NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BENCH BOOK

An NLRB Trial Manual

July 2026

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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.

This July 2026 edition includes citations to additional Board and court decisions, as well as further discussion of the various procedural and evidentiary issues they address.

Like previous editions, this edition of the *Bench Book* is designed to provide NLRB judges with a reference guide during ULP hearings when other resources may not be readily available. However, it is also a useful tool for all trial practitioners before the Board. It sets forth Board precedent and other rulings and authorities on certain recurring procedural and evidentiary issues that may arise during the hearing. It is not a digest of substantive law. Nor should it be cited as precedent or 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 Chapter 596 "Procedure in ULP Proceedings," Chapter 737 "Evidence," and Chapter 700 "General Legal Principles."

The basic sources that govern ULP hearings 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 in the *Bench Book* to the Board's Rules and Regulations and Statements of Procedure, the FRE, and the FRCP have been updated to reflect the most recent amendments.

The *Bench Book* also includes references to unpublished Board orders that may provide useful guidance. References 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, are included as well. These 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***, 573 U.S. 513 (2014) (holding that the appointments of Members Sharon Block, Richard Griffin, and Terence Flynn during a 3-day intrasession recess were invalid). However, they likewise may provide useful guidance in evaluating similar issues and factual situations.

A search of the *Bench Book* 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

BENCH BOOK

An NLRB Trial Manual

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CHAPTER 1. MODEL STATEMENTS, ORDERS, AND OATHS

§ 1–100 Judge's Opening Statement

The following is a suggested opening statement:

This is a formal hearing 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 written motions, position statements, or other communications during the hearing should be addressed to that office.

Will the parties' counsel or other representatives please state their appearances for the record at this time. For the General Counsel . . . For the Charging Party . . . For the Respondent . . .

Thank you. Although we are here to litigate the case, I am advising you now, before I have heard any of the testimony, that I intend to also offer you an opportunity for settlement discussions at two specific stages of the hearing: first, at the conclusion of the General Counsel's case and, second, at the end of the trial. If I inadvertently forget to do so, please call it to my attention. And do not hesitate to request a reasonable recess at any other time for further settlement discussions if you believe they may be fruitful.

General Counsel, would you please introduce the pleadings and other formal papers at this time. After they are in evidence, I will address any preliminary motions or other procedural matters the parties may wish to raise before their opening statements.

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

§ 1–200 Judge's Closing Statement

The following is a suggested closing statement:

The parties will be provided ____ [up to 35] days to file posthearing briefs. The due date will therefore be _____. The briefs should be filed directly with the Judges Division office in _____, regardless of whether they are e-filed or mailed. See Sections 102.2–102.5 of the Board's Rules for filing and service requirements.

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.

Please refer to the Board's Rules and Regulations for further information regarding the filing of briefs and proposed findings for my consideration, and regarding procedures before the Board after the issuance of my decision.

Finally, I remind you that settlement is still an option. In fact, now that the evidence is all in, you might be better able to assess your chances of winning than you were at the outset of the trial. I therefore encourage all parties to revisit and carefully weigh the risks entailed and decide whether an amicable settlement of the issues might not offer a more satisfactory solution.

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

§ 1–300 Sequestration Order

The following is a model sequestration order set forth in ***Greyhound Lines***, 319 NLRB 554 (1995):

Counsel has invoked a rule requiring that the witnesses be sequestered. This means that all persons who are going to testify in this proceeding, with specific exceptions that I will tell you about, may only be present in the hearing room 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 hearing room even if they are going to testify or have testified. However, alleged discriminatees, including charging parties, may not remain in the hearing room when other witnesses on behalf of the General Counsel or the charging party are giving testimony regarding events as to which the alleged discriminatees will be expected to testify.

The rule also means that from this point on until the hearing 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 hearing 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 such 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 hearing room of their obligations under the rule.

It is also recommended that witnesses be reminded as they leave the witness stand that they are not to discuss their testimony with any other witness or potential witness until the hearing 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, except 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 possible witness the testimony they have already given or will give.
>
> Likewise, counsel for a party may not disclose to a witness the testimony of other witnesses for the same side. Counsel may, however, inform counsel's own witness of the content of testimony given by any opposing party's witness to prepare to rebut that testimony.
>
> It is counsel's responsibility to make sure that they and their witnesses comply with this sequestration rule.

The judge should also ask each party to identify on the record the person designated as essential to the presentation of that party's case.

A full discussion of Board precedent with respect to separating, excluding, or sequestering witnesses is set forth in **CHAPTER 11**, Sequestration of Witnesses. As discussed there, the *Greyhound* model order is generally consistent with FRE 615. In light of more recent amendments to that rule, however, the judge should consider adding a statement to the model order making clear that excluded witnesses also may not access hearing testimony (at least not of witnesses for the same side) in any other manner. See **§ 11–200**, Scope of Sequestration Order.

§ 1–400 Witness Oath

Examination is under oath. NLRB Rules and Regulations, Sec. 102.30. Before they testify, an oath should be administered to each witness in a manner calculated to impress upon the witness the duty to testify truthfully. See FRE 603.

A solemn affirmation instead of an oath is acceptable. See FRE 603 and FRCP Rule 43(b). If a witness is unwilling, based on religious conviction, to either swear or affirm, any statement 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.2d 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).

A party that will be calling a witness it knows is 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 in this hearing 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 hearing 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 hearing 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 state and spell the witness's name.

§ 1–500 Interpreter's Oath

"An interpreter must be qualified and must give an oath or affirmation to make a true translation." FRE 604. 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 truthfully and accurately interpret and translate, to the best of your skill and understanding, the questions asked of the witnesses and their answers in this proceeding?

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 relevant to the merits of the case 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." 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." Sec. 102.127(b). See also Sec. 102.129. The prohibition continues "until the issues are finally resolved by the Board." 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) (Board found a prohibited ex parte communication where a representative of the General Counsel improperly 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 a party 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); ***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 without serving them with a copy of the application.

Communications regarding the status of a proceeding (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 which all parties agree, or 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 the 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 (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 statement to the alleged 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. Although not specifically listed in rule 102.130, it is also permissible 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 (2020 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 ex parte communication is oral, the judge should refuse to listen, inform the communicator of the prohibition, and advise the communicator to put the communication in writing, with copies to all parties. If the communication was completed, the judge should prepare a memorandum stating its substance, place it "on the public record of the proceeding," and serve copies "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," and serve copies "on all other parties to the proceeding and on the attorneys of record for the parties." Ibid.

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

It is not clear what further steps should be taken by the judge. Section 102.133(a) of the Board's Rules provides:

> Where the nature and circumstances of a prohibited communication . . . are such that the interests of justice and statutory policy may require remedial action, the Board, the Administrative Law Judge, or the 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 not less than 7 days from the date of issuance, why the Board may 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 may be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

Succeeding subsections of Section 102.133 set forth actions to be taken by the Board but do not provide for further action by a judge who issues the notice to show cause.

§ 2–300 Duties and Powers of Trial Judge

The administrative law judge's basic duty is to "inquire fully into the facts as to 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 hearing (Sec. 102.35(a)(6)). The judge should direct the hearing so that it "take[s] place in a dignified atmosphere, free of threats and intimidation," as the "tribunal conducting the proceedings has a heavy responsibility to ensure that such is the case." ***Altemose Construction Co. v. NLRB***, 514 F.2d 8, 12–13 (3d Cir. 1975). The judge should also ensure that the hearing is "confined to material issues and conducted with all expeditiousness consonant with due process," ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950).

In doing so, "the question of 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). In appropriate circumstances, the judge may even place time limits on a party's presentation of its case or on cross-examination. See, e.g., ***Dickens, Inc.***, 355 NLRB 255, 257–258 (2010) (judge acted within his discretion by imposing a time limit on the testimony of respondent's owner, who appeared pro se, and cutting off his testimony after 4 hours, as it largely consisted of an "incomprehensible monologue" and it was unlikely that any additional testimony would have provided probative evidence); Id. at 257 (noting that a judge has the discretion to terminate cross examination of a witness when the questioning has ceased to develop new evidence or possible avenues of impeachment); ***University Medical Center***, 335 NLRB 1318 n. 1, 1343 (2001) (judge did not violate respondent's due process rights by imposing, on the tenth day of hearing, a time limit of 1 week for respondent to finish its case, and by requiring respondent to rest a half day after the 1 week deadline), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003).

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"); ***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).

See also **§§ 16–102, 16–403, 16–607, and 16–611,** below.

If appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct (Sec. 102.35(a)(6)). Although Section 102.38 provides that any "party has the right to appear at the hearing 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 Administrative Law Judge may limit the participation of any party as appropriate." See also Section 102.177(b) of the Board's Rules ("[m]isconduct . . . at any hearing before an Administrative Law Judge . . . may be grounds for summary exclusion from the hearing"), discussed in **§ 6–610**, Exclusion of Counsel, below.

To strike all related testimony of a witness who refuses to answer a proper question (Sec. 102.35(a)(6)). See, e.g., ***Nassau Insurance Co***., 280 NLRB 878, 897 (1986) (judge properly acted within her discretion by striking the entire testimony of a General Counsel witness who failed to appear for further examination); ***Today's Man***, 263 NLRB 332 (1982) (judge properly ruled that the respondent's president could not assert the attorney-client privilege in response to certain questions on cross examination, directed him to respond to the questions, and issued an order striking his entire testimony when he failed to do so).

To hold conferences for the settlement or simplification of issues (Sec. 102.35(a)(7)). See **§ 7–100**, Conference Calls; **§ 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 in limine, 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 or more definite statement), **§ 3–400,** et seq. (motions for consolidation and severance), **§ 3–840** (motions for deferral to grievance arbitration), **§ 5–300,** et seq. (motions to change the date or location of the hearing)**, § 8–415** (motions for a protective order), **§ 12–400** (applications to take testimony by videoconference); **§ 12–500** (motions regarding whether to hold an in-person or remote hearing).

To approve stipulations of fact (Sec. 102.35(a)(9)). See **§ 10–200**, Motions for Decision Based on Stipulated Record, below.

To make and file decisions (Sec. 102.35(a)(10)). "After a hearing for the purpose of taking evidence upon a complaint, the administrative law judge will 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 **§ 15–800**, 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. See ***Starbucks Corp***., 374 NLRB No. 9, slip op. at 1 n. 1 (2024) (a judge may interrupt or question witnesses in order to clarify testimony); ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994) (judge may examine witnesses or interrupt questioning in order to clarify testimony or develop a complete and integrated record), enfd. mem. 57 F.3d 1073 (7th Cir. 1995); ***Indianapolis Glove***, above ("[I]t is appropriate for [the judge] to question witnesses in order to ascertain their credibility or to clarify their testimony."); ***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"). See also ***Chipotle Services, LLC***, 363 NLRB 336, 342 (2015) (judge called a witness to question him about respondent's efforts toward subpoena compliance), enfd. 849 F.3d 1161 (8th Cir. 2017).

However, care should be taken to 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

Section 102.36 of the Board's Rules states that an administrative law judge "may withdraw from a proceeding because of a personal bias or for other disqualifying reasons."

§ 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 (1950).

