees would be paid upon the presentation of a voucher). See also FRCP 45(b), and NLRB Casehandling Manual (Part One), Secs. 11778 (service of subpoenas) and 11780 (witness fees).

The distance to be traveled, however, may justify requiring that travel expenses be included with service of the subpoena, even by the Government. See ***Zurn/N.E.P.C.O.***, above (judge concluded that it was an "undue burden" to require a disinterested witness to advance his own costs for 550-mile round trip).

Note that a respondent's failure to pay the witness fee and mileage to employees who appear at the hearing as required by the subpoena may also constitute a violation of the Act. See ***Howard Mfg. Co.***, 231 NLRB 731, 732 (1977) (respondent's failure to tender fees to seven subpoenaed striker-discriminatees who had not been subpoenaed or called to testify by the General Counsel violated Section 8(a)(4) and (1) of the Act).

§ 8–150 Expert Witnesses, Required Fees and Mileage

Regarding expert witnesses, the standard fee for witnesses does not constitute payment of the fee charged by an expert, and a subpoena may be quashed when the appropriate expert witness fee has not been included with service of the subpoena. ***Zurn/N.E.P.C.O.***, above, 329 NLRB at 486–487.

§ 8–200 Revocation of Subpoenas

§ 8–205 Standing to File Petition to Revoke

Generally a party lacks standing to file a petition to revoke a subpoena that is addressed to a third party unless the petition asserts that the requested information is protected by a privilege or right to privacy. ***Jones & Carter, Inc***., 16-CA-27969, unpub. Board order denying petition to revoke issued October 20, 2011 (2011 WL 4994786, 2011 NLRB LEXIS 594), and unpub. Board order denying motion for reconsideration issued December 30, 2011 (2011 WL 6936398, 2011 NLRB LEXIS 778) (employer's assertion of contractual property interest in the services of its employees is not a legally sufficient basis to establish standing to petition to revoke subpoenas ad testificandum addressed to them). As standing is jurisdictional in nature, it should be raised sua sponte by the judge even if no party has raised the issue. ***Ibid***. See also ***Teamsters Local 377***, 8-CA-39174, unpub. Board order issued Feb. 22, 2011 (2011 WL 815005, 2011 NLRB LEXIS 85).

§ 8–210 Petition to Revoke "In Writing"

Section 102.31(b) of the Board's rules provides that petitions to revoke "shall" be filed "in writing." However, to avoid unnecessary delay, a party may be required to argue orally against a subpoena. ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995) (denying respondent's request for the full 5 days allowed by Sec. 102.31 to file a written petition to revoke a subpoena served on the morning of the trial).

§ 8–220 "Within 5 Days" Requirement

Sec. 102.31(b) of the Board's Rules also requires that a petition to revoke be filed within 5 days of receiving the subpoena. See also Sec. 11(1) of the Act. In computing the time period, the date of service and intermediate Saturdays, Sundays, and holidays are not counted. NLRB Rules and Regulations, Sec. 102.111(a). However, again, to avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. ***Packaging Techniques, Inc.***, above.

Note that the 5-day rule may not be strictly applied if the subpoenaed material is subject to a privilege. See ***M. J. Mechanical Services***, 324 NLRB 812, 832 (1997) ("reporter's privilege") and cases cited by the judge there. See also the following court cases holding that a party did not waive its right to challenge subpoena enforcement by failing to exhaust administrative remedies by timely filing a petition to revoke: ***NLRB v. Midland Daily News***, 151 F.3d 472, 474–475 (6th Cir. 1998) (a Board subpoena that "constituted a constitutional infringement of [the respondent newspaper's] right to exercise commercial free speech"); and ***EEOC v. Lutheran Social Services***, 186 F.3d 959, 960 (D.C. Cir. 1999) (an EEOC document protected by the attorney-client privilege), discussed at length in ***NLRB v. Coughlin****,* 2005 WL 850964, 2005 U.S. Dist. LEXIS 6660 (S. Dist. Ill. March 4, 2005) (following *Lutheran Social Services* with respect to documents protected by attorney client privilege and work product doctrine).

But see ***Detroit Newspapers Agency***, 326 NLRB 700, 751 n. 25 (1998), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000), where the Board, in an unpublished order, granted a special appeal during the trial and reversed a judge who refused to apply the 5-day rule because, inter alia, the subpoenaed material was covered by the attorney-client privilege. The Board held that the judge "abused his discretion . . . because the Respondent did not file a proper motion or petition to revoke within 5 days." See also ***FTC v. GlaxoSmithKline***, 202 F.R.D. 8 (D.D.C. 2001) (distinguishing *Lutheran Social Services*, above, on the ground that the FTC subpoena specifically stated that a petition to revoke or privilege log must be filed within 5 days).

§ 8–230 Grounds for Revoking Subpoena

Section 102.31(b) of the Board's Rules states that a subpoena "shall" be revoked if the evidence requested "does not relate to any matter under investigation or in question in the proceedings," the subpoena "does not describe with sufficient particularity the evidence whose production is required," or "if for any other reason sufficient in law the subpoena is otherwise invalid." This rule applies to subpoenas ad testificandum as well as subpoenas duces tecum. See, e.g., ***Elevator Constructors No. 1 (Otis Elevator),*** unpub. Board order issued August 29, 2014 (2014 WL 4302555, 2014 NLRB LEXIS 670), and cases cited there.

Although not binding on the Agency, the Federal Rules of Civil Procedure also provide "useful guidance" and "should be consulted." ***Brink's, Inc.***, 281 NLRB 468 (1986) (citing FRCP 26 and 45 in quashing employer's subpoenas in representation case). See also ***Clinton Food 4 Less***, 288 NLRB 597 n. 1, 618–619 (1988) (applying *Brink's* analysis in quashing respondent employer's subpoena in unfair labor practice case); and ****CNN America***, 352 NLRB 675, 676 (2008), supplemental proceedings 353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014), discussed fully below (applying FRCP in evaluating General Counsel subpoena for electronically stored records).

A respondent's denial of jurisdiction is not grounds for revoking a hearing subpoena, at least where Board jurisdiction is not plainly lacking. See ***NLRB v. Chapa De Indian Health Program, Inc.***, 316 F.3d 995, 1002 (9th Cir. 2003). See also, with respect to investigative subpoenas, ***EEOC v. Kloster Cruise, Ltd.,*** 939 F.2d 920, 924 (11th Cir. 1991); ***NLRB v. Fortune Bay Resort Casino***, 688 F.Supp.2d 858 (D. Minn. 2010); and ***Eulen America***, 12-CA-26948, unpub. Board order issued July 16, 2011 (2011 WL 3098547, 2011 NLRB LEXIS 373).

Ordinarily, the judge should not revoke a subpoena on grounds not asserted in the petition to revoke. ***Postal Workers Local 64***, 340 NLRB 912 (2003).

§ 8–235 Ruling on Petition to Revoke

The judge's prompt ruling on the petition to revoke may assist the parties in preparing for trial and avoid subsequent delays. However, a judge's failure to rule prior to the scheduled hearing does not excuse a party from making a good faith effort to begin gathering the subpoenaed documents upon service of the subpoena and bring them to the hearing. See ***San Luis Trucking***, 352 NLRB 311, 312 (2008), reaffd. 356 NLRB No. 36 (2010), enfd. 479 Fed. Appx. 743 (9th Cir. 2012); and ***McAllister Towing & Transportation***, 341 NLRB 394 (2004). See also **§8-620**, Failure to Produce Documents.

§ 8–240 Preserving Related Material

In ***Dauman Pallet, Inc.***, 314 NLRB 185, 213 (1994), the judge exercised his discretion to defer issues of "piercing the corporate veil" and personal liability to the compliance proceeding, but did not revoke the General Counsel's subpoena for this reason to the extent it sought such information; rather, he ordered the respondent to "preserve" and "maintain" documents related to these issues for later use at the compliance stage of the proceedings.

§ 8–300 Scope of Subpoenas

§ 8–310 Material Must Be "Reasonably Relevant"

Subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. See NLRB Rules and Regulations, Sec. 102.31(b); and ***Perdue Farms***, 323 NLRB 345, 348 (1997) (the information must be "reasonably relevant"), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998). On the other hand, if the subpoenaed information is not reasonably relevant, the subpoena should be revoked. See *****Hispanics United of Buffalo***, 359 NLRB No. 37 (2012) (respondent's subpoena seeking various information from the alleged discriminatees, including communications among themselves, applications for and receipt of unemployment benefits, and any complaints to State or Federal agencies, was properly revoked by the judge as an unwarranted "fishing expedition" as the respondent failed to show that such information was relevant to any issue in dispute); and ***NLRB v. Jackson Hospital Corp***., 557 F.3d 301, 305–306 (6th Cir. 2009) (ALJ did not violate respondent's due process rights in compliance proceeding by quashing its subpoena to the extent it sought discriminatees' personal banking and other records relating to private financial obligations, as employer failed to establish a reasonable suspicion to believe that the discriminatees were hiding income), enfg. 352 NLRB 194 (2008).

With respect to employer subpoenas seeking information regarding the immigration status of an alleged discriminatee or a witness, see **§§16.402.6** and **16.608.1,** below.

§ 8–320 Request Must Not Be Vague or Overbroad

For a case addressing whether a subpoena duces tecum was too vague, see ***SEIU United Healthcare Workers—West***, 20–CG–65, unpub. Board order issued October 24, 2006 (General Counsel subpoena duces tecum was not impermissibly vague where it asked for information about union pressure regarding employees' refusal to work overtime in language borrowed from Board cases dealing with concerted refusals to volunteer for overtime in the healthcare industry).

For cases addressing subpoenas ad testificandums, see, e.g., ***Postal Workers Local 64***, 340 NLRB 912, 913 (2003) (subpoena ad testificandum was sufficiently specific where it identified the unfair labor practice case that the witness would testify about); and ***Offshore Mariners United***, 338 NLRB 745 (2002) (same). Accord: ***Christus St. Vincent Regional Medical Center***, 28-CA-149798, unpub. Board order issued Aug. 24, 2015 (2015 WL 5025387; 2015 NLRB LEXIS 631).

A subpoena may also be quashed to the extent the subpoena, on its face, is overbroad and/or seeks privileged or otherwise protected information. See ***Brink's, Inc.***, 281 NLRB 468, 469 (1986) (granting petitions to revoke challenged portions of employer's subpoenas in their

entirety where most of the challenged portions "generally were drafted without regard for the usual standards applicable to subpoenas or discovery" set forth in the Board's Rules and FRCP 26 and 45); and ***In re Horn***, 976 F.2d 1314, 1318–1319 (9th Cir. 1992) (quashing grand jury subpoena that, "on its face . . .clearly encompass[ed'" privileged information and placed an "unreasonable and undue burden upon the subpoenaed witness" to justify withholding documents "which the government [knew] in advance [were] beyond its reach"). See also ***Cherokee Marine Terminal***, 287 NLRB 1080, 1097 (1988); ***Harvey Aluminum***, 156 NLRB 1353, 1365 (1966); and ***J. H. Rutter Rex Mfg. Co. v. NLRB***, 473 F.2d 223 (5th Cir. 1973), cert. denied 94 S.Ct. 120 (1973) (quashing respondent subpoenas seeking the General Counsel's entire investigative file).

The judge, however, should consider the circumstances of each case in deciding whether the subpoena should be revoked in its entirety or only in part. See ***NLRB v. Interstate Builders, Inc***., 351 F.3d 1020 (10th Cir. 2003) (ALJ abused his discretion in summarily revoking the bulk of a subpoena respondent served on the union, as the subpoena was not "so overbroad so as to constitute a wholesale 'fishing expedition' meriting revocation in almost every particular"). See also ****CNN America, Inc.***, 353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014) (rejecting employer's argument that the General Counsel's subpoena "must stand or fall as a whole").

Note that a judge may often resolve objections that a subpoena is vague or overbroad by asking that the request be narrowed or made more specific. With a little time and attention, such objections may be resolved by compromise. If pressed, however, the judge must rule on such objections.

§ 8–330 Burdensomeness of Production

The party asserting burdensomeness must meet a high standard or burden of proof. A subpoena is not "unduly burdensome" simply because it requires the production of a large number of documents. To satisfy the burden, the party must show that production of the subpoenaed information "would seriously disrupt its normal business operations." ***NLRB v. Carolina Food Processors, Inc.***, 81 F.3d 507, 513–514 (4th Cir. 1996), cited with approval in ***McAllister Towing & Transportation Co.***, 341 NLRB 394, 397 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005)***.*** Bare assertions are insufficient. ****Voith Industrial Services, Inc***., Case 9-CA-75496, unpub. Board order issued August 27, 2012 (2012 WL 3679872, 2012 NLRB LEXIS 532). See also **§8–340**, below, regarding electronically stored information.

To the extent a respondent previously provided to the General Counsel documents requested by a General Counsel subpoena, the respondent will not be required to produce those documents to the General Counsel again; however, the respondent must accurately describe the documents that were previously provided and state whether those documents constitute all of the documents now being subpoenaed. See, e.g., ***Island Architectural Woodwork, Inc***., 29–CA–124027, unpub. Board order issued August 6, 2014, n. 2 (2014 WL 3867966, 2014 NLRB LEXIS 617).

§ 8–340 Electronically Stored Information (Computer Records)

In ****CNN America***, 352 NLRB 675, 676 (2008), the Board indicated that, if the subpoenaed party makes a "plausible argument" that production of certain types of information in electronic form would be disruptive of its business operations, then the judge should "strike a balance between the competing interests of the parties in the relevancy and necessity of the information and the potential cost and burdensomeness of its production in the form requested."

The Board indicated that, in performing the analysis, the judge should apply the Federal Rules of Civil Procedure and the factors set forth in *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,* Second Edition (The Sedona Conference Working Group Series, 2007), available at https://thesedonaconference.org/ publications.

Following issuance of the Board's order in *CNN*, the judge (appointed as special master) evaluated the General Counsel's subpoena requests applying:

> FRCP 26(b)(2)(C) (requiring courts to limit discovery if "the burden or expense . . . outweighs its likely benefit, considering the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issue"), and
>
> Sedona principle 2 (stating that "when balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in FRCP 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy").

The judge concluded that the foregoing factors favored the General Counsel's position—specifically, that the requested information related directly to the core complaint allegations and was highly important to the litigation; that the requested documents had a greater probative value than contradictory testimony; that there was a large amount of money in controversy; that CNN had failed to establish the cost of complying with the GC requests, which had been substantially narrowed following the Board's order; and that CNN had also failed to object to the technological feasibility of producing the documents. The Board agreed with the judge's analysis and conclusions. *****353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014).

With respect to requests for production of emails, see, ***Healthbridge Management***, ***LLC***, 34-CA-12715, unpub. Board order issued Oct. 18, 2011 (2011 WL 4955613, 2011 NLRB LEXIS 591). In that case, the respondent contended that the judge improperly denied its petition to revoke in part a General Counsel subpoena seeking various communications, including emails. The respondent contended that compliance with the subpoena would require thousands of dollars and several months to retrieve and search email backup tapes for previously deleted emails. Granting the appeal in part, the Board directed the respondents "to provide all responsive documents and communications available without resort to analysis of the email backup tapes, subject to the . . . General Counsel having the opportunity to persuade the judge that an additional search is necessary and the Respondent having the opportunity to demonstrate that it would be unduly burdensome." The Board has issued similar orders in several other cases. See, e.g., ***Somerset Valley***, 22-CA-29599, unpub. Board order issued June 23, 2011 (2011 WL 2515543, 2011 NLRB LEXIS 317).

§ 8–400 Privileged Material

As indicated in **§ 8-320**, above, a subpoena may be quashed to the extent the subpoena, on its face, seeks privileged material. The following sections apply where the subpoena has not been revoked, but the subpoenaed party asserts that one or more of the documents responsive to the subpoena contain privileged material.

§ 8–405 Burden of Proof—Privilege Log/Index

FRCP 45(e)(2)(A) requires a person withholding documents or communications under a claim of privilege to "(i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."

Consistent with the foregoing, the Board requires the party asserting a privilege to prove that it is applicable. ***CNN America, Inc.*,** 352 NLRB 448, 448–449 (2008), supplemental proceedings 352 NLRB 675 (2008) and 353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014). As part of this burden, the party must provide a privilege index log specifically identifying the documents it believes are covered by the privilege. At a minimum, the index must include "(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipient(s) of the document." ***CNN America, Inc.***, above, 353 NLRB at 899 (quoting from the Board's unpublished order in ***Tri-Tech Services***, 15–CA–16707, dated July 17, 2003). See also ***U.S. v. Construction Products Research, Inc.***, 73 F.3d 464, 473 (2d Cir. 1996), cert. denied 519 U.S. 927 (1996).

Under the FRCP, a judge in his/her discretion may also require the party asserting the privilege to provide additional information in the form of affidavits or testimony in order to evaluate the privilege. See, e.g., ***In re Grand Jury Subpoena***, 274 F.3d 563, 576 (1st Cir. 2001)***; Holifield v. U.S***., 901 F.2d 201, 204 (7th Cir. 1990); and ***Friends of Hope Valley v. Frederick Co***., 268 F.R.D. 643, 651-652 (E.D. Cal. 2010). If the party asserting the privilege fails to demonstrate sufficient grounds for protection, the judge may find that the privilege has been waived. ***In re Grand Jury Subpoena***, above. See also ***NLRB v. Jackson Hospital Corp***., 257 F.R.D. 302, 307–308 (D.D.C. 2009) (where a party fails to submit an adequate privilege log, the judge may: (1) permit the party another chance to submit a more detailed log; (2) deem the inadequate log a waiver of the privilege; (3) conduct an in camera inspection of the withheld documents; or (4) conduct an in camera inspection of a select sample of the withheld documents).

§ 8–410 In Camera Inspections

ALJ authority. There may be circumstances where in camera review of the actual documents is warranted prior to ruling. The authority of administrative law judges to conduct in camera inspections has been specifically upheld by the Board. ***CNN America, Inc.***, above, 352 NLRB at 449; ***Kaiser Aluminum & Chemical Corp.***, 339 NLRB 829 (2003); and ***Brink's, Inc.***, 281 NLRB 468, 470 (1986).

However, decisions by two circuit courts have raised doubts about whether an order to present subpoenaed documents to an ALJ for in camera inspection may be enforced. See ***NLRB v. Interbake Foods***, 637 F.3d 492, 499 (4th Cir. 2011) (although the ALJ has authority to order production of documents for in camera review to aid in evaluating the privilege, if the responding party refuses to obey, only an Article III court may resolve the impasse and enforce the subpoena); and ***NLRB v. Detroit Newspapers Agency***, 185 F.3d 602, 605 (6th Cir. 1999) (district court may not delegate to the ALJ responsibility for reviewing documents in camera to determine whether they are privileged).

To avoid the potential delay inherent in collateral court litigation, the judge may therefore wish to consider alternatives to ordering in camera inspection, including requiring the party asserting the privilege to provide additional information in the form of affidavits or testimony to support the privilege. See **§ 8–405**, above.

Factual basis required. Generally, if a party seeks in camera inspection of material that is claimed to be privileged, the judge should require that party to articulate specific grounds for the inspection. If the moving party shows an adequate factual basis to support a good-faith belief that such inspection may reveal evidence that is not protected by the privilege, the judge in his/her discretion may order that the evidence be presented for an in camera inspection, considering the amount of material to be reviewed, the material's relevance, and the likelihood that review will reveal whether the documents are privileged. See ***U.S. v. Zolin***, 491 U.S. 554, 571 (1989); and ***In re Grand Jury Investigation***, 974 F.2d 1068 (9th Cir. 1992). See also ***NLRB v. Interbake Foods***, above, 637 F.3d at 502, and on remand, 2011 WL 6736435, 2011 U.S. Dist. LEXIS 146536 (D. Md. Dec. 21, 2011) (finding that the General Counsel failed to present sufficient grounds to conduct in camera inspection of email strings that respondent claimed were protected by attorney-client privilege).

Procedures. If the ALJ determines that certain documents are not privileged and should be produced, the ALJ should not turn over the documents directly to the party subpoenaing them, but should identify the documents to be produced and afford the parties an opportunity to seek review. If such review is sought, the ALJ should place the documents under seal so that they can be reviewed by the Board and/or court. See ***Quality Roofing Supply Company***, 4-CA-36952 et al., ALJ special master's report issued August 17, 2011 (2011 WL 3625915, 2011 NLRB LEXIS 444).

In camera inspections may also be used in other contexts. For example, where a party sought copies of minutes of union meetings, the Board noted that Section 7 gives employees the right to keep attendance at union meetings confidential. ***Guess, Inc.***, 339 NLRB 432, 434 (2003). Thus, if such material is found relevant, the judge should view it in camera and require redaction of any portions identifying individuals other than the alleged discriminatee. *__R.K. Mechanical__, 27–CA–18863, unpub. Board order issued June 23, 2008, n. 2. See also **§16–613.1,** Jencks Statements**,** below.

§ 8–415 Protective Orders

ALJ authority. NLRB judges have the authority to issue protective orders in appropriate circumstances. ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010, 1011 (2005).

Good cause requirement. A party seeking a protective order with respect to disclosure of subpoenaed documents bears the burden of demonstrating "good cause" under FRCP Rule 26(c), "or that disclosure would cause clearly defined and serious harm." ***Impremedia***, 29-CA-131066, unpub. Board order issued Jan. 14, 2015 (2015 WL 193732, 2015 NLRB LEXIS 19) (denying respondent's request because it failed to establish either).

In applying FRCP 26(c), the courts generally require that the motion be supported by a particular and specific demonstration of fact, as opposed to mere conclusory or speculative claims of harm. See ***Serrano v. Cintas Corp***., 699 F.3d 884, 901(6th Cir. 2012), cert. denied, 134 S. Ct. 92 (2013); ***Shingara v. Skiles***, 420 F.3d 301, 306 (3d Cir. 2005); ***Foltz v. State Farm Mutual Automobile Insurance Co.,*** 331 F.3d 1122, 1130 (9th Cir. 2003); and ***In re Terra International, Inc***., 134 F.3d 302, 306, (5th Cir. 1998).

Where a party seeks to prevent public disclosure of documents after they are introduced and made part of the formal record, courts may require an even stronger showing given the public's interest in and historical access to judicial records. See, e.g., ***Kamakana v. City and County of Honolulu,*** 447 F.3d 1172 (9th Cir. 2006) (requiring "compelling reasons" to seal documents); and ***Citizens First National Bank of Princeton v. Cincinnati Insurance Co.***, 178 F.3d 943, 944–945 (7th Cir. 1999) (trial judge "may not rubber stamp a stipulation to seal the record").

The Board itself has not explicitly addressed the showing necessary to establish good cause for an order preventing disclosure of subpoenaed documents under FRCP 26(c). However, it appears to agree that conclusory claims of harm are not enough. See ***Waterbed World***, 289 NLRB 808, 809 (1988) (denying respondent's motion for a protective order, which would have barred disclosure to the discriminatees of documents attached to its motion to reopen the record, because of the "scanty and conclusory nature of the respondent's averments" and the Board's policy of affording discriminatees the right to hear testimony except under certain circumstances).

Further, the Board has indicated that certain types of routine employment information normally do not warrant a protective order. Thus, in ***Richmond Times Dispatch***, 5–CA–29157 et al, unpub. Board order issued August 1, 2002, the Board held that the judge improperly issued a protective order governing the production and exchange of subpoenaed documents to the extent it covered timesheets that showed hours worked or wages paid to employees. In agreement with the General Counsel, the Board held that the material consisted of "routine employment-related information," and that Respondent had "failed to demonstrate good cause warranting a protective order under FRCP 26 (c)." The Board majority did not pass at that time on whether the judge properly protected certain other information, including disciplinary records and electronic mail documents; however, the Board majority later denied the General Counsel's appeal with respect to this information, noting that there had been no showing of prejudice from entry of the protective order. 346 NLRB 74, 74 n. 1 (2005).

Provisions of order. Protective orders generally limit the persons who may have access to the information and the use to which they may put the information. Alternatively, the order may require redaction of personal identifiers, such as names, addresses, and social security numbers, prior to any disclosure. See, e.g., ***Rangel v. City of Chicago***, 2010 WL 3699991, 2010 U.S. Dist. LEXIS 94989 (N.D. Ill. Sept. 13, 2010); and ***Kelly v. City of New York***, 2003 WL 548400, 2003 U.S. Dist. LEXIS 2553 (S.D. N.Y. Feb. 24, 2003). See also **§ 12–800,** below, regarding the required redaction of personal information from documents submitted into the record.

If it is determined that a protective order is appropriate, the judge may ask the party seeking the order to submit a proposed order. The judge can then tailor the order to meet the legitimate needs of the moving party and the possible objections of other parties. For examples of protective orders issued in Board cases, see:

1) ***AT&T Corp.***, 337 NLRB 689, 693 n. 1 (2002): "The exhibits in this proceeding are covered by a protective order . . . and no exhibits are to be furnished to outside sources pursuant to the Freedom of Information Act or pursuant to other requests."

2) ***National Football League***, 309 NLRB 78, 88 (1992): "It is ordered that the protective order entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony be continued in full force and effect and that all exhibits introduced into evidence under seal will continue to be maintained under seal and that portions of the transcript of the hearing held during in camera sessions will not be open to the public."

3) ***United Parcel Service***, 304 NLRB 693, 693–694 (1991): "[U]se [of the subpoenaed documents] shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing."

See also ***H & M International Transportation, Inc***., 22-CA-089596, unpub. Board order issued May 23, 2014 (2014 WL 2194514, 2014 NLRB LEXIS 388) where the respondent company sought unrestricted access to the memory card of a cell phone the discriminatee used to audiotape the meeting where he was disciplined. The Board held that the judge did not abuse her discretion in ordering production of the memory card so that the company could evaluate the recording's reliability; however, the Board held that production "should be subject to a protective order . . . requiring that the memory card be given to a designated qualified expert in forensic analysis of electronic records, not in the direct employ of any party, for retrieval and review of the audio file at issue, and any associated metadata, in order to protect the confidentiality and integrity of the data."

Sealing Documents. If the protective order forbids disclosure to the general public or other nonparties or participants in the proceeding of an entire document that has been admitted into the record, it is essential that the judge place the documents under seal. The failure to do so may undermine subsequent attempts to enforce the order. See ***United Parcel Service,*** above. It is also advisable to include the protective order in any recommended order issued by the judge. See ***National Football League***, above, 309 NLRB at 79; and ***Carthage Heating & Sheet Metal***, 273 NLRB 120, 123 (1984).

For an example of an order sealing documents deemed confidential by other federal agencies, see ***Security Walls,*** 28–CA–22701, JD–26–10 (April 21, 2010) (2010 WL 2180785, 2010 NLRB LEXIS 105), adopted in the absence of exceptions June 3, 2010. In that case, the General Counsel introduced a document from the respondent security company's personnel manual at the U.S. Dept. of Energy (DOE) nuclear waste facility in New Mexico. The judge ordered that the document "be placed in a sealed file to be opened only by Agency personnel as necessary to evaluate and decide the issues in this particular case," and that it "not . . . be furnished or disclosed to outside non-governmental sources or the public pursuant to a request under the Freedom of Information Act (FOIA) or otherwise . . . without prior DOE approval." See also the Dept. of Justice's guidance on disclosing documents originating from other agencies, DOJ FOIA Guide (2009 ed.), Procedural Requirements, Referrals and Consultations (http://www.justice.gov/oip/foia_guide09.htm).

Violations of order. In ***United Parcel Service***, above, the Board noted that violation of a protective order may be enforced by processing a charge of misconduct under Section 102.177 of the Board's Rules. See **§6–600** et seq., above.

§ 8–420 Identity of Union Supporters (Authorization Cards)

A respondent may not obtain copies of union authorization cards by subpoena. The identity of card signers is deemed confidential and disclosure would have a chilling effect on union activity. See ***National Telephone Directory Corp.***, 319 NLRB 420, 421–422 (1995) (judge erred in ordering production of the names of employees who signed authorization cards and attended union meetings, as the confidentiality interests of such employees outweighed respondent's need to obtain their identity for cross-examination and credibility impeachment purposes and could only be waived by the employees themselves). See also ***Chino Valley Medical Center***, 362 NLRB No. 32 n. 1 (2015) (employer violated 8(a)(1) by issuing subpoenas duces tecum to employees encompassing communications between employees and the union,

union authorization and membership cards, and all documents relating to the distribution and/or solicitation of union authorization cards); and ***Wright Electric, Inc***., 327 NLRB No. 196 (1999) (employer violated 8(a)(1) by subpoenaing employee authorization cards in a state court lawsuit), enfd. 200 F.3d. 1162, 1167 (8th Cir. 2000). The Board has applied the same rule to forms indicating that employees wanted continued representation by the union. See ***Sheraton Anchorage***, 19-CA-32148 et al., unpub. Board order issued January 21, 2011 (granting union's special appeal and quashing a respondent subpoena that sought all such forms, notwithstanding that the General Counsel had introduced a few of them for impeachment purposes).

See also ***Veritas Health Services, Inc. v. NLRB***, 671 F.3d 1267, 1274 (D.C. Cir. 2012) (citing *National Telephone Directory* in holding that the ALJ did not abuse her discretion in redacting some documents and limiting certain testimony to protect the names of registered nurses who had contacted the union). But cf. ***Ozark Automotive Distributors, Inc. v. NLRB***, 779 F.3d 576 (D.C. Cir. 2015), denying enf. and remanding 357 NLRB No. 88 (Sept. 8, 2011), where the court held that the hearing officer in an election-objections case erred in quashing the employer's subpoenas to the union and a prounion employee (Castillo) who the employer contended was a union agent and had made objectionable threatening phone calls to other employees before the election. The subpoenas sought records of the telephone calls between Castillo and the union, and between Castillo and other employees. The court held that the subpoena requests for the date and time of each call were relevant to the employer's allegations and to Castillo's credibility as a union witness, and did not infringe on any employee confidentiality interests under *National Telephone*. The court further held that, to the extent the subpoenas sought additional information that might infringe on employee confidentiality interests, the hearing officer should have conducted an in camera review of the documents to determine if those interests outweighed the employer's interests or to narrow the scope of the subpoenas rather than revoking them in their entirety.

§ 8–425 Collective-Bargaining Information

The General Counsel (and indirectly the charging party union) may not, by using a subpoena, obtain the same information that the respondent employer allegedly withheld from the union in violation of Section 8(a)(5) of the Act. This would amount to using the subpoena process "as a substitute for the Board order sought by the complaint." ***Electrical Energy Services***, 288 NLRB 925, 931 (1988).

Respondent subpoenas that broadly request union records, including communications between the union and its members, have been revoked in order to protect the bargaining process. See ***Berbiglia, Inc.***, 233 NLRB 1476, 1495 (1977) ("If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure"); and ***Champ Corp.***, 291 NLRB 803, 817 (1988) (citing *Berbiglia*, as well as the subpoena's overbreadth and facial deficiency, as grounds for revoking respondent's subpoena seeking all union notes or other records describing or recording collective-bargaining sessions), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991). See also ***Cook Paint and Varnish Co.***, 258 NLRB 1230 (1981) (employer violated 8(a)(1) by demanding, prior to an arbitration hearing over an employee's discharge, that the union steward disclose the substance of his conversations with the discharged employee and to produce his notes about the matter, as the union steward had the conversations with the employee and took the notes in his representational capacity, and compelling disclosure would "manifestly restrain[] employees in their willingness to candidly discuss matters with their chosen, statutory representatives").

In ***Jung Sun Laundry Group***, 29–CA–29946, unpub. order issued September 3, 2010, the Board applied this reasoning in revoking an employer's subpoena that sought "all documents regarding the union's collective-bargaining agreements and most favored nations clauses," and minutes of meetings between the union and other employers regarding collective-bargaining negotiations. Citing both *Berbiglia* and *Detroit Edison v. NLRB*, 440 U.S. 301, 314-315 (1979), the Board found that the union had a "considerable" interest in maintaining the confidentiality of such documents, and that the employer had failed to establish that its interest outweighed the union's interest. Accordingly, the Board granted the union's special appeal and reversed the judge's order, which had required the union to produce the documents subject to recording them on a privilege log, redaction, and in camera inspection.

This rationale would seem also to apply to subpoenas seeking *employer* notes relating to bargaining strategy. See ***Patrick Cudahy, Inc.***, 288 NLRB 968, 969–971 (1988) (quoting *Berbiglia*, above, and applying attorney client privilege broadly where General Counsel's subpoenas sought collective-bargaining information from the respondent employer), discussed in **§ 8–435**, below. But see ***NLRB v. SEIU Local 521***, 2008 WL 152176 (N.D. Cal. Jan. 16, 2008) (court enforced General Counsel subpoena notwithstanding that the subpoenaed documents might incidentally contain information about the respondents' bargaining strategies, distinguishing *Berbiglia* and *Champ* on the ground that they involved employer subpoenas, the respondents had failed to explain or demonstrate how negotiations would be compromised if such information were disclosed to the Board, and any confidentiality concerns could be addressed by a protective order); and ***NLRB v. Jackson Hospital Corp***., 257 F.R.D. 302 (D.D.C. 2009) (citing *SEIU Local 521*, special master in contempt proceeding rejected respondent employer's assertion that it was privileged to withhold documents revealing bargaining strategy from the General Counsel, and ordered the respondent to produce the subpoenaed documents to the General Counsel subject to a protective order prohibiting disclosure of the bargaining-strategy information to the union).

§ 8–430 Attorney-Client Privilege

"The Board recognizes the fundamental principle that communications made in confidence between an attorney and his or her client for the purpose of seeking and obtaining legal advice are privileged." ***Smithfield Packing Co***., 344 NLRB 1, 13 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006). The Board also recognizes that the privilege protects both communications from the attorney to the client and communications from the client to the attorney. ***Patrick Cudahy***, 288 NLRB 968, 971 (1988), quoting ***Upjohn Corp. v. U.S.*****,** 449 U.S. 383, 390 (1981) ("the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice").

A concise summary of the privilege is set forth in ***U.S. v. United Shoe Machinery Corp.***, 89 F. Supp. 357, 358–359 (D. Mass. 1950), which the Board cited with approval in *Patrick Cudahy*:

> The privilege applies only if (1) the holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his or her client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Regarding communications from the attorney to the client, courts are divided on whether such communications are protected (1) only if they would reveal a confidential communication from the client; (2) only if they are based in significant part on a confidential communication from the client; or (3) irrespective of their relationship to any communications from the client. See Graham, **24 Fed. Prac. & Proc. Evid. § 5491** (1st ed., database updated April 2015) (collecting cases). It appears that the Board has not directly addressed this issue.

The privilege applies only to testimony or evidence that reveals the substance of communications to or from an attorney or his/her subordinate. Thus, in ***Smithfield Packing,*** above, the Board held that the privilege did not apply to a supervisor's testimony about what her managers instructed her to do during a union campaign—notwithstanding the employer's argument that the instructions may have resulted from privileged communications between the manager and the employer's attorney—because the supervisor's "testimony pertained only to her instructions from her management superiors, not to any communications to or from counsel.".344 NLRB at 12 n. 57. Cf. ***Swartwood v. County of San Diego***, 2013 WL 6670545 at *9, 2013 U.S. Dist. LEXIS 177774 at *24 (S.D. Cal. Dec. 18, 2013) (text of email circulated among defendant county's employees was properly redacted pursuant to privilege because it mentioned the county's attorney and repeated her legal advice to the county); and ***Santrade, Ltd. V. General Electric Co***., 150 F.R.D. 539, 545 (E.D. N.C. 1993) ("a document need not be authored or addressed to an attorney in order to be properly withheld . . .documents subject to the privilege may be transmitted between non-attorneys (especially individuals involved in corporate decision-making) so that the corporation may be properly informed of legal advice and act appropriately").

The privilege applies only to communications and not to facts. A witness may not refuse to disclose facts within his own knowledge simply because he incorporates those facts into a communication with his attorney. ***Sunland Construction Co.***, 311 NLRB 685, 699–700 (1993), quoting from ***Upjohn*****,** above, 449 U.S. at 396–397. Nor is factual information privileged merely because it was uncovered by the company while conducting an analysis at the direction of its attorney. See ***In re Six Grand Jury Witnesses***, 979 F.2d 939, 944 (2d Cir. 1992), cert. denied 509 U.S. 905 (1993). See also ***Patrick Cudahy***, above, 288 NLRB at 971 n. 13 ("It is *communication* between attorney and client related to the giving of legal advice that is privileged—not simply documents that pass between them. Thus, nonprivileged documents—e.g., ordinary corporate records such as payroll or personnel records—cannot be swept within the privilege simply by being transmitted from client to attorney or vice versa."); and ***B.P. Exploration, Inc.***, 337 NLRB 887, 889 (2002) (Board held that the attorney client privilege applied to safety reports because attorney directed that the reports be created to provide legal advice regarding compliance with safety regulations and handling of citations; however, Board emphasized that it was the reports, not the underlying information, that the union sought). Cf. ***Borgess Medical Center***, 342 NLRB 1105, 1106 n. 5 (2004) (privilege did not apply to incident reports sought by union in connection with arbitration proceeding because they were not prepared by or with participation of attorney).

One recurring type of privilege issue concerns the proper characterization of communications involving in-house counsel in circumstances where it is shown that the official performs both legal and regular business functions. For court cases addressing the issue, see, e.g., ***In re Sealed Case***, 737 F.2d 94 (D.C. Cir. 1984) (company could shelter former vice president-general counsel's advice "only upon a clear showing that he gave it in a professional legal capacity"); ***In re Google, Inc***., 462 Fed. Appx. 975, 978 (9th Cir. 2012) (same "clear showing" must be made even if the in-house attorney did not have distinct non-legal responsibilities); and ***Boca Investerings Partnership v. U.S.,*** 31 F.Supp.2d 9, 11–12 (D.D.C. 1998) (citing additional cases). Where the communication to or from the in-house attorney may have both a legal and a business purpose, see ***In re Kellog Brown & Root, Inc***., 756 F.3d 754,

760 (D.C. Cir. 2014), cert. denied 135 S.Ct. 1163 (2015) (communication is protected if obtaining or providing legal advice was "a primary purpose of the communication, meaning one of the significant purposes of the communication").

For an in-depth analysis of attorney-client and work-product issues, including where attorneys wear two hats, see ***Epstein, The Attorney-Client Privilege and the Work-Product Doctrine*** (5th ed. 2007).

§ 8–435 The Privilege and Collective-Bargaining and Business Records

Where collective-bargaining information is sought, the Board applies the attorney-client privilege broadly in evaluating management communications with counsel. See ***Patrick Cudahy***, above, 288 NLRB at 969–971, and **§ 8–425**, above. See also ***Taylor Lumber & Treating, Inc.***, 326 NLRB 1298 n. 2 (1998) (privilege applied to confidential communications between respondent's chief negotiator and members of respondent's management control group because he was also engaged by respondent to provide legal services in connection with other employment relations matters)**.** However, the Board has emphasized that the analysis may be different in other situations. 288 NLRB at 971 n. 12. For example, a narrower or stricter analysis typically applied by the courts may be warranted in 8(a)(3) cases where the communication relates primarily to an employer's antiunion campaign strategy rather than legal advice. See generally ***Matter of Feldberg***, 862 F.2d 622, 626 -628 (7th Cir. 1988) ("A business that gets marketing advice from a lawyer does not acquire a privilege in the bargain."); and ***In re Lindsay***, 158 F.3d 1263, 1270 (D.C. Cir. 1998), cert. denied 525 U.S. 996 (1998) (a lawyer's "advice on political, strategic, or policy issues, valuable as it may have been, would not be shielded from disclosure by the attorney-client privilege.")

As discussed above, ordinary corporate records such as payroll or personnel records, cannot be swept within the privilege simply by being transmitted from the client to the attorney. Nevertheless, when legal advice relates to collective bargaining, the Board will not readily and broadly compel disclosure of confidential communications between attorney and client simply because the communications are intermixed with business and economic considerations. The notes of exchanges in a bargaining session with other parties are not protected, however, unless they are intermingled with privileged communications. See ****CNN America, Inc.***, above, 352 NLRB at 449; and ***Patrick Cudahy***, above, 288 NLRB at 971 n. 13.

§ 8–440 Waiver of Attorney-Client Privilege

The attorney-client privilege may be waived, either deliberately or by inadvertence or failing to safeguard the material. Thus, in ***Farm Fresh, Inc.***, 301 NLRB 907, 917 (1991), the Board held that the privilege did not apply when a document, arguably subject to the privilege, was stolen and given to the union, as the respondent was required to safeguard the document.

FRE 502 places certain limitations on waiver with respect to both intentional and unintentional disclosures in Federal and State proceedings. For example, FRE 502(b) provides that an "inadvertent" disclosure in a Federal proceeding or to a Federal officer or agency will not operate as a waiver of the privilege if "reasonable steps" were taken to prevent disclosure and to rectify the error. See **§ 16-502**, below. As indicated in the Advisory Committee Notes, a number of factors may be considered in applying this rule, including the number of documents to be reviewed and the time constraints for production. For a case applying FRE 502(b), see ***Church Square Supermarket***, 356 NLRB No. 170, slip op. at 13, n. 40 (2011) (rejecting employer's contention that a document it had previously disclosed to the General Counsel in response to a

subpoena was not admissible under FRE 502(b), as the disclosure was not "inadvertent" and/or the employer had failed to take reasonable steps to prevent disclosure).

The presence of a third person who is not acting as an agent of either the client or the client's attorney waives the privilege. ***U.S. v. Evans***, 113 F.3d 1457, 1462–1467 (7th Cir. 1997) (finding waiver, notwithstanding that the third person was an attorney, as the credited testimony established that he was present only as a personal friend and witness).

The privilege may also be waived by providing the documents in other proceedings. See ***Wal-Mart Stores, Inc.***, 348 NLRB 833, 834 (2006). But see ***Taylor Lumber & Treating, Inc.***, above, 326 NLRB at 1300 (no waiver where attorney gave affidavit during the regional office's investigation, and the affidavit did not contain facts about privileged communications). However, as indicated above, FRE 502 places certain limitations on waiver, which should be considered in evaluating whether the disclosure in the other Federal or State proceeding operated as a waiver.

Once waived, the attorney-client privilege is lost in all forums for proceedings running concurrent with or after the waiver occurs. See ***Wal-Mart Stores, Inc.***, above, 348 NLRB at 834. In that case, the Board held that the respondent's production of subpoenaed documents in a state court proceeding constituted a waiver in the Board proceeding, even though the waiver came after the hearing closed and while the case was pending before the Board on the General Counsel's exceptions to the ALJ's decision. The Board therefore remanded the case to the ALJ to reopen the record to receive and evaluate the evidence.

§ 8–445 Crime/Fraud Exception to Attorney-Client Privilege

Attorney-client communications in furtherance of crimes or frauds are not protected by the attorney-client privilege. A sufficient showing of the applicability of the crime/fraud exception is made by evidence that, if believed, would prima facie establish the elements of an ongoing or future crime or fraud. See, e.g., ***Smithfield Packing Co.***, 344 NLRB 1, 14 n. 60 (2004) (testimony with respect to communications between respondent's former manager and respondent's attorney regarding the preparation of manager's affidavit, specifically as to whether manager gave a false affidavit to the respondent's attorney and whether the attorney knew it was false, came within crime fraud exception), enfd. 447 F.3d 821 (D.C. Cir. 2006).

However, the Board has declined to apply the crime/fraud exception to attorney-client communications in furtherance of unfair labor practices. ***Patrick Cudahy, Inc.***, above, 288 NLRB at 972–974.

§ 8–450 Duration of Attorney-Client Privilege

In ***Swidler & Berlin v. U.S.***, 524 U.S. 399 (1998), the Supreme Court held that the attorney-client privilege survives the death of a client. "The weight of authority, however, holds that a dissolved or defunct corporation retains no privilege." ***SEC v., Carrillo Huettel LLP***, 2015 WL 1610282, 2015 U.S. Dist. LEXIS 45988 (S.D. NY. April 8, 2015) (citing cases).

§ 8–455 Work Product Doctrine

The work-product doctrine protects documents prepared in anticipation of litigation by or for a party representative, regardless of whether the representative is an attorney. It was first recognized in ***Hickman v. Taylor***, 329 U.S. 495, 511 (1947), and is now codified in FRCP 26(b)(3).

A document is protected work product if it was prepared or obtained because of the prospect of litigation, rather than in the ordinary course of business, i.e. it would not have been prepared but for the "fairly foreseeable" prospect of litigation. See cases cited in ***Central Telephone Company of Texas***, 343 NLRB 987, 988 (2004) (finding that the privilege applied, and that the union was not entitled to copies of notes taken by respondent's human resources specialist while investigating alleged misconduct that later became the subject of a grievance, as the investigation was directed by in-house counsel, respondent did not ordinarily conduct such an extensive investigation, and its fear of litigation was "objectively reasonable" even though no litigation had been initiated and the employees had not yet been disciplined when the notes were prepared). Compare ****Hawaii Tribune Herald***, 359 NLRB No. 39 (2012) (finding that privilege did not apply to a statement given by an employee to a manager as part of the employer's pre-disciplinary investigation of a union steward's alleged misconduct, even though the manager met with the employee at the suggestion of the employer's attorneys and, at some time after the meeting, handwrote on the statement that it was "prepared at the advice of counsel in preparation for arbitration").

FRCP 26(b)(3)(A)(ii) provides for an exception upon a party's showing that it has "a substantial need for the materials" and "cannot, without undue hardship obtain their substantial equivalent by other means." For cases applying this exception, see ***Central Telephone Company of Texas***, above (union failed to meet its burden as the respondent had provided the union with witness statements and the union was able to conduct its own witness interviews); and ***Marian Manor for the Aged and Infirm, Inc.***, 333 NLRB 1084 (2001) (employer seeking copy of responses to union's survey of employer's nursing staff regarding supervisory indicia failed to show that it was unable to obtain the equivalent information by other means, including conducting its own survey of employees). See also ***Kaiser Aluminum & Chemical Corp.***, 339 NLRB 829 (2003) (respondent failed to show substantial need for copy of position statement submitted by charging party to General Counsel in support of its charge during the investigation).

However, even if the exception is found to apply and documents within the privilege are ordered disclosed, Rule 26(b)(3)(B) requires protection against disclosure of the "mental impressions, conclusion, opinions, or legal theories of a parties' attorney or other representative concerning the litigation." ***Central Telephone Company of Texas,*** above, 343 NLRB at 998.

§ 8–460 Waiver of Work Product Privilege

For a Board case addressing waiver of the work product privilege, see ***Ralphs Grocery Co.***, 352 NLRB 128, 129 (2008), reaffd. 355 NLRB 1279 (2010) (finding that a limited waiver respondent executed in a federal criminal proceeding did not waive the privilege as to certain audit information as there was no evidence that the audit information was requested or inquired into by the U.S. Attorney).

With respect to position statements, compare ***Kaiser Aluminum***, above (charging party does not waive privilege by giving position statement to General Counsel); with ***Evergreen America Corp.***, 348 NLRB 178, 187 (2006) (contrary rule applies where respondent submits position statement to General Counsel). See also **§ 16–801.3,** Admission or Statement by Opposing Party**.**

As discussed in **Sec. 8–440** above, FRE 502 sets forth certain limitations on waiver of the attorney-client and work-product privileges in connection with intentional and inadvertent disclosures in Federal and State proceedings. For a Board case applying FRE 502(b) (inadvertent disclosures), see ***Church Square Supermarket***, 356 NLRB No. 170, slip op. at 13,

n. 40 (2011) (rejecting employer's contention that a document it had previously disclosed to the General Counsel in response to a subpoena was inadmissible under FRE 502).

§ 8–465 Reporter's Privilege

In ***CNN America, Inc.***, 352 NLRB 675, 676–677 (2008), supplemental proceedings 353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014), the Board did not specifically decide whether a reporter's privilege applies in Board proceedings. However, assuming for sake of argument that it does, the Board endorsed a balancing test to determine whether the subpoenaed information must be provided. Relevant factors to consider are: whether or not the information is obtainable from alternative sources; whether it is crucial to establish the claim; and whether the need for the information outweighs the interest in protecting the substance of the reporter's newsgathering. Applying these factors, the Board found that the balance tipped in favor of disclosure to the General Counsel, noting the absence of any claim by CNN that the information sought was obtained from a confidential source or would likely lead to discovery of confidential information or sources.

§ 8–470 Testimony by Board Agents and Privileged Files

Section 102.118(a) of the Board's Rules provides that, except as provided under the Board's Freedom of Information Act (FOIA) regulations (Sec. 102.117(a)–(c)), no person employed by the Agency or acting on its behalf shall produce or present files, reports, or records under the control of the Board or General Counsel in any legal proceeding, whether in response to a subpoena or otherwise, without the written consent of the Board or its Chairman (if the documents are in Washington, D.C. and in the Board's control), or the written consent of the General Counsel (if the documents are in a Regional Office or in Washington, D.C. under the General Counsel's control).

The same section also requires similar consent to obtain testimony by an Agency employee or agent. See also ***Laidlaw Transit, Inc.***, 327 NLRB 315, 316 (1998) (to avoid the appearance of partiality, the Board has a strong and longstanding policy against Board agents and employees appearing as witnesses in a legal proceeding); and ***Sunol Valley Golf Co.***, 305 NLRB 493, 495 (1991) (finding that balance weighed against requiring Board agent to testify, and therefore quashing respondent's subpoenas), supplemented by 310 NLRB 357, 365, 368 nn. 7 and 8 (1993), enfd. 48 F.3d 444 (9th Cir. 1995). See also **§ 16–611.5**, Failure to Call Witness: Adverse Inference, below.

§ 8–475 Mediator Not Subject to Subpoena

Board policy does not permit a party to compel a mediator to testify in Board proceedings. ***Success Village Apartments, Inc.***, 347 NLRB 1065 (2006). Thus, a subpoena requiring the testimony of a mediator to testify must be quashed.

§ 8–480 State Confidentiality Rules Not Controlling

Evidence that is otherwise admissible is not rendered inadmissible in Board proceedings because it is privileged under State law. See ***R. Sabee Co.***, 351 NLRB 1350, 1350 n. 3 (2007) (judge properly accepted into evidence statements made during state court injunction proceeding and related court-ordered mediation of state law claims, despite claim of privilege under Wisconsin law); and ***North Carolina License Plate Agency # 18***, 346 NLRB 293, 294 n. 5 (2006) (evidence from a state unemployment commission, which was privileged under state law,

was nevertheless admissible in Board proceeding), enfd. 243 Fed. Appx. 771 (4th Cir. 2007). See also ***Diva Limousine***, 22–CA–091561, unpub. Board order issued Dec. 3, 2013 (2013 WL 6328060, 2013 NLRB LEXIS 739) ("objections [to subpoenas] made solely on the basis of a state code of civil procedure . . . are not cognizable in a Board proceeding"); and ***Miller v. St. John's Health System***, 2011 WL 3890315, 2011 U.S. Dist. LEXIS 83766 (S.D. Ind. July 29, 2011) (denying motion to quash employer's subpoena in ADEA wrongful termination action seeking documents from the state agency relating to the plaintiff employee's application for unemployment benefits in order to determine what steps she had taken to mitigate damages by seeking employment). See also **§16–501** (FRE 501), below.

§ 8–500 Jencks Statements Not Producible by Subpoena

A Jencks "statement" or affidavit given to the General Counsel by a witness is not subject to production by subpoena in advance of trial. ***H. B. Zachry Co.***, 310 NLRB 1037, 1037–1038 (1993). Nor is such statement or affidavit producible under the Freedom of Information Act (FOIA). See ***Stride Rite Corp.***, 228 NLRB 224, 226 n. 3 (1977).

Such statements or affidavits are producible only after the witness has testified and for use on cross-examination of the witness. See Sec. 102.118(b)(c) and (d) of the Board's Rules.

For the origin of the rule, see ***Jencks v. U.S.***, 353 U.S. 657, 662 (1957). See also **§16–613.1,** Jencks Statements, below, for a more detailed discussion of such statements.

§ 8–510 Tape/Video Recordings

Contemporaneous remarks captured on an audio or video tape are not a Jencks "statement" subject to Section 102.118(d) of the Board's Rules because they are "not a description of a past event" but part of the substantive event itself. See ***Leisure Knoll Assn.***, 327 NLRB 470 n. 1 (1999) (tape recordings and transcripts of conversations between a supervisor and employee); and ***Dickens, Inc***., 355 NLRB 255 n. 7 (2010) (tape recordings of incidents occurring in employer's facility), citing with approval ***Delta Mechanical, Inc.***, 323 NLRB 76, 77 (1997).

However, such recordings may be subject to production pursuant to a subpoena. If the recording is in the sole possession of the General Counsel, a written request must be made pursuant to Section 102.118(a). See ***Gallup, Inc.***, 349 NLRB 1213, 1218 (2007). In that case, the General Counsel refused to turn the tapes over to the respondent pursuant to either the respondent's subpoena or the Jenks rule (as the recordings were not "statements" under that rule). The judge ruled that production was required pursuant to the subpoena, and therefore struck the witness's testimony as a sanction for the General Counsel's noncompliance. (See **§8–620**, Failure to Produce Documents, below.) On special appeal, however, the Board reversed, and held that the respondent must first request the General Counsel's consent to produce under Section 102.118(a). (See **§8–470**, Testimony by Board Agents and Privileged Files, above.)

For a discussion of the admissibility of tape recordings, see **§16–402.8,** below.

§ 8–600 Refusal to Honor Subpoena

§ 8–610 Failure of Witness to Appear

The failure of a witness to appear and testify in compliance with a subpoena may warrant evidentiary sanctions, including prohibiting the noncomplying party from calling the same witnesses and drawing adverse inferences against that party. ***Rogan Bros. Sanitation, Inc***., 362 NLRB No. 61, slip op. at 3 n. 9 (2015), and cases cited there. See also ***Carpenters Local 405***, 328 NLRB 788 n. 2 (1999).

§ 8–620 Failure to Produce Documents

A party has an obligation to begin a good faith effort to gather responsive documents upon service of a subpoena, and a party that simply ignores a subpoena pending a ruling on a petition to revoke does so at its peril. ***McAllister Towing & Transportation***, 341 NLRB 394, 396–397 (2004) (upholding judge's imposition of evidentiary sanctions against the respondent for failing to substantially comply with the subpoenas upon issuance of the judge's order partially denying its petition to revoke on the first day of hearing), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). See also ***San Luis Trucking***, 352 NLRB 211, 212 (2008), reaffd. 356 NLRB No. 36 (2010) (imposing evidentiary sanctions where respondent merely made 2471 boxes of documents "available" to the General Counsel the afternoon before the hearing, without making any effort to separate requested materials from unrequested materials, and did not produce the requested documents in the form required by FRCP 34 and 45 at the hearing, despite the judge's denial of respondent's petition to revoke at the outset thereof), enfd. 479 Fed. Appx. 743 (9th Cir. 2012).

Evidentiary Sanctions. As indicated by ***McAllister Towing*** and ***San Luis Trucking***, the Board has repeatedly affirmed the authority of ALJs to impose evidentiary sanctions against a noncomplying party where the General Counsel has elected not to initiate court enforcement proceedings (see **§8–700**, below). And the courts have generally agreed based on the Board's inherent interest in maintaining the integrity of the hearing process. See ***Perdue Farms Inc. v. NLRB,*** 144 F.3d 830, 834 (D.C. Cir. 1998) ("Once a party's challenge to a subpoena has been rejected . . .the party cannot 'pick and choose which parts. . .it will obey and which parts it can ignore.' A party refusing to comply with a subpoena risks application of the preclusion rule." [citation omitted]). But see, to the contrary, ***NLRB v. Int'l Medication Systems***, 640 F.2d 1110 (9th Cir. 1981) (reversing and remanding on ground that only the federal district courts have authority to issue sanctions for subpoena noncompliance).

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Several sanctions are available where a party refuses or fails to timely or properly comply with a subpoena. The appropriate option, if any, is within the discretion of the judge, who may choose any or all of them, depending on the circumstances. ***McAllister Towing & Transportation***, above. The judge may:

1) Draw an adverse inference. See, e.g., ***Metro-West Ambulance Service***, 360 NLRB No. 124, slip op. at 2–3 and n. 13 (2014) (where respondent in Sec. 8(a)(3) discrimination case failed to produce accident reports over the previous 2 years in response to General Counsel's subpoena, an adverse inference was proper that respondent failed to show that it treated the discriminatee the same as other employees who engaged in comparable misconduct).

Generally, it would be improper to draw an adverse inference if a satisfactory explanation is provided for the failure to produce the documents. See ***Hansen Bros. Enterprises***, 313 NLRB 599, 608 (1993) (discriminatee credibly testified that old tax returns did not exist); ***Champ Corp.***, 291 NLRB 803 (1988) (union presented credible testimony concerning its good-faith but unsuccessful search for subpoenaed notes, and other evidence supported reasonable inference that notes could have been inadvertently destroyed or misplaced), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

An adverse inference is also inappropriate based on a party's mere invocation of the attorney client privilege. See ***Nabisco, Inc. v. PF Brands, Inc***., 191 F.3d 208, 225–226 (2d Cir. 1999), abrogated on other grounds 537 U.S. 418 (2003); and ***Parker v. Prudential Insurance Co***., 900 F.2d 772, 775 (4th Cir. 1990).

The judge may, in his or her discretion, also decline to make an adverse inference under the particular circumstances presented. See ***CPS Chemical Co.***, 324 NLRB 1018, 1019 (1997) (no prejudice suffered by nonproduction), enfd. 160 F.3d 150 (3d Cir. 1998). But see ***Metro-West Ambulance Service***, above (drawing an adverse inference even though the judge found it unnecessary to do so); and ***Zapex Corp***., 235 NLRB 1239–1240 (1978) (holding that judge improperly failed to draw an adverse inference that respondent had not satisfied its burden of proving its defense where respondent failed to produce subpoenaed records relevant to the issue), enfd.621 F.2d 328 (9th Cir. 1980).

2) Bar a noncomplying party from presenting evidence about the subject matter sought by the subpoena. ***M.D. Miller Trucking***, 361 NLRB No. 141, slip op. at 1 n. 1 and JD. at 5 (2014); ***Perdue Farms***, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998); and ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995). The judge may also preclude the noncomplying party from cross-examining witnesses about the same matter. ***NLRB v. C. H. Sprague & Son***, 428 F.2d 938, 942 (1st Cir. 1970). See also ***McAllister Towing & Transportation***, above, 341 NLRB at 396 (noting that, although the judge did not impose this particular sanction, judges have the authority to do so).

3) Permit the introduction of secondary evidence by the party who has been disadvantaged. See ***Bannon Mills***, 146 NLRB 611, 614 n. 4, 633–634 (1964); and ***American Art Industries***, 166 NLRB 943, 951–953 (1967), affd. in pertinent part 415 F.2d 1223, 1229–1230 (5th Cir. 1969) (permitting General Counsel to present secondary evidence, including employee testimony, regarding the number of employees in the unit in lieu of employee payroll and other records that respondent failed to produce). See also ***Roofers Local 30 (Associated Builders and Contractors, Inc.),*** 227 NLRB 1444, 1449 (1977) (permitting General Counsel to introduce secondary evidence, including hearsay testimony, regarding the identity of those who were present during and participated in the alleged incidents, in lieu of subpoenaed evidence not produced by respondent).

4) Strike pleadings or the testimony of witnesses that related to the same subject matter as the undisclosed documents. See ***Equipment Trucking Co***., 336 NLRB 277, 277 n. 1 (2001) (striking respondent's answer with respect to certain allegations); and ***Lenscraft Optical Corp***., 128 NLRB 807, 817 (1960) (striking testimony of witnesses who failed to reappear for cross-examination after the documents were belatedly disclosed).

One or more of the foregoing evidentiary sanctions are likewise available where a charging party contumaciously refuses to fully comply with a respondent subpoena. See ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010 (2005). It is not clear, however, whether or to what extent the ALJ may or should apply the sanctions against the General Counsel as well in such circumstances. For an example where the ALJ did so, see *__Station Casinos__*, 358 NLRB No.153, JD. at 13–17 (2012) (striking testimony of four witnesses called by the General Counsel). Note, however, that the Board apparently did not pass on the judge's sanctions ruling in that case, as the charging party did not file exceptions and the General Counsel filed only limited exceptions.

Dismissal of Complaint. Noncompliance with a subpoena normally does not by itself warrant the dismissal of a complaint. In ***Teamsters Local 917 (Peerless Importers)***, above, the Board reversed a judge who had dismissed the General Counsel's complaint because the charging party failed to produce an unredacted copy of a document subpoenaed by the respondent relevant to its defense. Citing ***McAllister Towing***, above, the Board noted that there were other less drastic sanctions available to the judge and observed that dismissing a complaint because of subpoena noncompliance would have been unprecedented. 345 NLRB at 1011.

§ 8–630 Interference with Subpoena Compliance

It is a violation of the Act to state or imply that compliance with a subpoena is optional. ***Bobs Motors, Inc.***, 241 NLRB 1236, 1236 (1979). Attempting to dissuade an employee from speaking to a Board agent or appearing at a Board trial also violates the Act. ***Alterman Transport Lines, Inc.***, 127 NLRB 803, 804 (1960); ***Certain-Teed Products Corp.***, 147 NLRB 1517, 1520 (1964); and ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46, 54 (1998). See also ***U.S. Precision Lens***, 288 NLRB 505 n. 3 (1988) (treating a witness's attendance at a Board trial as absences counting against her in the employer's "excellent attendance" program violates Section 8(a)(4)). A judge who learns that witnesses are being subjected to retaliation for testifying should take steps to prevent retaliation by at least firmly warning against it.

With respect to destroyed evidence, see ***Akiona v. U.S.***, 938 F.2d 158, 160–161 (9th Cir. 1991), cert. denied 503 U.S. 962 (1992) ("Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case"). But see ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614, 636 (2007) (no inference of unlawful intent drawn from supervisors' destruction of their worksheets used during selection process where respondent had no legal duty to retain the records and there was no business or personal reason for the supervisors to keep them).

In certain circumstances, the judge may impose litigation costs against a party who violates a judge's instructions regarding subpoenas. In ***675 West End Owners Corp.,*** 345 NLRB 324, 326, 327 n. 11 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008), the Board approved such costs against a respondent who disobeyed the judge's instructions that a revoked subpoena may not be served again and that issuance of a subpoena after the close of the hearing is "an abuse of Board process." The Board agreed with the judge's recommendation that a hearing be held to determine the litigation costs expended by the charging party and the General Counsel because of the respondent's conduct, citing applicable authorities under the "bad faith" exception to the American Rule against awarding litigation costs.

§ 8–700 Enforcement of Subpoenas on Behalf of Private Party

Section 102.31(d) of the Board's Rules provides that upon failure to comply with a Board subpoena issued on request of a private party, the General Counsel "shall," in the name of the Board, institute a proceeding in district court, "unless enforcement of the subpoena would be inconsistent with the law and the policies of the National Labor Relations Act." See also Sec. 11(2) of the Act (providing for federal district court jurisdiction "upon application by the Board" in the event of "contumacy or refusal to obey a subpoena issued to any person").

The Board, however, has made clear that the General Counsel is not required to institute enforcement proceedings sua sponte, but only on request of the party on whose behalf the subpoena was issued. See ***Best Western City View Motor Inn***, 325 NLRB 1186 (1998) (applying same rule to subpoena enforcement contempt proceedings). Nor is the General

Counsel required to initiate enforcement proceedings where the subpoena is incapable of being enforced. See ***Champ Corp.***, 291 NLRB 803 (1988) (subpoena was incapable of being enforced as documents were unavailable), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

If asked to rule on whether the subpoenaed party has contumaciously refused to comply with the subpoena within the meaning of Section 11(2) of the Act and Section 102.31(d) of the Rules, the ALJ should normally do so. See the panel majority's unpublished order dated March 3, 2011, in ***Station Casinos, LLC***, Cases 28-CA-22918 et al. (2011 WL 828422, 2011 NLRB LEXIS 93) (granting the respondent's request for special permission to appeal the Regional Director's refusal to institute subpoena enforcement proceedings, and remanding the matter to the judge with instructions to address in the first instance, upon respondent's request, whether the charging party had contumaciously refused to comply with those portions of the subpoena not previously quashed by the judge).

Where enforcement proceedings are initiated, an adjournment of the trial may be necessary until the subpoena issue is resolved. Often the judge may avoid the delay attendant to subpoena enforcement by convincing the parties to resolve the issue by agreement.

CHAPTER 9. SETTLEMENTS

§ 9–100 In General

"[T]he Board from the very beginning has encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." ***Wallace Corp. v. NLRB***, 323 U.S. 248, 253–254 (1944). As stated in the NLRB Casehandling Manual (Part One), Settlements, Section 10124.1:

> It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution of issues as an alternative to litigation. Moreover, the Administrative Procedure Act (Sec. 5(b)) requires that the Agency consider "offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit." (5 U.S.C. § 554(c)(1)). Since voluntary remedial action is a high priority, diligent settlement efforts should be exerted in all meritorious cases. Settlement of a meritorious case is the most effective means to: 1) improve relationships between the parties; 2) effectuate the purposes of the Act; and 3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses.