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 a private 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). 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, judges should recuse themselves if they previously served as a lawyer in the matter, participated personally and substantially as a government lawyer or public official concerning the proceeding, or publicly expressed an opinion concerning the merits of the matter while serving in government employment. See Rule 2.11 of the ABA Model Code of Judicial Conduct (2020 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 employer's contention that the judge was biased because approximately 89% of his 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 a 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. United States***, 510 U.S. 540, 555 (1994). Thus, bias may not be inferred simply because the judge made evidentiary rulings unfavorable to the party. ***United Nurses Associations of California v. NLRB***, 871 F.3d 767, 778 (9th Cir. 2017). Likewise, 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 F. Appx. 8, 10, 12–13 (6th Cir. 2007).

Criticism 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 ***United States v. Logan***, 998 F.2d 1025, 1029 (D.C. Cir. 1993) (judge "upbraided" counsel for flouting the judge's orders); ***United States 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, notwithstanding 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"); ***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."

Suggestions to counsel regarding litigation strategy or tactics. Such suggestions are generally improper. See ***Thermoid Co.***, 90 NLRB 614 n. 2 (1950) ("[W]e do not condone the practice of a Trial Examiner during a recess offering suggestions in trial tactics to counsel."). For specific examples, compare ***Reading Anthracite Co.***, above (judge's conduct as a whole, including his statement that he "would appreciate it if counsel [for the General Counsel] would maintain a reasonably militant posture" with respect to the relevance of certain questioning by the respondent's counsel, at the very least gave the appearance of partiality and prejudgment sufficient to warrant disqualification), with ***Thermoid***, above (trial examiner did not commit prejudicial error by suggesting that the General Counsel move to make respondent's witness his own in order to examine the witness beyond the scope of respondent's direct examination, as the suggestion "related to a technical rule of cross-examination procedure and, in any event, involved general background evidence upon which the Trial Examiner relied only to a very limited extent"), ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994) (finding no bias based on an "isolated incident" where the judge told the General Counsel to ask additional questions to more fully develop the record on a particular issue, as the judge might have accomplished the same thing through his own questioning), enfd. mem. 57 F.3d 1073 (7th Cir. 1995).

Questioning witnesses. It is well established that bias may not be inferred simply because the judge questioned the party's witnesses. ***United Nurses Associations of California,*** *above*, 871 F.3d at 778. See also **§ 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.

Gratuitous remarks. The Board has cautioned against making gratuitous remarks regarding witnesses or testimony, ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955), or 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).

Comments about the merits and 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 rejected allegations of bias where judges expressed an opinion about a particular defense after all the evidence had been received, ***Teamsters Local 722,*** 314 NLRB at 1018, or about 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) (directing that a new judge be appointed where the original judge expressed his view, prior to hearing any evidence, that some allegations did not constitute unfair labor practices and that he therefore intended to preclude introduction of any evidence to support the allegations); ***Reading Anthracite***, above (same, where the judge made statements throughout the hearing creating the impression that he had prejudged the ultimate issue in the case and exhibited hostility, bias, and prejudice towards the respondent).

Encouraging settlement. "[S]imply encouraging the parties to consider settlement . . . [does] not display bias or create the impression of prejudgment." ***J. Westrum Electric***, 365 NLRB No. 151, slip op. at 1 n.1 (2017) (rejecting the respondent's contention that the judge displayed bias by encouraging the parties to discuss settlement after the General Counsel finished presenting his case and again at the close of the hearing), enfd. per curiam 753 F. Appx. 421 (8th Cir. 2019). See also **§§ 9–200** through **9–240**, below.

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, in ***Dish Network Service Corp.***, 345 NLRB 1071 (2005), the Board 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 because the judge had copied verbatim extensive portions of the briefs filed by the General Counsel and the charging party even though the Board had previously warned him in another case where he did so that it did not condone the practice. See also ***J.J. Cassone Bakery***, 345 NLRB 1305 (2005); **§ 15**–**400**, Posthearing Briefs, below.

§ 2–420 Disqualification Procedure

The provisions regarding disqualification of administrative law judges are set forth in Section 102.36(a) of the Board's Rules. A party may request the judge to withdraw "on grounds of personal bias or disqualification" at any time following the judge's designation and before filing of the judge's decision. The requesting 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 "will promptly disqualify himself/herself and withdraw from the proceeding." If the judge does not disqualify himself/herself, the judge "must rule upon the record, stating the grounds for that ruling," or, if the hearing has closed, the judge will proceed with the issuance of the decision and the provisions of § 102.26 apply with respect to review of the judge's rulings. 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). 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); ***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) (respondent's motion to disqualify, which was filed with the trial judge 7 weeks after the hearing 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

Under Section 10(b) of the Act, the General Counsel cannot issue a complaint unless a charge has been filed. See ***Prime Healthcare Paradise Valley, LLC***, 368 NLRB No. 10, slip op. at 4–5 (2019); ***Burnett Specialists v. Cowen***, 140 F.4th 686, 690 (5th Cir. 2025); ***IUOE, Loc. 39 v. NLRB***, 155 F.4th 1023, 1038 n. 3 (9th Cir. 2025)

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(a) (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 ***FDRLST Media, LLC***, 2–CA–243109, unpub. Board order issued Feb. 7, 2020 (2020 WL 1182438), reaffd. 370 NLRB No. 49, slip op. at 1 n. 4 (2020), affd. on point but enf. denied on other grounds 35 F.4th 108 (3d Cir. 2022). In that case, the respondent web magazine argued that the complaint should be dismissed because the charging party was "nothing more than a random person on the internet" who saw the publisher's allegedly unlawful tweet. The Board rejected the argument as "the clear and unambiguous weight of both Board and Supreme Court authority holds that any person may file an initial charge," citing ***NLRB v. Indiana & Michigan Electric Co***., 318 U.S. 9, 17–18 (1943), ***Castle Hill Health Care Center***, 355 NLRB 1156, 1190 (2010). And the Board's ruling was upheld on appeal. ***FDRLST Media, LLC, v. NLRB***, 35 F.4th 108, 119 (3d Cir. 2022) (Section 10(b) places no limitations on who may file an actionable unfair labor practice charge).

The charge must be filed with the Regional Director for a Region in which the alleged unfair labor practice occurred or with the General Counsel. NLRB Rules and Regulations, Secs. 102.10 and 102.33. However, the venue where the charge was filed does not affect the Board's jurisdiction or the validity of the complaint. See ***FDRLST Media, LLC***, 35 F.4th 108, 119–20 (3d Cir. 2022) (the Board's organization into regional offices for administrative convenience does not divest any individual Regional Office of the Board's nationwide authority), enforcing 2020 WL 1182438 (the venue for filing of a charge is not a basis for attacking the validity of a complaint); ***Harris Corp.***, 269 NLRB 733, 734 n. 1 (1984); ***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 a 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). But see ***Guild San Jose***, 370 NLRB No. 47, slip op. at 1 n. 1 (2020) (the failure to properly serve the charge within the 10(b) period is cured by timely service of the complaint within the 10(b) period, absent a showing of prejudice), and cases cited there. 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 respondent 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 **§ 3–210,** Complaint Closely Related to Timely Charge; **§ 3–330**, Amendments and Section 10(b); **§ 3–550**, Revival of Withdrawn or Dismissed Charge; **§ 3–700**, Section 10(b) Affirmative Defense, below.

§ 3–130 Sufficiency of the Charge

A charge merely serves to initiate a Board investigation to determine whether a complaint should be issued. It is not a pleading and is not measured by the standards applicable to a pleading in a private lawsuit. See ***FDRLST Media, LLC*****,** 2020 WL 1182438, at n. 2 (2020) (citing ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 307 (1959) (the role of the Board is not "to adjudicate private controversies" but "to advance the public interest in eliminating obstructions to interstate commerce.")); ***NLRB v. Indiana & Michigan Electric***, 318 U.S. at 18 ("The charge does not . . . serve the purpose of a pleading."). Thus, 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 ***NLRB v. Raymond Pearson, Inc.***, 243 F.2d 456, 458 (5th Cir. 1957)); ***FDRLST Media, LLC***, 35 F.4th at 115 (a charge is merely the means whereby action on the part of the Board is instituted).

§ 3–140 Scope of Investigation of the Charge

The Regional Office is not required to limit the investigation of a charge to the specific unfair labor practices alleged therein. See ***NLRB v. Fant Milling Co***., above, 360 U.S. at 307–309 ("Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.").

Section 10062.5 of the NLRB Casehandling Manual (Part 1) provides that, where the Regional Office's investigation uncovers evidence of other unfair labor practices not specified in the charge, the Region should make a determination whether the charge is sufficient to support the additional allegations, and if it is not, the charging party should be apprised of the deficiency and given an opportunity to file an amended charge.

Although the Casehandling Manual is not binding on the Board (see **§ 3–830**, below), the Board has implicitly approved the foregoing procedure. See ***Leukemia and Lymphoma Society***, 363 NLRB 1082 (2016). In that case, the respondent moved to dismiss certain allegations involving its handbook rules because the allegations were unrelated to the charge; the Region evaluated the handbook on its own initiative; and the charging party amended the charge to include the handbook allegations at the Region's suggestion or direction. The Board found "no merit" in the respondent's contention that the allegations were barred by Section 10(b) in these circumstances, noting that the investigative procedure respondent described "conforms to Section 10062.5 of the NLRB Casehandling Manual (Part 1) Unfair Labor Practice Proceedings."

§ 3–200 Complaint

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); ***NLRB v. UFCW, Local 23, AFL-CIO***, 484 U.S. 112, 125–126 (1987) (until the hearing begins, settlement and dismissal determinations are prosecutorial, giving the General Counsel unreviewable discretion to withdraw a complaint); ***United Nat. Foods, Inc. v. NLRB***, 138 F.4th 937, 948 - 950 (5th Cir. 2025) (Acting General Counsel's decision to withdraw complaint, after respondent filed a motion for summary judgment but before the Board had taken any action on the motion, was an unreviewable act of prosecutorial discretion). 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 Complaint Closely Related to Timely Charge

A complaint is not restricted to the precise allegations of the charge. The complaint may also allege matters relating to and growing out of the charged conduct. ***NLRB v. Fant Milling Co.***, above, 360 U.S. at 309. The test is stated in ***Redd-I, Inc.***, 290 NLRB 1115, 1116 (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.

See also ***Old Dominion Freight Line***, 331 NLRB 111 (2000).

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

> 1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge;
>
> 2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and
>
> 3) a respondent would raise the same or similar defenses to both the otherwise untimely allegation and timely allegations.

Starbucks Coffee Co., 372 NLRB No. 50, slip op. at 2 (2023), reconsideration denied 372 NLRB No. 102 (2023), enfd. in part 125 F.4th 78 (3d Cir. 2024). See also ***Charter Communications, LLC,*** 366 NLRB No. 46, slip op. at 2 (2018), reconsideration denied by unpub. Board order issued June 7, 2018 (2018 WL 2761559), enfd. 939 F.3d 798 (6th Cir. 2019).

It is not necessary under the first factor that the otherwise untimely allegation involve the same section of the Act as the timely allegations. ***Nickles Bakery of Indiana***, 296 NLRB 927 n. 5 (1989). See, e.g., ***Vista Del Sol Healthcare***, 363 NLRB 1193, 1219 (2016) (untimely 8(a)(3) wage increase allegation involved common legal theory with timely 8(a)(1) inducement and

promise of benefit allegations as both were based on respondent's animus against the union's organizing campaign).