§ 9–200 Promoting Settlement

§ 9–220 At Pretrial Conference

Normally the trial judge has his or her first contact with the parties by telephone in the pretrial conference call. By definition, at this stage of the proceeding a complaint has issued, the parties have not been able to settle the case, and the trial is imminent.

Consistent with the general policies set forth above, the judge at that time should emphasize the importance of pursuing settlement, and ensure that the parties are fully apprised of each other's positions on settlement. The parties should also be encouraged to discuss their positions and settlement terms during the conference call, with the degree of judicial participation the parties and the judge find appropriate. Finally, the General Counsel should be asked to prepare a complete settlement package including, when appropriate, a calculation of all monetary obligations.

Parties, particularly respondents, may sometimes be reluctant to freely discuss the merits of the case during settlement discussions. However, they should be encouraged to do so, at least to some extent, as it will assist in identifying areas of disagreement and evaluating whether a settlement is possible.

It may be helpful to remind the parties of the many disadvantages of litigation, including: (1) the financial costs of trial; (2) the time that managers, supervisors, and employees will be absent from work to prepare for and attend the trial; (3) the delay in resolving the dispute, including the possibility of subsequent appeals and compliance proceedings; and (4) the risk of losing, and thereby either receiving nothing (if the charging party), or being ordered to pay additional backpay with interest (if the respondent), including medical expenses (see, e.g., ***Nortech Waste***, 336 NLRB 554 n. 2 (2001); ***McDaniel Ford, Inc.***, 331 NLRB 1645 (2000); and ***Hansen Bros. Enterprises***, 313 NLRB 599 (1993)).

If there is any possibility of settlement, the parties should be encouraged to continue settlement discussions after the conference call. If practical and potentially helpful, the judge should also attempt to schedule one or more follow-up conference calls. This will establish both a target date for the exchange of additional information or proposals and an agreed-upon time for further discussion.

Ordinarily such calls should include all parties, unless the judge secures permission to speak to one party separately. The judge should be careful not to discuss settlement offers directly with an alleged discriminatee in the absence of counsel for the General Counsel.

§ 9–230 At the Trial

How much time a judge should allow before going on the record or during the trial for settlement discussions will depend on all the circumstances. Relevant factors include the willingness of the parties to share information and offer reasonable terms, the complexities of the case and the likelihood of reaching a full or partial settlement that will significantly reduce the time needed for litigation, and the availability of witnesses if the trial is delayed.

The judge should carefully evaluate the circumstances to ensure that any significant delay is likely to be fruitful and minimally impact the flow of the trial in the event a final settlement is not realized.

§ 9–240 After the Trial

Parties may, of course, continue to engage in settlement discussions after the record is closed and while the judge is preparing a decision. Such discussions typically occur, if at all, without the judge, but the judge may participate if requested. If the parties desire an extension of time beyond the usual 35-day limit for the filing of posthearing briefs to engage in further settlement efforts, they may seek an extension from the Chief Judge or Deputy or Associate Chief Judge in the appropriate office.

§ 9–300 Judge's Role in Approving Settlements

§ 9–320 Settlements Before Record Opens and Testimony Taken

Neither the judge nor the Board has any role in approving or rejecting an unfair labor practice settlement before the trial opens. Consideration and approval or rejection of a pretrial settlement are the sole province of the General Counsel and his agents, subject to the review procedures provided to parties adversely affected by the rulings. ***NLRB v. Food & Commercial Workers Local 23***, 484 U.S. 112, 124–126 (1987).

The Board has applied this same policy where the General Counsel seeks to withdraw the complaint after the hearing has opened but before any evidence has been introduced. See ***Sheet Metal Workers Local 28 (American Elgen),*** 306 NLRB 981, 981–982 (1992) (reversing the judge, the Board held that, even if the trial has opened, the General Counsel retains sole, unreviewable, authority to withdraw the complaint if no evidence has been introduced and no contention has been made that a legal issue was ripe for adjudication on the parties' pleadings alone).

However, if the settlement is non-Board, i.e. the General Counsel is not a party to the settlement, it may properly be submitted to the judge for review and approval after the hearing

has opened, even if no evidence has been introduced. See ***Flint Iceland Arenas***, 325 NLRB 318 (1998), where both the judge and the Board (on appeal) reviewed and applied the relevant factors in considering a non-Board settlement opposed by General Counsel at the beginning of the hearing and before any evidence was introduced.

§ 9–330 Settlements After Testimony Is Taken and Before Decision Issues

Section 101.9(d)(1) of the Board's Statements of Procedure provides that if an informal settlement is reached after the trial opens and testimony is taken but before a decision is issued, it must be submitted to the trial judge for review and approval. This provision has been interpreted to apply to all settlements, including formal settlements providing for issuance a Board order. See NLRB Casehandling Manual (Part One), Sec. 10164.7(b). See also ***Beverly California Corp.***, 326 NLRB 232, 236 n. 18 (1988); and ***Today's Man***, 263 NLRB 332 (1982). However, Section 101.9(d)(1) provides that a formal settlement must also be submitted to the Board for final approval after receiving approval from the judge.

If the judge approves or rejects the settlement over the objection of a party, the aggrieved party may file a special appeal with the Board pursuant to Section 102.26 of the Board's Rules. See **§10-500,** "Interlocutory Special Appeals from Judges Rulings," below.

§ 9–340 Settlement After Judge's Decision Issues—ADR Program

After the judge issues a decision in a case, the matter is transferred to the Board and the judge has no further role. Therefore, any settlement proposal proffered to the judge after the decision has issued should be rejected as beyond the jurisdiction of the judge. The moving parties should be directed to take appropriate matters to the Executive Secretary of the Board.

The parties may also avail themselves of the Board's voluntary Alternative Dispute Resolution (ADR) program, which applies to certain unfair labor practice cases pending before the Board on appeal. Details of the ADR program may be found in the Board's March 24, 2009 press release announcing that the pilot program had been made permanent. See also the Board's Oct. 23, 2012 press release announcing that the Board had contracted with the Federal Mediation and Conciliation Service (FMCS) to provide mediators to parties who participate in the Board's ADR program. Both are available on the NLRB website. For more information, the parties should contact the Executive Secretary's office.

§ 9–400 Standards for Approving or Rejecting Settlements

§ 9–410 Types of Settlements—Formal, Informal, and Non-Board

As indicated above, settlements may be either formal (providing for issuance of a cease-and-desist order by the Board and court enforcement) or informal (not involving the issuance of a Board order). Either type of settlement may be utilized at any time after a charge has been filed, although normally informal settlements are not accepted after the case has been heard and the Board has issued a cease-and-desist order on the basis of the record.

A third type of settlement, a non-Board settlement, involves an adjustment strictly between the respondent(s) and the other non-Board parties. The General Counsel is not a party to a non-Board settlement, even though he may be involved in the settlement discussions and post-settlement compliance. Thus, the General Counsel cannot be found in breach of a non-Board

settlement. See ***Dilling Mechanical Contractors,*** 348 NLRB 98, 103 (2006). See also **§ 9–620**, below.

§ 9–420 Formal Settlements

The NLRB Casehandling Manual (Part One), Settlements, Section 10164.1 provides:

> A formal settlement is a written stipulation providing that, on approval by the Board, a Board order in conformity with its terms will issue. Ordinarily, it will also provide for the consent entry of a court judgment enforcing the order. Sec. 101.9(b)(1), Statements of Procedure.

The Casehandling Manual also sets forth procedures for transferring formal settlements to the General Counsel's Washington, D.C. office and the Board, as well as sample language appropriate for formal settlements. See Secs. 10164–10170.

Normally formal settlement agreements are drafted by the Regional Offices, using the procedural and technical language in the manuals, to meet the requirements for submission to the General Counsel and the Board for final review and approval. The judge should refrain from significantly reviewing nonsubstantive aspects of formal settlement agreements. But see ***Pipefitters Local 290, UFCW***, 348 NLRB 998 (2006) (Board majority rejected proposed formal settlement because it did not contain provisions memorializing the parties' reported agreement that the General Counsel would only seek enforcement of the order if the respondent failed to comply with it).

If the judge rules on a formal settlement during the trial, the judge should indicate approval or rejection on the record. Alternatively, such as during an adjournment or after the trial closes, the judge should issue an order and notification to the parties. The Regional Office thereafter assumes the responsibility for transmitting the stipulation and supporting documents to the General Counsel's Division of Operations Management so that the procedure for obtaining approval of the General Counsel and the Board can be implemented.

§ 9–430 Informal and Non-Board Settlements

In ***Independent Stave Co.,*** 287 NLRB 740, 743 (1987), the Board set out the relevant considerations for approving non-Board settlements. The Board stated that it would not reject the parties' non-Board settlement "simply because it does not mirror a full remedy;" rather, it would

> examine all the . . . circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Applying these factors, the Board approved a prehearing non-Board settlement of 8(a)(3) complaint allegations (which had been signed by three of the four alleged discriminatees) over the General Counsel's objection. See also ***McKenzie-Willamette Medical Center***, 361 NLRB

No. 7 (2014), where the Board applied the foregoing factors and approved a posthearing non-Board settlement of 8(a)(5) complaint allegations over the General Counsel's objection that it did not provide for posting a notice or otherwise fully remedy the allegations; and ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614 (2007), where the Board applied the same factors and approved private termination agreements wherein employees waived or released any subsequent claims, including the right to file charges with or obtain any relief from the Board arising out of their prior employment. (A further discussion of such releases is found in **§9–640**, Releases, below.). But see ***Flyte Time Worldwide***, 362 NLRB No. 46 (2015) (Board declined to apply *Independent Stave* analysis and denied the charging party's unopposed request, following issuance of the ALJ's decision, to withdraw his 8(a)(1) charge pursuant to a private settlement reached in a related class action wage and hour lawsuit, as the settlement did not even address, much less remedy, the 8(a)(1) allegation).

The Board has also applied the *Independent Stave* factors to both informal and formal settlements. See ***Woodworkers Local 3–433 (Kimtruss Corp.)***, 304 NLRB 1, 2 (1991) (upholding judge's approval of post-hearing informal settlement of Section 8(b) allegations against the respondent union over the objections of the respondent employer in the companion Section 8(a) case); and ***KW Electric Inc.***, 327 NLRB 70 (1998) (approving formal settlement over charging party's objection after judge's decision issued).

For other cases approving settlements applying the above factors, see ***Hospital Perea***, 356 NLRB No. 150 (2011) (reversing ALJ and approving non-Board settlement of 8(a)(5) unilateral change allegation over General Counsel's objection); ***American Pacific Pipe Co.***, 290 NLRB 623, 623–624 (1988) (approving non-Board settlement of a backpay claim over General Counsel's objection); and ***Longshoremen ILA Local 1814 (Amstar Sugar)***, 301 NLRB 764, 764–765 (1991) (approving non-Board settlement over the opposition of the General Counsel after the judge issued his decision).

For cases rejecting settlements, see ***International Shipping Agency, Inc***., 24–CA–091723, unpub. Board order issued April 20, 2015 (2015 WL 1802717, 2015 NLRB LEXIS 288) (finding that the judge erred in approving a non-Board settlement in an 8(a)(5), (3), and (1) partial-closing case that was opposed by the General Counsel, did not provide for posting a notice, provided for only 32 percent backpay and a circumscribed preferential hiring remedy rather than a reinstatement remedy for the 28 alleged discriminatees, failed to address a large portion of the alleged violations, and required the employees to waive their right to strike); ****Michels Corp***., 30-CA-81206, unpub. Board order issued Dec. 19, 2012 (2012 WL 6625274, 2012 NLRB LEXIS 860) (finding that the judge improperly accepted a non-Board settlement over the General Counsel's objections where the settlement provided only backpay and a neutral employment reference to the alleged discriminatee, did not provide for any notice to other employees of their rights, and included a broad confidentiality clause); ***Alamo Rent-A-Car, Inc.***, 338 NLRB 275 (2002) (likewise disapproving a non-Board settlement where the first and second factors weighed heavily against approval); and ***Flint Iceland Arenas***, 325 NLRB 318, 318–319 (1998) (same). See also ****Goya Foods of Florida***, 358 NLRB No. 43 (2012) (finding that all four criteria favored rejecting the non-Board settlement); and ***Frontier Foundries, Inc.***, 312 NLRB 73 (1993) (rejecting non-Board settlement that provided only 6 percent backpay, even though it also provided for additional amounts as "liquidated damages," allegedly to avoid being taxed as income).

Note that, in ***International Shipping Agency***, above, the Board also held that the judge erred in rejecting certain financial and tax records the General Counsel offered into evidence to show, contrary to the charging party union's assertion, that the respondent had the ability to pay a greater backpay amount than provided in the non-Board settlement.

§ 9–440 Settlement by Consent Order

In limited circumstances, the judge may also approve a settlement by "consent order"—that is, a unilateral settlement offered by the respondent but approved by neither the General Counsel nor the charging party.

The Board applies the *Independent Stave* factors in evaluating such consent orders. However, because the first factor clearly weighs heavily against approval (particularly if both the General Counsel and the charging party expressly object to the respondent's proposal), the Board appears more likely to require that the proffered unilateral settlement address and fully remedy all the unfair labor practices alleged in the complaint. See, for example, ***Enclosure Suppliers, LLC***, 9-CA-46169, unpub. Board order issued July 14, 2011 (2011 WL 2837659, 2011 NLRB LEXIS 361) (rejecting informal consent order because the remedy for the alleged 8(a)(1) allegations did not require the respondent to comply with the cease and desist provisions beyond the 60-day notice posting period); ***Iron Workers Local 27 (Morrison-Knudson)***, 313 NLRB 215, 217 (1993) (rejecting proposed consent order in 8(b)(1)(A) hiring hall case because it did not provide for posting a notice), enfd. mem. 70 F.3d 119 (9th Cir. 1995); ***Food Lion, Inc.***, 304 NLRB 602 n. 4 (1991) (rejecting proposed consent order in 8(a)(1) denial of union access case because it contained various restrictions on union access); and ***Copper State Rubber***, 301 NLRB 138 (1991) (rejecting proposed consent order because it did not settle the allegations concerning one of the discriminatees, and settling the other allegations would not necessarily save the parties the time and expense of litigation as the evidence underlying those allegations could be used as background evidence to support the nonsettled allegations).

Compare ***National Telephone Services***, 301 NLRB 1 n. 2 (1991); and ***Electrical Workers IUE Local 201 (General Electric Co.)***, 188 NLRB 855, 857 (1971) (accepting proposed consent orders because they settled all the allegations of the complaint and provided for the appropriate remedies, including notice posting).

But see ***Laborers Local 872***, 28–CB–118809, unpub. Board order issued Jan. 12, 2015 (2015 WL 153954, 2015 NLRB LEXIS 10). The complaint in that case alleged that the respondent union had unlawfully failed to provide certain hiring hall information to the individual charging party. Under the proposed informal consent order, the union agreed to provide the charging party with the requested information and to post a union notice in the hiring hall for a year stating that, on request, the union would promptly make hiring hall referral records available for review by anyone using the hall. Applying the *Independent Stave* factors, the judge approved the consent order, notwithstanding the General Counsel's objection that it did not provide for posting an official Board notice that specifically addressed the refusal to provide information to the charging party. The Board upheld the judge's ruling, finding that the consent order "substantially remedie[d]" the alleged violations.

For a case where the Board approved a consent order over the General Counsel's objections that it did not require the respondent to read the remedial notice and failed to include "default" language providing for a formal Board order in the event of noncompliance, see ***Heil Environmental***, 10-CA-114054, unpub. Board order issued June 20, 2014 (2014 WL 2812204, 2014 NLRB LEXIS 456). The complaint in that case alleged a variety of 8(a)(1) violations during an organizing campaign. The Board rejected the General Counsel's objections to the proposed consent order, finding that "a recent non-Board settlement entered into by the Respondent and the Charging Party which no party seeks to set aside and a 30-year old unrelated unfair labor practice case are insufficient bases for concluding that the Respondent has a history of violations of the Act."

§ 9–500 Procedures for Considering, Accepting, or Rejecting Settlement

Preparation of written agreement. It is always wise to ensure that the parties prepare a legible and complete settlement with all elements included before the settlement is formally considered. Experience has shown that oral agreements are sometimes based on mutual misunderstandings. Indeed, even written settlements should be clear and understandable because the Board will set aside an ambiguous settlement where the Board concludes there has been no meeting of the minds. See ***Local Union 290, UFCW***, 348 NLRB 998 (2006); and ***Doubletree Guest Suites Santa Monica***, 347 NLRB 782 (2006).

An informal settlement may be secured on Form NLRB 5378, "Settlement Agreement Approved by an Administrative Law Judge." The forms are available in Regional Offices. The settlement agreement and the notice should be entered into evidence as exhibits so that the Board has a full record to review if there is an appeal.

Positions of Parties. The positions of all parties on the settlement should also be put on the record. When a party objects to the approval of a formal settlement, the party must be given a reasonable opportunity on the record to state its position and argument opposing the settlement. See NLRB Statements of Procedure, Sec. 101.9(d)(1). If the issues are somewhat complex, it may be appropriate to request briefs on the advisability of approving a settlement.

Positions of Discriminatees. In settlements involving discriminatees, their position(s) regarding approval of the settlement should also be put on the record, either directly or indirectly through the General Counsel or the charging party's representation of their position(s). In ***Flint Iceland Arenas***, 325 NLRB 318, 320 (1998), a Board majority rejected a non-Board settlement in part on this basis. The Board majority held, among other things, that although it is not necessary that all discriminatees be notified and that they all agree to be bound, the views of named and otherwise identifiable discriminatees should be taken into account and, if those individuals have not been informed of the settlement or have not been given opportunity to express their views of the settlement, their lack of a record position is a factor to be considered in evaluating the settlement. See also ***Alamo Rent-A-Car, Inc.***, 338 NLRB 275 (2002) (affirming the judge's rejection of a non-Board settlement, opposed by the General Counsel, where the settlement only partially remedied the unfair labor practices alleged and had the approval of only one of four discriminatees).

Judge's Ruling or Order. As indicated in **§ 9–420**, above, the judge's ruling and reasoning in approving or rejecting the settlement should likewise be stated on the record for purposes of review. Alternatively, If the settlement occurs after the close of trial or during a hiatus in the case, a written order is appropriate. The judge should issue an order rather than a decision when approving a settlement agreement, even where the judge overrules an objection to the settlement.

Right to Appeal. As indicated in **§ 9–330**, above, If the judge approves or rejects the settlement over the objection of a party, the aggrieved party should be advised of the right to file a special appeal with the Board pursuant to Section 102.26 of the Board's Rules. See NLRB Statements of Procedure, Sec. 101.9(d)(2).

Recessing Trial Pending Compliance. Ordinarily, if a judge approves a settlement on the record, the judge should recess the trial indefinitely. The judge should ask that the General Counsel file a motion to dismiss when compliance has been completed.

Alternately, if the compliance is straightforward after the settlement is approved, the complaint may be immediately dismissed and the case remanded to the Regional Director to handle compliance and close the case without further intervention by the judge. The parties should be informed that in the event the Regional Director determines compliance has not been achieved, the Regional Director may set aside the settlement and reissue the complaint, which would be assigned for trial in the normal course, without automatic reassignment to the judge who approved the settlement.

Formal Settlements. As indicated in **§9–420,** above, if the judge approves a formal settlement, it should be approved in writing and left with the Regional Office so that the procedure in Section 10164.7 of the NLRB Casehandling Manual (Part One) for obtaining approval of the Board can be implemented.

§ 9–550 Summary Judgment to Enforce Settlement

Settlement agreements, by their terms, may provide for summary judgment to enforce the settlement in the event of noncompliance. See, e.g., ***Great Northwest Builders***, 344 NLRB 969 (2005) (Board granted General Counsel's motion for summary judgment where the settlement agreement provided that, in case of noncompliance, the respondent's answer to the original complaint would be withdrawn and the General Counsel could obtain an order to remedy the allegations in the complaint through a motion for summary judgment). See also **§9–800**, Setting Aside Settlement Agreements, below.

§ 9–600 Various Provisions of Settlement Agreements

§ 9–610 Nonadmission Clauses

Inclusion of a nonadmission clause is not a valid basis for objecting to a proposed formal settlement that provides for entry of an enforceable Board order and otherwise effectuates the policies of the Act. ***Mine Workers (James Bros. Coal),*** 191 NLRB 209, 209–210 (1971). See also ***Containair Systems Corp. v. NLRB***, 521 F.2d 1166, 1172 (2d Cir. 1975); ***NLRB v. Oil Workers (Catalytic Maintenance),*** 476 F.2d 1031, 1037 (1st Cir. 1973); and ***Concrete Materials of Georgia v. NLRB***, 440 F.2d 61, 68 (5th Cir. 1971). But cf. ***Teamsters Local 115 (Gross Metal Products),*** 275 NLRB 1547 (1985) (upholding judge's rejection of formal settlement after the close of the trial, which was opposed by the charging party, as it contained both a narrow order and a nonadmission clause notwithstanding that the respondent union was a recidivist, had allegedly again engaged in widespread picket line misconduct and violence, and offered only a limited defense at trial).

Informal settlements containing such clauses are also frequently accepted by the General Counsel and approved by judges and the Board, even over the objection of the charging party. See, e.g., ***Woodworkers Local 3–433 (Kimtruss Corp.)***, 304 NLRB 1, 2 (1991); and ***Garment Workers ILGWU Local 415–475 (Arosa Knitting) v. NLRB***, 501 F.2d 823, 826, 832–833 (D.C. Cir. 1974). Although Section 10130.8 of the NLRB Casehandling Manual (Part One) states that nonadmission clauses "should not be routinely incorporated in settlement agreements," this provision is apparently intended simply to make clear to regional office personnel that they can reject such clauses in egregious cases. See ***BPH & Co. v. NLRB***, 333 F.3d 213, 222 (D.C.Cir. 2003).

Nonadmission clauses, however, may not be included in the Board's Notice to Employees "under any circumstances." ***Pottsville Bleaching Co.,*** 301 NLRB 1095, 1095–1096 (1991). See also ***Teamsters Local 372 (Detroit Newspapers)***, 323 NLRB 278, 280 n. 4 (1997).

§ 9–620 Reservation Clauses: Settlement Bar Rule

A formal or informal Board settlement disposes of all issues involving presettlement conduct, unless prior violations were unknown to the General Counsel, were not readily discoverable by investigation, or were specifically reserved from the settlement by mutual understanding of the parties. ***Hollywood Roosevelt Hotel Co.,*** 235 NLRB 1397 (1978), reaffd. in ***Park-Ohio Industries,*** 283 NLRB 571, 572 (1987). See also ***Ratliff Trucking Corp.***, 310 NLRB 1224 (1993) (finding that the issue was not specifically reserved, and that the settlement therefore barred the new complaint). Thus, where the issue is raised, the judge may have to determine the scope and meaning of the prior settlement agreement.

As indicated in **§ 9–410**, above, however, a non-Board settlement does not preclude the General Counsel from re-alleging settled matters in subsequent unfair labor practices. Such a settlement is not approved by the Regional Director, even though withdrawal of a charge may have been approved, and therefore "does not estop the Regional Director from proceeding on any new charge alleging the same conduct as the withdrawn charges." ***Auto Bus, Inc.,*** 293 NLRB 855, 855–856 (1989), quoting the judge in ***Quinn Co.***, 273 NLRB 795, 799 (1984). See also ***KFMB Stations***, 343 NLRB 748 n. 3 (2004) (citing *Auto Bus* with approval).

§ 9–630 Joint and Several Liability

A settlement proposal limited to one of a number of (potential) jointly and severally liable respondents does not extinguish the liability of the nonsettling respondents, unless that is the intention of the parties. See ***Urban Laboratories***, 305 NLRB 987, 987–988 (1991), citing ***Zenith Radio v. Hazeltine Research***, 401 U.S. 321, 342–348 (1971) (an antitrust case).

§ 9–640 Releases

Release and discharge of the respondent from all claims by an employee is permissible as part of a settlement, unless it prohibits filing future unfair labor practice charges that are unrelated to the past dispute or employment. See ***First National Supermarkets***, 302 NLRB 727, 727–728 (1991) (finding release lawful, as it was limited to claims arising out of the past employment relationship). See also ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614, 615–616 (2007) (dismissing 8(a)(1) charges filed by 37 alleged discriminatees over their terminations, as a prior settlement agreement waived the right to file such charges in exchange for enhanced severance benefits); and ***Septix Waste, Inc.***, 346 NLRB 494 (2006) (dismissing 8(a)(1) charges filed by the union, as a prior settlement waived all such claims that could have been made as of that date and the new charges were all based on facts in existence at that time). Cf. ***Quality Roofing Supply Company***, 357 NLRB No. 75 (2011) (distinguishing *Septix* and finding that the release did not waive the union's right to file charge that was not pending at time of settlement and involved different unlawful conduct, as the release did not contain similar language covering charges that "could have been" raised at the time of the settlement.)

A release may also be found overbroad and unlawful if it prohibits the employee from providing evidence in the investigation of charges. See ***Clark Distribution Systems, Inc.***, 336 NLRB 747 (2001).

§ 9–650 Taxability

Backpay is generally taxable as income in the year it is received. See ***Tortillas Don Chavas, LLC,*** 361 NLRB No. 10, slip op. at 5 n. 24 (2014) (requiring respondents to compensate employees for the adverse income tax consequences of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned absent the violation).

A number of circuit courts have held that awards of back and front pay under Title VII, ADEA, and ERISA are "wages" subject to statutory withholding. See ***Noel v. New York State Office of Mental Health***, 697 F.3d 209, 213 n. 4 (2d Cir. 2012) (citing additional cases).

§ 9–700 Deferral to Grievance/Arbitration Settlements

The Board applies the same deferral principles to grievance/arbitration settlements as it does to arbitral awards. See ***Alpha Beta Co.***, 273 NLRB 1546 (1985), review denied 808 F.2d 1342, 1345–1346 (9th Cir. 1987) (deferring to settlement, despite the lack of any backpay, as the contractual grievance proceedings were fair and regular, all parties agreed to be bound, the employees were fully informed and given the right to accept or reject the settlement, and the General Counsel failed to establish that the settlement was clearly repugnant to the Act).

As discussed in **§ 3–740**, Deferral to Grievance Arbitration, above, the Board in ***Babcock & Wilcox Construction Co.***, 361 NLRB No. 132 (December 15, 2014) adopted a new postarbitral deferral standard for future 8(a)(3) and (1) cases. Consistent with that standard, the Board held that, in such cases, it must be shown that the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement. Slip op. at 13.

In evaluating grievance/arbitration settlements, the Board also considers the factors set forth in ***Independent Stave***, 287 NLRB 740, 743 (1987) for evaluating unfair labor practice settlements. See ***Babcock & Wilcox***, above; and ***Postal Service***, 300 NLRB 196, 198, n. 13 (1990). For a discussion of those factors, see **§ 9–430**, above.

§ 9–800 Setting Aside Settlement Agreements

Informal and non-Board settlements may be set aside if their provisions are breached, postsettlement unfair labor practices are committed, or the settlement is so ambiguous that there was no meeting of the minds.

Noncompliance with Settlement. Section 101.9(e)(2) of the Board's Statements of Procedure specifically provides that if a respondent fails to comply with the terms of an informal settlement agreement, the Regional Director may set the agreement aside and institute further proceedings on the same charge. It is also well established that a Regional Director has the authority to reinstate a withdrawn charge following noncompliance with a non-Board settlement agreement, notwithstanding Section 10(b) of the Act, provided the original charge was timely filed. See ***Sterling Nursing Home***, 316 NLRB 413, 416 (1995); and ***Norris Concrete Materials***, 282 NLRB 289, 291 (1986).

The Regional Director's action in setting aside the settlement and reactivating the case is reviewable by the judge and the Board in the new complaint trial. For cases upholding the Regional Director's action, see ***Sidhal Industries, LLP***, 356 NLRB No. 67 (2010) (Regional

Director set aside settlement and reissued complaint pursuant to settlement's default language, where employer complied with the 8(a)(3) remedial provisions of settlement, but not the 8(a)(5) provisions); ***Nations Rent, Inc.***, 339 NLRB 830, 831 (2003) (employer reinstated and made whole employee, but continued to maintain overbroad rule and failed to notify employee in writing that his discipline had been expunged); and ***Postal Workers Local 735***, 340 NLRB 1363, 1364–1365 (2003) (respondent union's president published a post-settlement column, either during or immediately after the notice-posting period, which condemned the charging party and lauded the steward whose conduct led to the original charge). But see ***Courier Journal***, 342 NLRB 1148, 1149–1150 (2004) (union's failure to protest closure of original case on compliance, pursuant to settlement agreement, precluded unfair labor practice predicated on company's failure to furnish certain information not provided at time of compliance).

Where a settlement has been set aside, a full remedy should normally be issued for the alleged presettlement conduct, less any amounts already paid pursuant to the settlement. See ***Sidhal Industries***, above, at n. 2. But cf. ***Totilleria La Poblanita***, 357 NLRB No. 22 (2011) (construing the General Counsel's motion for summary judgment as a request for enforcement of the provisions of the settlement, and therefore limiting the affirmative remedies to those specifically requested in the motion).

New Unfair Labor Practices. Subsequent or continuing unfair labor practices will ordinarily justify setting aside a settlement agreement. ***Scripps Memorial Hospital Encinitas***, 347 NLRB 52, 53 (2006); and ***YMCA of the Pikes Peak Region, Inc.,*** 291 NLRB 998, 1010, 1012 (1988), enfd. 914 F.2d 1442, 1449–1450 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991).

However, new unfair labor practices will not warrant setting aside the settlement if they are "isolated" or "insubstantial." See ***Diamond Electric Mfg. Corp.***, 346 NLRB 857, 862–863 (2006) (single post-settlement instance of discriminatory discipline insufficient), citing ***Coopers Int'l Union***, 208 NLRB 175 (1974). See also ***Porto Mills***, 149 NLRB 1454, 1470 (1964); and ***Wooster Brass Co.***, 80 NLRB 1633, 1635 (1948).

Ambiguous Agreement. An informal settlement may also be set aside if the agreement is so ambiguous that a conclusion is warranted that there was no meeting of the minds on a settlement. See ***Doubletree Guest Suites Santa Monica***, 347 NLRB 782, 782–783 (2006) (setting aside prior informal settlement on this basis, and therefore finding no settlement bar to issuing new complaint).

§ 9–850 Decision Vacated by Settlement

Unless otherwise expressly provided, an order vacating a prior decision pursuant to a settlement vacates that decision "only insofar as there is no longer a court-enforceable order in the case and the decision has no preclusive effect on the parties." ***Caterpillar, Inc.***, 332 NLRB 1116, 1116 (2000). The decision remains published and "may be cited as controlling precedent with respect to the legal analysis therein." Ibid. In this respect, it is distinguishable from a vacatur on the merits, which eliminates the prior decision for all purposes, including precedential effect.

§ 9–900 Role of Settlement Judge

The role of a settlement judge is established and defined by Section 102.35(b) of the Board's Rules:

> Upon the request of any party or the judge assigned to hear a case, or on his or her own motion, the [Chief Judge or Deputy or Associate Chief Judge . . .] may assign a judge, who shall be other than the trial judge, to conduct settlement negotiations. In exercising his or her discretion, the [Chief Judge, Deputy Chief Judge, or Associate Chief Judge] making the assignment will consider, among other factors, whether there is reason to believe that resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. Provided, however, that no . . . assignment shall be made absent the agreement of all parties to the use of this procedure.
>
> (1) The settlement judge shall convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the [Chief Judge, Deputy Chief Judge, or Associate Chief Judge] the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. [If feasible], settlement conferences shall be held in person.
>
> (2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.
>
> (3) Participation of the settlement judge shall terminate upon the order of the [Chief Judge, Deputy Chief, or Associate Chief Judge] issued after consultation with the settlement judge. The conduct of settlement negotiations shall not unduly delay the hearing.
>
> (4) All discussions between the parties and the settlement judge shall be confidential. The settlement judge shall not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge shall be admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.
>
> (5) No decision of [the Chief Judge, Deputy Chief Judge, or Associate Chief Judge] concerning the assignment of a settlement judge or the termination of a settlement judge's assignment shall be appealable to the Board.
>
> (6) Any settlement reached under the auspices of a settlement judge shall be subject to approval in accordance with the provisions of Section 101.9 of the Board's Statements of Procedure.

Although the rule provides that the settlement judge shall be “other than the trial judge,” the settlement judge may be assigned to hear the case in the absence of any objections. See ***Kingsbridge Heights Rehabilitation and Care Center***, 353 NLRB 631, 633 (2008).

CHAPTER 10. MOTIONS AND SPECIAL APPEALS

§ 10–100 Motions for Decision Based on Stipulated Record

Under section 102.35(a)(9) of the Board's Rules, a record may be stipulated directly to the Board for decision, provided all parties consent and waive a trial and the issuance of a decision by the judge. Under the same section, the parties may also agree to waive a trial and stipulate facts to the judge for issuance of a judge's decision. When a case is stipulated to a judge, he or she should make sure that the stipulation is complete enough to support a decision on all relevant issues.

A stipulation of fact is ordinarily conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the judge accepts it, ***Kroger Co.***, 211 NLRB 363, 364 (1974), except on a showing of "manifest injustice," U.S. v. Kanu, 695 F.3d 74 (D.C. Cir. 2012). See also ***Graham, 6 Handbook of Fed. Evid***. **Sec. 801:26** (7th ed., database updated Nov. 2014).

The General Counsel may make appropriate stipulations with adverse parties concerning relevant facts, subject to the right of a charging party who does not join in a stipulation to offer contrary evidence or additional material facts. ***Borg-Warner Corp.***, 113 NLRB 152, 154 (1955), petition for review denied 231 F.2d 237 (7th Cir. 1956), cert. denied 352 U.S. 908 (1956). See also ***International Longshoremen's Assn (New York Shipping Assn., Inc.)***, 266 NLRB 230, 239 n. 7 (1983) (judge accepted stipulation notwithstanding that one of the charging parties declined to join it, rejecting the charging party's offer of further proof), enf. denied on other grounds 734 F.2d 966 (4th Cir. 1984), affd. 473 U.S. 61 (1985).

§ 10–200 Motions to Dismiss

A respondent may move the judge to dismiss a complaint or portions of a complaint. In ruling on such a motion under Section 102.35(a)(8) of the Board's Rules, the judge should follow the same standard the Board uses in ruling on motions to dismiss under Section 102.24; that is, the judge should "construe the complaint in the light most favorable to the General Counsel, accept all factual allegations as true, and determine whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." ***Detroit Newspapers Agency***, 330 NLRB 524, 525 n. 7 (2000). See also ***Yale University***, 330 NLRB 246, 247 n. 8 (1999) (Board is guided by the Federal Rules of Civil Procedure in reviewing a respondent's motion to dismiss for failure of proof).

For cases applying the foregoing standard, compare ***Central Telephone Company of Texas,*** 343 NLRB 987, 998, Appendix B (2004) (upholding the judge's bench decision granting the respondent's motion to dismiss the complaint after the General Counsel rested), with ***St. Mary's Nursing Home***, 342 NLRB 979, 980 n. 6 (2004) (finding that the judge erroneously ruled from the bench that the General Counsel had failed to establish animus in a discrimination case).

The judge should also consider whether the General Counsel is seeking to pursue a new theory of violation that has not previously been considered by the Board. See ***Fry's Food Stores***, 358 NLRB No. 66, slip op. at 2 (2012), reaffd. 362 NLRB No. 36 (2015) (discussing Board's earlier October 18, 2010 unpublished ruling granting the General Counsel's special appeal of judge's order granting the respondent union's motion to dismiss).

When granting a motion to dismiss, the judge should issue a "decision" under Section 102.45(a) of the Board's Rules, so that the appropriate procedures for appealing under Section 102.46 will apply. See ***Technology Service Solutions***, 332 NLRB 1096 (2000).

See also the cases cited in **§ 3–740** above, addressing motions to defer to arbitration, which are also essentially motions to dismiss.

§ 10–300 Motions for Summary and Default Judgment

A judge likewise has the authority to rule on motions for summary and default judgment under Section 102.35(a)(8) of the Board's Rules. This authority exists notwithstanding the failure of the moving party to file such a motion directly with the Board at least 28 days prior to the hearing under Section 102.24 of the Rules. See ***Calyer Architectural Woodworking Corp.,*** 338 NLRB 315 (2002). See also **§ 3–500**, Answer to Complaint, above.

§ 10–400 Motions to Reopen Record

After the close of the trial but before issuance of the judge's decision, a party may file a motion with the judge to reopen the record on the basis of "newly discovered evidence." The judge is authorized to rule on such a procedural motion under Section 102.35(a)(8) of the Board's Rules.

The standards for ruling on such motions are set out in decisions addressing the Board's similar authority under Section 102.48(d)(1) of the Board's Rules.

First, the movant must demonstrate that the evidence is truly "newly discovered." In ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46 n. 1 (1998), the Board held that newly discovered evidence is "evidence which was in existence" at the time of the trial, and the movant was "excusably ignorant" of it, i.e. the movant "acted with reasonable diligence to uncover and introduce the evidence." Thus, evidence that did not exist at the time of the trial because it relates to events that occurred after the close of the trial is not "newly discovered." ***Allis-Chalmers Corp.***, 286 NLRB 291 n. 1 (1987). See also ***Planned Building Services, Inc.***, 347 NLRB 670 n. 4 (2006) (Board affirmed judge's refusal to accept documents submitted by respondent after close of the hearing on the grounds that the evidence was not newly discovered).

Second, the movant must "demonstrate that the introduction of the [evidence in question] would require a different result than that reached by the judge." ***Fitel/Lucent Technologies***, above. See also ***County Waste of Ulster***, 354 NLRB 392 (2009), reaffd. 355 NLRB 413 (2010).

§ 10–500 Interlocutory Special Appeals from Judges Rulings

Section 102.26 of the Board's Rules permits a party to file an interlocutory appeal from a judge's ruling by "special permission of the Board." A judge need not grant a recess in the hearing pending such a special appeal and may continue with and close the hearing without waiting for the Board to rule on the appeal. See, e.g., ***Custom Excavating, Inc***., 228 NLRB 285, 286 (1977). However, if the judge has a genuine doubt about the ruling, any recess should allow adequate time for the Board to rule. It is suggested that the judge set a date by which the request for leave to appeal should be filed and set a resumption date no less than one week later.

Note that Section 102.26 of the Board's Rules requires service of the request and any responses on the judge.

CHAPTER 11. SEQUESTRATION OF WITNESSES

§ 11–100 In General

The primary Board cases addressing separation of witnesses during trial are ***Unga Painting Corp.***, 237 NLRB 1306, 1308 (1978) (addressing rights of discriminatees under sequestration order); and ***Greyhound Lines****,* 319 NLRB 554, 554 (1995) (setting forth model sequestration order).

Consistent with the statutory command to follow the Federal Rules of Evidence "so far as practical," the Board has generally attempted to follow the "spirit" of FRE 615 (Exclusion of Witnesses) in fashioning its own rules in this area. Thus, as under FRE 615, the Board has held that exclusion of witnesses is a matter of right, and the judge therefore has no discretion to deny a request. ***Unga Painting***, above.

In dealing with specific situations arising under the rule, however, the Board has attempted to balance the sometimes competing interests of openness and protecting the rights of parties and discriminatees on the one hand, and "minimiz[ing] fabrication," "detecting inconsistent testimony," and "ascertaining the truth" on the other. ***Unga Painting***, above. Specific situations addressed by the Board and courts are discussed in the sections below.

§ 11–200 Scope of Order

As indicated above, a model separation of witnesses order is set forth in ***Greyhound Lines****,* 319 NLRB 554 (1995). See **§1–300**, above.

The "heartland" of FRE 615 is the exclusion of potential witnesses from the courtroom "so that they cannot hear the testimony of other witnesses." ***U.S. v. Sepulveda***, 15 F.3d 1161, 1175–1176 (1st Cir. 1993), cert. denied 512 U.S. 1223 (1994). However, under FRE 615, a court "retains discretion to add other restrictions or not, as it judges appropriate." ***U.S. v. Magana***, 127 F.3d 1, 5 (1st Cir. 1997) (citing cases). Examples are discussed below.

§ 11–210 Conferring with Counsel

The trial judge has discretion, pursuant to a sequestration order, to instruct nonparty witnesses not to discuss their testimony with anyone, including the parties' counsel, during recesses in the witnesses' testimony. ***Geders v. U.S.,*** 425 U.S. 80, 87–88, (1976).

The judge likewise has discretion to instruct party witnesses not to confer with counsel during a short recess between direct and cross-examinations. ***Perry v. Leeke***, 488 U.S. 272, 283–284 (1989). See also ***United Chrome Products***, 288 NLRB 1176 n. 1 (1988) (during a 10-minute recess in the General Counsel's examination of respondent's general manager as a hostile witness, it was not error for the judge to instruct the witness that he could speak with respondent's counsel to "be prepared for questioning by [that] counsel," but not about "what he testified and how to change it").

However, in ***Geders***, above, the Court held that the trial judge deprived the criminal defendant of this Sixth Amendment right to the assistance of counsel by prohibiting him from consulting with his counsel about anything during a 17-hour overnight recess in his testimony. The Fifth Circuit subsequently reached a similar conclusion in a civil case, based on the Fifth Amendment right to due process, holding that the trial judge erred in barring the defendant

corporation's president and sole shareholder from conferring with the corporation's counsel during several overnight recesses in his testimony. ***Potashnick v. Port City Construction Co***., 609 F.2d 1101, 1117 (5th Cir.), cert. denied 449 U.S. 820 (1980).

Opposing counsel "may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court." ***Geders***, 425 U.S. at 89. Such questioning may properly include "whether [the defendant] met with his attorney and whether his testimony was discussed at those meetings"; however, questions about "the substance of the legal advice given to [the defendant]" may violate the attorney-client privilege. ***U.S. v. Carrillo***, 16 F.3d 1046, 1050 (9th Cir.1994).

§ 11–220 Showing Transcripts to Witnesses

Where a sequestration order has issued, informing prospective witnesses of prior testimony, including by showing transcripts to them, is prohibited "without express permission of the administrative law judge;" however, "counsel for a party may inform counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side . . . to prepare for rebuttal of [the] testimony." ***Greyhound Lines****,* above, 319 NLRB at 554.

Greyhound modifies the Board's prior seemingly absolute prohibition on showing separated witnesses the transcripts of other witnesses' testimony. See ***El Mundo Corp.***, 301 NLRB 351 (1991). But, that modification appears confined to a showing by counsel and to only so much of the transcript as is needed for possible rebuttal of testimony recited in the transcript, as opposed to making the entire transcript available for open-ended perusal by a prospective witness.

§ 11–300 Requests to Separate Witnesses

As indicated above, if a request is made, the judge "shall" order witnesses excluded. FRE 615 and ***Unga Painting Corp.***, above, 237 NLRB at 1307. No formal exceptions to this rule are recognized. However, the failure of the judge to issue a sequestration order on request will not require reversal in the absence of any prejudice. See ***AEI2, LLC***, 343 NLRB 433 (2004) (finding no prejudice where there were only two other witnesses, one who would not have testified to the events, and the other who likely would have been designated as a party representative); and ***Curlee Clothing Co.***, 240 NLRB 355 n. 1 (1979) (finding no prejudice where judge in a pre-*Unga Painting* hearing denied a request because the large number of witnesses and severe spatial limitations rendered separation impossible), enfd. in relevant part 607 F.2d 1213 (8th Cir. 1979).

No time is specified for making the request to separate witnesses. See FRE 615. See also ***AEI2, LLC***, above, 343 NLRB at 433 n. 4, and authorities cited there. But see ***Alpert's, Inc.***, 267 NLRB 159 n. 1 (1983) (upholding judge's denial of request that was not made until after the General Counsel's second witness had testified).

The judge also possesses authority to order witnesses excluded on his/her own motion, i.e. even if not requested. FRE 615.

§ 11–400 Who Should and Should Not Be Separated

All potential witnesses should be excluded from the trial. ***Unga Painting Corp.***, above, 237 NLRB at 1307; and ***Greyhound Lines***, above, 319 NLRB at 554. Both FRE 615 and the Board, however, recognize several exceptions.

Party who is a natural person. See FRE 615(a) ("a party who is a natural person") and ***Greyhound***, above ("natural persons who are parties").

Officer or employee of a non-natural party who is designated as its representative by its attorney. FRE 615(b). See also ***Greyhound Lines***, above ("representatives of nonnatural parties"). The Board reads this exception as limiting a corporate respondent to its attorney and one other representative. ***Unga Painting Corp.***, above, 237 NLRB at 1308 n. 16. Further, in ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d 625, 630 (4th Cir. 1996), the court held that the representative must be an employee, and that the corporation's "mere designation of a person to act on its behalf at trial" does not convert the person into its employee.

Person essential to a party's presentation. See FRE 615(c) ("a person whose presence a party shows to be essential to presenting the party's claim or defense"); and ***Greyhound Lines***, above ("a person who is shown by a party to be essential to the presentation of the party's cause"). It must be shown that the presence is "'essential,' rather than simply desirable." ***U.S. v. Jackson***, 60 F.3d 128, 135 (2d Cir. 1995), cert. denied 516 U.S. 980, 1130, 1165 (1995 and 1996). See also ***Opus 3 Ltd. v. Heritage Park***, above, 91 F.3d at 628 (burden is on party asserting that witness's presence is essential); and ***Tasty Baking Co. v. NLRB***, 254 F.3d 114, 123 (D.C. Cir. 2001) ("the ALJ retains considerable discretion in determining which witnesses are 'essential' within the meaning of the rule").

Alleged discriminatees. The Board allows a limited exemption for alleged discriminatees. They are exempted from exclusion, except "during that portion of the hearing when another of the General Counsel's or the charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal." ***Unga Painting Corp.***, above, 237 NLRB at 1307. See also ***Greyhound Lines***, above.

However, the judge retains some discretion in applying this limited exemption. Thus, in ***Unga Painting***, the Board stated that the judge may decline to follow the rule if, in his/her judgment "there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying." 237 NLRB at 1307. For example, in a footnote the Board noted that the third exception in FRE 615 for "essential" persons "is broad enough to permit a showing of these special circumstances and allows the [judge] considerable discretion." Id. at n. 14.

Discriminatees designated essential representative. Notwithstanding the Board's footnote in ***Unga Painting***, above, there appears to be some ambiguity regarding the right of a discriminatee who is also designated as the General Counsel's or charging party's representative to stay throughout the trial. The judge approved such a designation, and allowed the discriminatee to remain in the hearing room, in ***Impact Industries***, 285 NLRB 5, 6 (1987), remanded on other grounds 847 F.2d 379 (7th Cir. 1988). But see ***Weis Markets, Inc. v. NLRB***, 265 F.3d 239, 245–246 (4th Cir. 2001), modifying in part 325 NLRB 871 (1998) (court rejected respondent's contention that it was prejudiced by judge's allowing discriminatee who was the General Counsel's designated representative to remain throughout the trial, even while subsequent General Counsel witnesses testified to the same events, but expressed disapproval of the judge's "departure from Board precedent"). In any event, as indicated above, the judge should require a showing that the discriminatee's unrestricted presence is "essential" in these circumstances.

§ 11–500 Violation of Sequestration Order

A prerequisite to finding a violation of a sequestration order is the issuance of the order itself. See ***U.S. v. Williams***, 136 F.3d 1166, 1168–1169 (7th Cir. 1998) (parties informed the judge that they had agreed to sequestration, but there was "no formal request for entry of an order," and "no sequestration order was ever entered"). Further, the parameters of the judge's sequestration order should be clearly defined. See ***Continental Winding Co.***, 305 NLRB 122, 129 (1991).

Once an order has issued, however, counsel are expected to police the rule, to inform any witnesses not present at the time the judge issues the order of their obligations under the order, and to bring any violations to the judge's attention. See ***Greyhound Lines***, above, 319 NLRB at 554.

When a witness has violated a sequestration order, the Board's preferred course appears to be "stricter scrutiny of the tainted testimony," without striking the testimony of that witness. ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1149 (1994), enfd. 72 F.3d 780 (10th Cir. 1995). Nevertheless, violating a separation of witnesses order "may warrant striking the tainted testimony if it can be demonstrated that a party was prejudiced by the violation of the rule." ***Suburban Trails***, 326 NLRB 1250 n. 1 (1998).

If disregard of a sequestration order is revealed before a witness is called to testify, under FRE 615 that witness may be barred from testifying. ***U.S. v. Wilson***, 103 F.3d 1402, 1406 (8th Cir. 1997) (holding that trial court "clearly acted within its discretion in concluding that [witness] could not be called to testify at the last minute after sitting in the courtroom and listening to much of the case"). Cf. ***North Hills Office Services***, 342 NLRB 437 n. 2 (2004) (Board rejected respondent's contention that the judge improperly allowed the attorney for the charging party, who had been present throughout the trial, to testify in violation of the sequestration order, inasmuch as the judge had warned the parties that the "credibility of witnesses who were present during the testimony of other witnesses would be subject to attack," and "fairly applied the sequestration order to all parties").

As discussed above in **§6**–**600**, et seq. regarding attorney misconduct, violations of a sequestration order by counsel may warrant an admonishment or reprimand or referral to the General Counsel under Section 102.177 of the Board's Rules. See ***Sargent Karch***, 314 NLRB 482 (1994) (suspending attorney for 6 months after second violation).

CHAPTER 12. THE HEARING RECORD

§ 12–100 Public hearings

Section 102.34 of the Board's Rules provides that hearings "shall be public unless otherwise ordered by the Board or the administrative law judge." Similarly, Section 101.10(a) of the Board's Statements of Procedure provides that "except in extraordinary situations the hearing is open to the public."

§ 12–200 Opening a Trial by Telephone or Mail

A judge may open a trial by telephone or by mail in the interests of saving time and expenses for all concerned. See, e.g., ***Ironworkers Local 843 (Norglass, Inc.)***, 327 NLRB 29 (1998).

This is typically done in a situation in which a charging party or the General Counsel is unwilling to join in a proposed settlement. See, e.g., ***CWA Local 9403 (Pacific Bell)***, 322 NLRB 142 (1996). In such situations, one of the parties to the settlement makes a motion to open the trial by mail, to receive the formal papers, and consider the proposed settlement agreement. The judge issues a show cause order, giving the parties a date to show cause why the motion should not be granted or to submit a statement why the settlement should be approved. Upon receipt of the statements, if the judge decides the settlement should be approved, he or she issues an order granting the motion to open the record, discusses the objections, approves the settlement, and adjourns the trial indefinitely, pending full compliance with the agreement.

If the parties are willing, this can be accomplished even more efficiently by considering the motion, the settlement agreement, and any objections in a telephone conference call, with a court reporter recording the proceedings.

A similar procedure is also used in lengthy trials at a distant location involving the production of voluminous subpoenaed documents. The trial is opened by a telephone conference call, and the judge rules on disputed issues raised in the petition to revoke the subpoena. The judge then travels to the trial site when the parties are ready to resume the trial.

§ 12–300 Testimony by Telephone

The Board has disapproved taking a witness's testimony by telephone over the respondent's objections. See ***Westside Painting, Inc.***, 328 NLRB 796, 796–797 (1999) ("under Section 102.30 of the Board's Rules, witnesses in Board unfair labor practice proceedings may not testify by telephone"). The Board emphasized the importance of viewing the demeanor of the witness by the trier of fact, as well as the lack of sufficient safeguards that may have impaired the respondent's right of cross-examination.

Nevertheless, judges have, on occasion, taken telephone testimony when all parties agreed to the procedure. See, for example, ***Team Clean, Inc.***, 348 NLRB 1231 (2006), where an entire trial—albeit a short one with simple issues—was conducted by telephone.

§ 12–400 Testimony by Videoconference

FRCP 43 provides that ”for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”

The foregoing standard is not further defined. However, the Advisory Committee Notes indicate that mere inconvenience for the witness to attend the trial is not a sufficient justification, and that an unexpected development, such as an accident or illness, would likely be the most persuasive justification. See also ***Rodriguez v. SGLC, Inc.***, 2012 WL 3704922, 2012 U.S. Dist. LEXIS 120862 (E.D. Cal. Aug. 24, 2012) (denying plaintiffs' motion to permit them to testify from Mexico by videoconferencing, as they had shown only that it would be inconvenient for them to attend the trial, not that they could not have obtained a visa or could not afford to attend); ***SEC v. Yang***, 2014 WL 1303457, 2014 U.S. Dist. LEXIS 42580 (N.D. Ill. March 30, 2014) (denying defendants' motion to take testimony of witnesses in China by videoconference in the absence of a showing that they could not obtain a visa or that travel was prohibitively expensive for them); and ***Sille v. Parball Corp***., 2011 WL 2680560 (D. Nev. July 8, 2011) (denying plaintiff's "blanket" motion to take testimony of virtually all of its witnesses in Norway and New York by videoconference, given the lateness of the motion and the absence of any unexpected circumstances).

But compare ***FTC v. Swedish Match North America, Inc***., 197 F.R.D. 1 (D.D.C. 2000) (granting plaintiff's motion to permit witness in Oklahoma to testify by videoconference to avoid the "serious inconvenience" of traveling "across the continent"); ***Virtual Architecture, Ltd. V. Rick***, 2012 WL 388507, 2012 U.S. Dist. LEXIS 15118 (S.D.N.Y. Feb. 7, 2012) (granting plaintiff's motion to permit witness in Seychelles to testify by videoconference given the long distance and flight time and the witness's assertion that it would be "virtually impossible" for him to obtain a visa in time to testify in person); and ***Sprint Nextel Corp. v. Yoak***, 2014 WL 6796074, 2014 U.S. Dist. LEXIS 166881 (E.D. Mo. Dec. 2, 2014) (granting plaintiff's motion to permit a witness to testify by videoconference in order to "spare the witness the serious inconvenience in traveling from Seattle a second time"; witness had previously traveled to St. Louis to testify, but was unable to do so because of defendant's motions to delay and continue the hearing). See also ***Lopez v. NTI, LLC***, 748 F.Supp.2d 471, 479–481 (D. Md. 2010) (permitting the Honduran plaintiffs to testify by videoconference because of their "strikingly few financial resources" and the "substantial inconvenience and cost" of travel, but not the Virginia and Tennessee plaintiffs).

The Board has not directly addressed whether FRCP 43 applies in unfair labor practice proceedings. However, it has upheld the discretion of judges to take witness testimony by videoconference, even over the objection of a party. In ***EF International Language Schools, Inc***., 363 NLRB No. 20 (2015), the Board affirmed the findings of the associate chief judge and trial judge that the use of videoconference technology to take the testimony of a General Counsel corroborating witness who resided in Madrid, Spain from the U.S. Embassy there was appropriate and did not deny the respondent due process. The Board distinguished ***Westside Painting***, above, involving testimony by telephone, as the videoconferencing technology used enabled the judge and the parties to observe the witness at all material times.

Further, the Board has made clear that there are circumstances where ALJs should permit testimony by videoconference. In ***MPE, Inc***., 9–CA–084228, the General Counsel filed a motion to take the testimony of the alleged 8(a)(3) discriminatee by videoconference because he was currently incarcerated in a federal prison located several hundred miles from the hearing site and was not scheduled to be released for over a year. The respondent opposed the motion, and the

judge denied it on the ground that the General Counsel's proposal to conduct the video-conference by Skype or Glowpoint technology failed to include appropriate safeguards to ensure that the videoconferenced testimony would be the functional equivalent of live testimony at the hearing. The Board reversed, stating:

> The General Counsel has demonstrated that [the alleged discriminatee] is a key witness in this matter, and that [he] is unavailable to testify in person because he is incarcerated in the federal prison . . . . While we agree with the judge that Skype technology, in its current form, is not a viable means for taking video testimony, we are persuaded by the General Counsel's argument that the Glowpoint video conference technology used by the Board and by the Federal Bureau of Prisons is acceptable for video testimony, subject to appropriate procedural safeguards to preserve the due process rights of the parties, such as those described in OM 08-20 (Pilot Video Testimony Program in Representation Cases), or as otherwise may be agreed upon by the parties.

The Board added, however, that the judge retained the discretion to strike the video testimony if he "subsequently determines that the actual circumstances of the video testimony do not provide the parties with a meaningful opportunity to examine and cross-examine the witness, or give the judge the appropriate ability to assess [the witness's] demeanor for the purposes of assessing his credibility." See the Board's unpublished order dated January 29, 2015 (2015 WL 400660; 2015 NLRB LEXIS 47).

For other examples where ALJs have approved taking testimony by videoconference, see ***Spurlino Materials, LLC***, 357 NLRB No. 126 (2011) (by agreement of all parties, the ALJ held the last day of hearing, which followed a 3-week recess and was relatively short, by videoconference); ***SRC Painting***, 357 NLRB No. 5 (2011) (ALJ conducted entire hearing, which lasted less than 1 hour, by video where neither the General Counsel nor the charging party objected and the respondent did not respond to the judge's notice to show cause or appear at the hearing); and ****M.V.M., Inc.***, 352 NLRB 1165, 1165 n.1 (2008) (the testimony of one witness was taken by video without objection, where the original testimony of the witness erroneously was not transcribed).

Videoconferencing equipment is available in all regional offices and most large law firms. If video testimony is taken, counsel should be given the opportunity to be present, perhaps through a surrogate, at the location where the witness appears, and all other reasonable due process requirements should be followed. Obviously, a reporter must be present to transcribe the testimony and care should be taken to ensure that the reporter is able to hear all the speakers wherever they are located. In addition, the camera should be adjusted to give a close-up view of the witness and exhibits should be provided in advance. These and other such technical or logistical problems should be considered in evaluating relative advantages and disadvantages of permitting videoconferencing.

§ 12–500 Tape Recorders in Trial

The use of a tape recorder by parties to record trial proceedings is within the discretion of the judge. Compare ***Red & White Supermarkets***, 172 NLRB 1841, 1846 (1968) (use of tape recorder permitted), with ***Marriott Corp.***, 172 NLRB 1891, 1892 n. 1 (1968) (permission to use tape recorder denied), enfd. in part 417 F.2d 176 (4th Cir. 1969).

Although the reviewing court in *Marriott* found no prejudice from the judge's ruling, it indicated that a recorder should be permitted to the extent that it does not interfere with or slow down the trial. 417 F.2d at 178. Nevertheless, the Board subsequently upheld a judge's discretion to deny a respondent's request to use a tape recorder in ***Daisy's Originals, Inc.***, 187 NLRB 251 n. 1 (1970) (judge denied request on ground he would not be able to police its use; the Board further noted that the judge and parties are bound by the transcript prepared by the official reporting service).

Obviously, if a tape recording is permitted, it would be subject to the restrictions imposed by a sequestration order.

§ 12–600 Television Cameras in Courtroom

The Board's policy is that its trials may not be televised. That policy is reflected in a June 10, 1991 letter from the Deputy Executive Secretary to a television station that had requested permission to televise a trial. The letter states that the policy may be reviewed later; however, to date, there has been no change.

§ 12–700 Correcting the Transcript

The judge should not unilaterally correct a trial transcript, except for obvious typographical errors. Corrections should be made pursuant to a motion by a party or, if there is none, after issuance of an order to show cause. ***Serv-Air, Inc.***, 161 NLRB 382 n. 1 (1966); and ***W. B. Jones Lumber Co.***, 114 NLRB 415 n. 1 (1955), enfd. 245 F.2d 388 (9th Cir. 1957).

In ***Teamsters Local 705 (Pennsylvania Truck Lines)***, 314 NLRB 95 n. 2 (1994), the Board rejected the General Counsel's attempt to supply the surname of an additional discriminatee, whose name was inaudibly described in the transcript. The Board stated that the burden is on the parties to make certain the transcript is clear and correct. During a trial, the judge should make sure, to the extent possible, that the testimony is correctly and adequately transcribed, particularly that the witness's testimony is audible.

§ 12–800 Redacting Private Information (Social Security Numbers)

Sensitive personally identifiable information (SPII) should not be submitted by the parties into the public record or used by judges in decisions. The Agency defines SPII as an individual's name in combination with one or more of the following:

- Date of birth
- Social Security number
- Driver's license number
- Financial account number
- Credit or debit card number

CHAPTER 13. BOARD PRECEDENT AND RELITIGATION OF ISSUES

§ 13–100 Binding Board Precedent, Judge Required to Follow

The judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. See, e.g., ***Pathmark Stores, Inc.***, 342 NLRB 378 n. 1 (2004); ***Waco, Inc.***, 273 NLRB 746, 749 n. 14 (1984); ***Los Angeles New Hospital***, 244 NLRB 960, 962 n. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); and ***Iowa Beef Packers***, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964).

Of course, a judge is also bound to follow particular Board findings in a prior case, where appropriate, under the doctrine of collateral estoppel. See ***Great Lakes Chemical Corp.,*** 300 NLRB 1024, 1024–1025 and n. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). See also **§13–600**, Relitigation of Issues, below.

§ 13–200 Adopted Judge Decisions, When Not Binding Precedent

When the Board has adopted all or even a portion of a judge's decision to which no exceptions have been filed, that decision or portion is not binding precedent in other cases. ***Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel*)**, 357 NLRB No. 140 n. 1 (2011); and **Trump Marina Associates LLC,** 354 NLRB 1027 n. 2 (2009), reaffd. 344 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011); ***Carpenters Local 370 (Eastern Contractors Assn.),*** 332 NLRB 174, 175 n. 2 (2000); ***Watsonville Register-Pajaronian***, 327 NLRB 957, 959 n. 4 (1999); and ***Colgate-Palmolive Co.***, 323 NLRB 515 n. 1 (1997).

In reviewing prior decisions to determine whether any of the ALJ's findings or analyses have precedential value, it is important to check:

1) which party or parties filed exceptions to the ALJ's decision (this is usually stated in the first paragraph of the Board's decision);

2) whether there were no exceptions to any of the judge's findings or analyses (this is usually stated in a footnote in the Board's decision);

3) whether the Board did not pass on any of the judge's findings or analyses for some reason (this is also usually stated in a footnote); and

4) whether the Board affirmed any of the findings on different grounds than the ALJ.

§ 13–300 Reliance on Prior Findings of Another Judge

Credibility determinations. It is "generally inappropriate" to base credibility determinations solely on credibility determinations made in a prior case. ***Electrical Workers (Nixdorf Computers Corp.)***, 252 NLRB 539 n. 1 (1980). See also ***Fluor Daniel, Inc. v. NLRB***, 332 F.3d 961, 972 (6th Cir. 2003), cert. denied, 543 U.S. 1089 (2005) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness").

ALJ decisions adopted in the absence of exceptions. Although lacking precedential legal authority, a judge's decision that has been adopted by the Board in the absence of exceptions may properly be relied on in a subsequent case involving the same parties, at least where all the required elements of collateral estoppel are met. See ***Moulton Mfg. Co***., 152 NLRB 196, 207–209 (1965) (rejecting respondent's argument that such decisions should be given no more effect

than a settlement agreement); and ***Operating Engineers Local 12 (Associated Engineers),*** 270 NLRB 1172, 1172–1173 (1984) (prior ALJ decision may be relied on to show respondent has a proclivity to violate the Act, even if the decision was adopted by the Board in the absence of exceptions). See also ***Hitchens v. County of Montgomery***, 98 Fed. Appx. 106 (3d Cir. 2004) (hearing officer's proposed decision that was adopted by the state labor agency in the absence of exceptions was a final order sufficient to bar relitigation of same issues in subsequent federal action against the same party or party in privity).

ALJ decisions pending before the Board on exceptions. An ALJ decision that is pending before the Board on exceptions is not binding authority and should not be cited as such. See ***Healthbridge Management, LLC***, 362 NLRB No. 33, slip op. at 1 n. 3 (2015) citing ***St. Vincent Medical Center***, 338 NLRB 888 (2003). Nevertheless, the trial judge appears to have the discretion to rely on factual findings made by another ALJ in a prior case even if the case is still pending before the Board on exceptions. See ***Wynn Las Vegas, LLC***, 358 NLRB No. 81 (2012) (holding that the trial judge properly barred respondent from relitigating lawfulness of suspension, as that issue had already been decided by another ALJ in a prior case that was pending before the Board on exceptions, and the Board had since affirmed the ALJ's decision); ***Detroit Newspapers Agency***, 326 NLRB 782 n. 3 (1998) (noting that the trial judge had relied on an earlier decision by another ALJ that was pending before the Board to find that a strike was an unfair labor practice strike, and that the Board had since affirmed the ALJ's decision), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000); and ***Grand Rapids Press of Booth Newspapers***, 327 NLRB 393, 394–395 (1998) (same, where the trial judge relied on another ALJ's findings in an earlier case as evidence of animus), enfd. mem. 215 F.3d 1327 (6th Cir. 2000). This approach advances judicial efficiency, and avoids inconsistent results and delays attendant to awaiting the Board's review of the judge's decision in the earlier case. However, the judge should keep in mind that, if the Board reverses the earlier judge's findings on review, the judge's findings in the second case may likewise be vulnerable to reversal. See, e.g.,***Detroit Newspapers***, above; and ***Ironworkers Local 103***, 195 NLRB 980, 983 (1972).