The second factor is not satisfied "merely because timely and untimely allegations pertain to events that occurred during or in response to the same union campaign." ***Charter Communications***, slip op. at 2 n. 7, citing ***Carney Hospital***, 350 NLRB 627, 630 (2007).

The third factor "is concerned, at least in part, with whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the untimely allegations as it would in defending against the timely allegations." ***Charter Communications***, slip op. at 4, citing ***Fry's Food Stores***, 361 NLRB 1216, 1217 n. 5 (2014). See also ***Applebee's***, 367 NLRB No. 44, slip op. at 3 (2018) ("[I]t is only necessary for this part of the test that the defenses be similar, not that they be identical."). It is not a mandatory factor, i.e., the Board may find allegations closely related even if this third factor is not satisfied. See ***Earthgrains Co.,*** 351 NLRB 733, 734 n. 8 (2007), citing ***Carney Hospital***, 350 NLRB at 628 n. 8. See also ***Costco Wholesale Corp***., 366 NLRB No. 9, slip op. at 1 n. 2 (2018) (finding that the *Redd-I* "closely related" test was satisfied based solely on the first two factors).

See also **§ 3–330**, Amendments and Section 10(b); **§ 3–550**, Revival of Withdrawn or Dismissed Charge; and **§ 3–700**, Section 10(b) Affirmative Defense, below.

§ 3–220 Adequacy of Complaint

Like all pleadings before the Board, the requirements of a complaint are governed by the Board's Rules rather than the Federal Rules of Civil Procedure. See ***Nissan North America, Inc.,*** 10-CA-198732, unpub. Board order issued Nov. 16, 2017 (2017 WL 5516533), at n. 2; and ***Component Bar Products, Inc.,*** 364 NLRB 1901, 1909 (2016). Section 102.15 of the Board's Rules states that a complaint "will" contain:

> (a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and
> (b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.

"Applying this rule, the Board and the courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different contexts." ***Artesia Ready Mix Concrete***, 339 NLRB 1224, 1226 (2003), citing, e.g., ***NLRB v. Piqua Munising Wood Products Co***., 109 F.2d 552, 557 (6th Cir. 1940) ("The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. 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 respondent may be put upon his defense."). See also ***Kumho Tires Georgia***, 370 NLRB No. 32, slip op. at 5 n. 15 (2020) ("The General Counsel is not required to plead the exact testimony in his complaint."); ***Starbucks Corp***., 373 NLRB No. 53, slip op. at 2 n. 7 (2024) ("[M]inor factual discrepancies [in the undisputed evidence] from what was alleged in the complaint as to the location of where a violation occurred do not create a due-process issue.").

However, as discussed in **§ 3–600** below, the Board will not issue a default (no answer) summary judgment on a complaint that fails to include a clear or specific factual basis to determine that the alleged conduct was unlawful.

§ 3–230 Bill of Particulars or More Definite Statement

If a respondent believes the complaint provides inadequate notice of the allegations, it may file a motion for a bill of particulars or more definite statement with the Division of Judges. See, e.g., ***Full-Fill Industries***, LLC, 25–CA–249830, unpub. Board order issued Nov. 17, 2020 (2020 WL 6781765), at 1 n. 2 (such prehearing motions are properly filed with the Division of Judges rather than the Board).

Although FRCP 12(e) requires such a motion to be filed before a responsive pleading, the Board's Rules do not impose any deadline or timeframe. ***Nissan North America***, above. However, the motion is normally filed before the hearing opens so that the respondent can use the additional details to prepare its defense. In that event, the motion will be handled by the Chief Judge or Deputy or Associate Chief Judge in the appropriate office, unless the trial judge has been designated.

If the motion is not filed until after the hearing opens, the trial judge will rule on the motion. The General Counsel's opening statement, however, may provide the details or clarification the respondent seeks, thereby rendering the motion moot. See ***Stor-Rite Metal Products***, 283 NLRB 856, 861 n. 6 (1987), enf. denied on other grounds 856 F.2d 957 (7th Cir. 1988).

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." ***Affinity Medical Center***, 364 NLRB 878, 879 (2016), quoting ***North American Rockwell Corp. v. NLRB***, 389 F.2d 866, 871 (10th Cir. 1968). Thus, in ***Affinity***, the Board held that the judge erred in requiring the GC to provide additional information regarding a proposed amendment to the complaint, as the proposal already stated the nature of the alleged conduct (specific unilateral rule changes), the names of the supervisors allegedly involved in each change, the dates of the changes, and the location. See also ***Dal-Tex Optical Co.***, 130 NLRB 1313 n. 1 (1961) (employer's motion for particulars regarding certain alleged 8(a)(1) threats or statements was properly denied where the complaint described the nature of the activity, the dates, and the names of the agents that made the alleged threats or statements); ***Mid-Atlantic Restaurant Group LLC d/b/a Kelly's Taproom v. NLRB***, 722 F. Appx. 284, 287 (3rd Cir. 2018) (ALJ did not abuse his discretion in denying the employer's motion for a bill of particulars regarding an employee's alleged 8(a)(1) discharge as the complaint adequately pled that the employee had openly complained about shift schedules, that her complaints constituted protected concerted activity, and that she was discharged for that activity); ***Public Service Co. of Oklahoma v. NLRB***, 318 F.3d 1173, 1181–1182 (10th Cir. 2003) (employer was not denied due process because the complaint's 8(a)(5) bad-faith bargaining allegation, which alleged that the employer had insisted on proposals granting it unilateral control over the employees' terms and conditions of employment, failed to specifically identify the bargaining proposals).

Compare ***Guitar Center Stores, Inc***., 13–CA–130446, unpub. Board order issued Nov. 3, 2015 (2015 WL 6735635). In that case, the 8(a)(5) complaint alleged that the respondent had bargained in bad faith "at various times" during the previous 2 years by, inter alia, making regressive bargaining proposals and unilateral changes to mandatory subjects of bargaining, failing to make proposals for an extended period of time, and implementing benefits in nonunion facilities. The Board held that the judge did not abuse his discretion in granting the respondent's motion for a bill of particulars and ordering the General Counsel to identify the regressive

bargaining proposals and unilateral changes at issue, the period of time during which respondent unlawfully failed to make proposals, and the benefits implemented at nonunion stores.

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, set forth in **§ 3–220,** above. Thus, the following additional information need not be pleaded:

Names of employees who were allegedly threatened or interrogated. The names of employees to whom an alleged threat or other 8(a)(1) violation was directed need not be pleaded, and a respondent is not entitled to disclosure of the names before the hearing. 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). 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.

Dates alleged discriminatees engaged in union or concerted activity. The date(s) that an alleged discriminatee engaged in protected union or concerted activity likewise need not be pleaded. ***Cannoli Factory***, 29–CA–187620, unpub. Board order issued April 18, 2017 (2017 WL 1462121).

Theory of the case. "The General Counsel is also not required to plead [ ] evidence or the theory of the case in the complaint." ***Starbucks Corp***., Case 10–CA–291616, unpub. Board order issued Nov. 9, 2022 (2022 WL 16851736), citing ***McDonald's USA, LLC***, 362 NLRB 1347 (2015); ***Boilermakers Local 363 (Fluor Corp.)***, 123 NLRB 1877, 1913 (1959). See also ***Davis Supermarkets, Inc. v. NLRB***, 2 F.3d 1162, 1169 (D.C. Cir. 1993); ***North American Rockwell***, above, 389 F.2d at 871.

With respect to General Counsel motions for a bill of particulars regarding affirmative defenses asserted in a respondent's answer, see **§ 3–620**, below.

§ 3–300 Amendments to Complaints

Section 102.17 of the Board's Rules provides that a complaint may be amended before, during, and after the hearing "upon such terms as may be deemed just."

§ 3–310 Amendments Before the Hearing

Section 102.17 provides that the Regional Director may amend the complaint prior to the hearing. The RD may do so even if a motion to dismiss the complaint is pending before the Board. See ***Starbucks Corp***., above. In that case, the respondent filed a prehearing motion with the Board to dismiss the complaint for failing to state a claim and lacking specificity. While the motion was still pending before the Board, the RD issued an amended complaint that superseded the original complaint. The Board ruled that the amendment was within the RD's authority under 102.17, and that "from a judicial economy standpoint," there was "no practical reason to prevent the [RD] from curing an alleged deficiency in the complaint that the Respondent has brought to

her attention in a motion to dismiss." The Board also noted that the Respondent had "not alleged any prejudice resulting from the amendment," and that even if the Board were to have granted the Respondent's motion to dismiss, it "would have done so without prejudice, allowing the [RD] to refile." The Board therefore denied the motion to dismiss the original complaint as "moot." It also denied the Respondent's additional motion to dismiss the amended complaint, finding that the amended complaint satisfied the pleading requirements of Section 102.15 of the Board's Rules. See also ***UPMC Western Psychiatric Hospital***, 06–CA–316473, unpub. Board order issued Jan. 8, 2024 (2024 WL 95553), slip op. at 2 (citing and following *Starbucks*).

§ 3–320 Amendments During and After the Hearing

Section 102.17 provides that "upon motion," the trial judge may amend the complaint "at the hearing and until the case has been transferred to the Board pursuant to § 102.45" following the trial judge's decision. See also ***Folsom Ready Mix, Inc***., 338 NLRB 1172 n. 1 (2003).

Motion by the General Counsel required. The complaint may only be amended on motion by the General Counsel. The judge may not amend the complaint over the GC's objection or in a manner inconsistent or contrary to the GC's motion. ***GPS Terminal Services***, 333 NLRB 968, 968–969 (2001). Nor may the judge find a violation on a theory that the GC has expressly disclaimed. ***Indiana Bell Telephone Co***., 370 NLRB No. 93, slip op. at 1 (2021); ***Mid-Atlantic Regional Council of Carpenters (Goodell, Devries, Leech & Dann, LLP),*** 356 NLRB 61 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 ***Hobby Lobby Stores, Inc***., 363 NLRB 1965 n. 2 (2016) ("It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case."), citing ***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 GC's theory). See also ***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 GC 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 GC argued only that it was unlawfully applied); ***Concord Honda***, 367 NLRB No. 104, slip op. at 1 n. 3 (2019) (Board refused to consider the charging party union's arguments that the employer's arbitration agreement was not enforceable under the FAA or other federal statutes, both because these alternative legal theories were "wholly outside the scope of the General Counsel's complaint" and because such claims were not within the Board's jurisdiction and "should be presented to the court or agency that has jurisdiction to consider them.").

The courts generally agree. See ***Weigand v. NLRB***, 783 F.3d 889, 895 (D.C. Cir. 2015); ***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 **§ 3–340,** De Facto Amendment—Unpleaded But Fully Litigated, below, discussing when the judge may find a different violation even without a motion to amend the complaint. See also ***Service Employees Local 32BJ v. NLRB*****,** 647 F.3d 435, 446 (2d Cir. 2011) (Board erred in refusing to consider an 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), decision on remand 365 NLRB No. 162 (2017).