§ 13–400 Reliance on Settlements

Informal settlements and formal settlements that contain nonadmission clauses may not be relied on in subsequent cases involving the same parties. See ***Sheet Metal Workers Local 28***, 323 NLRB 204 (1997). However, formal settlements that do not contain a nonadmission clause may be relied on in subsequent cases to show that the respondent has a proclivity to violate the Act. ***Teamsters Local 122***, 334 NLRB 1190, 1192 n. 11 (2001); ***Painters District Council 9 (We're Associates***), 329 NLRB 140, 143 (1999); and ***Teamsters Local 945 (Newark Disposal Service),*** 232 NLRB 1, 3–4 (1977), enfd. mem. 586 F.2d 835 (D.C. Cir. 1978).

§ 13–500 Reliance on Portions of Other Records

In ***Beverly Health & Rehabilitation Services***, 335 NLRB 635, 639 n. 26 (2001), enfd. in part, 317 F.3d 316 (D.C. Cir. 2003), the Board stated that it expects parties to introduce all nontestimonial evidence on which they rely in the form of exhibits. They cannot "incorporate by reference" portions of other records, even those of Board cases involving the same parties.

§ 13–600 Relitigation of Issues

In the absence of newly discovered and previously unavailable evidence or special circumstances, the respondent in a Section 8(a)(5) unfair labor practice case may not relitigate issues that were or could have been litigated in a prior representation proceeding. ***Nursing Center at Vineland***, 318 NLRB 901, 903 (1995), enfd. mem. 151 LRRM 2736 (3d Cir. 1996).

Nor may the respondent relitigate in the compliance proceeding matters decided in the underlying unfair labor practice proceeding. ***Task Force Security & Investigations***, 323 NLRB 674 n. 2 (1997). See also ***Lorge School***, 355 NLRB 558 n. 1 and 563 (2010) (issues in the underlying case, including the authority of the two-Member Board to issue the decision, are barred by res judicata where the decision has been judicially enforced).

With respect to issues actually litigated in prior unfair labor practice cases, see ***Stark Electric, Inc.***, 327 NLRB 518 n. 1 (1999); ***Planned Building Services, Inc.***, 347 NLRB 670 n. 2 (2006); and ***Success Village Apartments, Inc.,*** 348 NLRB 579 n. 4 (2006) (judge may rely, at least in part, on findings in prior Board decisions involving the same respondent to find animus). See also ***Allied Mechanical Services, Inc.***, 352 NLRB 662, 664 (2008), reconsideration denied 356 NLRB No. 1 (2010) (respondent was collaterally estopped from alleging that its bargaining relationship with a union was based on Section 8(f) rather that Section 9(a) because a prior Board decision involving the same parties was necessarily premised on the existence of a Section 9(a) relationship and a prior settlement agreement confirmed such a relationship); and ***Great Lakes Chemical Corp.***, 300 NLRB 1024, 1025 and nn. 3 and 4 (1990) (respondent was collaterally estopped from relitigating facts relating to its duty to bargain as a successor, which were fully and fairly litigated and necessarily decided in prior proceeding involving same parties), enfd. 967 F.2d 624 (D.C. Cir. 1992). Compare ***Harvey's Resort***, 271 NLRB 306 (1984) (collateral estoppel is inapplicable where matter was not put in issue in prior case). See also ***National Marine Engineers Beneficial Assn. v. NLRB***, 274 F.2d 167, 172–175 (2d Cir. 1960).

With respect to issues fully litigated before another judge but still pending before the Board on exceptions to the judge's decision, see **§ 13–300,** Reliance on Prior Findings of Another Judge, above.

With respect to the application of collateral estoppel and res judicata to the General Counsel or Board, see ***Precision Industries***, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). In that case, the Board held that prior age and race discrimination charges filed with the EEOC by several discriminatees did not judicially estop the General Counsel from asserting that the failure to hire was based on antiunion animus, as neither the General Counsel nor the Charging Party Union were parties in the EEOC proceeding.

The Board in ***Precision Industries*** also rejected respondent's res-judicata argument that the complaint was barred because respondent had prevailed in an ERISA suit brought by the Union and certain former employees and retirees. The Board cited "the general rule that the Government is not precluded from litigating an issue involving the enforcement of Federal law that a private party has litigated unsuccessfully, when the Government was not a party to the private litigation." Ibid., citing ***Field Bridge Associates***, 306 NLRB 322 (1992), enfd. sub nom. ***Service Employees Local 32B–32J v. NLRB***, 982 F. 2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

See also ***Roadway Express***, 355 NLRB 197 (2010), where the respondent employer argued that a court's dismissal of the alleged discriminatee's hybrid 301/DFR claim against the

employer and union collaterally estopped the General Counsel from subsequently opposing deferral of the related 8(a)(3) allegations against the employer on the ground that the union had breached its DFR in the prior grievance proceeding. Relying on the same "general rule" above, the Board rejected the respondent's argument as the General Counsel was neither a party to the unsuccessful lawsuit nor in privity with the alleged discriminatee (since the Board acts in the public interest), and the court dismissed the DFR claim on the ground that the discriminatee had waived it, rather than on the merits.

The Board's application of its general policy has been rejected by two circuit courts. See ***NLRB v. Donna-Lee Sportswear***, 836 F.2d 31 (1st Cir. 1987); and ***NLRB v. Heyman***, 541 F.2d 796 (9th Cir. 1976) (holding that where the existence of a contract has been decided by a district court in actions brought under ERISA or Sec. 301, the Board is precluded from relitigating that issue in a later 8(a)(5) case). However, in subsequent cases, the Board has distinguished these two circuit court decisions based on their particular facts. See ***Field Bridge Associates***, above, 306 NLRB at 323 n. 2 (the existence of the contract was "the essence of the unfair labor practice charge," rather than just one aspect of the allegations, and did not have "implications concerning Section 8(a)(3) of the Act"); ***Precision Industries***, above, 320 NLRB at 663, n. 13 ("the issue in the unfair labor practice case—the existence, vel non, of a contract—was the same as the one that had been decided in the court proceeding"); and ***Roadway Express***, above (the Board's unfair labor practice findings depended "entirely" on the existence of a contract, and the courts' prior findings on that issue represented "a minimal intrusion into the Board's jurisdiction" as "no broad policy question" was implicated in that determination). See also ***Galaxy Towers Condominium Assn***., 361 NLRB No. 36 n. 3 (2014) ("We adhere to the general rule not to apply judicial estoppel where the Government was not a party to the prior proceeding.").

CHAPTER 14. SUPPLEMENTAL OR RELATED PROCEEDINGS

§ 14–100 Remands

On a remand for further hearing, the judge is limited to considering only those matters specified by the Board's order and cannot expand the scope of the trial. ***Monark Boat Co.***, 276 NLRB 1143 n. 3 (1985), enfd. 800 F.2d 191 (8th Cir. 1986).

§ 14–200 Compliance Proceedings

Special procedural rules govern supplemental backpay proceedings, particularly regarding the allocation of the burden of proof on various issues. For a list of these burden-of-proof rules, see ***Minette Mills, Inc.,*** 316 NLRB 1009, 1010–1011 (1995). See also ***St. George Warehouse***, 351 NLRB 961 (2007) (modifying traditional rule and shifting burden of going forward to the discriminatee and General Counsel to present evidence that the discriminatee took reasonable steps to apply for substantially equivalent jobs), enfd. 645 F.3d 666 (3rd Cir. 2011); and ***Grosvenor Resort***, 350 NLRB 1197 (2007) (holding that, absent circumstances justifying a longer delay, discriminatees should begin their search for interim work within 2 weeks of discharge).

With respect to imposing special remedies in the compliance proceeding, see ***2 Sisters Food Group, Inc***., 359 NLRB No. 158 n. 3 (2013), reaffd. 361 NLRB No. 152 (2014) (judge should not have considered the charging party's request for numerous additional notice remedies in the compliance proceeding where the additional remedies could have been but were not sought at the unfair labor practice stage of the case). But cf. ***Gimrock Construction***, 356 NLRB No. 83 (2011) (judge properly granted General Counsel's request in compliance proceeding for special bargaining remedies, including a specific bargaining schedule and mandatory progress reports, notwithstanding that the underlying court-enforced Board order contained only a traditional bargaining order), enf. denied in relevant part 695 F.3d 1188, 1193 (11th Cir. 2012).

§ 14–300 Bankruptcy Proceedings

"It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers." See, e.g., ***Consumer Product Services, LLC***, 357 NLRB No. 87, slip op. at 1 n. 2 (2011), and cases cited there. See also ***NLRB v. Evans Plumbing Co.***, 639 F.2d 291, 293 (5th Cir. 1981). Collection of backpay, however, requires a separate application to the bankruptcy court. ***NLRB v. Continental Hagen Corp.,*** 932 F.2d 828, 832–833 (9th Cir. 1991); and ***NLRB v. 15th Avenue Iron Works***, 964 F.2d 1336, 1337 (2d. Cir. 1992).

CHAPTER 15. ORAL ARGUMENT, BRIEFS, JUDGES DECISIONS

§ 15–100 Pretrial or Trial Briefs

The Board's Rules contain no specific provision for pretrial or trial briefs. However, Section 102.35(a)(12) provides that judges have authority "to request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support [of it]." Further, the 3d Edition of the U.S. Administrative Conference's Manual for Administrative Law Judges (https://archive.org/details/gov.acus.1993.manual), states at 47:

> Some cases, particularly complex ones, can be facilitated by trial briefs stating the principal contentions of the parties, the evidence to be presented and the purposes for which it is submitted. [The] briefs may also present the results of research the judge has requested on legal or technical problems. The judge may instruct each party to include in the brief any procedural motions and requests, such as provisions to bar proposed written evidence.

See also ***Bunge Milling, Inc***., 33-CA-15997, unpub. Board order issued Dec. 30, 2011 (2011 WL 6886297, 2011 NLRB LEXIS 770) (ALJ did not abuse his discretion by requiring parties to submit prehearing briefs on whether the Board should defer to an arbitrator's decision and award).

§ 15–200 Post-Trial Oral Argument

Section 102.42 of the Board's Rules specifically provides that "any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which may include presentation of proposed findings and conclusions, and shall be included in the stenographic report of the hearing."

§ 15–300 Post-Trial Briefs

Section 102.42 of the Board's Rules provides that the judge has discretion whether to allow time for parties to file posthearing briefs. See also ***K.O. Steel Foundry & Machine****,* 340 NLRB 1295 (2003) (upholding judge's discretion to allow oral argument in lieu of briefs). In most cases, judges will allow parties to file posthearing briefs, as they can be quite helpful. But see **§15–500**, Expedited Decision Without Briefs; and **§15–600**, Bench Decision, below

Time to File. Section 102.42 provides that the judge may fix a reasonable time for filing the briefs, but not in excess of 35 days of the close of trial (counting intermediate weekends and holidays, see Sec. 102.111). Requests for extension of time must be filed with the appropriate Chief, Deputy, or Associate Chief Judge.

Parties should be informed that the Board and its chief judges will not lightly grant postponements for the submission of briefs and that motions for extension of time should, on their face, explain the reason for the request and indicate whether the other parties object to the proposed extension. See **§1–200**, Closing Statement by Judge, above.

Where Briefs Are to be Filed. The judge should inform the parties at the beginning of the trial that briefs should be filed in the office to which the judge is assigned. Motions for extension of time should be directed to the Chief, Deputy, or Associate Chief Judge at that office as well.

Filing and Service Requirements. Section 102.42 requires that three copies of the brief be filed, with simultaneous service on the other parties. Other filing and service requirements for briefs are set forth in Sections 102.111–102.114 of the Board's Rules. See also **CHAPTER 4**, "Service of Documents," above.

Note that briefs may be e-filed, but not faxed (although they may be served by fax with consent of the served party). The brief should be e-filed directly with the Judges Division, and should otherwise comport with the rules posted on the Board's web-site. E-filed briefs must also comport with all applicable time requirements, including those in Section 102.111 of the Board's Rules. Filing is effective upon the receipt of an e-mailed document and notification that the e-filed brief has been received by the Division of Judges. A statement of service must accompany the e-filed brief, in accordance with Section 102.114(i) of the Board's Rules. Electronic filings will be accepted up to 11:59 p.m., local time, at the receiving office on the due date. Parties who e-file documents are required to serve them on other parties to the case by e-mail whenever possible.

Reply or Answering Briefs. There is no provision in the Board's Rules for the filing of reply or answering briefs to the administrative law judge. However, the trial judge has the discretion to ask for them, or grant a motion for leave to file them, in an appropriate case. See ***Gallup, Inc.***, 349 NLRB 1213, 1217 (2007), and cases cited there.

CAUTION: Judges should not use excerpts from the briefs of the parties as a substitute for their findings and legal analysis in the written decision. Extensive and verbatim copying from the brief of the prevailing party in the judge's decision not only creates the appearance of partiality, but also gives the impression that the judge failed to conduct "an independent analysis of the case's underlying facts and legal issues." ***Dish Network Service Corp.,*** 345 NLRB 1071 (2005). See also **§2–410**, Grounds Asserted for Disqualification, above.

§ 15–400 Briefs Not Part of Official Record

Briefs to the judge do not normally become part of the official record in the case. See Sec. 102.45(b) of the Board's Rules. See also ***Stagehands Referral Service, LLC***, 356 NLRB No. 152 (2011); and ***Vanguard Fire & Security Systems***, 345 NLRB 1016, 1020 (2005).

§ 15–500 Expedited Decision Without Briefs

The Board allows the issuance of an expedited decision, without waiting for the filing of briefs, upon due notice to the parties. Section 102.42 of the Board's Rules provides that:

> In any case in which the administrative law judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, he or she shall notify the parties at the opening of the hearing or as soon thereafter as practicable that he or she may wish to hear oral argument in lieu of briefs.

Thus, after giving the required notice to the parties and after hearing the oral arguments in lieu of briefs, the judge may proceed to read the transcript, exhibits, and applicable authorities, and prepare a written expedited decision in the usual manner.

An expedited decision may be preferred as an alternative to a bench decision, discussed below in **§15–600**. It avoids the sometimes hurried approach and potential pitfalls of a bench decision, which must be delivered orally at the close of the trial.

§ 15–600 Bench Decision

§ 15–610 In General

Section 102.35(a)(10) of the Board's Rules provides that administrative law judges shall have authority "to make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89–554, 5 U.S.C. § 557." This procedure has received court approval. See ***NLRB v. Beverly Manor Nursing Home***, 174 F.3d 13, 35 (1st Cir. 1999), enfg. 325 NLRB 598 (1998).

§ 15–620 Deciding to Issue Bench Decision

Whether to issue a bench decision is within the informed discretion of the trial judge. However, bench decisions should not be issued in complex cases. ***Des Moines Register and Tribune Co.***, 339 NLRB 1035 n. 1 (2003) (cautioning that judges should not issue bench decisions in complex cases, but should invite briefs and conduct a more thorough analysis in a written decision), petition for review denied, 381 F.3d 767 (8th Cir. 2004). Rather, they should be rendered only in those cases that "turn on a very straightforward credibility issue; cases involving one day [trials]; cases involving a well settled legal issue when there is no dispute [over] the facts; short single issue cases; or cases in which a party defaults by not appearing at the hearing . . . [I]n more complex cases, including cases with lengthy records, [bench decisions] would likely not be appropriate." Proposed Board Guidelines on Bench Decisions, 59 Fed. Reg. 65, 942–965, 943 (Dec. 22, 1994), adopted as a final rule, 61 Fed. Reg. 6941 (1996).

As indicated above, the judge should put the parties on notice as soon as practicable that a bench decision is contemplated and that oral argument instead of post-trial briefs will be required. Thus, if possible, the judge should notify the parties at the opening of the trial, or even before at the pretrial telephone conference, that a bench decision will be rendered. However, there may be circumstances where later notice is appropriate. See ***NLRB v. Beverly Manor Nursing Home***, above, 174 F.3d at 36 (approving mid-trial notice where the determination and announcement to the parties had been made by the judge as soon as practicable as the case evolved).

§ 15–630 Procedures for Issuance of Bench Decisions

Oral argument should be heard following the presentation of all evidence. The parties may request a brief time to outline and finalize their oral argument.

The judge's bench decision is delivered orally on the record. Under Section 102.35(a)(10) of the Board's Rules, the decision may be issued up to 72 hours after the conclusion of oral argument. See ***E-Z Recycling***, 331 NLRB 950 n. 1 (2000). However, the decision should ordinarily be delivered immediately following oral argument.

The court reporter prepares the transcript of the proceedings, including the transcription of the orally delivered bench decision. Section 102.45 of the Board's Rules provides, in part:

> If the administrative law judge delivers a bench decision, promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and cause a copy . . . to be served on each of the parties. Upon the filing of the decision, the

> Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of [the] transfer, on all the parties. Service of the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.

The judge should be very attentive to the time restrictions of these provisions and comply with them.

The certification may include corrections of the transcript. Although the judge should avoid wholesale revision of the oral decision, some correction or clarification of the decision is also permitted. In addition, if the judge concludes in reviewing the transcript that the oral decision was inadequate, the certification process provides opportunity for inclusion of "supplementary matter the judge may deem necessary to complete the decision." Thus, the certification process may be utilized as necessary to eliminate faults or inadequacies in the oral decision. For example, the certification might include a formal order and notice that had been described only in summary fashion in the oral decision, or may include omitted case citations.

Judges must always be mindful of the potential for errors in bench decisions. Transcripts of bench decisions often contain numerous and critical typographical errors. The errors necessitate substantial corrections. To eliminate the need for extensive corrections, judges have made their prepared remarks a record exhibit or have provided the court reporter a copy of their remarks for guidance.

Under section 102.46 of the Board's Rules, the time for filing exceptions to a bench decision runs from the date of service of the order transferring the case to the Board. Thus, the date of the transfer shown on the Order Transferring the Case to the Board (which accompanies the judge's certification of the bench decision and supplement)—not the date of oral delivery of the bench decision—controls the submission of exceptions to the bench decision.

§ 15–700 Contents of Judge's Decision

Section 102.45(a) of the Board's Rules requires that decisions "contain findings of fact, conclusions, and the reasons or basis [for them], upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations [on] what disposition of the case should be made." See also NLRB Statements of Procedure, Sec. 101.11(a). Decisions which fail to make specific factual findings regarding issues raised by complaints, and which fail to include analysis of contentions, do not satisfy the obligations imposed on judges and may be remanded. See ***Webb Furniture Enterprises***, 272 NLRB 312 (1984).

A bench decision should contain all the elements that would appear in a regular written decision, including appropriate credibility determinations, necessary findings of fact and conclusions of law, and adequate rationale on all relevant issues. Every effort should be made to render the decision complete and unabbreviated. The Board will remand bench decisions that do not make necessary findings of fact and conclusions of law, do not properly deal with relevant contested testimony or other evidence, or fail to consider the contentions of the parties or present sufficient legal analysis. See, e.g., ***Dynatron/Bondo Corp.***, 326 NLRB 1170 (1998).

After a decision issues, the judge may issue an erratum. ***Daniel Construction Co.***, 239 NLRB 1335 n. 2 (1979), enfd. mem. 634 F.2d 621 (4th Cir. 1980), cert. denied 450 U.S. 918 (1981). But, an erratum may not be used as a means for making substantive changes in a decision. "Under Sections 102.35 and 102.45 of the Board's Rules and Regulations, [the] judge is

authorized to issue post-decisional errata to correct material typographical errors, but not to change matters of substance, such as findings on the merits." ***Wilco Business Forms***, 280 NLRB 1336 n. 2 (1986). An erratum may also be utilized to correct obvious omissions, but only ones explicitly encompassed by what has been said in the decision, such as correcting a notice so that it conforms to the remedy and recommended order. An erratum may not be utilized to add names of discriminatees who were never mentioned in the decision. For those changes, parties "should seek correction . . . either through exceptions . . . or by motions to the Board." Ibid.

CHAPTER 16. EVIDENCE[2]

§ 16–100 Federal Rules Apply "So Far As Practicable"

Section 10(b) of the Act, 29 U.S.C. § 160(b), states: "Any [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." See also NLRB Rules and Regulations, Sec. 102.39, and Statements of Procedure, Sec. 101.10(a).

The Board holds that it is not required to apply the Federal Rules of Evidence (FRE) strictly. ***International Business Systems***, 258 NLRB 181 n. 6 (1981), enfd. mem. 659 F.2d 1069 (3d Cir. 1981). In general, the courts agree. See ***NLRB v. St. George Warehouse***, 645 F.3d 666, 674 (3rd Cir. 2011) (hearsay testimony of deceased discriminatee's mother was properly admitted in backpay proceeding regarding discriminatee's post-termination search for work); and ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479 (7th Cir. 1992) (dictum, but cases cited). But not always. See ***NLRB v. United Sanitation Service***, 737 F.2d 936, 940–941 (11th Cir. 1984) (Board erred in admitting affidavit of alleged discriminatee who had died before trial).

The Board is not bound by state rules of evidence. ***R. Sabee Co.***, 351 NLRB 1350, 1350 n. 3 (2007). See also **§8–480** (State Confidentiality Rules); and **§§16–501** (FRE 501), and **16–804.2** (Deceased Declarant).

§ 16–102 FRE 102. Purpose

> **FRE 102** states that the Federal Rules of Evidence:
> should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

§ 16–102.1 Taut Record

Ideally, the judge will receive evidence that is competent, relevant, and material, and exclude that which is not, resulting in a taut record. However, the judge may be presented with circumstances where the evidence is relevant but could result in significant delay in the trial. In these circumstances, the judge should also refer to **FRE 403**, which states that relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." See **§16–403, below.**

§ 16–103 FRE 103. Rulings on Evidence

> **FRE 103** states in relevant part:
> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
> **(1)** if the ruling admits evidence, a party, on the record:
> **(A)** timely objects or moves to strike; and
> **(B)** states the specific ground, unless it was apparent from the context; or

[2] The organization of this chapter follows the Federal Rules of Evidence. All of the evidentiary rules are included except certain rules (302, 407, 409–415, 606, and 1008) or provisions (indicated by ellipses) that are applicable only to criminal, tort, or jury trials.

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
. . . .
(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

§ 16–103.1 Offers of Proof

When the judge sustains an objection to a question propounded to a witness, the proponent may make an offer of proof to show the substance of the excluded evidence. FRE 103(a)(2).

However, the judge may inquire of counsel (usually outside the presence of the witness) regarding the basis for anticipating an answer, particularly if the offer of proof is made on cross-examination, or on direct examination of an adverse witness. The judge will then be in a position to determine whether the offer of proof is genuine or a mere speculative declaration by counsel. See ***Union Electric Steel Corp.,*** 140 NLRB 138 n. 1 (1962); and ***Auto Workers v. NLRB***, 231 F.2d 237, 242-243 (7th Cir.), cert. denied 77 S.Ct. 146 (1956) (finding that offers of proof based on anticipated testimony by adverse witnesses were properly rejected under the circumstances). See also ***Duncan Foundry & Machine Works v. NLRB***, 458 F.2d 933, 937 (7th Cir. 1972) (Board properly rejected proffer that "consisted of argument and conclusory matter, rather than evidence").

On the request of a party, documents offered as part of a rejected offer of proof should be placed in the rejected exhibits file. ***Crown Corrugated Container, Inc.***, 123 NLRB 318, 320 (1959). See also ***Omaha World-Herald***, 357 NLRB No. 156 (2011) (judge erred in not placing rejected exhibits in a rejected exhibits file).

Narrative or Q & A offers of proof. Counsel normally makes a narrative offer by stating what the witness would testify if permitted to answer. See ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479–1480 (7th Cir. 1992). However, the judge may also direct that the offer be made by questions and answers (Q & A). FRE 103(c). See, e.g., ***Smithfield Packing Co.***, 344 NLRB 1, 13–14 and n. 60 (2004) (judge properly permitted testimonial offer of proof with respect to communications between respondent's former manager and respondent's attorney regarding the preparation of manager's affidavit, specifically as to whether manager gave a false affidavit to the respondent's attorney and whether the attorney knew it was false, in order to determine whether the evidence came within crime fraud exception to attorney-client privilege), enfd. 447 F.3d 821 (D.C. Cir. 2006).

The Q & A procedure can be useful if the judge is doubtful about his or her ruling. Sometimes the questions and answers will suggest that a different ruling should be made. In that event, the evidence will already be in the record if the judge reverses himself or is later reversed by the Board. For another example where a judge permitted an offer of proof in question and answer form, see ***Metropolitan Transportation Services***, 351 NLRB 657, 670 (2007).

However, the negatives associated with a Q & A offer of proof usually outweigh the benefits. First, it will usually take more time than a simple narrative and the record may be unnecessarily expanded. Second, the parties are likely to be encouraged to litigate a "shadow" record through a series of offers of proof. The opponent will then seek to make offers rebutting the other party's offers of proof, arguing that the judge should allow the rebuttal offers so that the Board can see that there is no merit to the offers of the proponent. See, e.g., ***Smithfield Packing***, above, 344 NLRB at 186.

Waiver of objection to offer of proof. If a party opposing the offer of proof later enters the same area as covered by the offer of proof, the objection is considered waived and the proffered matter may be considered as evidence. ***Goski Trucking Corp.***, 325 NLRB 1032 (1998) (charging party, in the absence of an objection from the General Counsel, crossed-examined witness on same subject addressed in the respondent's offer of proof).

§ 16–104 FRE 104. Preliminary Questions

> **FRE 104** states in relevant part:
> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
> **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
> **. . . .**

§ 16–105 FRE 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

> **FRE 105** states in relevant part:
> If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope . . .

§ 16–106 FRE 106. Remainder of or Related Writings or Recorded Statements

> **FRE 106** states:
> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

See, e.g., ***J. G. Braun Co.,*** 126 NLRB 368, 369 n. 3 (1960) (where respondent on cross-examination had read portions of an affidavit into the record to refresh the recollection of a witness, it was error for the judge to reject the General Counsel's offer of the entire affidavit into evidence).

§ 16–201 FRE 201. Judicial Notice of Adjudicative Facts

FRE 201 states in relevant part:
(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
(c) Taking Notice. The court:
(1) may take judicial notice on its own; or
(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
(d) Timing. The court may take judicial notice at any stage of the proceeding.
(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
. . . .

Under FRE 201, adjudicative facts that are not subject to reasonable dispute may be given judicial notice (sometimes referred to "official" or "administrative" notice) at any stage of the proceedings, with or without a request by one of the parties.

For examples of Board cases taking judicial notice of adjudicative facts, see ***Bud Antle, Inc***., 359 NLRB No. 140, slip op. at 1 n. 3 (2013), reaffd. 361 NLRB No. 87 (2014) (distances between cities based on Google Maps); ***San Manuel Indian Bingo and Casino***, 341 NLRB 1055 n. 3 (2004) (finding that casino was located on the tribal reservation based on two Federal Agency publications and a court decision), enfd. 475 F.3d 1306 (D.C. Cir. 2007); and ***Drummond Coal Co.***, 277 NLRB 1618, 1618 n. 1 (1986) (taking official notice of an arbitral award issued after close of hearing, despite party's objection). See also ***Metro Demolition Co.***, 348 NLRB 272 n. 3 (2006) (Board may take administrative notice of its own proceedings).

For a discussion of the difference between adjudicative facts and legislative or "background" facts (which are not subject to the requirements of FRE 201), and other considerations, including the applicability of the hearsay rules, see ***Goode & Wellborne, Courtroom Handbook on Federal Evidence*** 268–272 (West 2012); and **21B Fed. Prac. & Proc. Evid**. §§ 5103.2 and 5104 (2d ed. Database updated April 2015).

§ 16–301 FRE 301. Presumptions in Civil Cases Generally

FRE 301 states:
In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

§ 16–400 Relevancy

§ 16–401 FRE 401. Test for Relevant Evidence

FRE 401 states:
Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

§ 16–402 FRE 402. General Admissibility of Relevant Evidence

FRE 402 states:
Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.

§ 16–402.1 Parol Evidence

Although evidence outside an agreement is inadmissible to vary or contradict its clear and unambiguous terms, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining "the correct interpretation of the agreement." ***Don Lee Distributor, Inc.***, 322 NLRB 470, 484–485 (1996), enfd. 145 F.3d 834 (6th Cir. 1998), cert. denied 525 U.S. 1102 (1999).

Parol evidence is also admissible to show mutual mistake of the parties to a contract. ***London v. Grandview Building Assoc.,*** 183 U.S. 308, 341 (1902); ***Federated American Insurance Co.***, 219 NLRB 200, 203 (1975); and ***NLRB v. Cook County School Bus, Inc.***, 283 F.3d 888, 893 (7th Cir. 2002). See also ***Contek International, Inc.***, 344 NLRB 879, 883**–**884 (2005) (a unilateral mistake may also be grounds for rescission if it is so obvious as to put the other party on notice of the error).

Parol evidence is likewise admissible to show past practices inconsistent with an expired contract. See ***Church Square Supermarket***, 356 NLRB No. 170, slip op. at 4 (2011) and cases cited therein.

For a case addressing a respondent's argument that parol evidence should be admitted to show "fraud in the execution" of an agreement, see ***Sheehy Enterprises, Inc.***, 353 NLRB 803 (2009), reaffd. 355 NLRB 478 (2010) (Board found it unnecessary to decide whether parol evidence is admissible under Board law to prove the defense, since, even if the evidence were considered and credited, it failed to establish the defense). See also ***Horizon Group of New England***, 347 NLRB 795 (2006) (same).

§ 16–402.2 Evidence of Animus and Discrimination

To show animus, the General Counsel may offer unalleged statements (made either beyond or within the 6-month limitation period) indicating opposition to unionization. The Board relies on such statements as evidence of animus, notwithstanding Section 8(c) of the Act. See ***Galicks, Inc***., 355 NLRB 366 n. 3 (2010), enfd, in relevant part 671 F.3d 602, 609 (6th Cir. 2012); ***Sunshine Piping, Inc.,*** 351 NLRB 1371, 1378 n. 28, 1387 (2007); ***Tejas Electrical Services,*** 338 NLRB 416, 417 (2002); ***Tim Foley Plumbing Services***, 337 NLRB 328, 329 (2001); ***Stoody***

Co., 312 NLRB 1175, 1176–1177, 1182 (1993); and ***Wright Line***, 251 NLRB 1083, 1090 (1980), enfd. 662 F.2d 899, 907 n. 14 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also ***NLRB v. Relco Locomotives, Inc.,*** 734 F.3d 764 (8th Cir. 2013). And cf. ***NLRB v. Brown***, 380 U.S. 278, 289 (1965) (citing company's "more than amicable" relationship with union in finding insufficient evidence that company was motivated by union animus).

Some courts of appeals have disagreed with the Board's reliance on such statements. See cases listed in ***Tim Foley Plumbing Services***, above, 337 NLRB at 329 n. 5; and ***Norton Audubon Hospital,*** 338 NLRB 320 n. 1 (2002). However, NLRB judges are bound to apply established Board law. See **§13–100**, above.

With respect to the ultimate issue of whether a respondent's alleged actions against an employee were discriminatory, it is irrelevant whether the employee personally believes that the employer's actions were discriminatory. ***Professional Medical Transport, Inc***., 362 NLRB No. 19, slip op. at 9 n. 25 (2015).

§ 16–402.3 Evidence of Coercion

The test to determine coercion under Section 8(a)(1) is an objective test, not a subjective one. See, e.g., ***Multi-Ad Services***, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Thus, testimony about what an employee understood or subjectively interpreted the supervisor's statement to mean may not be relied on and is normally not admissible. ***Miami Systems Corp.***, 320 NLRB 71 n. 4 (1995), enfd. in relevant part 111 F.3d 1284 (6th Cir. 1997). Compare ***NLRB v. Gissel Packing Co.***, 395 U.S. 575, 608–609 (1969). Rather, the "full context" in which the alleged unlawful conduct occurred should be evaluated to determine if it would tend to coerce a reasonable employee. ***Westwood Health Care Center***, 330 NLRB 935, 940 n. 17 (2000).

§ 16–402.4 Background Evidence: Section 10(b)

It is well established that evidence of events occurring more than 6 months before the charge may be considered as background to shed light on a respondent's motivation for conduct within the 10(b) period. See, e.g., ***Wilmington Fabricators***, 332 NLRB 57 n. 6 (2000); and ***Douglas Aircraft Co***., 307 NLRB 536 n. 2 (1992). See also **§ 3–620**, above, regarding admission of evidence concerning events outside the 10(b) period.

§ 16–402.5 Evidence of Presettlement Conduct

Under well-established Board law, presettlement conduct may properly be considered as background evidence to establish the motive for the Respondent's postsettlement conduct. See ***Ambrose Auto***, 361 NLRB No. 104 n. 2 (2014), and cases cited there.

For example, in ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997), the Board held that, in determining whether settlements of alleged discrimination had been breached by the postsettlement suspension and reassignment of two union supporters, the judge could consider evidence of presettlement statements by the respondent reflecting union animus, as "shedding light" on the respondent's motivation. The Board cited its decision in ***Special Mine Services***, 308 NLRB 711, 711, 720–721 (1992), enfd. in part 11 F.3d 88 (7th Cir. 1993), in which it agreed with the judge that the respondent's presettlement conduct evidenced "strong union animus" for the alleged unlawful subcontracting.

The presettlement conduct can be used to show motive even without a reservation-of-rights clause in the settlement. See ***St. Mary's Nursing Home****,* 342 NLRB 979, 979–980 (2004), affd. 240 Fed. Appx. 8, 12–13 (6th Cir. 2007). Further, if the settlement agreement does specifically reserve the General Counsel's right to use the evidence obtained in the settled case for any purpose in the litigation of any other case, the General Counsel may present that evidence, and the Board may make findings and conclusions thereon, in a subsequent case. Thus, in ***Outdoor Venture Corp.***, 327 NLRB 706, 708–709 (1999), the Board held that the settled conduct in a prior case could be used to establish that a strike was prolonged by unfair labor practices and thereby converted to an unfair labor practice strike.

Normally, evidence of settlement discussions is inadmissible to prove or disprove liability under FRE 408, but not if the evidence is used for other legitimate purposes. See **§16–408**, below.

§ 16–402.6 Evidence Affecting Remedy

Instatement of applicants. In ***FES***, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the Board provided "guidance to all parties litigating refusal-to-hire and refusal-to-consider violations;" specifically "[to make] clear the elements of the violation, the respective burdens of the parties, and the stage at which issues are to be litigated." The Board adopted the framework of ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in allocating the parties' respective burdens, but supplemented that analysis by requiring the General Counsel to establish additional facts in the hearing on the merits.

The Board in ***FES*** also defined what evidence affecting a possible backpay and instatement remedy is appropriate at the compliance stage. In cases involving a finding of discriminatory refusal to hire, the compliance proceeding is used for "precise calculations for the make-whole remedy." The compliance proceeding also "may be used to determine which of the applicants would have been hired" in cases where the "number of applicants exceeds the number of available jobs." It may also be used in construction industry cases to determine whether "the discriminatees would have been transferred to other worksites upon the completion of the project at which the unlawful conduct occurred." ***FES***, 331 NLRB at 14. The compliance proceeding is likewise used to determine whether discriminatees would have been selected for job openings arising after the beginning of the hearing on the merits, or for openings arising before the beginning of the hearing that the General Counsel neither knew nor should have known about. Id. at 15.

In refusal-to consider cases, the Board stated that "whether the applicant would have been offered that job had he been given nondiscriminatory consideration . . . is appropriately determined in the compliance stage." Id. at 16.

Note that in ***Planned Building Services, Inc.***, 347 NLRB 670, 672 (2006), the Board modified the respondent's burden in the compliance proceeding under ***FES*** in cases involving a successor employer's failure to hire. See also ***W & M Properties of Connecticut, Inc. v. NLRB***, 514 F.3d 1341 (D.C. Cir. 2008), affg. 348 NLRB 162 (2006) (upholding Board's modification).

Reinstatement. In an 8(a)(3) case in which denial of reinstatement is affirmatively alleged in the complaint, the better practice is to admit the respondent's testimony of unconditional offers of reinstatement, because the Board must fashion a remedy. ***Charles E. McCauley Assoc., Inc.***, 266 NLRB 649 (1983); and ***Kelley Bros. Nurseries***, 145 NLRB 285, 285 n. 2 (1963), enf. denied 341 F.2d 433 (2d Cir. 1965).

However, where the matter has not been fully litigated in the merits hearing, the Board has found no prejudice by deferring the matter to the compliance proceeding. See ***Charles E. McCauley***, above; ***Baker Mfg. Co.***, 269 NLRB 794 n. 2, 813 (1984), enfd. in part 759 F.2d 1219 (5th Cir. 1985). See also ***Solutia, Inc***., 357 NLRB No. 15, slip op. at 9 n. 20 (2011) (ordering reinstatement and backpay remedy, but deferring to compliance whether individual employees who opted to retire after employer unilaterally transferred their work were entitled to the remedy, where all parties agreed to defer litigation of the issue), enfd. 699 F.3d 50 (1st Cir. 2012).

Discriminatee misconduct/after-acquired evidence. If an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have refused to hire or discharged any employee, instatement or reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. See, e.g., ***First Transit, Inc.***, 350 NLRB 825 (2007) (employee who admitted prior felony conviction at compliance hearing was denied reinstatement for concealing the conviction on her original employment application). See also ***Tel Data Corp.***, 315 NLRB 364, 366–367 (1994), enfd. in part 90 F.3d 1195 (6th Cir. 1996); and ***John Cuneo, Inc.***, 298 NLRB 856 (1990).

Thus, if the issue arises at or before the merits hearing, the judge should normally receive and consider evidence on the issue, including the nature of the misconduct, when the respondent first learned of it, and whether the respondent would have refused to hire or discharged the employee for it had respondent known of it earlier. See ***Tel Data Corp.***, above. See also ***Bob's Ambulance Service***, 183 NLRB 961 (1970), where the Board granted the respondent's motion to reopen the record and remanded the proceeding to the judge to decide if reinstatement was an appropriate remedy, noting that "the issue of employee misconduct which may warrant forfeiture of reinstatement goes to the remedy and not to the issue of compliance with the remedy."

Undocumented workers. Although undocumented workers are employees entitled to exercise their rights under the Act, they are not entitled to backpay or reinstatement during the period when they are not authorized to be present in the United States. See ***Domsey Trading Corp.***, 351 NLRB 824, 825 (2007), citing ***Hoffman Plastics Compounds v. NLRB***, 535 U.S. 137 (2002). This is true regardless of whether the employee or the employer violated the immigration laws. ***Mezonos Maven Bakery, Inc.***, 357 NLRB No. 47 (2011), supplemental proceedings 362 NLRB No. 41 (2015).

Nevertheless, it is appropriate to issue a backpay and unconditional reinstatement order at the merits stage, leaving to the compliance stage whether backpay and reinstatement or conditional reinstatement is actually warranted consistent with *Hoffman*. See ***Tuv Taam Corp.***, 340 NLRB 756, 760-761 (2003). See also ***Mezonos Maven Bakery***, above; ***Farm Fresh Co., Target One, LLC***, 361 NLRB No. 83, slip op. at 1 n. 1 (2014); and ***Concrete Form Walls***, 346 NLRB 831, 835 (2006), enfd. 225 Fed. Appx. 837 (11th Cir. 2007). Thus, evidence regarding an employee's immigration status is normally irrelevant at the merits stage of the proceeding. ***Tuv Taam Corp.***, above. See ***Concrete Form Walls***, above (undocumented status is not a defense to an alleged discriminatory discharge if it was not the moving cause of the discharge or was used as a pretext for discrimination); and ***Farm Fresh Co.,*** above (judge did not abuse his discretion in preventing the respondent employer from questioning the alleged discriminatees about their immigration status in the merits proceeding, even though the employer contended that they voluntarily quit to avoid going through the E-Verify process, because the respondent was permitted to ask them questions about why they resigned). See also **§ 16–608.1**, Impeachment on Collateral Matters, below.

In the backpay proceeding, if the employer fails on request to articulate a factual basis for its affirmative defense that a discriminatee lacks immigration status, the defense should be stricken. See ***Flaum Appetizing Corp***., 357 NLRB No. 162 (2011) (striking employer's affirmative defenses in backpay proceeding that the discriminatees were undocumented aliens, as the employer failed, in response to a motion for particulars, to articulate any factual support or reason to believe it could obtain such factual support for the defenses).

For a discussion of what limits, if any, the ALJ and Board may properly place on employers in questioning employees about their immigration status in the backpay proceeding, see ***NLRB v. Domsey Trading Corp.***, 636 F.3d 33 (2d Cir. 2011) (employer was entitled to ask discriminatees direct questions in backpay proceeding about their immigration status and to introduce testimony of its immigration expert).

§ 16–402.7 Stolen Evidence

The Board admits allegedly stolen documents unless it is established that an agent of the Government acted in collusion with the individual who stole the document. See ***NLRB v. South Bay Daily Breeze***, 415 F.2d 360, 363–365 (9th Cir. 1969), cert. denied 397 U.S. 915 (1970) (thoroughly discussing the reasons for the policy and upholding it); and ***Air Line Pilots Assn.***, 97 NLRB 929, 933 (1951). See also ***U.S. v. Janis***, 428 U.S. 433 (1976).

§ 16–402.8 Tape Recordings

General Rule. Tape recordings are generally admissible in Board proceedings, even if made without the knowledge or consent of a party to the conversation, and even if the taping violates State law. ***Times Herald Record***, 334 NLRB 350, 354 (2001), enfd. 27 Fed. Appx. 64 (2d Cir. 2001); ***Williamhouse of California, Inc.***, 317 NLRB 699 n. 1 and JD n. 2 (1995); and ***Wellstream Corp.***, 313 NLRB 698, 711 (1994).

A different result possibly might obtain if the Federal wiretapping statute were violated: that is, if the recording was secretly made in conjunction with the interception of a telephone conversation between two or more other parties. But the interception of a conversation over a cordless phone's radio wave has been held not to violate the Federal wiretapping law. ***In re Askin***, 47 F.3d 100, 102–104 (4th Cir. 1995), cert. denied, 516 U.S. 944 (1995). And a supervisor's remarks during a cordless phone conversation, picked up by the discriminatee's "police" scanner and recorded by the discriminatee, provided evidence of animus in ***Scientific Ecology Group***, 317 NLRB 1259, 1259, 1261 (1995).

Tape recording issues frequently arise when an employee has secretly taped remarks of a manager made during a meeting or conference held on the jobsite. In ***McAllister Bros.***, 278 NLRB 601n. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987), the Board expressly disavowed a statement by the judge that the Board historically has taken a dim view of personnel who tape-record meetings with their employer. Indeed, citing cases, the Board stated that it "has sometimes found tape recordings of employee meetings to be the best evidence of what was said." Ibid.

Such conduct, however, is not a basis to discredit the individual who made the recording. See ***Fleming Companies***, 336 NLRB 192, 192 n. 2 (2001) (Board stated that it did not rely on a witness's surreptitious taping of a conversation with management representatives as a basis for discrediting the witness's testimony), enfd. in part 349 F.3d 968 (7th Cir. 2003). See also ***Hawaii Tribune-Herald v. NLRB***, 677 F.3d 1241 (D.C. Cir. 2012) (rejecting employer's argument that secretly recording a meeting is "so fundamentally dishonest and deceitful that it should be

deemed categorically unprotected," even in the absence of any company policy or law prohibiting secret audiotaping), enfg. 356 NLRB No. 63 (2011).

Collective-Bargaining Exception. As a policy matter, the Board excludes secret tape recordings of negotiations, because they "would inhibit severely the willingness of parties to express themselves freely." ***Carpenter Sprinkler Corp.***, 238 NLRB 974, 974–975 (1978), affd. in relevant part, 605 F.2d 60, 65–66 (2d Cir. 1979).

Authentication. Like other evidence (see **§16–901.1**, below), tape recordings may be authenticated by circumstantial evidence. See, e.g., ***U.S. v. Carrasco***, 887 F.2d 794, 803–804 (7th Cir. 1989) (audiotape); and ***U.S. v. Damrah***, 412 F.3d 618, 628 (6th Cir. 2005) (videotape). However, any editing must be explained by someone with knowledge of the editing. See ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1146 n. 7 (1994), enfd. 72 F.3d 780, 787 (10th Cir. 1995) (affirming judge who excluded edited videotape taken by a guard, because the guard did not do the editing and could not describe what was edited).

Defects in Recording. Proffered recordings in many of our cases are of less than perfect quality, some words or passages being garbled or inaudible. Unless the defects are so substantial that they render the entire recording untrustworthy, any defects go to weight, not to admissibility. See ***U.S. v. Parks***, 100 F.3d 1300,1305 and n. 2 (7th Cir. 1996).

NOTE. Often the best way to receive evidence of a tape recording is to obtain a stipulation of a written transcript for receipt in evidence, along with the tape if requested.

§ 16–402.9 State Agency Decisions

The Board receives in evidence and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight on unfair labor practice issues. See ***Cardiovascular Consultants of Nevada***, 323 NLRB 67 n. 1 (1997) (reversing the judge, the Board received State unemployment compensation decision because established Board law holds them to be admissible but not controlling); and ***Whitesville Mill Service Co.***, 307 NLRB 937, 945 n. 6 (1992) (the decision of the State agency that the employee was not fired for union activities was considered but found not to be persuasive because, at the State hearing, the plant manager refused to answer questions concerning his knowledge of union activity).

§ 16–403 FRE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

> **FRE 403** states:
> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FRE 403 creates a balancing test, and necessarily involves the exercise of discretion. Although the rule generally favors admission, evidence that has scant probative value may be excluded under the rule. See ***22A Fed. Prac. & Proc. Evid***. § 5214 (1st Ed., database updated April 2015); and ***Goode and Wellborne, Courtroom Handbook on Federal Evidence*** 285–289 (West 2012).

For cases upholding the judge's exercise of discretion, see, e.g., ***J.S. Troupe Electric, Inc.***, 344 NLRB 1009, 1010 (2005) (Board cited both FRE 403 and FRE 608(b) in upholding judge's exclusion of primary and secondary evidence of alleged discriminatee's false claim for unemployment or workers compensation benefits, notwithstanding that the judge broadly credited the discriminatee); ***Dickens, Inc.***, 355 NLRB 255, 257 (2010) (judge properly exercised discretion in terminating unrepresented respondent's cross-examination, directing him to present his own testimony at that time, and subsequently cutting off his narrative testimony after several hours); ***University Medical Center***, 335 NLRB 1318 n. 1, 1342–1343 (2001) (upholding judge's imposition of time limits on presentation of respondent's case), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003); ***Teamsters Local 122 (August A. Busch & Co. of Massachusetts)***, 334 NLRB 1190, 1193, 1255 (2001) (same; also ordering litigation costs for delaying trial); and ***NLRB v. Champa Linen Service***, 324 F.2d 28, 30 (10th Cir. 1963) (endorsing the judge's refusal to permit cross-examination of truth of a statement, which was alleged to be a Section 8(a)(1) violation, that union official "stole a million dollars").

See also **§§2–300 (**Duties of Trial Judge) and **16–102** (FRE 102), above.

§ 16–404 FRE 404. Character Evidence; Crimes or Other Acts

FRE 404 states in relevant part:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

. . . .

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

See ***Sunshine Piping***, 351 NLRB 1371, 1375 (2007) (evidence that two of the General Counsel's witnesses had engaged in drug-related activity and other misconduct while employed by respondent was not admissible under Rules 404(b) or 608(b), as their prior conduct was neither "a material issue in the case" nor "a 'crime of dishonesty' (such as forgery) tending to impugn their credibility"). See also **§§16–607**, **608**, and **609**, below.

§ 16–405 FRE 405. Methods of Proving Character

FRE 405 states:

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

See ***Ponderosa Granite Co***., 267 NLRB 212 n. 1 (1983) (judge in 8(a)(3) discharge case erred in admitting testimony by a deputy sheriff and employee of another store about specific instances where the alleged discriminatee had written bad checks, as the discriminatee's character was not an essential element of a charge, claim, or defense as required by FRE 405(b)).

§ 16–406 FRE 406. Habit; Routine Practice

FRE 406 states:
Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

§ 16–408 FRE 408. Compromise Offers and Negotiations

FRE 408 states in relevant part:
(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
(2) conduct or a statement made during compromise negotiations about the claim . . . .
(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FRE 408 prohibits use of offers of settlement or other statements during settlement discussions as admissions, but does not prohibit their use other purposes. Thus, for example, alleged threats made during informal grievance settlement discussions may be admitted in a subsequent NLRB case. ***Miami Systems Corp.***, 320 NLRB 71 n. 2 (1995), modified but affirmed on point, ***Uforma/Shelby Business Forms v. NLRB***, 111 F.3d 1284, 1293–1294 (6th Cir. 1997). See also ***R. Sabee Co.***, 351 NLRB 1350 n. 3 (2007) (anti-union statements by respondent's negotiator during mediation of state claims were admissible in NLRB proceeding); and ***St. George Warehouse, Inc.***, 349 NLRB 870, 874 (2007) ("if a respondent engages in *independently unlawful* conduct during a settlement discussion, evidence of that conduct can be introduced and the matter can be adjudicated").

§ 16–501 FRE 501. Privileges in General

FRE 501 states:
The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by

the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

As the committee and conference reports on FRE 501 indicate, in civil cases State law on privileges chiefly applies in diversity cases, with Federal law applying otherwise. Hence, in unfair labor practice trials before the NLRB, Federal law applies. See ***Quarles Mfg. Co.***, 83 NLRB 697, 699 n. 8 (1949), citing Section 10(b) of the Act in declining to apply the Texas "Dead Man's" statute, as discussed in **§16–804.2**, below. See also ***R. Sabee Co.,*** 351 NLRB at 1350 n. 3, discussed in **§8–480** (State Confidentiality Rules); and **§§16–100** and **16–408**, above.

For a more detailed discussion of privileges, including the attorney-client privilege, the work-product privilege, the reporter's privilege, privileges connected with the production of Board files and testimony of Board agents, and the mediator's privilege, see **§8–400** et seq., above, dealing with subpoenas. The same principles apply where parties attempt to submit testimony or evidence involving the named privileges during the hearing.

Protective orders may also be appropriate when handling testimony or evidence that may call into question confidential information. For a more detailed discussion of protective orders, see **§8–415**, above.

§ 16–501.1 Fifth Amendment Claims

No requirement to stay proceeding. There is no deprivation of rights under the Fifth Amendment simply because a civil or administrative proceeding goes forward while a criminal proceeding involving the same party is in progress. See ***United States v. White***, 589 F.2d. 1283, 1286 (5th Cir. 1979); ***Diebold v. Civil Service Commission of St. Louis County***, 611 F.2d 697, 700**–**701 (8th Cir. 1979). "At the administrative hearing [the individual] will have a 'free choice to admit, to deny, or to refuse to answer.' This is full vindication of the Fifth Amendment privilege against self-incrimination." ***Luman v. Tanzler***, 411 F.2d 164, 167 (5th Cir. 1969), cert. denied, 396 U.S. 929 (1969).

No duty to advise of constitutional rights. Because Board proceedings are not criminal cases (in which witnesses or parties may be taken into custody or deprived of their freedom), Board agents have no duty to warn charged parties of their constitutional rights. ***F. J. Buckner Corp. v. NLRB***, 401 F.2d 910 (9th Cir. 1968), cert. denied 393 U.S. 1084 (1969).

Adverse Inference may be drawn. In civil cases, the trier of fact may draw an adverse inference from the invocation of a privilege under the Fifth Amendment, at least where there is independent evidence of the fact sought to be elicited. See, e.g., ***Doe v. Glanzer***, 232 F.3d 1258 (9th Cir. 2000); and ***LaSalle Bank Lake View v. Seguban***, 54 F.3d 387, 389–391 (7th Cir. 1995). See also ***Sunshine Piping, Inc.***, 351 NLRB 1371, 1378 n. 28 (2007) (Board relied on supervisor's initial invocation of the Fifth Amendment as evidence that she sincerely believed that she had done something wrong).

Grant of immunity. Under section 102.31(c) of the Board's Rules, if an individual has or is likely to assert a Fifth Amendment privilege against self-incrimination in a Board proceeding, any party may request an order requiring that individual to give testimony or provide other information in the proceeding. Such requests should be filed directly with the Board prior to the hearing, and with the judge during the hearing.

Section 102.31(c) states that such orders may only be issued by the Board with the approval of the Attorney General. Accordingly, the rule provides that, "if the judge deems the request appropriate, he shall recommend that the Board seek the approval of the Attorney General for the issuance of the order," and that "until the Board has issued the requested order no individual who claims the privilege against self-incrimination shall be required, or permitted, to testify or to give other information respecting the subject matter of the claim."

In evaluating such requests, the judge should consider the factors considered by the Attorney General in requesting use immunity from a court under 18 U.S.C. §§ 6001–6005. See *__Greenwood 2, Inc__*., 22-CA-029249, unpub. Board order issued April 30, 2012 (2012 WL 1515342) (remanding to judge "for the purpose of receiving and considering a proffer from the Respondents concerning the nature and content of the testimony [the witness] would provide, if immunity were granted, and how that testimony would support a finding that the Respondents had not violated the [NLRA], as alleged"). A representative list of such factors may be found on the DOJ website, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/23mcrm.htm.

For an example of a case where the Board issued such an order upon the recommendation of the judge and the approval of the Attorney General, see ***Health Care Employees District 1199 (Frances Schervier Home)***, 245 NLRB 800, 801 (1979) (respondent union in 8(b)(1)(A) violence case requested grant of immunity for several witnesses who were named as participants in the alleged violence, and both the General Counsel and the charging party employer concurred in the request).

For an example where the Board found that such an order was not warranted, see ***Carnegie Linen Services, Inc***., 2-CA-39560; 2-RC-23436. In that case, the 8(a)(1) and (3) complaint alleged that the respondent's owner had inflicted bodily injury on an employee and discharged him because of his union activities. A related objection in the consolidated representation case alleged that the owner physically assaulted the employee by throwing coffee in his face. The respondent requested that the hearing be postponed until the related criminal charge against the owner involving the same incident was resolved. However, at the request of the charging party union, and over the respondent's objection, the judge recommended to the Board that it seek approval from the Attorney General to issue an order requiring the owner to testify at the Board hearing. The judge reasoned that the owner's testimony was "necessary to the public interest" under Section 102.31(c) because of the interest in expeditiously resolving the unfair labor practice issues and because the representation proceeding had been blocked pending resolution of those issues.

However, by unpublished order dated Oct. 28, 2010, the Board panel summarily rejected the judge's recommendation. It directed the judge to "proceed to hear the case as promptly as possible," and stated that "all parties may present whatever admissible evidence is available to them and make any appropriate legal arguments, including arguments concerning what, if any, inferences should be drawn based on any assertion of the privilege against self-incrimination." The judge thereafter proceeded to hear the case and issued a decision finding the alleged violations, without drawing any adverse inferences based on the owner's failure to testify, which the Board affirmed. See 357 NLRB No. 188, slip op. at 1 n. 1 and JD at 16–17 (2011)).

As indicated in Section 102.31(c), absent a Board order, a witness asserting the privilege should not be asked or permitted to testify about the subject matter of his Fifth Amendment claim. See ***Domsey Trading Corp.***, 351 NLRB 824, 897 n. 76 (2007). See also ***North Hills Office Services, Inc***., 344 NLRB 1083 n. 1 (2005).

§ 16–502 FRE 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

FRE 502 states:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.

When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of this Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions. In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

For a Board case applying FRE 502(b) (inadvertent disclosures), see ***Church Square Supermarket***, 356 NLRB No. 170, slip op. at 13 n. 40 (2011) (rejecting employer's contention that a document it had previously disclosed to the General Counsel in response to a subpoena was inadmissible under FRE 502). See also **§§ 8–440** and **8-460**, above.

§ 16–600 Witnesses

The general rules governing witnesses are set forth in FRE 601–706.

§ 16–601 FRE 601. Competency to Testify in General

FRE 601 states:

> Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

State law on competency of witnesses does not apply in Board proceedings, because the Act is a Federal statute and Section 10(b) of the Act provides that the Federal rules of evidence, "so far as practicable," shall apply to Board proceedings. See also **§16–501**, above. As a result, most objections to competency are eliminated, and are properly treated instead as bearing on credibility and weight.

§ 16–601.1 Trial Attorney for Party

Unlike the courts, the Board does not pass on, and leaves to State bar associations to decide, questions of ethical propriety of a party's trial attorney testifying in a Board proceeding. Thus, when the trial attorney's testimony is otherwise relevant and competent, judges should overrule objections based on canons of ethics. ***Reno Hilton***, 319 NLRB 1154, 1185 n. 18 (1995); ***Page Litho, Inc.***, 311 NLRB 881 n. 1, 889 (1993), enfd. in part mem. 65 F.3d 169 (6th Cir. 1995); and ***Operating Engineers Local 9 (Fountain Sand)***, 210 NLRB 129 n. 1 (1974). See also **§6–201**, Attorney as Witness, above.

§ 16–601.2 Interested Parties

Testimony by an interested party in the case may be relied on by the judge, even if self-serving and uncorroborated, if it is "reasonably deemed to be credible and trustworthy . . . and is not undermined by evidence to the contrary." ***Sam's Club v. NLRB***, 141 F.3d 653, 658 (6th Cir. 1998). See also ***Ferguson Enterprises, Inc***., 355 NLRB 1121 n. 2 (2010).

§ 16–602 FRE 602. Need for Personal Knowledge

FRE 602 states:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

See, e.g., ***Comet Fast Freight, Inc***., 262 NLRB 430, 432 n. 11 (1982) (record was sufficient to establish under FRE 602 that witness had personal knowledge to support his testimony that "other drivers did not mind driving the red truck like I did," where witness was

employed as a driver at the same terminal as the other drivers, the truck was in fact driven by other drivers, and none of them ever complained that it was unsafe).

§ 16–603 FRE 603. Oath or Affirmation to Testify Truthfully

FRE 603 states:
Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

See **§1–400**, above, for a discussion of witness oaths in Board hearings.

§ 16–604 FRE 604. Interpreter

FRE 604 states:
An interpreter must be qualified and must give an oath or affirmation to make a true translation

See **§1–500**, above, for an interpreter's oath.

§ 16–604.1 Objections to Interpretation

Interpreters should strive to translate exactly what was said, without comment or embellishment. Generally, there is no objection over the use of interpreters, although sometimes questions arise over the accuracy of the translation. In such cases, the version of the official interpreter governs, unless the judge, after due consideration, decides otherwise. See ***NLRB v. Bakers of Paris, Inc***., 929 F. 2d 1427, 1436 n. 4 (9th Cir. 1991) (acknowledging "the need for the trier of fact in any judicial proceeding to consider the accuracy of the translations presented" and suggesting that the presence of an "official" translation may not always resolve the issue). See also ****Coastal Insulation Corp***., 354 NLRB 495, 497 (2009) (judge advised that interpreter's translation would constitute the transcribed record, but allowed charging party an opportunity to challenge the translation).

Particular care should be given to the use of interpreters when assessing the credibility of a witness. It may be appropriate for the judge to restrict the use of interpreters in certain circumstances; for example, when alleged threats are made in English, the witness should be able to recount what was said in English. See ***Northern Cap Mfg. Co.***, 146 NLRB 198, 201-204 (1964). See also ***Yaohan U.S.A. Corp.***, 319 NLRB 424 n. 2 (1995) (affirming judge's restrictions on use of interpreters for witnesses who demonstrated some ability to converse in English), enfd. mem. 121 F.3d 720 (9th Cir. 1997). Where interpretation is necessary, the judge should carefully monitor the translation process to ensure that both the translator and the witness understood the questions asked and that the witness's answers were accurately interpreted. See ***NLRB v. Del Ray Tortilleria, Inc.***, 787 F.2d 1118, 1121-1122 (7th Cir. 1986), enfg. 272 NLRB 1106, 1115 n. 21 (1984).

§ 16–604.2 Translation of Documents.

In appropriate circumstances, to avoid delay in the hearing, the official hearing interpreter may be asked to translate documents or recordings. See ***Dickens, Inc***., 355 NLRB 255, 256–257 (2010) (judge acted within his discretion and in a "commonsense" manner to expedite the progress of the trial by having the hearing interpreter translate a tape recording that the judge had ordered the General Counsel to turn over to respondent's counsel).

In ***NLRB v. Doral Building Services***, 666 F.2d 432, 435 (9th Cir. 1982), the court held that the General Counsel erroneously failed to provide an official translation of non-English language affidavits of his witnesses. The court indicated that it is not adequate to simply provide the original native-language affidavit and "unofficial" English translation prepared by a Board agent to the respondent and leave it up to the respondent to provide its own translator. The case was remanded so that the respondent could be provided with an "official" English translation of the original foreign language statements.

What constitutes a sufficient "official" translation was subsequently addressed in ***International Medication Systems***, 274 NLRB 1197, 1199, n. 4 (1985). There, the Board agent who translated the affidavits certified at the bottom that he or she was bilingual in English and Spanish and had translated the affidavits correctly. The employer argued that this was insufficient under *Doral*. However, the judge stated that the Board agent's certification appeared to be "as 'official' as the Board can get." The judge further noted that an official translator was present at the hearing, who could have addressed any questions as to the accuracy of the Board agent's translation. Accordingly, he denied the employer's motion to strike the witness's testimony. The judge's ruling in *International Medication Systems* was later noted, without any expressed disapproval, in ***NLRB v. Bakers of Paris, Inc.***, 929 F.2d 1427, 1436 n. 4 (9th Cir. 1991). See also **§16–613** (FRE 613), below, regarding use of prior statements for impeachment.

§ 16–604.3 Assisting Hearing Impaired Witness

A court has discretion whether to appoint an interpreter or facilitator under FRE 604 and 611(a) to assist a hearing impaired witness. See ***U.S. v. Damra***, 621 F.3d 474 (6th Cir. 2010), cert. denied 131 S.Ct. 2930 (2011).

In ***Manno Electric***, 321 NLRB 278, 278 n. 7 (1996), the Board held that respondents were not denied due process when the judge failed to provide or offer special auditory enhancement devices to assist the company president who was hearing impaired. Although respondents' counsel informed the judge of the problem, counsel made no request for the equipment. The judge on several occasions instructed witnesses to speak louder and there were no contemporaneous complaints that those instructions were not sufficient to reasonably accommodate the president's hearing problems. The Board also noted that neither the Act nor the Board's Rules require an unsolicited offer to provide this equipment.

§ 16–604.4 Appointment and Payment of Interpreter

In ***George Joseph Orchard Siding, Inc.***, 325 NLRB 252, 252–253 (1998), the Board upheld the discretion of the judge to order the General Counsel to provide an interpreter in the unfair labor practice proceeding. Specifically, the Board (over the dissent of two Members) found: (1) that administrative law judges have "discretionary authority" to appoint interpreters in unfair labor practice cases, and (2) that the General Counsel "failed to establish that the judge abused his discretion by ordering the Agency to provide [and pay for] an interpreter in this case."

In a later backpay case involving about 200 unfair labor practice strikers, the Board also upheld the discretion of the judge to *decline* to order the General Counsel to provide and pay for an interpreter. ***Domsey Trading Corp.***, 325 NLRB 429, 429–432 (1998). The judge declined to order the General Counsel to pay an interpreter for discriminatees called by the respondent employer because it was the respondent's burden to establish interim earnings and failure to mitigate its backpay liability, and requiring the Agency to pay the cost of interpreters would "in

essence, give the Respondent a blank check to spend the Government's money to defend itself." The Board (with the dissenters in *George Joseph Orchard* now in the majority) found that the judge properly exercised his discretion under the circumstances. See also ***Ji Shiang, Inc.***, 357 NLRB No. 108, JD. at n. 4 (2011) (likewise rejecting respondent's assertion that the General Counsel was required to pay for interpretation of its witnesses in backpay proceeding).

§ 16–605 FRE 605. Judge's Competency as a Witness

FRE 605 states:

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

§ 16–607 FRE 607. Who May Impeach a Witness

FRE 607 states:

Any party, including the party that called the witness, may attack the witness's credibility.

§ 16–607.1 Impeachment Generally

Subject to certain limitations (see, e.g. **§16-607.2**, below), the judge should be careful not to unduly restrict questions or evidence pertaining to impeachment. See, for example, ***Halstead Industries***, 299 NLRB 759 n. 1 (1990). In that case, the judge, affirmed by the Board, refused to receive evidence in support of Halstead's offer of proof that the General Counsel's main witness was biased against Halstead and in favor of the alleged discriminatee because of the witness's "intimate relationship" with the company's former employee relations director who had demonstrated hostility toward the company. The company argued that the former director was using the General Counsel's main witness to give false testimony showing an unlawful motive by the plant manager. The court remanded the case so that the impeachment evidence could be considered and weighed. ***Halstead Metal Products v. NLRB***, 940 F.2d 66, 72–73 (4th Cir. 1991) ("Impeachment evidence is crucial in Board proceedings, because the [judge] sits as judge and jury.")