Notwithstanding the foregoing, a charging party may submit additional evidence in support of the General Counsel's theory of the case. See, e.g., ***DH Long Point Mgt. LLC***, 369 NLRB No. 18, slip op. at 13 n. 37 (2020), enfd. per curiam 858 F. Appx. 366 (D.C. Cir. 2021). In that case, the ALJ ruled that the charging party union could present testimony about a manager's coercive statement as additional evidence of the employer's animus and discriminatory motive for disciplining and discharging an employee, even though the manager's statement was not alleged as a violation in the complaint. The ALJ noted that the employer was given adequate notice at the outset of the hearing that the union would be presenting such evidence.

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

Limits on Judge's Discretion. The judge has "wide discretion" in granting or denying a motion to amend; however, 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 547, 549 n. 8 (2015), enfd. 651 F. Appx. 34 (2d Cir. 2016). See also **§ 3–330,** Amendments and Section 10(b), below, discussing allegations occurring more than 6 months before the motion to amend but within 6 months of the charge.

During the hearing. In ***Rogan Bros***., above, the Board held that the first and third factors supported allowing the General Counsel to amend the complaint during the hearing to allege that the respondent employers were a single employer as well as alter egos. Although the GC had stated at the outset of the hearing that no single-employer allegation was being made, the GC subsequently filed the motion to amend during a 2-month adjournment, before the GC rested, and the allegation was thereafter fully litigated. Accordingly, the Board found that the judge did not abuse his discretion in granting the GC's motion. The Second Circuit agreed, finding that the single-employer theory was substantially similar to the alter ego theory alleged in the complaint, it was added before the GC completed the case in chief, and the respondent could have recalled any of the GC's witnesses that had already testified.

See also ***Hood River Distillers, Inc.,*** 372 NLRB No. 126, slip op. at 1 n. 2 (2023) (ALJ did not deny respondent due process by granting General Counsel's motion to add two more 8(a)(5) unilateral-change allegations on the first day of hearing where the union did not receive notice of the changes until days before the hearing, the judge allowed respondent time to prepare its defense before the GC presented testimony about them, and they were fully litigated); ***Remington Lodging & Hospitality, LLC***, 363 NLRB 987 n.1 (2016) (ALJ did not deny the respondent due process by granting the GC's motion to add an 8(a)(1) allegation involving an employer leaflet 12 days after the hearing opened, as the respondent did not produce the leaflet in response to the GC's subpoena until 7 days after the hearing opened and the respondent had an opportunity to introduce evidence regarding the allegation before the hearing closed), enfd. 847 F.3d 180 (5th Cir. 2017); ***Amglo Kemlite Laboratories***, 360 NLRB 319, 323 (2014) (ALJ erred in denying the GC's motion, on the last day of the 3-day hearing, to amend the 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), enfd. 833 F.3d 824 (7th Cir. 2016);

Pincus Elevator & Electric Co., 308 NLRB 684, 684–685 (1992) (ALJ abused her discretion by denying the GC'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).

But see ***King Soopers, Inc. v. NLRB***, 859 F.3d 23, 33 (D.C. Cir. 2017), denying enf. in relevant part of 364 NLRB 1153 n. 1 (2016). In that case, the court reversed the Board and found that the General Counsel's mid-hearing motion to amend the complaint came too late because the GC had access to all of the relevant information necessary to investigate the charge for a full year before the hearing, provided no valid excuse for failing to include the charge in the initial complaint, and did not make the motion to amend until after the company had finished cross-examining the GC's key witness).

Compare also ***Hood River Distillers, Inc.,*** above, slip op. at 1 n. 2 (ALJ did not abuse his discretion in denying the General Counsel's motion on the ninth day of the 11-day hearing, after the GC had rested and the respondent had begun presenting its defense, to further amend the complaint to allege an additional 8(a)(5) allegation that respondent eliminated two positions; although the elimination of one of the positions did not become known until a respondent witness testified, respondent had previously made known that it eliminated the other position, and the changes were not fully litigated); ***Latino Express, Inc***., 358 NLRB 823 n. 3, and JD. at 827 n. 2 (2012), reaffd. 361 NLRB 1171 (2014) (ALJ did not abuse his discretion in denying, as "inexcusably late and prejudicial," the GC's motion, at the end of the second day of the 3-day hearing, to amend the complaint to allege that respondent unlawfully served subpoenas on employees 2 weeks before the hearing that sought union-related pamphlets, letters, emails, and other documents in their possession).

At the close of the hearing. 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. 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 GC 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 1084, 1085–1086 (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 GC 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 GC's employee witnesses the day before. The ALJ denied the motion, citing the lateness of the motion and the GC'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. The court rejected the Board's argument that the respondent had a burden to identify with specificity the testimony or defenses it could have presented to

defeat the allegation. The court stated that, "[w]hen a late amendment deprives an employer of notice and the opportunity to litigate its liability, we will find prejudice warranting reversal so long as there is even a chance that the company could have successfully defended against the charge." The court found that the respondent satisfied this "low standard" because, had the respondent been given earlier notice, it could have attacked the employee's credibility regarding the allegation, cross-examined her to expose any inconsistencies, and explored the issue more fully with the supervisor and other witnesses. The court also rejected the Board's argument that the respondent could have recalled witnesses to rebut the employee's testimony as the ALJ had closed the hearing without giving the respondent a chance to reopen evidence and, "moreover," respondent was not "required to attempt to recall witnesses to cure the prejudice created" by the late amendment. ***Bruce Packing Co. v. NLRB,*** 795 F.3d at 24.

But see ***Boar's Head Provisions Co.***, 370 NLRB No. 124, slip op. at 1 n.2 (2021). There, the ALJ granted the General Counsel's motion at the end of the hearing to amend a complaint allegation that the respondent denied off-duty employees access to the parking lots to instead allege that respondent engaged in and created the impression of surveillance of the employees' union activities. On exceptions, the respondent argued that it was prejudiced by the judges' ruling, citing the D.C. Circuit's decision in *Bruce Packing Co. v. NLRB*, above. The Board, however, found that the respondent "could not have successfully defended against the unlawful surveillance charge" as the respondent had "called and elicited testimony from most, if not all, of [its] witnesses that were involved in the alleged surveillance activity" and the "clear record evidence" established that the respondent treated employee handbilling activity in a disparate manner compared to other, non-union employee activity such as selling fruit and vegetables from employees' vehicles.

After the hearing. 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 had been made in the GC's posthearing brief and the judge failed to rule on it.) The Board found that the 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 GC'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 126 (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 GC'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 GC 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 1216 (2014), citing ***Redd-I, Inc***., 290 NLRB 1115 (1988). For a discussion of the *Redd-I* "closely related" test, see **§ 3–210,** Complaint Closely Related to Timely Charge, above. See also **§ 3–550**, Revival of Withdrawn or Dismissed Charge; and **§ 3–700**, Section 10(b) Affirmative Defense, below.

§ 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. The issue may also sometimes arise where the evidence indicates that the alleged violation occurred on a different date than that alleged in the complaint.

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." This 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 1643, 1652 n. 36 (2012) (Board majority finds liability based on an unalleged theory, rejecting as "inapposite" cases cited by the respondent and the dissent that involved unalleged violations).

Both parts of the *Pergament* test must be satisfied; if a matter is not closely connected to any of the complaint allegations, a violation cannot be found regardless of whether it was fully litigated. See ***List Industries, Inc.***, 373 NLRB No. 146, slip op. at 2 n. 5 (2024) (finding it unnecessary to consider whether employer's unalleged maintenance of an overbroad distribution policy was fully litigated, as it was not closely connected to any of the complaint allegations). See also ***Vermont Info. Processing, Inc. v. NLRB***, No. 24-1360, --- F.4th ---, 2026 WL 1470238 (D.C. Cir. May 26, 2026), where the complaint alleged that three employees were fired for engaging in concerted activities by "creating and disseminating a spreadsheet where employees could view and share salary information," and the ALJ found the three were unlawfully terminated for their instant messaging chats about the spreadsheet and about the termination of a coworker who was the spreadsheet's originator. In its decision, the Board clarified that "the relevant protected concerted activity that these employees engaged in and for which Respondent discharged them is their online chat communications about the salary spreadsheet, workplace conditions, and frustration of [their coworker's] recent discharge." ***Vermont Info. Processing Inc.***, 373 NLRB No. 131, slip op. at 1 n. 5 (2024). On appeal, respondent argued that the Board "impermissibly found a violation based on uncharged conduct." In denying enforcement regarding the three discharges, and remanding the matter back to the Board, the DC Circuit held that the ALJ's findings were appropriate, as they were closely connected to the complaint allegations, because the chats were inextricably linked to the employees' roles in creating and disseminating the spreadsheet. ***Vermont Info. Processing, Inc.***, 2026 WL 1470238, at *6. However, the DC Circuit held that the Board inappropriately further enlarged the relevant conduct to include online chat communications about workplace conditions, which "stretched the charged

conduct beyond its breaking point," as "workplace conditions is a far reaching category that can encompass anything from salaries to cafeteria options to interpersonal dynamics." Id. at *7.

Violations of a different section of the Act. For cases involving this situation, see ***Pergament***, above (judge properly found that the respondent's refusal to hire employees violated 8(a)(4) rather than 8(a)(3) as alleged, because 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 the evidence and admitted that the employees were not hired because of the pending NLRB charges); ***KenMor Electric Co.***., 355 NLRB 1024 (2010) (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); ***Airborne Freight Corp.***, 343 NLRB 580, 581 (2004) (supervisor's alleged 8(a)(1) and (3) statements and refusal to transfer an employee both also violated 8(a)(4)); ***Valley Cabinet & Mfg***., 253 NLRB 98, 100 n. 10 (1980) (respondent union's 8(b)(2) failure to notify an employee of her dues obligations before requesting her discharge also violated 8(b)(1)A)), enfd. mem. 691 F.2d 509 (9th Cir. 1982).

Violations based on a different theory. The Board considers the following four factors in evaluating whether it is appropriate to find a violation on a theory that was not clearly articulated by the General Counsel:

> (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; (3) whether the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory [in question].

DirectSat USA, LLC, 366 NLRB No. 40, slip op. at 1 (2018) (finding that all four factors supported finding a violation on a different theory in that case), enfd. 925 F.3d 1272 (D.C. Cir. 2019).

The following are examples where the Board has found a violation on a different theory.