§ 16–607.2 Limitations on Impeachment: Names of Pro-Union Employees

In ***National Telephone Directory Corp.***, 319 NLRB 420, 422 (1995), the Board held that the respondent company could not obtain the identity of current employees who had signed authorization cards or attended union meetings. The Board held that the potential chilling effect on union activity outweighed the employer's right to test the credibility of the General Counsel's witnesses during cross-examination, and that the employees' confidentiality interests could only be waived by the employees themselves. See also the additional cases cited in **§ 8–420**, Identity of Union Supporters Protected (Authorization Cards), above.

§ 16–608 FRE 608. A Witness's Character for Truthfulness or Untruthfulness

FRE 608 states:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

§ 16–608.1 Impeachment on Collateral Matters

Under FRE 608(b), a judge has discretion to refuse to permit impeachment of a witness on a collateral matter that is not probative of the witness's propensity to testify untruthfully concerning a material issue. See ***New York Sheet Metal Works, Inc.***, 243 NLRB 967 n. 3 (1979) ("It is well within the discretionary authority of [the ALJ] . . . to apply the general evidentiary limitation on impeachment of a witness on a collateral matter."). See also ***Sunshine Piping, Inc.***, 351 NLRB 1371, 1374–1376 (2007) (judge could have excluded cross-examination of witness's prior drug related acts as it was not relevant to alleged alteration of attendance records); and ***J.S. Troup Electric, Inc.***, 344 NLRB 1009, 1009–1010 (2005) (application of FRE 608(b) is subject to Rule 403, which permits a judge to bar cross-examination of a witness about specific bad acts if its probative value is outweighed by considerations of undue delay or waste of time).

With respect to questioning witnesses in the merits proceeding about whether they had made prior false statements about their immigration status and eligibility to work, see ***Farm Fresh Company, Target One, LLC***, 361 NLRB No. 83, slip op. at 1 n. 1 (2014), discussed in **§ 16–402.6,** above (judge did not abuse his discretion in preventing the respondent employer from questioning the alleged discriminatees about their immigration status in the merits proceeding). See also ***Double D Construction Group***, 339 NLRB 303 (2003). In that case, the Board found that the judge erred in discrediting the discriminatee solely on the basis that he admitted giving the respondent a false Social Security number to obtain employment, without considering other credibility factors. The Board noted (n. 14) that the judge "arguably" could have refused to admit the evidence under FRE 608, citing ***Enterprise Industrial Piping Co***., 117 NLRB 995 n. 2 (1957) (trial examiner did not abuse discretion in refusing to permit cross-examination concerning employee's false statements on unemployment insurance claim).

For a court case discussing this issue, see ***U.S. v. Almeida-Perez***, 549 F.3d 1162, 1174–1175 (8th Cir. 2008). The court in that case held that the magistrate judge's inquiry about the circumstances under which the witnesses entered the country was not plain error, citing FRE 608(b) and two cases where unlawful entry or other violation of immigration laws was considered admissible because relevant to truthfulness (***U.S. v. Cardales***, 168 F.3d 548, 557 (1st Cir. 1999), cert. denied 120 S.Ct. 101 (1999); and ***U.S. v. Cambindo Valencia***, 609 F.2d 603, 633 (2d Cir. 1979), cert. denied 100 S.Ct. 2163 (1980)). However, the court noted that "the use of such evidence is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage. See FRE 403." It added that "the relevance of an immigration violation to character for truthfulness is at the least debatable and would depend on the facts of the particular violation since many immigration violations do not involve a false statement." See also ***Rivera v. NIBCO, Inc***., 364 F.3d 1057, 1064 (9th Cir. 2004); and ***Rengifo v. Erovos Enterprises, Inc***., 2007 WL 894376, 2007 U.S. Dist. LEXIS 19928 (S.D. N.Y. March

20, 2007) (quashing employer subpoenas seeking information about the plaintiff's immigration status, notwithstanding its asserted relevance to credibility, because of the potential chilling effect it would have on the willingness of plaintiffs to bring civil rights claims).

§ 16–608.2 Use of extrinsic evidence

Even if testimony on such collateral matters is allowed, the use of "extrinsic" evidence to impeach is generally prohibited (unless it involves a criminal conviction, see **§16–609**, below). Thus, admission of extrinsic evidence of specific acts to attack the witness's response is not permitted, unless it tends to show bias or motive to testify untruthfully. See ***Sunshine Piping,*** and ***J.S. Troup Electric, Inc.***, above.

§ 16–608.3 Evaluating Credibility Based on Specific Acts

With respect to the appropriate weight to give specific prior acts in evaluating credibility, see ***Double D Construction Group***, above, in which the Board criticized a judge for discrediting a witness for lying about his social security number in the past, without taking into account all of the factors tending to support his credibility at the time of his testimony. See also ***Boardwalk Regency Corp.***, 344 NLRB 984 n. 1 (2005), pet. for review denied, 196 Fed. Appx. 59 (3d Cir. 2006) (*Double D Construction* stands for the proposition that "a judge should not rely solely on a single prior act of falsification" in making credibility determinations; if there are other factors supporting the witness's credibility, "they too must be considered").

§ 16–609 FRE 609. Impeachment by Evidence of a Criminal Conviction

FRE 609 states in relevant part:

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case . . . ;

. . . and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

> **(d) Juvenile Adjudications.** Evidence of a juvenile adjudication is [not] admissible under this rule [in a civil case] . . . .
> **(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Under FRE 609, a witness may be impeached, subject to FRE 403, by reference to prior criminal convictions (not merely arrests) if they are either (1) punishable by death or imprisonment over 1 year, or (2) the elements of the crime required proof or admission of an act of dishonesty or false statement. See ***Service Employees (GMG Janitorial)***, 322 NLRB 402, 406 (1996) (mail fraud and conspiracy convictions admitted and considered under FRE 609).

FRE 609 also sets forth time limits: if more than 10 years have passed since the witness's conviction or release from confinement, whichever is later, the evidence of conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect," and the proponent gives the adverse party "reasonable notice" of the intent to use it. See ***Pessoa Construction Co***., 361 NLRB No. 138, slip op. at 1 n. 1 and JD. at 4 n. 6 (2014) (judge in supplemental backpay proceeding did not abuse his discretion in excluding evidence of the discriminatee's prior criminal convictions given, inter alia, the passage of time and respondents' failure to provide reasonable written notice of its intent to use the evidence).

The judge may, of course, still credit a witness notwithstanding such convictions. See ***Franklin Iron & Metal Corp.***, 315 NLRB 819 n. 1 (1994) (judge considered a felony conviction within the last 10 years for carrying a concealed weapon, but nevertheless credited the substantially corroborated testimony of the witness), enfd. 83 F.3d 156 (6th Cir. 1996).

§ 16–610 FRE 610. Religious Beliefs or Opinions

FRE 610 states:

> Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

See ***Rike's***, 241 NLRB 240 n. 1 (1979) (citing FRE 610 in finding that the trial judge erred by crediting a witness based in part on her "religious convictions").

FRE 610 does not preclude evidence of religious beliefs or opinions to show motive or bias. See ***Firemen's Fund Insurance Co. v. Thien***, 63 F.3d 754, 760–761 (8th Cir. 1995).

For a discussion of whether the judge should exclude evidence that a witness is a full or part-time minister, see ***U.S. v. Davis***, 779 F.3d 1305, 1310 (11th Cir. 2015) (FRE 610 does not bar such evidence, but the judge has discretion to exclude it under FRE 403 where it has limited probative value that is outweighed by the danger of unfair prejudice).

§ 16–611 FRE 611. Mode and Order of Examining and Presenting Evidence

FRE 611 states:

> **(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
> **(1)** make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

§ 16–611.1 Order of Examination

FRE 611(a) grants the trial judge wide discretion to allow witnesses to testify out-of-turn, for example to save time, avoid confusion, or accommodate the schedule of a critical witness. See ***28 Fed. Prac. & Proc. Evid***. § 6164 (2d ed., database updated April 2015); and ***Goode & Wellborne, Courtroom Handbook on Federal Evidence*** 410 (West 2012). But see ***Boetticher & Kellogg Co.***, 137 NLRB 1392 n. 1, 1398–1399 (1962) (judge erred in precluding a respondent from conducting any cross examination of a General Counsel witness after the respondent refused the judge's direction to cross examine the witness before the charging party union had questioned the witness).

§ 16–611.2 Cross-Examination Beyond the Scope

FRE 611(b) gives judges discretion to "allow inquiry into additional matters as if on direct examination," and judges often do so (for example, to develop a full record without recalling witnesses). The judge should use his or her best judgment in the circumstances.

§ 16–611.3 Rebuttal and Surrebuttal Testimony

FRE 611 makes no mention of redirect and recross examination. However, the judge has broad discretion in deciding whether rebuttal and surrebuttal testimony would be helpful in developing the evidence, or whether it would inappropriately and unnecessarily prolong the trial. See ***Garden Ridge Management, Inc.***, 347 NLRB 131 n. 3 (2006) ("the admissibility of evidence on rebuttal is within the discretion of the judge, even if the evidence is not technically proper rebuttal evidence"), citing ***Water's Edge***, 293 NLRB 465 n. 2 (1989) (judge did not abuse his discretion by admitting testimony by a General Counsel witness on rebuttal, even though it was technically not proper rebuttal because it was not introduced to refute evidence provided by the respondent's witness), enfd. in part 14 F.3d 811 (2d Cir. 1994). See also ***Bethlehem Temple Learning Center, Inc.***, 330 NLRB 1177 n. 1 (2000) (judge did not abuse his discretion in rejecting, as too late, respondent's proffer of evidence on surrebuttal that the charging party/ alleged discriminatee had a criminal conviction to attack her credibility), citing ***U.S. v. Mitan***, 966 F.2d 1165, 1176 (7th Cir. 1992) (trial court has broad discretion to reject rebuttal and surrebuttal testimony and does not abuse it where party had an opportunity to introduce the evidence at an earlier point); and ***First Class Maintenance***, 289 NLRB 484 n. 4 (1988) (judge properly refused to allow certain rebuttal testimony offered by the General Counsel, as the evidence would have been cumulative and the General Counsel had 9 days notice that he might desire the testimony).

§ 16–611.4 Leading Questions/Hostile Witnesses

Under FRE 611(c), leading questions ordinarily are not permitted on direct examination or examination of a friendly witness, except as may be necessary to develop the witness' testimony, but are permitted on cross-examination or examination of a hostile or adverse witness.

Leading questions may impair the probative value of the testimony. ***Greyston Bakery***, 327 NLRB 433, 440 n. 13 (1999). Even when there is no objection to leading questions on direct, the better practice is for the judge first to warn counsel not to lead. ***Liberty Coach Co.***, 128 NLRB 160, 162 n. 7 (1960). But see ***W & M Properties of Connecticut, Inc.***, 348 NLRB 162 (2006) (no error for judge to permit General Counsel to ask leading questions on direct examination "to develop the witness's testimony" after several nonleading questions were unsuccessful in eliciting certain testimony), enfd. 514 F.3d 1341 (D.C. Cir. 2008).

No advance request or ruling is necessary before beginning examination of a hostile or adverse witness under FRE 611(c). The test of that right comes when the opponent objects that a question is leading. ***Omaha Building Trades Council (Crossroads Joint Venture)***, 284 NLRB 328, 329 n. 4 (1987), enfd. 856 F.2d 47 (8th Cir. 1988).

Generally, after direct examination of the adverse witness under 611(c), the nonadverse party may not ask leading questions on cross-examination. Nevertheless, the judge retains discretion to allow it. See ***28 Fed. Prac. & Proc. Evid.*** § 6168 (2d ed., database updated April 2015).

A charging party discriminatee is an adverse party under FRE 611(c) (formerly FRCP 43(b)) and can be called as an adverse witness by the respondent. ***Security Services, Inc.***, 198 NLRB 1166 (1972) (it was reversible error for the judge to preclude the respondent from calling the charging party discriminatee as an adverse witness rather than its own witness).

§ 16–611.5 Failure to Call Witness: Adverse Inference

Although not addressed in FRE 611, a judge may draw an adverse inference when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. ***International Automated Machines***, 285 NLRB 1122, 1123 (1987) (adverse inference was warranted for respondent's failure to call its production manager to testify about significant disputed matters), enfd. mem. 861 F.2d 720 (6th Cir. 1988); ****Parksite Group***, 354 NLRB 801, 805 (2009) (failure of respondent to call its manager who evaluated alleged discriminatees for rehire was subject to adverse inference; General Counsel was not required to subpoena manager) and ***Government Employees (IBPO),*** 327 NLRB 676, 699 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999). But see ***Riverdale Nursing Home***, 317 NLRB 881, 882 (1995) (it is improper for judge to rely on adverse inference to fill an evidentiary gap in the General Counsel's case); and ***Ridgewell's, Inc.***, 334 NLRB 37, 42 (2001) (denying respondent's request for an adverse inference against the General Counsel for failing to present any evidence on a particular issue, as respondent had the burden of proof on that issue), enfd. 38 Fed. Appx. 29 (D.C. Cir. 2002). Compare also ***Advocate South Suburban Hospital v. NLRB***, 468 F.3d 1038, 1048 and n. 8 (7th Cir. 2006) (adverse inference is warranted only when the missing witness was peculiarly in the power of the other party to produce)***.***

A party's failure to explain why it did not call the witness may support drawing the adverse inference. See ***Martin Luther King, Sr. Nursing Center***, 231 NLRB 15 n. 1 (1977) (judge

properly drew adverse inference in absence of explanation). But see ***Roosevelt Memorial Medical Center***, 348 NLRB 1016, 1022 (2006) (judge abused his discretion by drawing adverse inference from respondent's failure to call a manager; circumstances indicated manager was not called because his testimony was unnecessary, not because it would have been adverse). Accord: ***One Stop Kosher Supermarket***, 355 NLRB 1237, 1238 n. 3 (2010) (finding, for same reason, that no adverse inference was warranted from failure of General Counsel or Charging Party to call rebuttal witness). Conversely, of course, an adverse inference would normally not be appropriate where an adequate explanation is provided.

Effect or scope of adverse inference. An adverse inference that a nontestifying witness would not have supported a party's witness(es) does not necessarily warrant an inference that the nontestifying witness would have supported the opposing party's witness(es). The judge may properly consider all the circumstances in evaluating the effect or scope of the adverse inference. See ***Spurlino Materials, LLC***, 357 NLRB No. 126, slip op. at 12–13 (2011) (General Counsel's failure to call fellow strikers who witnessed striker's conversation with supervisor warranted adverse inference that their testimony would not have supported striker's version of the conversation; however, the circumstances did not warrant an inference that their testimony would have supported the supervisor's version as that version was not believable and there were reasons to question the supervisor's own credibility).

Bystander employees. Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. ***Torbitt & Castleman, Inc.***, 320 NLRB 907, 910 n. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. ***C & S Distributors***, 321 NLRB 404 n. 2 (1996), citing ***Queen of the Valley Hospital***, 316 NLRB 721 n. 1 (1995). Accord: ***Stabilus, Inc***., 355 NLRB 836, 840 n. 19 (2010).

Former Supervisors. No adverse inference is drawn from the failure of a respondent to call a former co-owner, manager, or supervisor when the record does not show it is reasonable to assume that the person is favorably disposed toward the respondent. See ***Goldsmith Motors Corp.***, 310 NLRB 1279 n. 1 (1993); and ***Christie Electric Corp.***, 284 NLRB 740, 784 n. 137 (1987) (declining to draw an adverse inference from the failure to call a former supervisor).

Board agents. As discussed in **§8–470**, above, ordinarily a Board agent cannot be required to testify in a Board proceeding. It is also improper for the judge to draw an adverse inference from General Counsel's failure to call a Board agent to testify. ***Independent Stations Co.***, 284 NLRB 394 n. 1, 412, 415 (1987).

§ 16–612 FRE 612. Writing Used to Refresh a Witness's Memory

FRE 612 states in relevant part:

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. . . . [A]n adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates

to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.
(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. . . .

It is generally held that the recollection of one's own nonadverse witness should not be refreshed until the witness's memory has been exhausted. The recollection of the witness may then be refreshed by leading questions or any artificial aid if appropriate and not improperly suggestive. See **28 Fed. Prac. & Proc. Evid.** § 6184 (2d ed., database updated April 2015); and **Goode & Wellborne, Courtroom Handbook of Federal Evidence** 418 (West 2012).

Adverse Party's Right to Introduce Refreshing Document. See, e.g., ***J. G. Braun Co.***, 126 NLRB 368, 369 n. 3 (1960) (where respondent on cross-examination had read portions of an affidavit into the record to refresh the recollection of a witness, it was error for judge to reject the General Counsel's offer of the entire affidavit into evidence); and ***Baker Hotel of Dallas***, 134 NLRB 524 n. 1 (1961), enfd. 311 F.2d 528 (5th Cir. 1963). See also FRE 106 (Remainder of or Related Writings or Recorded Statements).

In Camera Inspection and Redaction. In ****CNN America, Inc.***, 352 NLRB 265 (2008), supplemental proceedings 352 NLRB 448 (2008), 352 NLRB 675 (2008), and 353 NLRB 891 (2009), final decision and order issued 361 NLRB No. 47 (2014), the Board indicated that, with respect to documents used in preparation for testifying, the judge's review should be done after the witness has testified. In that case, the Board reversed a judge's ruling that the respondent was required, before the witness testified, to provide opposing counsel with all documents that had been reviewed by the witness within 6 months prior to the hearing. The Board held that the judge read Rule 612(2) too broadly. For the rule to apply, the documents must have been viewed for the purpose of refreshing a witness's recollection and the refreshing must be undertaken for the purpose of testifying. The Board held that the judge should only order documents to be turned over under Rule 612 after the witness has testified so that the judge may properly apply the conditions set forth in the rule.

§ 16–613 FRE 613. Witness's Prior Statement

FRE 613 states:
(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

FRE 613 addresses situations where a party seeks to impeach a witness by proof of the witness's prior inconsistent statement. Subsection (a) of the rule requires the party in such circumstances to show or disclose the statement to the adverse party's counsel during the examination.

Although FRE 613 does not itself place any limitations on a judge's consideration of prior inconsistent statements, the judge should carefully weigh the circumstances and relevance of the alleged contradictions. See ***Advocate South Suburban Hospital v. NLRB***, 468 F. 3d 1038, 1046 (7th Cir. 2006) ("where a contradiction goes to the heart of a witness's story, belief can be error. But crediting the witness makes sense when the impeaching statements differ only with respect to minor aspects of the story or where the discrepancies are easily explained." [citations omitted]). The judge, of course, should also consider the manner in which the statement was taken—such as whether it was recorded in the witness's native language so that the witness could read it before signing—in weighing the effect of the prior statement on credibility. ***NLRB v. Bakers of Paris, Inc.***, 929 F.2d 1427, 1436 (9th Cir. 1991). See also **§16–604.2**, Translation of Documents, above.

Of course, the judge must also be evenhanded and apply the same standards in evaluating inconsistent prior statements or testimony by General Counsel or charging party witnesses and by respondent witnesses. See ***Alta Bates Summit Medical Center v. NLRB***, 687 F.3d 424, 437–438 (D.C. Cir. 2012), remanding 357 NLRB No. 31 (2011).

§ 16–613.1 Jencks Statements

The following rules otherwise apply to disclosure of prior statements given to the General Counsel (referred to as Jencks statements).

Disclosure required only on request after witness testifies. There is no general requirement in Board proceedings that the General Counsel disclose a witness's prior statement before the witness has testified. Under Section 102.118 of the Board's Rules, pretrial statements given by a witness called by the General Counsel in an unfair labor practice case need not be released or produced unless and until disclosure has been requested after the witness has testified.

The proper time for a disclosure request is at the close of the direct examination; it is premature to demand production earlier. ***U.S. v. Martinez*****,** 151 F.3d 384, 390–391 (5th Cir. 1998), cert. denied 525 U.S. 1031 and 1085 (1998 and 1999). See also ***H. B. Zachry Co.***, 310 NLRB 1037, 1038 (1993) (production cannot be required by subpoena on theory that employee witness waived confidentiality by giving copy to the union); and ***Edwards Trucking Co.***, 129 NLRB 385, 386 n. 1 (1960).

Similarly, it may be too late to demand production after the witness has been excused. ***Walsh Lumpkin Wholesale Drug Co.***, 129 NLRB 294, 296 (1960) (upholding judge's denial of respondent's request for any pretrial statements by two witnesses after the witnesses had been fully cross-examined and excused). See also ***Earthgrains Co.,*** 336 NLRB 1119, 1122 (2001) (request for affidavits was untimely when made immediately prior to close of trial after last witness had been excused); ***SBC California***, 344 NLRB 243 n. 3 (2005) (request for affidavit was untimely when made at the close of respondent's case).

Indeed, in ***I-O Services***, 218 NLRB 566 n. 1 (1975), the Board held that the judge did not abuse her discretion under the circumstances by denying a respondent's request that was made "well into" the cross-examination of the witness. The Board noted that respondent had failed to show prejudice, as the witness's testimony was "in may respects merely cumulative and fully corroborated by other witnesses, including witnesses presented by the Respondent."

Disclosure limited to Jencks '"statements". Section 102.118(d) defines a Jencks "statement" to mean any written statement by the witness that is signed or otherwise adopted or approved by him/her, as well as a tape recording or transcription that is a substantially verbatim recital of an oral statement made by the witness to the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement. See also ***Rosenberg v. U.S.***, 360 U.S. 367, 370 (1959) (a signed letter constitutes a producible "statement").

If notes taken by a Board agent (or a memo made of an interview with the witness) are not adopted or approved by the witness, they are not a Jencks "statement" and are therefore not producible under Section 102.118(b)(1). ***Caterpillar, Inc.***, 313 NLRB 626 n. 2, 627 n. 4 (1993); and ***Coca-Cola Bottling Co.***, 250 NLRB 1341, 1342 (1980). See also ***National Specialties Installations, Inc.***, 344 NLRB 191 (2005) (written notice from third party to a witness, such as a notice from a witness's bank, is not a "statement made by said witness" within the meaning of the Rule; and since it was not adopted by the witness, it is not producible).

Regarding notes passed by a witness to counsel during trial, see ***Wabash Transformer Corp.***, 215 NLRB 546 n. 3 (1974), enfd. 509 F.2d 647 (8th Cir. 1975), cert. denied 423 U.S. 827 (1975). In that case, the respondent requested all notes that a witness had passed to the General Counsel during the trial. The General Counsel produced the notes in his possession, but stated on the record that he had probably discarded the others, because he did not consider them to be Jencks "statements" and the respondent had not previously shown any interest in them. Assuming arguendo that the notes constituted "statements," the Board found no basis for rejecting the witness's testimony under the circumstances.

Regarding tape or video recordings, see **§8–510**, above.

Disclosure limited to related statements. The entire statement need not be produced unless the entire contents relate to the subject matter about which the witness testified. Thus, in ***Caterpillar, Inc***., 313 NLRB 626 (1993), the Board held that when the General Counsel asserts that material in a Jencks statement does not relate to the subject matter of the witness's testimony on direct examination, the judge must inspect the statement in camera and excise any portion of the statement that does not relate to the testimony. The judge may exercise discretion in this respect, and retain portions that relate to the pleadings, even if not to the testimony. See also ***Tejas Electrical Services, Inc.***, 338 NLRB 416 n. 2 (2002) (judge erred in summarily denying respondent's request for production of affidavits given by the General Counsel's witnesses in other cases, without making a determination, through in camera inspection, that the affidavits were not relevant to issues raised in the case).

Limitations apply to copies in possession of others. No waiver results from the General Counsel's witnesses giving copies of their affidavits to the charging party union, i.e. the respondent is not entitled to the affidavits until after the witness is called and testifies on behalf of the General Counsel, even if the affidavits are not exclusively in the General Counsel's possession. ***H. B. Zachry Co.***, 310 NLRB 1037, 1038 (1993) (reversing judge and quashing the respondent's subpoenas on the union to the extent they sought production of statements by individuals who were not called to testify).

A respondent likewise may not subpoena the affidavits from the witnesses themselves; indeed, an employer violates section 8(a)(1) of the Act by subpoenaing Board affidavits given by its employees. See ***Santa Barbara News-Press***, 358 NLRB No. 155 (2012), reaffd. 361 NLRB No. 88 (2014).

Respondent not entitled to statements of its own witness. Respondents are not entitled to Jencks statements of their own witnesses. ***Clear Channel Outdoor, Inc.***, 346 NLRB 696 n. 1 (2006). This is true even if called as an adverse or hostile witness under FRE 611(c). See ***Kenrich Petrochemicals, Inc.***, 149 NLRB 910, 911 n. 2 (1964) (respondent was not entitled to Jencks statement given by charging party, as charging party was called by respondent as an adverse witness); and ***NLRB v. Duquesne Electric Co.***, 518 F.2d 701, 705 (3d Cir. 1975) (upholding judge's application of *Kenrich Petrochemicals* where respondent called a discriminatee to testify, noting that FRCP 43(b) [now FRE 611(c)] only authorizes leading questions, not cross-examination). Note, however, that the court in ***Duquesne*** suggested that respondent might have been entitled to the discriminatee's affidavit to impeach if "she had given testimony damaging to the [respondent'] case, which she never did." 518 F.2d at 705.

Charging Party entitled to statements given by Respondent's witness. A charging party is entitled, on request and for the purpose of cross-examination, to a pretrial statement given to the General Counsel by an agent who testifies on behalf of the respondent. See ***Senftner Volkswagen Corp.***, 257 NLRB 178 n. 1, 186–187 (1981), enfd. 681 F.2d 557 (8th Cir. 1982), where the Board upheld the judge's ruling that allowed the charging party to utilize for cross-examination the pretrial affidavit given by a respondent witness. See also NLRB Casehandling Manual (Part One),.Sec. 10394.7.

Board law is somewhat unclear whether a charging party may demand a copy of a witness's Jencks statement before or after calling the witness as an adverse or hostile witness under FRE 611(c). See ***Louisiana Dock Co.***, 293 NLRB 233, 250–251 (1989), enf. denied, 909 F.2d 281 (7th Cir. 1990). However, based on decisions dealing with 611(c) witnesses called by respondents, the answer would appear to be "no." See ***Kenrich Petrochemicals, Inc.***; and ***NLRB v. Duquesne Electric Co.***, above.

Duty to search for statements. In ***Albertson's, Inc.***, Case 27–CA–13390, unpub. Order issued January 29, 1999, the Board ruled that the General Counsel is obligated to search its files (before, it is implied, the witness testifies) for any statements in cases involving charges filed by the charging party union against the respondent during the period covered by the pending charges. Further, the Board denied the General Counsel's request to restrict the search to the same Regional Office where the pending charges were filed. However, it ruled that the General Counsel was not required to search files in cases involving charges against other employers.

Right to sufficient time to study statements. A judge's denial of 15 minutes time to study the statement after production was found to be prejudicial error requiring a remand in *A. R. Blase Co.*, 143 NLRB 197, 197–198 (1963), enf. denied 338 F.2d 327 (9th Cir. 1964). Normally, the General Counsel should not oppose a request for a reasonable time for study. See NLRB Casehandling Manual (Part One), Sec. 10394.9.

Copying and retaining statements. There is no absolute right to make copies of the statements, unless the statements are admitted into evidence. This is within the judge's discretion. ***Manbeck Baking Co.***, 130 NLRB 1186, 1189–1190 (1961). However, Section 10394.9 of the NLRB Casehandling Manual (Part One) now provides that, for witness statements required to be produced by the General Counsel to a respondent, the General Counsel will produce both the original and a copy.

With respect to retaining the statement, in ***Wal-Mart Stores, Inc***., 339 NLRB 64 (2003), the Board held that a Jencks witness statement may not be retained after the close of the trial. After the witness has testified, the exception to the general prohibition against using Board files under Section 102.118(b)(1) of the Board's Rules no longer applies and the prohibition of the rule

is restored. Nonetheless, the Board confirmed that a judge may, in his or her discretion, permit counsel to copy the statement and to retain it throughout the hearing "for any legitimate trial purpose." Id. at n. 3. See also NLRB Casehandling Manual (Part One), Sec. 10394.9 (providing that, on request, the respondent may retain the copies throughout the trial for legitimate trial purposes, returning them at the close of the trial (unless, of course, the statement has been made an exhibit)).

Because some counsel may make notes that they would be reluctant to disclose to the General Counsel, it is prudent to establish a procedure in advance, such as an agreed upon destruction of copies with attorney notes, to avoid later controversy and dispute.

§ 16–614 FRE 614. Court's Calling or Examining a Witness

FRE 614 states:
(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.
(b) Examining. The court may examine a witness regardless of who calls the witness.
(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Section 102.35(a)(11) of the Board's Rules similarly provides that the judge may "call, examine, and cross-examine witnesses and . . . introduce into the record documentary or other evidence." See **§ 2–300**, Duties of Trial Judge, above.

§ 16–615 FRE 615. Excluding Witnesses

FRE 615 states:
At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
(d) a person authorized by statute to be present.

As fully discussed in **Chapter 11,** Sequestration of Witnesses, the Board has generally attempted to follow the "spirit" of FRE 615 in fashioning its own rules in this area. See also **§ 1–300** (Model Sequestration Order).

§ 16–700 Opinions and Expert Testimony

§ 16–701 FRE 701. Opinion Testimony by Lay Witnesses

FRE 701 states:
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

§ 16–702 FRE 702. Testimony by Expert Witnesses

FRE 702 states:
A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

For examples where FRE 702 has been applied in Board proceedings, see ***Chemical Solvents, Inc***., 362 NLRB No. 164, slip op. at 23 (2015) (rejecting the respondent's proffered expert witness testimony, in 8(a)(3) and (5) plant-closure case, that the respondent realized cost savings after the closure, as the expert's after-the-fact assessment could not have played any part in the respondent's decision and, in any event, would not be a defense to the allegations); and ***National Extrusion & Mfg. Co.***, 357 NLRB No. 8, slip op. at 29 and n. 29 (2011) (rejecting the General Counsel's proffered expert witness testimony, in case alleging 8(a)(5) refusal to provide health insurance-information, that health insurance companies usually provide plan documents to prospective purchasers, as such generalized testimony did not directly address the respondent's evidence that it was unable in this particular instance to obtain the plan documents from the insurance company).

§ 16–702.1 Polygraph Evidence

Some courts have accepted such evidence upon stipulation or for impeachment or corroboration. See, e.g., ***U.S. v. Piccioninna***, 885 F.2d 1529 (11th Cir. 1989). Others have upheld a trial court's discretion to reject such evidence as inadmissible***.*** See ***U.S. v. Henderson***, 409 F.3d 1293, 1303 (11th Cir. 2005), cert denied 126 S.Ct. 1331 (2006); and ***U.S. v. Cordoba***, 194 F.3d 1053 (9th Cir. 1999). There appears to be no universal rule. See **22 Fed. Prac. & Proc. Evid.** § **5169.3** (2d ed., database updated April 2015) (summarizing treatment of polygraph evidence by federal and state jurisdiction).

A polygraph was admitted by the judge and given some, but not controlling, weight in assessing credibility in ***J.C. Penny Co.***, 172 NLRB 1279 (1968) (discrediting witness despite polygraph evidence that witness testified truthfully), enfd. in relevant part 416 F.2d 702, 705 (7th Cir. 1969). See also ***Hudlin v. OPM***, 119 M.S.P.R. 61, 69, 71 (2012) (finding plaintiff-applicant's testimony credible based in part on passing a polygraph). Compare ***Ackerman Mfg. Co***., 241 NLRB 621, 622 n. 1 (1979) (judge rejected certified polygraph report to the extent it was submitted by respondent to show that witness was truthful in his statements to the polygraphist about observing the discriminatees' removing company property, but admitted it for purposes of evaluating the respondent's investigative efforts and "bona fides" in failing to recall the discriminatees).

§ 16–702.2 Prior Notice to Opponent

Prior notice should normally be given by a party intending to use an expert witness at the trial so that the opposing party may have time to obtain its own expert. The failure to do so may be considered by the judge in ruling on the admissibility of the expert testimony under FRE 403. See ***National Extrusion,*** above, 357 NLRB No. 8, slip op. at 29 n. 29. See also **§§16–102** and **16-403**, above.

§ 16–703 FRE 703. Bases of an Expert's Opinion Testimony

> **FRE 703** states:
> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Where expert testimony has been received, the judge may disregard it if the premises for the analysis and conclusions are flawed. See ***Raley's***, 348 NLRB 382, 562–563 (2006) (handwriting expert's testimony about signatures on petition was based on flawed premises); ***H. B. Zachry Co.***, 319 NLRB 967, 979–980 (1995) (basis for management professor's opinion about union members' motive for applying for work was flawed), modified on different point, 127 F.3d 1300 (11th Cir. 1997); ***Fluor Daniel, Inc.***, 304 NLRB 970, 971 n. 10, 975, 978, 980 (1991) (statistical consultant's conclusions about employer's hiring decisions were based on flawed assumptions), enfd. mem. 976 F.2d 744 (11th Cir. 1992).