Section 8(a)(1) allegations. See ***Troy Grove,*** 372 NLRB No. 94, slip op. at 2 n. 10 (2023) (respondent's issuance of layoff notices violated 8(a)(1) even though the General Counsel only alleged that the layoffs themselves violated 8(a)(3) and the allegation was dismissed because the layoffs were rescinded before they became effective); ***Pain Relief Centers, P.A.,*** 371 NLRB No. 143, slip op. at 2 n. 10 (2022) (respondent's state court breach of contract claims against the discriminatees violated 8(a)(1) because they were preempted, even though the GC only argued that they were baseless and retaliatory, as there could be no claim that respondent would have presented additional evidence if it knew the case would be decided on a preemption theory); ***Space Needle, LLC***, 362 NLRB 35, 38–39 (2015) (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, as the coercive-statement theory involved the same facts and inquiry as to whether the statement would reasonably tend to coerce employees, and was fully litigated), enfd. 692 F. Appx. 462 (9th Cir. 2017); ***Intertape Polymer Corp***., 360 NLRB 957, 958 n. 8 (2014) (employer's confiscation of union literature from the employee breakroom violated 8(a)(1) because the employer's past policy or practice was to permit literature in that area, even though the complaint alleged a violation on a disparate-enforcement theory), enfd. on point 801 F.3d 224, 232–233 (4th Cir. 2015); ***Parexel Int'l, LLC***, 356 NLRB 516 (2011)

(finding an 8(a)(1) discharge violation based on a "preemptive strike" theory rather than the alleged "retaliation" theory); ***AKAL Security, Inc.***, 354 NLRB 122, 125 (2009), reaffd. 355 NLRB 584 (2010) (holding that the judge's application of *Burnup & Sims* instead of *Wright Line* to find an 8(a)(1) discharge violation did not deny respondent due process as respondent clearly anticipated that *Burnup & Sims* could apply and litigated accordingly). See also ***20/20 Communications, Inc***., 369 NLRB No. 119, slip op. at 3 n. 7 (2020) (finding that the employer's arbitration agreement was unlawful on an additional basis not argued by the parties, as the finding was "based on the language of the [arbitration agreement] itself, which is part of the stipulated record").

But compare ***Securitas Security Services USA***, 369 NLRB No. 57, slip op. at 2 (2020) (declining to address whether the employer's investigative confidentiality policy was unlawful because it applied to nonparticipants in the investigation or prohibited employees from discussing the underlying incident, as the complaint only alleged that the employer unlawfully prohibited an employee-witness to an incident from discussing the incident with anyone during the investigation and did not allege that the employer's policy was overbroad in any other respect, and no such issues were litigated); ***Fry's Food Stores***, 366 NLRB No. 138, slip op. at 4 (2018) (finding that the judge improperly found that a dues checkoff agreement was unlawful on its face where the General Counsel repeatedly stated at the hearing that the sole theory was that the employer and union had misapplied the agreement to prevent employees from revoking their authorizations); and ***Buonadonna ShopRite,*** 356 NLRB 857, 858 (2011) (finding that the judge improperly found an 8(a)(1) violation on the theory that the employer denied the employee's request to consult with a particular union representative by telephone before proceeding with an investigatory interview, where the complaint alleged only that the employer unlawfully denied the employee's request to be represented by the union during the interview, and the evidence showed that another union representative was present at the interview to represent him).

Section 8(a)(3) or (4) allegations. See ***Hawaiian Dredging Construction Co***., 362 NLRB 81, 82 n. 6 (2015) (finding that employer's discharge or layoff of union members violated 8(a)(3) under both a *Wright Line* unlawful-motive theory and a *Great Dane* inherently destructive theory even though the General Counsel never advanced a *Wright Line* theory), enf. denied and remanded for reconsideration of the evidence supporting the employer's defenses 857 F.3d 877 (D. C. Cir. 2017), on remand 368 NLRB No. 7 (2019), rev. denied sub nom. *Boilermakers Local 627 v. NLRB*, 61 F.4th 971 (D.C. Cir. 2023).

But compare ***Lamar Advertising of Hartford***, 343 NLRB 261, 265 (2004) (rejecting the 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).

Section 8(a)(5) allegations. See ***Stein, Inc***., 369 NLRB No. 10, slip op. at 4 (2020), reconsideration denied 2020 WL 1931433 (Mar. 17, 2020) (respondent successor employer violated 8(a)(5) by discharging an employee pursuant to a unilateral change in the initial employment terms it had previously established, even though the GC alleged a violation on the ground that the successor employer had forfeited the right to set initial terms of employment, as the complaint allegation was broad enough to include the alternative rationale and the relevant facts were fully litigated); ***Graymont PA, Inc***., 364 NLRB 356, 360–362 (2016) (respondent employer's failure to timely notify the union that the information it requested did not exist violated 8(a)(5) even though the complaint only alleged the failure to provide the information, as the issues were closely related and the respondent asserted that the information did not exist as an affirmative defense to the refusal-to-provide-information allegation); ***Facet Enterprises v. NLRB***, 907 F.2d 963, 969–975 (10th Cir. 1990) (upholding the Board's finding of an 8(a)(5) 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 261, 262–263 (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).

Section 8(b) allegations. See ***IBEW Local 58 (Paramount Industries, Inc.),*** 365 NLRB No. 30, slip op. at 4 n. 17 (2017) (holding that it was proper to find an 8(b)(1)(A) violation on an additional theory that the General Counsel had not clearly pursued, as "the conduct was alleged in the complaint," "all of the underlying facts [were] undisputed," "the law [was] well established," and "no due process concerns [were] implicated"), rev. denied 888 F.3d 1313 (D.C. Cir. 2018); ***Teamsters Local 89 (Jack Cooper Transport Co.),*** 365 NLRB No. 115 (2017) (finding that the respondent union's delay in furnishing certain information to the company violated 8(b)(3) even though the complaint only alleged that the union failed to furnish information to the company, as the issues were closely connected and the union itself elicited testimony to explain why it delayed furnishing the information).

But compare ***Laborers Local 91 (Scrufari Construction Co.),*** 368 NLRB No. 40, slip op. at 1 & n. 2 (2019) (declining to address whether the respondent union violated 8(b)(1)(A) by disciplining a member for filing NLRB charges against it, as the complaint only alleged that the union unlawfully disciplined the member because his brother criticized the union leadership, and the additional theory was not raised or litigated before the ALJ), enfd. 825 F. Appx. 51 (2d Cir. 2020).

Violations based on unalleged conduct. For cases finding violations based on unalleged conduct, see ***ExxonMobil Research & Eng'g Co., Inc. v. NLRB***, 132 F.4th 337, 351 (5th Cir. 2025) (Board's finding of a violation based upon a new theory met the *Pergament* two part standard as it stemmed from the same nucleus of operative facts as the ALJ's original finding and the matter was fully litigated); ***Northeast Center for Rehabilitation and Brain Injury,*** 372 NLRB No. 35, slip op. at 6 n. 21 (2022) (employer's unalleged actions to increase management visibility constituted 8(a)(1) surveillance, as the facts were fully litigated and the issue was closely connected to the complaint's 8(a)(1) allegations that the employer made certain statements that created the impression of surveillance), enfd. in relevant part 94 F.4th 67, 73 n. 3 (D.C. Cir. 2024); ***Ozburn-Hessey Logistics, LLC***, 366 NLRB No. 173 (2018) (employer's unalleged unilateral change in its attendance policy violated 8(a)(5), and that its subsequent discharge of an employee pursuant thereto violated 8(a)(5) as well, where the complaint alleged that a prior change in the attendance policy violated 8(a)(5), the later change occurred during the same time period while the employer was challenging the union's certification, the General Counsel informed the employer's counsel by email months before the hearing that the later change was at issue, and the later change and its application to the terminated employee were fully litigated at the hearing), enfd. 939 F.3d 777 (6th Cir. 2019); ***Irving Ready-Mix, Inc***., 357 NLRB 1272, 1285 n. 13 (2011) (certain unalleged but admitted statements by a 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) (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); ***Meisner Electric, Inc.***, 316 NLRB 597 (1995) (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 ***Dalton School***, 364 NLRB 132, 133 (2016) (8(a)(1) interrogation was not fully litigated, notwithstanding that it was related to the alleged 8(a)(1) termination and respondent relied on it as a defense to that allegation, as respondent was not put on notice that the pertinent facts would be used to prove an interrogation violation); ***Piggly Wiggly Midwest,*** 357 NLRB 2344, 2345 (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 the General Counsel's cross-examination, and the GC's failure to move to amend the complaint during trial may have hindered the respondent in presenting exculpatory evidence); ***Champion International Corp.***, 339 NLRB 672 (2003) (litigation of the alleged 8(a)(5) unilateral-change violation did not establish that the parties also fully litigated the unalleged 8(a)(5) direct-dealing violation).

See also ***Teamsters "General" Local 200***, 357 NLRB 1844, 1845 (2011) (judge improperly found an 8(b)(1)(A) violation as his statements in response to the General Counsel's motion on the first day of hearing to add the allegation led respondent to reasonably believe that it would not have to defend against that allegation). Nor may the judge find a violation on a theory that the GC has expressly disclaimed.

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 578, 579–580 (2012) (rejecting the General Counsel's request, in a 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 GC reasonably should have known about the additional discriminatee; and (3) the GC did not request a remedy for the additional discriminatee until the case reached the Board), and cases cited there.

Different violation date. It is not unusual for the evidence at the hearing to show that the alleged violation occurred on a different date than the date alleged in the complaint. In such circumstances, the General Counsel will typically move to amend the complaint allegation to conform to the evidence. See, e.g., ***Carbonex Coal Co***., 262 NLRB 1306, 1313 (1982). However, the violation may be found even absent an amendment where the issue was the same regardless of the date and was fully litigated. See ***Sunbelt Rentals, Inc.***, 370 NLRB No. 102, slip op. at 2 n. 8 (2021) (finding 3–4 month date discrepancy regarding an 8(a)(1) threat of futility inconsequential). ***Williams Enterprises***, 301 NLRB 167, 168 (1991) (finding 5-month date discrepancy regarding an 8(a)(3) refusal to hire immaterial), enfd. In relevant part 956 F.2d 1226 (D.C. Cir. 1992). See also FRCP 15(b)(2) (issues tried by express or implied consent).

§ 3–400 Consolidation and Severance

§ 3–410 General Principles

Before issuance of a complaint, the General Counsel or the Regional Director has exclusive authority to consolidate or sever cases. The Regional Director also retains the authority to consolidate or sever on the RD's own motion after the complaint issues, but only until the hearing has opened. NLRB Rules and Regulations, Sec. 102.33(a)–(d).

After issuance of the complaint and before the hearing opens, the Chief Judge or Deputy or Associate Chief Judge in the appropriate office may consolidate or sever cases on motion of any party. After the hearing has opened, a motion for consolidation or severance is made to and ruled on by the trial judge. 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). See also ***Affinity Medical Center***, 364 NLRB 876 (2016) (judge did not abuse her discretion in denying the General Counsel's motion to consolidate three new complaints with the existing "highly complex 118-page amended consolidated complaint" given that the old and new allegations were not sufficiently intertwined to require consolidation and could be effectively litigated separately, and consolidation would cause significant delay in the ongoing proceeding); ***McDonald's USA, LLC***, 363 NLRB 847 (2016) (judge did not abuse her discretion in denying motion to sever consolidated complaints against McDonald's and numerous franchisees and to require separate complaints and hearings for each where the General Counsel alleged that they were joint employers).

With respect to consolidating a complaint with a compliance specification or a related representation case involving post-election challenges or objections, see **§§ 14–110** and **14–200**, respectively, below.

§ 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 the 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 GC 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. As the Board stated in ***Affinity Medical Center***, above, "*Jefferson Chemical* and *Peyton Packing* have been narrowly limited to their factual situations," and "only apply to cases involving the relitigation of the same conduct." 364 NLRB at 877 (citations omitted). Thus, the Board in ***Affinity*** found no bar to litigating the allegations in three new consolidated complaints separately as they were "factually independent" of those in the ongoing consolidated proceeding. The Board also noted that the judge had denied the General Counsel's motion to consolidate the new complaints with the consolidated complaint in the ongoing proceeding.

See also ***Napleton Cadillac of Libertyville***, 369 NLRB No. 56, slip op. at 10 (2020) (finding no bar to litigating allegations where the alleged unlawful conduct began 3 months after the last alleged unlawful conduct in the earlier proceeding, the General Counsel did not issue the consolidated complaint on the charges until over 9 months after the hearing in the earlier proceeding, and the respective allegations were factually independent); ***Frontier Hotel and Casino***, 324 NLRB 1225 (1997) (finding no bar to litigating an allegation where it involved a "discreet act" that did not occur until well after the lengthy hearing in the earlier proceeding opened); ***Harrison Steel Castings Co.***, 255 NLRB 1426, 1426–1427 (1981) (finding no bar to litigating an 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); ***Maremont Corp. World Parts Division***, 249 NLRB 216, 216–217 (1980) (finding no bar to litigating an allegation in a 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 GC's motion on the first day of hearing to add the allegation to the complaint).

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) (denying the respondent's appeal of the judge's denial of its motion to bifurcate the trial and litigate respondent's Sec. 10(b) statute of limitations defense before the merits); ***Gulfport Stevedoring Assn***., 15-CA-096939, unpub. Board order issued Sept. 9, 2013 (2013 WL 4782797) (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); ***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) (merely holding the unfair labor practice hearing is not irreparable harm).

But see ***United States 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 be 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 GC's special appeal, and directed the judge to permit the introduction of all evidence relating to all the consolidated cases for hearing.

Compare ***McDonald's USA, LLC***, 363 NLRB 867 (2016) (denying respondents' special appeal and finding that the judge did not abuse her discretion by issuing a case management order in the consolidated proceeding providing that the General Counsel and charging parties would present evidence on the alleged joint employer status of the respondents before presenting evidence on the merits of the alleged unfair labor practices).

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 **2 Moore's Manual —Federal Practice and Procedure § 20.03** (2023); **Gensler, 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 42** (Feb. 2024 Update). See also ***Hoyt v. Career Systems Development Corp.***, No. 07-CV-1733, 2010 WL 2653368 (S.D. Cal. June 30, 2010) (denying the defendant company's motion, in an employment discrimination case, to bifurcate and litigate the threshold issue of the 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 Withdrawal or Dismissal

Withdrawal of complaint. Under Section 102.18 of the Board's Rules, the Regional Director retains discretion to withdraw all or a portion of the complaint *sua sponte* at any time before the hearing, subject to review by the General Counsel but not by the Board or its ALJs. ***NLRB v. UFCW, Local 23***, 484 U.S. 112, 119 (1987). See also ***United Natural Foods, Inc.***, 370 NLRB No. 127 (2021) (Regional Director's prehearing order withdrawing complaint was not reviewable by the Board notwithstanding that the respondent had filed a motion with the Board for summary judgment as the case had not yet transferred to the Board), rev. denied 88 F.4th 536 (5th Cir. April 24, 2023). ***Rieth-Riley Constr. Co. v. Kerwin***, No. 24-1690, 2025 WL 1304812, at *3 (6th Cir. May 6, 2025) (district court properly dismissed lawsuit challenging the Regional Director's decision, before the hearing occurred, to withdraw certain complaint allegations, as "the Regional Director had the 'unreviewable discretion' to withdraw the complaint at that time."); ***United Natural Foods, Inc.***, 138 F.4th at 948–950. Indeed, the Regional Director retains such discretion even after the hearing opens if the GC has not introduced any relevant evidence in support of the allegations and there is no contention that the allegations are ripe for adjudication on the pleadings alone. See ***Sheet Metal Workers Local 28 (American Elgen)***, 306 NLRB 981, 981–982 (1992).

The General Counsel's introduction of the pleadings and other formal papers (GC Exh. 1), which are considered procedural rather than substantive evidence (see **§ 16–801.3**, below), does not itself forfeit this discretion. See ***Boilermakers Local 6 v. NLRB,*** 872 F.2d 331, 333–34 (9th Cir. 1989), cited with approval in *Sheet Metal Workers Local 28*, where the court upheld the Board's finding that the GC retained authority to withdraw a complaint even though the formal papers had been introduced at the hearing.

Beyond that, the precise dividing line appears somewhat unclear. In ***Sheet Metal Workers Local 28***, the Board stated that it was not "purporting to decide where the line is to be drawn in all circumstances" (306 NLRB at 982). However, it is clear that the Regional Director no longer possesses unreviewable discretion to withdraw the complaint if the General Counsel has presented sufficient evidence to establish a prima facie case. See ***General Maintenance Engineers, Inc.,*** 142 NLRB 295 (1963), which was likewise cited with approval in *Sheet Metal Workers Local 28*.

If the Regional Director no longer retains authority to withdraw the complaint, the General Counsel must file a motion to withdraw with the ALJ (or the Board, if the case is before it), who has discretion to grant or deny the motion. See, e.g., ***Sheet Metal Workers Local 162 (Lang's Enterprises)***, 314 NLRB 923 n. 2 (1994) (Board exercised its discretion to deny the GC's motion to withdraw where the allegation had been submitted on a stipulated record and briefed). If the judge grants the GC's motion, the complaint allegation is withdrawn but the underlying charge remains. See ***Verizon Wireless***, 369 NLRB No. 108, slip op. at 3 n. 15 (2020) (judge's order approving the GC's motion to withdraw certain complaint allegations following a change in Board law improperly required the Regional Director to dismiss the allegations on remand), citing ***Consumers Distributing***, 274 NLRB 346 n. 1 (1985) (approval of a motion to withdraw the complaint allegations does "not result in the case being closed because the underlying charge is still alive.").

Withdrawal of charge. Before the hearing opens, a charge may be withdrawn only with the consent of the Regional Director. After the hearing opens and evidence is introduced, but before the judge's decision issues, the charge may be withdrawn only with the consent of the judge. After the judge's decision issues, the charge may be withdrawn only with the consent of the Board. NLRB Statements of Procedure, Sec. 102.9.

Dismissal of charge. The dismissal of a charge by the Regional Director may be appealed to the General Counsel's Office of Appeals in Washington, D.C. 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 (1996); ***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 **§3–550**, Revival of Withdrawn or Dismissed Charge, below, in the context of Section 10(b) of the Act; **§ 13–600**, Res Judicata and Collateral Estoppel, regarding the nonpreclusive effect in subsequent litigation of the GC's dismissal of a charge.

See also **CHAPTER 9**, Settlements, below.

§ 3–550 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), rev. denied 130 F.3d 1083, 1087 (D.C. Cir. 1997) (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); ***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).

Three elements are required to establish fraudulent concealment: (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. ***Brown & Sharpe***, 321 NLRB at 924. 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. See ***Falcon Trucking, LLC***, 25–CA–132518, unpub. Board order issued Aug. 24, 2022 (2022 WL 3703864), citing, e.g., ***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); ***Sonicraft, Inc. v. NLRB***, 905 F.2d 146, 148–149 (7th Cir. 1990); ***Pioneer Hotel, Inc. v. NLRB***, 182 F.3d 939, 944–945 (D.C. Cir. 1999), enfg. in part 324 NLRB 918 n. 1 (1997). See also **§ 3–210**, 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 and is pending before the General Counsel on appeal. See **§ 3–500**, Withdrawal or Dismissal, above.

§ 3–600 Answer to Complaint

Section 102.20 of the Board's Rules sets forth the requirements for an answer. It states that the respondent must file an answer "within 14 days from service of the complaint"; that the respondent 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"; and that allegations not answered or denied or explained as required "will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown."

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** (Feb. 2024 Update); ***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). See also ***Bommarito v. Equixfax Information Services, LLC***, 340 F.R.D. 566, 569–570 (E.D. Mich. 2022); and ***Martinez v. Naranjo***, 328 F.R.D. 581, 599 (D.N.M. 2018) ("legal conclusions" and "speak for themselves" responses).

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 the 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 102.2(d) of the Board's Rules states that, like various other documents (motions, exceptions, and briefs), an answer to a complaint "may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result." A respondent's unexplained failure to file a request for an extension of time is a factor demonstrating lack of good cause. ***St. Monica Center for Rehabilitation & Healthcare***, 370 NLRB No. 122, slip op. at 1 (2021). See also ***Jireh Plumbing, LLC,*** 374 NLRB No. 74 slip op. at 1–2 (2026) (Board grants default judgment as Respondent's arguments did not constitute good cause for its failure to file a timely answer).

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." The Board strictly adheres to this affidavit requirement. ***Elevator Constructors Local 2 (Unitec Elevator Services Co***.), 337 NLRB 426, 428 (2002).

Amended Answer. Under Section 102.23 of the Board's Rules, a respondent may amend its answer at any time before the hearing. If the complaint has been amended, a respondent may also amend its answer after the hearing has opened "within such period as may be fixed by the [ALJ] or the Board." Whether to otherwise grant a motion to amend the answer after the hearing has opened is "in the discretion of the [ALJ] or the Board."

Motions to amend an answer, particularly when they come early in the hearing 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 the defendants in a products liability case leave to amend their answer to respond to two allegations in the amended complaint that they had inadvertently failed to respond to).

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

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 328, 332 n. 2 (2012), reaffd. 361 NLRB 884 (2014) (denying motion to allege an additional affirmative defense). See also the additional cases cited in the sections below regarding affirmative defenses.

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 or summary judgment. The failure to file a sufficient answer or to deny the complaint allegations normally warrants issuance of a default or summary judgment. See, e.g., ***Intersystems Design***, 267 NLRB 1310, 1311 (1983) (respondent's plea of "nolo contendere" to certain allegations constituted an admission and warranted granting summary judgment as to those allegations).

However, there are exceptions. For example, in ***GTS Ambulance Transportation***, 367 NLRB No. 82 (2019), the Board declined to grant a default judgment with respect to several 8(a)(3) disciplinary warning allegations because the complaint failed to allege that the warnings were issued because the employees joined or assisted the union or to discourage them from engaging in those activities, and thus did "not allege sufficient facts to determine whether the conduct violated the Act."

For the same reason, in ***All Steel Iron Works, Inc***., 13-CA-261682, unpub. Board order issued July 13, 2021 (2021 WL 2961497), the Board declined to issue a default judgment regarding an 8(a)(5) layoff allegation because the complaint failed to allege that the laid-off employees were in the bargaining unit, that the layoffs were mandatory subjects of bargaining, or that the respondent failed to provide the union with notice and an opportunity to bargain over the layoff decision. The Board also declined to issue a default judgment to the extent the complaint suggested that the employer also violated 8(a)(5) by refusing to notify and bargain with the union over the closure of the facility, as "the bare assertions of the complaint do not support a cause of

action given the Supreme Court's decision in *First National Maintenance Corp., v. NLRB*, 452 U.S. 666 (1981)."

See also ***Carl R. Bieber, Inc.,*** 369 NLRB No. 24, slip op. at 1 (2020) (denying default judgment with respect to an allegation that the employer unlawfully ceased remitting dues to the union following contract expiration, as this was not "a cognizable claim" given the Board's recent decision overruling precedent and holding that dues checkoff provisions are enforceable under Section 8(a)(5) of the Act only during the contract).