See also ***Parts Depot, Inc.***, 348 NLRB 152, 152 n. 6 (2006) (judge in backpay proceeding properly refused to permit an expert witness to opine, based on an analysis of employment trends, that employees did not make reasonable efforts to seek interim employment, as Board precedent requires consideration of an individual's particular circumstances rather than just probabilities).

The foregoing rulings are consistent with the Supreme Court's expression in ***General Electric Co. v. Joiner***, 522 U.S. 136 (1997), that a "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

§ 16–704 FRE 704. Opinion on an Ultimate Issue

> **FRE 704** states in relevant part:
> **(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
> . . . .

Under FRE 704, an opinion is not objectionable just because it embraces an ultimate issue. However, as indicated in the advisory committee notes, to be admitted, the testimony must still satisfy the standards set forth in Rule 702 (as well as 403). Thus, expert opinions on ultimate legal issues are properly excluded as within the exclusive province of the judge and Board. See ***Roundy's Inc. v. NLRB***, 674 F.3d 638, 647, 648 (7th Cir. 2012), enfg. in relevant part 356 NLRB No. 27, slip op. at 1 n. 4 (2010). The issue in that case was whether the employer had

unlawfully excluded union representatives from handbilling in common areas outside its stores. Citing the advisory committee notes to FRE 704, the court held that the judge did not abuse his discretion in refusing to permit the employer to call an alleged expert on Wisconsin real estate law to testify about the nature of the employer's property interest at the stores. The court also found that the employer had suffered no prejudice as the judge permitted the employer to include the alleged expert's interpretation of the law in its posthearing brief.

See also ***Nationwide Transport Finance v. Cass Information****,* 523 F.3d 1051, 1058 (9th Cir. 2008) (commercial law expert's legal conclusions about the applicability of the UCC to the facts of the case inadmissible); and ***Gilson v. Sirmons***, 520 F.3d 1196, 1243 (10th Cir. 2008) (expert testimony on witness's credibility inappropriate).

§ 16–705 FRE 705. Disclosing the Facts or Data Underlying an Expert's Opinion

FRE 705 states:

> Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

§ 16–706 FRE 706. Court-Appointed Expert Witnesses

FRE 706 states:

> **(a) Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
> **(b) Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
> **(1)** must advise the parties of any findings the expert makes;
> **(2)** may be deposed by any party;
> **(3)** may be called to testify by the court or any party; and
> **(4)** may be cross-examined by any party, including the party that called the expert.
> **(c) Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
> **(1)** in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
> **(2)** in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.
> **. . . .**
> **(e) Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

There is no specific provision in the Board's Rules comparable to FRE 706. But cf. ***George Joseph Orchard Siding, Inc***., 325 NLRB 252 (1998) (discussing a judge's inherent discretionary power under the NLRA, the APA, and the Board's Rules to appoint interpreters); and ***H & M International Transportation, Inc***., 22-CA-089596, unpub. Board order issued May 23, 2014 (2014 WL 2194514, 2014 NLRB LEXIS 388) (upholding judge's discretion to order production of a memory card from the alleged discriminatee's cell phone so that the company

could evaluate the reliability of an audio recording made with the phone, but directing the judge to issue a protective order "requiring that the memory card be given to a designated qualified expert in forensic analysis of electronic records, not in the direct employ of any party, for retrieval and review of the audio file at issue, and any associated metadata, in order to protect the confidentiality and integrity of the data.")

§ 16–800 Hearsay

§ 16–801 FRE 801. Definitions; Exclusions from Hearsay

FRE 801 states:
(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
(C) identifies a person as someone the declarant perceived earlier.
(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

§ 16–801.1 Purpose of Evidence: Truth of the Matter Asserted

As indicated in FRE 801(c)(2), an offered statement is hearsay only if it is offered "to prove the truth of the matter asserted in the statement." Thus, if it is offered for another purpose it is not hearsay. See, e.g., ***Hotel Bel-Air,*** 358 NLRB No. 152, slip op at 1 n. 1 (2012), reaffd. 361 NLRB No. 91 (2014), citing ***Hebert Industrial Insulation Corp.,*** 312 NLRB 602, 608 (1993).

§ 16–801.2 Affidavit of Recanting Witness

Where an employee witness gives testimony inconsistent from his/her pretrial affidavit, the Board has permitted the affidavits to be introduced as substantive evidence to allay concerns over witness intimidation. The Board has suggested that the affidavits may be sufficiently similar to depositions to constitute nonhearsay under FRE 801(d)(1)(A). But, even assuming they are hearsay, the Board has admitted them where corroborated. See ***Conley Trucking****,* 349 NLRB 308, 309–313 (2007), enfd. 520 F.3d 629 (6th Cir. 2008), and cases cited there. See also **§16–802**, Corroborated Hearsay, below. For pretrial statements of respondent supervisors or agents, see **§16–801.3**, Admission or Statement by Opposing Party, below.

For a case involving a posthearing recanting affidavit, see ***Southdown Care Center***, 313 NLRB 1114, 1114–1115, 1118 (1994). In that case, the Board remanded for consideration of the posthearing affidavit of a major witness indicating that most of her testimony in the trial was false. On remand the judge, disbelieving the recanting affidavit, reaffirmed his original findings, which the Board adopted.

§ 16–801.3 Admission or Statement by Opposing Party

Admissions and statements by a party or its agents are covered by FRE 801(d)(2). ***Ferguson Enterprises, Inc***., 355 NLRB 1121 n. 2 (2010) (supervisor's statements to charging party employee were nonhearsay admissions under FRE 801(d)(2)); and ***Times Union***, 356 NLRB No. 169 n. 1 (2011) (article by respondent's business reporter quoting respondent's publisher fell within exception to hearsay rule set forth in FRE 801(d)(2)(D) for statements by a party agent or employee on a matter within the scope of that relationship).

Statements by supervisors. Pretrial affidavits given to the General Counsel by supervisors while employed by the respondent concerning matters within the scope of employment are nonhearsay statements by a party opponent under FRE 801(d)(2). See, e.g., ***Fredericksburg Glass & Mirror***, 323 NLRB 165, 175–176 (1997) and cases cited there.

Party position statements. Many cases find attorney statements, both in and out of court, to be admissions. For example, it is well-established Board law that a lawyer's position letter can be received as an admission if it contains a statement or statements conflicting with the party's position. See, e.g., ***Raley's***, 348 NLRB 382, 501–502 (2006); ***McKenzie Engineering Co.***, 326 NLRB 473, 485 n. 6 (1998); ***Hogan Masonry***, 314 NLRB 332, 333 n. 1 (1994); and ***Massillon Community Hospital***, 282 NLRB 675 n. 5 (1987). See also ***United Technologies Corp.***, 310 NLRB 1126, 1127 n. 1 (1993) (position letter attached to an unsuccessful motion to dismiss the complaint), enfd. mem. 29 F.3d 621 (2d Cir. 1994). Indeed, it is reversible error for the judge to refuse to admit into evidence such a position paper. ***Massillon Community Hospital***, above; ***Florida Steel Co.***, 235 NLRB 1010, 1011-1012 (1978); ***Ablon Poultry & Egg Co.***, 134 NLRB 827 n. 1 (1961).

The rule applies even to respondent position statements submitted by former counsel. See ***United Scrap Metal, Inc.***, 344 NLRB 467, 467–468 and n. 5 (2005); and ***Optica Lee Borinquen***, 307 NLRB 705 n. 6 (1992), enfd. mem. 991 F.2d 786 (1st Cir. 1993). It also applies to position statements previously submitted in representation proceedings. See ***Evergreen America***, 348 NLRB 178 (2006), See also ***Bliss & Laughlin Steel Co.***, 266 NLRB 1165, 1167 n. 2 (1983), enfd. 754 F.2d 229 (7th Cir. 1985).

As previously discussed in **§8-455** (Work Product Privilege), the Board in ***Kaiser Aluminum***, 339 NLRB 829 (2003), held that a charging party does not waive the work product privilege by giving a position statement to the General Counsel. However, the Board did not overrule or otherwise signal that it was retreating from the cases cited above involving respondent position statements. See the judge's discussion in ***Evergreen America***, above, 348 NLRB at 187–188.

It is unclear what, if any, weight the judge may give a position statement that has been disavowed by the attorney prior to trial. See ***Orland Park Motor***, 333 NLRB 1017 n. 1 and 1024-1026 (2001). However, the Board has held that an admission in an answer filed in a prior proceeding may properly be considered notwithstanding counsel's assertion that the prior pleading was "simply a clerical error that was never remedied." ***Spurlino Materials, LLC***, 357 NLRB No. 126 n. 1 and JD. at nn. 18 and 20 (2011), The Board has also held that a lawyer's position letter can be used to impeach the lawyer's conflicting testimony at the trial. ***Harowe Servo Controls, Inc.***, 250 NLRB 958, 1033 (1980). See also ***Performance Friction Corp.***, 335 NLRB 1117, 1149 (2001), describing other ways an attorney can make admissions in Board proceedings.

A party may not affirmatively rely on its own assertions in position statements or briefs to help establish a point on which it carries the burden of proof. See ***Cannondale Corp.***, 310 NLRB 845, 852 (1993) (attorney's position letter); ***Domsey Trading Corp.***, 310 NLRB 777, 814 n. 35 (1993) (attorney's letter to the judge in the nature of a supplemental brief), enfd. 16 F.3d 517 (2d Cir. 1994); ***Auburn Foundry***, 274 NLRB 1317 n. 2 (1985), enfd. 791 F.2d 619 (7th Cir. 1986) (a statement in lawyer's brief to the judge); and ***Riverwoods Chappaqua Corp. v. Marine Midland Bank***, 30 F.3d 339, 343 (2d Cir. 1994) (statement made in the counsel's opening statement).

Statements in pleadings. Generally, documents contained in General Counsel's Exhibit 1 (charges, pleadings, motions, orders, and other matters that are part of the "record" under Sec. 102.45(b) of the Board's Rules), should not be relied on as substantive evidence unless they contain an admission. For a case where the judge relied on a respondent's precomplaint position statement, which was attached to a motion to dismiss and included in the "record," apparently as part of GC Exh. 1, see ***United Technologies Corp.***, above.

The Board has repeatedly held that admissions in an answer are binding even where the admitting party later attempts to produce contrary evidence. ***C.P. Associates, Inc.***, 336 NLRB 167 (2001); ***Consolidated Bus Transit, Inc.***, 350 NLRB 1064, 1065 n. 6 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); and ***Lorge School***, 355 NLRB 558, JD at n. 3 (2010) (answer to compliance specification). See also ***T. Steele Construction, Inc.***, 351 NLRB 1032 n. 12 (2007) (rejecting respondent's argument that its previous admission in its answer should be amended to a denial to conform to the evidence presented at trial); and ***Boydston Electric, Inc.***, 331 NLRB 1450, 1451 (2000) (holding that judge erred in finding, based on the evidence at trial, that alleged discriminatee was not discharged, in light of respondent's previous admission to the discharge in its answer).

With respect to admissions in withdrawn or superseded answers, see **Graham, 6 Handbook of Fed. Evid. § 801:26** (7th ed., database updated Nov. 2014) (admissions in superseded or withdrawn pleadings are considered evidentiary rather than binding admissions and may be controverted or explained by the party).

With respect to an admission in a previous case, see ***Spurlino Materials, LLC***, 357 NLRB No. 126 n. 1 and JD. at nn. 18 and 20 (2011) (respondent's admission in an answer filed in

a prior proceeding involving the same parties may properly be considered notwithstanding counsel's assertion that the prior pleading was "simply a clerical error that was never remedied").

Statements in form of opinion or legal conclusion. See ***Casino Pauma***, 362 NLRB No. 52, JD. at n. 7 (2015) (tribal casino's prior memos to its employees stating that they were protected by the NLRA, which were offered by the union and received into evidence without objection, could properly be considered in evaluating casino's argument that the Board lacked jurisdiction).

Statements by noncharging-party discriminatee. Affidavits or statements of a noncharging-party discriminatee generally are not admissible as substantive evidence because such an individual is not a "party opponent" under FRE 801(d)(2). See ***Performance Friction Corp.***, 335 NLRB 1117, 1120 n. 20 (2001); and ***Vencor Hospital Los Angeles***, 324 NLRB, 235 n. 5 (1997). But see **§16–801.1**, Pretrial Statement of Recanting Witness, above.

Documents in personnel files. Under FRE 801(d)(2), a document in an employee's personnel file may be received as substantive evidence for the truth of the matters asserted therein if it constitutes a statement by the respondent employer. ***Laidlaw Transit, Inc.***, 315 NLRB 509, 512 (1994) (a memo in an employee's personnel file, signed by the employee's manager and dated 10 days after the discharge, warrants an inference that the document, describing the termination interview, was company generated).

Note that memos and other documents in an employee's personnel file may also be admissible under FRE 803(6), the hearsay exception applicable to "records of regularly conducted activity" (business records), discussed more fully below in **§16–803.4.**

§ 16–802 FRE 802. The Rule Against Hearsay

FRE 802 states:
Hearsay is not admissible unless any of the following provides otherwise:
a federal statute; these rules; or other rules prescribed by the Supreme Court.

As with other rules of evidence, the Board applies the hearsay rules "so far as practicable." See **§16–100**, above. However, like other administrative agencies, the Board does "not invoke a technical rule of exclusion but admit[s] hearsay evidence and give[s] it such weight as its inherent quality justifies." ***Midland Hilton & Towers***, 324 NLRB 1141 n. 1 (1997), citing ***Alvin J. Bart & Co.***, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979).

§ 16–802.1 Corroborated hearsay

Hearsay evidence is admissible in Board proceedings "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." ***Midland Towers***, above, citing ***RJR Communications, Inc.***, 248 NLRB 920, 921 (1980). See also ***Rome Electrical Systems***, 356 NLRB No. 38 n. 4 (2010) (Board "may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable"); ***RC Aluminum Industries, Inc***., 343 NLRB 939, 940 (2004) (affirming judge's ruling admitting corroborated hearsay); and ***Dauman Pallet, Inc.***, 314 NLRB 185, 186 (1994) (overturning judge's exclusion of corroborated hearsay and according it weight). Cf. ***W. D. Manor Mechanical Contractors, Inc***., 357 NLRB No. 128, slip op. at 2 (2011) (uncorroborated hearsay is entitled to "little weight"); and

NLRB v. First Termite Control Co., 646 F.2d 424 (9th Cir. 1981) (holding that the evidence supporting legal jurisdiction was hearsay and remanding the case to the Board).

§ 16–802.2 Double hearsay

Double hearsay is inadmissible, unless both parts satisfy the Board's requirements. See ***Auto Workers Local 651 (General Motors)***, 331 NLRB 479, 481 (2000) (an employee's uncorroborated testimony that a second employee told her that he heard a supervisor call her a "voodoo sister" was unreliable hearsay and did not support a finding that the supervisor was in fact hostile to her); and ***T.L.C. St. Petersburg***, 307 NLRB 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993) (judge properly accorded no weight, on issue of company's good faith doubt of the union's majority status, to the company president's testimony concerning statements allegedly made by employees to an employee and a supervisor that they subsequently conveyed to him). Cf. ***Kamtech, Inc.***, 333 NLRB 242 n. 4 (2001) (purported "double hearsay" statements were actually a party admission not barred by the hearsay rule). See also FRE 805, set forth in **§16–805**, below.

§ 16–803 FRE 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

FRE 803 states in relevant part:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) ***Statement Made for Medical Diagnosis or Treatment.*** A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) ***Recorded Recollection*** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) ***Absence of a Record of a Regularly Conducted Activity.*** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) ***Public Records.*** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) ***Public Records of Vital Statistics.*** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) ***Records of Religious Organizations Concerning Personal or Family History.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.*** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) ***Family Records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) ***Records of Documents That Affect an Interest in Property.*** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) S*tatements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year; [and]

(C) the evidence is admitted to prove any fact essential to the judgment; . . . . .

The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [*Other Exceptions.*] [Transferred to Rule 807.]

§ 16–803.1 State of Mind: Motive

Issues frequently arise regarding a person's state of mind at the time of the alleged events. FRE 803(3) provides that a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact

remembered or believed . . .” are not excluded by the hearsay rule, even if the declarant is available as a witness. See, e.g., ***International Business Systems***, 258 NLRB 181 n. 6 (1981) (statements attributed to strikers about their reasons for striking are admissible as nonhearsay under FRE 803(3)), enfd. mem. 659 F.2d 1069 (3d Cir. 1981). See also ***Lightner v. Dauman Pallet, Inc***., 823 F. Supp. 249, 252 n. 2 (D. N.J. 1992), affd. mem. 993 F.2d 877 (3d Cir. 1993); and ***Garcia v. Green Fleet Systems, LLC***, 2014 WL 5343814, 2014 U.S. Dist. LEXIS 168196 (C.D. Cal. 2014) (testimony that employees had expressed fear of losing their jobs or other retaliation for supporting the union is admissible under the FRE 803(3) “state of mind” exception to the hearsay rule to show that the employer’s alleged unfair labor practices had a chilling effect and that an interm injunction against the employer under Section 10(j) of the Act is therefore just and proper).

§ 16–803.2 Recorded Recollection

Under FRE 803(5), the contents of a memorandum or record written, signed, or adopted by a witness reciting events which occurred in the past, but of which the witness has insufficient present recollection, are admissible in evidence as substantive proof of the events. See ***J. C. Penney Co. v. NLRB***, 384 F.2d 479, 484 (10th Cir. 1967) (distinguishing between writings admitted as past recollection recorded and writings used to stimulate memory [present recollection revived] or to determine truthfulness [prior inconsistent statements]).

Foundation Required. Normally, a foundation must be laid, through testimony of the witness, that at the time of the memorandum he had a recollection of the events, and that he made or adopted them believing them to be true. ***J.C. Penney Co. v. NLRB***, above. But cf. ***Three Sisters Sportswear Co.***, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (9th Cir. 1995), cert. denied 516 U.S. 1093 (1996), where the pretrial affidavit of a frightened witness (a current employee), who claimed not to remember anything about her affidavit other than her signature, was received in evidence as past recollection recorded under FRE 803(5).

Reading Document vs. Submitting as Exhibit. If admissible under FRE 803(5), the memorandum or record may be read into the record by the party offering it as substantive evidence, and the adverse party may actually submit it as an exhibit. See also ***Rome Electrical Systems***, 356 NLRB No. 38 (2010) (judge properly admitted and relied on General Counsel’s pretrial depositions of two third party witnesses under FRE 803(5), where the respondent explicitly waived any objection to General Counsel’s introduction of the depositions).

§ 16–803.3 Bargaining Notes

Bargaining notes have been held admissible as substantive evidence under one or more of the exceptions listed in FRE 803. See, e.g., ***Allis-Chalmers Mfg. Co.***, 179 NLRB 1, 2 n. 9 (1969); and ***NLRB v. Tex-Tan, Inc.***, 318 F.2d 472, 483 (5th Cir. 1963) (citing 803(5)); ***Pacific Coast Metal Trades Council (Lockheed Shipbuilding***), 282 NLRB 239, JD. at n. 2 (1986) (citing 803(6)), and ***Mack Trucks***, 277 NLRB 711, 725 (1985) (citing both 803(1) and 803(6)). In some cases the parties will stipulate to the receipt of the bargaining summaries of one or more parties, with the qualification that all parties are free to contest any entry and to advance their own version of the meetings. See ***Formosa Plastics Corp., Louisiana***, 320 NLRB 631, 641 (1996).

§ 16–803.4 Business Records

As noted in **§ 16–801.3,** above, memos and other documents in an employee's personnel file may be admitted as records of regularly conducted business activity under FRE 803(6), provided the conditions set forth in that rule are met. See ***Affinity Medical Center***, 362 NLRB No. 78, JD. at n. 8 (2015) (document purporting to be a verbal warning prepared 4 months after the event did not meet the requirements of FRE 803(6) because it was not prepared at or near the time of the incident and the circumstances of preparation indicated a lack of trustworthiness). See also ***Pierce v. Atchison Topeka & Santa Fe***, 110 F.3d 431, 444 (7th Cir. 1997) (trial judge did not abuse his discretion in excluding a manager's memo that was placed in the plaintiff-employee's personnel file and summarized manager's meetings with plaintiff, as it "was not created with the kind of regularity or routine that gives business records their inherent reliability," and "it was obviously to memorialize an unusual incident . . . that [the manager] may have been concerned could have some litigation potential to it.").

§ 16–804 FRE 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness

FRE 804 states in relevant part:

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony.*** Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) ***Statement Against Interest****.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to

invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; . . . .

(4) ***Statement of Personal or Family History.*** A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [*Other Exceptions*.] [Transferred to Rule 807.]

(6) ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

§ 16–804.1 Declarant Unavailable

For Board cases applying the FRE 804 unavailability requirement, see ***Park Maintenance***, 348 NLRB 1373 n. 2 (2006) (reversing judge's ruling admitting affidavits in the absence of a showing that the affiants were unavailable to testify); and ***Marine Engineers District 1 (Dutra Construction)***, 312 NLRB 55 (1993) (holding that the judge properly struck the non-Board affidavit of a nonappearing witness, offered in support of an affirmative defense, as the respondent did not allege that the affiant was unavailable to testify).

§ 16–804.2 Declarant Deceased

FRE 804 provides that certain statements, including former testimony and statements against interest, are excepted from the hearsay rule where the declarant is deceased. The Board will also generally admit into evidence other statements by a deceased person where the requirements of the residual hearsay exception (now FRE 807) are satisfied. See ***Weco Cleaning Specialists***, 308 NLRB 310, 311 n. 7, 314–315 (affidavit of a deceased company agent—which was taken by the union's attorney using the same procedures he used as a former Board agent—was admissible under the residual hearsay exception as the affidavit was supported by circumstantial guarantees of trustworthiness and corroborated by other evidence). See also ***NLRB v. St. George Warehouse***, 645 F.3d 666 (3rd Cir. 2011) (court declined to follow contrary decisions in the 5th and 11th Circuits and held that the hearsay testimony of the deceased discriminatee's mother regarding her son's post-termination search for alternative work was admissible in the backpay proceeding to show that the discriminatee had engaged in a reasonably diligent search for work), enfg. 355 NLRB 474 (2010).

Because unfair labor practice proceedings before the Board derive substantively and procedurally from a Federal statute, State law does not supply the "rule of decision" under FRE 601. Accordingly, the Board is not bound to apply State "Dead Man's" statutes excluding "statements attributed to deceased persons or those too ill to testify." ***Quarles Mfg. Co.***, 83 NLRB 697, 699 n. 8 (1949), remanded 190 F.2d 82 (5th Cir. 1951) (on request of Board for vacating order and dismissing complaint).

However, the Board subjects such a statement to "the closest scrutiny before deciding what weight to give it." ***West Texas Utilities***, 94 NLRB 1638, 1639 (1951), enfd. 195 F.2d 519 (5th Cir. 1952). See also ***Ann's Laundry***, 276 NLRB 269, 270 n. 3 (1985) (same).

§ 16–804.3 Affidavits

It is well established that "a party may use an affidavit to refresh a witness's recollection, to rehabilitate a witness's direct examination testimony on cross-examination, or to prove a witness's prior statements when a witness's testimony at hearing differs from that witness's affidavit." ***W & M Properties of Connecticut, Inc.***, 348 NLRB 162 (2006), enfd. 514 F.3d 1341 (D.C. Cir. 2008). Unless used for one of these purposes, affidavits generally are received substantively only if the declarant is deceased or unavailable, or the taking of testimony poses a threat to the health of the witness. This is because there is no opportunity for the opponent to cross-examine or the judge to observe demeanor. ***Weco Cleaning Specialists***, above, and ***Colonna's Shipyard***, 293 NLRB 136, 143 n. 2 (1989), enfd. mem. 900 F.2d 250 (4th Cir. 1990).

§ 16–805 FRE 805. Hearsay Within Hearsay

FRE 805 states:
Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

See **§ 16–802.2**, Double Hearsay, above.

§ 16–806 FRE 806. Attacking and Supporting the Declarant's Credibility

FRE 806 states:
When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

§ 16–807 FRE 807. Residual Exception

FRE 807 states:
(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
(1) the statement has equivalent circumstantial guarantees of trustworthiness;
(2) it is offered as evidence of a material fact;
(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
(4) admitting it will best serve the purposes of these rules and the interests of justice.
(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the

statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

§ 16–807.1 Notice Not Required

"The Board does not require adherence to the [Federal Rules of Evidence] requirement that the proponent of a hearsay statement make known to the adverse party, with a fair opportunity to prepare to meet it, of the intention to offer the statement, and the particulars of it, including the name and address of the declarant." ***Sheet Metal Workers Local 28 (Borella Bros.)***, 323 NLRB 207, 209 n. 2 (1997). [Note: the notice requirement was previously set forth in FRE 803(24), but is now contained only in FRE 807, the "Residual Exception"].

The judge, however, may exercise his or her discretion to impose a notice requirement in circumstances indicating that a lack of some notice will prejudice the adverse party or prolong the trial.

§ 16–900 Authentication and Identification

§ 16–901 FRE 901. Authenticating or Identifying Evidence

FRE 901 states:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.*** Testimony that an item is what it is claimed to be.

(2) ***Nonexpert Opinion About Handwriting.*** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) ***Comparison by an Expert Witness or the Trier of Fact.*** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) ***Opinion About a Voice.*** An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) ***Evidence About a Telephone Conversation.*** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) ***Evidence About Public Records.*** Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) ***Evidence About Ancient Documents or Data Compilations.*** For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) ***Evidence About a Process or System.*** Evidence describing a process or system and showing that it produces an accurate result.

(10) ***Methods Provided by a Statute or Rule.*** Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

§ 16–901.1 Circumstantial Evidence

Pursuant to FRE 901(b)(4), a document may be identified and authenticated by circumstantial as well as direct evidence. See ***Sunland Construction Co***., 311 NLRB 685, 692-698 (1993). See also cases cited in **Goode & Wellborne, Courtroom Handbook on Federal Evidence** 529 (West 2012); and **Graham**, **6 Handbook of Fed. Evid. § 901:4** (7th ed., database updated Nov. 2014).

§ 16–901.2 Handwriting/Union Authorization Cards

Board cases indicate that there are several alternative ways union authorization cards may be authenticated. Cards may be authenticated by the card signers themselves; by a witness who observed the cards being signed; or by the person who solicited the cards and received them back, even if the solicitor did not actually observe the cards being signed. See, e.g., ***Evergreen America Corp***., 348 NLRB 178, 179 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); and ***McEwen Mfg. Co***., 172 NLRB 990, 992 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), cert. denied 90 S.Ct. 1120 (1970), and cases cited there. See also ***Stride Rite***, 228 NLRB 224, 235 (1977) (cards were adequately authenticated by the solicitor under the circumstances despite "some confusion" in her testimony regarding who returned cards to her).

Cards may also be authenticated by comparing handwriting and signatures with authenticated specimens. Either an expert or the judge may perform this task. See FRE 901(b)(3) and ***Parts Depot, Inc.***, 332 NLRB 670, 674 (2000) ("[T]he Board has long held, consistent with Section 901(b)(3) of the Federal Rules of Evidence, that a judge or a handwriting expert may determine the genuineness of signatures on authorization cards by comparing them to W–4 forms in the employer's records" or other employment documents), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). See also ***Traction Wholesale Center Co.***, 328 NLRB 1058, 1059–1060 (1999) (judge properly compared signature on authorization card to signatures on employee's employment application and work rules forms, which respondent kept and relied on in the ordinary course of business and produced pursuant to a subpoena), enfd. 216 F.3d 92, 105 (D.C. Cir. 2000).

§ 16–902 FRE 902. Evidence That Is Self-Authenticating

FRE 902 states:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) ***Domestic Public Documents That Are Sealed and Signed.*** A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) ***Domestic Public Documents That Are Not Sealed but Are Signed and Certified.*** A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) ***Foreign Public Documents.*** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) ***Certified Copies of Public Records.*** A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) ***Official Publications.*** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) ***Newspapers and Periodicals*****.** Printed material purporting to be a newspaper or periodical.

(7) ***Trade Inscriptions and the Like.*** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8*) Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) ***Commercial Paper and Related Documents.*** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) ***Presumptions Under a Federal Statute.*** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) ***Certified Domestic Records of a Regularly Conducted Activity.*** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(12) ***Certified Foreign Records of a Regularly Conducted Activity.*** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

§ 16–902.1 Newspaper/Television Reports

Newspaper articles and job advertisements are self-authenticating under FRE 902(6). Self-authenticating documents, however, are not necessarily admissible. See, for example, ***Sheet Metal Workers Local 15****,* 346 NLRB 199, 202 (2006) (newspaper article's quotation of a CEO excluded as hearsay), enf. denied on other grounds, 491 F.3d 429 (D.C. Cir. 2007). See also ***B. N. Beard Co.***, 248 NLRB 198, 199 n. 9 (1980) (Board avoided the hearsay problem of an article quoting respondent's president by disregarding the quote and instead considering only the newspaper reporter's credited testimony describing what the president told him).

See also ***Dorothy Shamrock Coal Co.***, 279 NLRB 1298 n. 1 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987), where the judge excluded a newspaper article about increased reliance on leased drivers in the financially troubled trucking industry. The Board affirmed because the article was published after the employer laid off its drivers, and therefore, the article played no part in the employer's layoff decision.

Television interviews may require different treatment. TV videotapes are not listed in FRE 902 as self-authenticating. Questions are more likely to arise over the integrity of a TV news clip (has it been edited?) than whether a page from a newspaper is a forgery. In addition, once a TV videotape has been authenticated, it helps if the parties agree on a transcript of the text of the remarks, by speaker, shown on the TV videotape. Any remarks on the videotape of an absent witness possibly could be admissible under the "unavailability" exception in FRE 804.

§ 16–903 FRE 903. Subscribing Witness's Testimony

FRE 903 states:

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

§ 16–1000 Contents Of Writings, Recordings, And Photographs

§ 16–1001 FRE 1001. Definitions That Apply to This Article

FRE 1001 states:

In this article:

(a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
(b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.
(c) A “photograph” means a photographic image or its equivalent stored in any form.
(d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
(e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

§ 16–1002 FRE 1002. Requirement of the Original

FRE 1002 states:
An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

§ 16–1003 FRE 1003. Admissibility of Duplicates

FRE 1003 states:
A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original’s authenticity or the circumstances make it unfair to admit the duplicate.

§ 16–1004 FRE 1004. Admissibility of Other Evidence of Content

FRE 1004 states:
An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) an original cannot be obtained by any available judicial process;
(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(d) the writing, recording, or photograph is not closely related to a controlling issue.

§ 16–1005 FRE 1005. Copies of Public Records to Prove Content

FRE 1005 states:
The proponent may use a copy to prove the content of an official record —or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be

obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

§ 16–1006 FRE 1006. Summaries to Prove Content

FRE 1006 states:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Summaries of documents are often prepared and offered in evidence where the documents themselves are too voluminous or complicated to be conveniently presented in their entirety. Under FRE 1006, such summaries are admissible if the underlying documents would be admissible and have been made available to opposing counsel for examination, and a proper foundation for the summary is established (usually by the person who prepared the summary).

A party may also offer a summary of documents that are already in the record. In such circumstances, the judge may properly consider whether admission of the summary is warranted under FRE 611(a). Other types of summaries or compilations may require evaluation under one or more rules, such as FRE 803(5) (recorded recollection) or FRE 803(6) (summaries or compilations made at or near the time of the events and kept in the regular course of business).

Regardless of which type of summary is involved, in evaluating its admissibility and/or probative weight, the judge should carefully consider the circumstances under which the summary was prepared, and whether it reflects the author's subjective view or interpretation of the underlying information. See ***Monfort of Colorado***, 298 NLRB 73, 82 n. 37 (1990).

§ 16–1007 FRE 1007. Testimony or Statement of a Party to Prove Content

FRE 1007 states:

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

§ 16–1101 FRE 1101. Applicability of the Rules

FRE 1101 states:

(a) To Courts and Judges. These rules apply to proceedings before:
United States district courts; United States bankruptcy and magistrate judges; United States courts of appeals; the United States Court of Federal Claims; and the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
(b) To Cases and Proceedings. These rules apply in: civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; criminal cases and proceedings; and contempt proceedings, except those in which the court may act summarily.
(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.
(d) Exceptions. These rules — except for those on privilege — do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand-jury proceedings; and

(3) miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.