It is also "well established that the Board will not grant default judgment on an allegation that was denied in a timely-filed answer to a complaint even though the respondent later fails to timely answer an amended complaint repeating that allegation, provided that the repeated allegation is substantively unchanged from the original." ***Central Market of Indiana, Inc.,*** 366 NLRB No. 167, slip op. at 2 (2018) (internal quotations and citations omitted). This is true even where a complaint is reissued after a respondent fails to comply with a settlement agreement, unless the settlement explicitly provided for withdrawal of the prior answer or for entry of a default judgment in the event of noncompliance with the settlement. ***Pace Medical Transport, LLC***, 371 NLRB No. 58, slip op. at 2 (2022).

Note that the Board typically shows some leniency toward pro se respondents in determining whether to grant a motion for default judgment for failing to file a sufficient answer. See ***Prompt Medical Transportation***, 366 NLRB No. 50 (2018) (denying the General Counsel's motion for default judgment, even though the pro se respondent's letter did not respond to each and every allegation in the complaint and was not in a form that comported with the Board's rules, as the letter "could reasonably be construed as a denial of the substance of the complaint's [unfair labor practice] allegation and as an affirmative identification of material facts in dispute"), and cases cite therein. See also ***Central Market of Indiana***, above.

But "pro se status alone does not establish a good cause explanation for failing to file an answer." ***Cobalt Coal Corp***., 367 NLRB No. 45 (2018) (granting the General Counsel's motion for default judgment even though the respondent's owner sent an email letter to the Region stating that it was insolvent and unable to afford counsel or file an answer). See also ***Mailhandlers Local 307 (USPS),*** 367 NLRB No. 144, slip op. at 1–2 and n. 3 (2019) (granting the General Counsel's motion for a default judgment for respondent's failure to file an answer to the properly served complaint even though the respondent asserted that it did not retain counsel until after the motion was filed, that it had not actually received the complaint when it was issued, and that the Region's subsequent reminder letter did not enclose another copy of it).

For a discussion of the Board's procedural rules for filing such motions, see **§ 10–300**, Motions for Summary and Default Judgment, below.

§ 3–610 Jurisdiction

The Board's statutory jurisdiction must be established in every case, regardless of whether any party has timely raised or contested jurisdiction. See, e.g., ***FiveCap, Inc***., 331 NLRB 1165, 1176 (2000) (respondent did not waive the right to assert that it was an exempt "political subdivision" under Sec. 2(2) of the Act by failing to raise the issue in the prior representation case or admitting jurisdiction in its answer to the complaint in the unfair labor practice case), enfd. 294 F.3d 768 (6th Cir. 2002). Cf. ***Bannum Place of Saginaw, LLC***, 372 NLRB No. 97, slip op. at 1 n. 1 (2023) (Board declined to address in the supplemental compliance proceeding whether respondents were joint employers with an exempt federal entity, as such a finding would be

irrelevant to respondents' status as a statutory employer under Sec. 2(2) of the Act), enfd. 97 F.4th 351 (6th Cir. 2024).

However, "[w]hile a question concerning the Board's statutory jurisdiction may be raised at any time, it is well settled that the issue of jurisdiction under the Board's discretionary standards must be timely raised." ***Anchortank, Inc***., 233 NLRB 295 n. 1 (1977) (finding that the respondent waived the right to challenge the propriety of the discretionary jurisdictional standard alleged in the complaint because it did not raise the issue until after the hearing had closed), enfd. in part 618 F.2d 1153 (5th Cir. 1980). See also ***Paramedical Specialties Services, Inc***., 322 NLRB 351 n. 1 (1996) (Board issued a default judgment against respondent notwithstanding that the complaint did not clearly define the nature of respondent's service contracts, as the respondent had failed to timely contest the Board's discretionary jurisdiction); ***Ryder Student Transportation***, 297 NLRB 371, 372 (1989) (respondent failed to contest discretionary jurisdiction under the Board's *Res-Care* "right of control" test in the underlying representation proceeding); ***Gateway Motor Lodge***, 222 NLRB 851, 852 (1976) (respondent did not dispute that it satisfied the Board's discretionary jurisdictional commerce standards in the underlying representation case).

But see ***Laborers Local 1177***, 269 NLRB 746 (1984) ("It is of no consequence that the complaint allegations were ultimately uncontested if they do not, in fact, establish discretionary jurisdiction."). In that case, the Board dismissed the 8(b)(4) secondary boycott complaint, notwithstanding that no party disputed jurisdiction, because the complaint contained insufficient allegations to establish that the alleged primary and secondary employers' operations satisfied the Board's discretionary jurisdictional commerce standards and the General Counsel had not supplemented the allegations with evidence at the hearing. In a footnote (n. 3), the Board distinguished *Anchortank* because the issue there was whether the jurisdictional standard alleged in the complaint was the appropriate standard, not whether the applicable jurisdictional standard was met.

The Board will also assert jurisdiction in an unfair labor case where the respondent employer has refused to produce subpoenaed information relevant to whether it satisfies the Board's discretionary jurisdictional standards, provided the record demonstrates statutory jurisdiction. See ***Continental Packaging Corp***., 327 NLRB 400 (1998) (granting General Counsel's motion for default summary judgment where respondent failed to file an answer to the complaint and refused to comply with court-enforced subpoenas requiring records relevant to determining discretionary jurisdiction, as the undisputed allegations in the complaint and motion established that respondent was within Board's statutory jurisdiction). See also ***NAA Worldwide***, 371 NLRB No. 77, slip op. at 1, n. 2 (2022) (same), enfd. 2022 WL 824323 (9th Cir. Dec. 14, 2022); ***Club Coyote,*** 372 NLRB No. 39, slip op. at 2, n. 4 (2023) (same, where respondent did not petition to revoke the subpoena or produce the subpoenaed documents). Compare ***Tropicana Products, Inc***., 122 NLRB 121, 123 (1958) (likewise asserting jurisdiction in a representation case where the record established statutory jurisdiction and the employer plainly failed to cooperate by providing Board agents with requested information regarding discretionary jurisdiction, even though the Board did not attempt to subpoena the records).

For further discussion of the Board's jurisdictional standards, see NLRB Outline of Law and Procedure in Representation Cases § 1-100 et seq. (January 2025).

§ 3–620 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 191 n. 2 (2015) (defense that allegation is barred by Sec. 10(b) limitations period), enfd. 673 F. Appx. 1 (D.C. Cir. 2017); ***Hiran Mgmt., Inc. v. NLRB***, 157 F.4th 719, 724 (5th Cir. 2025) (affirmative defense raised for the first time in a posthearing brief is waived); ***Springfield Manor***, 295 NLRB 17 n. 2 (1989) (defense that alleged discriminatee is a supervisor), and additional cases discussed in **§§ 3–700** and **3–800** through **3–860**, 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 the General Counsel's motion to strike several of the respondent's affirmative defenses to the backpay specification as they were without merit as a matter of law), enfd. 500 F.3d 1 (1st Cir. 2007); ***TNT Logistics, North America***, 346 NLRB 1301 n. 1 (2006) (upholding judge's pretrial order granting the General Counsel's motion in limine to strike seven of the respondent's eight affirmative defenses as that they raised irrelevant matters), enfd. 246 F. Appx. 220 (4th Cir. 2007); ***Tri-County Paving, Inc***., 342 NLRB 1213, 1216 (2004) (striking defenses in a refusal-to-hire case that challenged the alleged discriminatees' status as bona fide applicants); ***Superior Industries International***, 295 NLRB 320, 322 (1989) (striking, as frivolous and irrelevant, respondent's affirmative defense that the General Counsel was engaged in a "cover up" and that the Board's election procedures were under investigation by "at least forty [unnamed] U.S. Senators and Congressmen"); ***Electrical Workers Local 1316 (Superior Contractors)***, 271 NLRB 338, 340 (1984) (striking, as irrelevant and immaterial, respondent's affirmative defense regarding the charging party's motivation in filing the charge); ***Sheet Metal Workers Local 3 (McCarthy Heating & Air Conditioning Services, Inc***.), 253 NLRB 330, JD. n. 2 (1980) (striking the respondent union's affirmative defense to the 8(b)(7)(C) picketing complaint that the charging party employer engaged in racial discrimination); 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 2006, 2010–2011 (2011) (striking the employer's affirmative defenses in the backpay proceeding asserting 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), 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.

§ 3–700 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 by the respondent in its answer or at the hearing, it is waived. ***EF International Language Schools,*** above; ***Approved Electric Corp***., 356 NLRB 238 n. 1 (2010); ***Dayton Newspapers, Inc.***, 339 NLRB 650, 653 n.8 (2003), enfd. in part 402 F.3d 651 (6th Cir. 2005).

The defense must also be specifically raised, i.e., the respondent must specify the allegation it asserts is untimely under Section 10(b); a mere boilerplate or catchall provision in the answer is insufficient. See ***United Government Security Officers of America International***, 367 NLRB No. 5, slip op. at 1 n. 1 (2018). In that case, the complaint alleged that the respondent International and local unions had violated Section 8(b)(1)(A) and (b)(2) of the Act in certain respects. In their posthearing brief, the respondents asserted that one of the 8(b)(1)(A) allegations was untimely under Section 10(b). However, the respondents had not previously asserted the 10(b) defense to that allegation. Although their answer included a 10(b) affirmative defense, it did not specify which of the allegations was untimely. Rather, it only generally stated: "To the extent any allegations were not made and expressly included in an unfair labor practice charge filed within six (6) months of the alleged violation, the allegations are time-barred by the applicable six-month statute of limitations." Nor had the respondents raised or litigated the 10(b) defense to the 8(b)(1)(A) allegation at the hearing. Accordingly, the Board found that the respondents had waived the defense.

§ 3–710 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 knew or should have known of a violation in the exercise of reasonable diligence. See, e.g., ***APWU, Local 512 (Postal Service)***, 374 NLRB No. 92, slip op. at 4 (2016); ***Castle Hill Health Care Center***, 355 NLRB 1156, 1191 (2010); ***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 ***New York Paving, Inc***., 370 NLRB No. 44, slip op. at 1 n. 8, 22 (2020), enfd. per curiam, No. 20-1469, 2021 WL 6102199 (D.C. Cir. 2021); ***Laborers Local 91 (Scrufari Construction Co.),*** 370 NLRB No. 42, slip op. at 16 (2020), enfd. No. 21-71, 2023 WL 2003133 (2d Cir. Feb. 15, 2023).

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. This 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); ***Esmark, Inc. v. NLRB***, 887 F.2d 739, 746 n. 6 (7th Cir. 1989). See also ***Leach Corp.***, 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 (1986).

§ 3–720 Background 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. See ***Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB***, 362 U.S. at 416 ("earlier events may be utilized to shed light on the true character of matters occurring within the limitations period"). For example, evidence outside the 10(b) period may be admitted and considered in evaluating whether an employer had animus and an unlawful motive for disciplining an employee for union or protected activity, ***Compañia Cervecera De Puerto Rico***, 373 NLRB No. 47, slip op. at 12–13 (2024), enfd.150 F.4th 601, 612 (D.C. Cir. 2025). ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997). And, it can be used to determine whether an employer unlawfully engaged in overall bad faith bargaining during the limitations period, ***Columbus Electric Cooperative, Inc.***, 372 NLRB No. 89, slip op. at 6 (2023). See also ***Mid-Atlantic Restaurant Group LLC v. NLRB***, 722 Fed.Appx. 284, 288 (3d Cir. 2018) (ALJ did not abuse his discretion by considering factual evidence outside the complaint's timeframe and not specifically pled to support finding a violation that was properly pled).

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." ***Machinists Lodge 1424 (Bryan Mfg.)***, 362 U.S. at 417–418 (allegation that the employer and the 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).

§ 3–730 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. See, e.g., ***Dynamic Nursing Services, Inc***., 369 NLRB No. 49, slip op. at 3–4 (2020); ***Charter Communications, LLC***, 366 NLRB No. 46, slip op. at 1 n. 4 (2018), enfd. 939 F.3d 798 (6th Cir. 2019); ***Cellular Sales of Missouri, LLC***, 362 NLRB 241, 242 (2015), affd. in relevant part 824 F.3d 772, 779 (8th Cir.2016). 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), enfd. 352 F.3d 831 (3d Cir. 2003) (anti-dual shop clause); ***Teamsters Local 293 (R. L. Lipton Distributing)***, 311 NLRB 538, 539 (1993) (shop steward superseniority clause). But see ***Machinists Lodge 1424 (Bryan Mfg.)***, above.

Similarly, if the employer 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 respondent's 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 261, 263–264 (2015); ***Vallow Floor Coverings, Inc***., 335 NLRB 20 (2001); ***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”).

§ 3–740 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,*** 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).

§ 3–750 Fraud or Deception

Fraudulently concealing the 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) (respondent fraudulently and deceitfully concealed its unlawful employment of nonunion carpenters from the union by assuring the union that it would no longer employ carpenters), enfd. 596 F.2d 378 (9th Cir.), and cases cited there.

For fraudulent concealment of facts from the General Counsel, see the next section.

§ 3–800 Other Affirmative Defenses

§ 3–810 Charging Party’s Motive or Misconduct

The charging party’s motive for filing the underlying charge “is irrelevant to the disposition of the allegations in the [General Counsel’s] complaint.” ***El Vocero de Puerto Rico, Inc***., 357 NLRB 1585, 1586 (2011); ***Dynabil Industries, Inc***., 330 NLRB 360, 362 (1999).

Ordinarily, a charging party’s own alleged misconduct is likewise not a defense to a respondent’s unfair labor practices. See ***Teamsters Local 918 (Tale-Lord Mfg. Co.),*** 206 NLRB 382, 383 (1973) (“[C]onduct by a union agent otherwise coercive and thus violative of Section 8(b)(1)(A) of the Act cannot be justified merely because an employer agent also engaged in unlawful activity.”); ***Carpenters Local 621 (Consolidated Constructors)***, 169 NLRB 1002, 1003 (1968) (“‘[U]nclean hands’ estops neither a company from filing a charge against one who violates the Act, nor the Board from vindicating and protecting the public rights inherent in the Act, which have been infringed.”), enfd. 406 F.2d 1081 (1st Cir. 1969); ***Plumbers Local 457 (Bomat Plumbing and Heating)***, 131 NLRB 1243, 1245–1247 (1961) (“One unfair labor practice does not excuse another. If a respondent believes that a charging party is guilty of unfair labor practices, the proper procedure is for the respondent to file unfair labor practice charges against the charging party and not to resort to unfair labor practices in justification or excuse.”), enfd. 299 F.2d 497 (2d Cir. 1962).

However, if proof of the charging party’s misconduct could affect the unfair labor practice findings, an affirmatively pleaded defense regarding the misconduct must be heard. This applies even if no charge was filed regarding the misconduct, or a charge regarding the misconduct was withdrawn or dismissed. See ***County Concrete Corp***., 366 NLRB No. 64, slip op. at 1 n. 1 (2018) (union’s failure to advise employees of their *Beck* rights not to pay dues for non-representational activities could be raised by the respondent employer as an affirmative defense to the 8(a)(5)

complaint allegation that it unlawfully failed to deduct dues, even though no charge was filed asserting a *Beck* violation), enfd. 765 F. Appx. 712 (3d Cir. 2019); ***Chicago Tribune Co.***, 304 NLRB 259, 259–261 (1991) (respondent employer in 8(a)(5) bad-faith bargaining case could raise the union's bad faith bargaining as an affirmative defense, even though the employer's previous 8(b)(3) charges regarding the union's conduct had been dismissed by the General Counsel or withdrawn by the employer). See also ***American Bottling Co. v. NLRB***, 992 F.3d 1129, 1140 (D.C. Cir. 2021) ("When Regional Directors decline to bring charges, they do so by exercising authority delegated from the General Counsel rather than the Board. And when the General Counsel declines to issue a complaint 'no proceeding before the Board occurs at all[,]' and the action has no precedential value whatsoever."), citing and quoting ***NLRB v. Sears, Roebuck & Co***., 421 U.S. 132, 138–139 (1975). Compare ***Greyhound Lines***, 319 NLRB 554, 555–557 (1995) (affirmative defense based on alleged union misconduct was stricken because no nexus was shown between the 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); ***Allou Distributors***, 201 NLRB 47, 47–48 (1973) (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* and issuing a bargaining order where a valid election was conducted and a certification had issued before any violence took place), enf. denied on other grounds 466 F.2d 748 (6th Cir. 1972); ***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).

§ 3–820 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. ***Newark Electric Corp***., 366 NLRB No. 145, slip op. at 1 n. 1 (2018), enfd. 14 F.4th 152 (2d Cir. 2021); ***UPS Ground Freight, Inc***., 366 NLRB No. 100, slip op. at 2 (2018). See also ***Midwest Terminals of Toledo***, 365 NLRB No. 157, slip op. at 1 n. 1 (2017), reaffg. 362 NLRB 468 n. 1 (2015) (rejecting defense even though the 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), enfd. 783 F. Appx. 1 (D.C. Cir. 2019); ***Teamsters Local 75 (Schreiber Foods)***, 365 NLRB No. 48, slip op. at 5 n. 6 (2017) (rejecting defense even though the alleged unlawful events occurred in 1989 and the Board did not issue its second supplemental decision on remand from the court of appeals until 9 years after the court's remand order); ***United Electrical Contractors Assn.***, 347 NLRB 1, 2–3 (2006) (denying motion to dismiss complaint against members of the 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); ***Rogan Bros. Sanitation, Inc***., 369 NLRB No. 53, slip op. at 5 n. 6 (2020) (rejecting defense despite 7-year delay between Board's original decision granting summary judgment pursuant to the noncompliance provisions of a bilateral informal settlement agreement and issuance of backpay specification); ***Human Development Assn.***, 348 NLRB 677 (2006) (rejecting defense despite the 13-year delay between enforcement of the Board's remedial order and issuance of the compliance specification), enfd. 275 F. Appx. 64 (2d Cir. 2008); ***Entergy Mississippi, Inc.***, 361 NLRB 892, 893 n. 5 (2014) (considerable delay by the Board in issuing the backpay specification did not warrant a reduction in the backpay award even assuming the delay contravened the APA), affd. in relevant part 810 F.3d 287, 298–299 (5th Cir. 2015).

With respect to considering passage of time and other changed circumstances in evaluating the appropriateness of a *Gissel* bargaining order, see **§ 16–402.5**, Evidence Affecting Remedy, below.

§ 3–830 Inadequate Investigation/Compliance with Casehandling Manual

Due process claims are tested not by analysis of the investigation, but by analysis of the complaint allegations. Thus, the adequacy of the General Counsel's investigation may not be litigated in the unfair labor practice hearing. ***Redway Carriers***, 274 NLRB 1359, 1371 (1985). See also ***Laborers Local 135 (Bechtel Power Corp.),*** 301 NLRB 1066, 1068 n. 19 (1991) (citing the same rule in a 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 GC or the Board. See ***Hempstead Lincoln Mercury Motors Corp.,*** 349 NLRB 552 n. 4 (2007); ***Offshore Mariners United***, 338 NLRB 745, 746 (2002), and cases cited therein. See also ***Steel Workers (Cequent Towing Products)***, 357 NLRB 516, 518 (2011) (rejecting the respondent union's argument that it was justified in maintaining an alleged unlawful annual renewal requirement for objectors because the requirement was consistent with guidelines set forth in a prior General Counsel Memorandum).

But see **§ 6–230**, "Skip Counsel" Violations, below.

§ 3–840 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. ***Detroit Medical Center,*** 369 NLRB No. 41, slip op. at 1 n. 1 (2020); and ***Provident Nursing Home***, 345 NLRB 581 n. 3 (2005). 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); ***Master Mechanical Insulation***, 320 NLRB 1134 n. 2 (1996). See also ***Wisconsin Bell Telephone***, 346 NLRB 62, 64, n. 8 (2005) (although the 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., ***King Soopers***, 364 NLRB 1153, 1174–1175 (2016), enfd. in relevant part 859 F.3d 23, 30 (D.C. Cir. 2017); ***Regency Heritage Nursing & Rehabilitation Center***, 360 NLRB 794, 806 (2014), enfd. 657 F. Appx. 129 (3d Cir. 2016); ***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). See also ***United Parcel Service, Inc.,*** 369 NLRB No. 1, slip op.at 10 n. 31 (2019) (reaffirming these standards for prearbitral deferral to grievance arbitration and overruling more recent decisions holding that in 8(a)(1) and (3) discharge or discipline cases the parties must have explicitly

authorized the arbitrator to decide the unfair labor practice issue), revd. on other grounds 372 NLRB No. 158 (2023).

With respect to postarbitral deferral, 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 proceedings were not fair and regular; 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. ***Olin Corp.*****,** 268 NLRB 573, 574 (1984). The Board also applies the same principles to settlements arising from the parties' contractual grievance/arbitration procedures. See ***Bethenergy Mines, Inc***., 308 NLRB 1242, 1244 n. 8 (1992), citing, e.g., ***Alpha Beta Co***., 273 NLRB 1546 (1985), rev. denied sub nom. ***Mahon v. NLRB***, 808 F.2d 1342 (9th Cir. 1987). See also ***United Parcel Service***, above (reaffirming these standards for postarbitral deferral and overruling more recent decisions holding to the contrary with respect to 8(a)(1) and (3) discharge and discipline cases).

As indicated above, the foregoing deferral policies and standards apply to collectively bargained grievance/arbitration procedures. The Board generally does not defer to dispute resolution procedures unilaterally established and implemented by the employer. See ***American Civil Liberties Union, Inc.***, 05–CA–300367, unpub. Board order issued March 6, 2024 (2024 WL 1012532) citing ***American League of Professional Baseball Clubs***, 180 NLRB 190, 191 (1969); ***Pontiac Osteopathic Hospital***, 284 NLRB 442 n. 3 (1987).

Procedure. The judge should evaluate whether deferral is warranted before evaluating the merits of the complaint allegations. ***Detroit Medical Center***, above, slip op. at 1 ("Deferral is a threshold issue which must be decided prior to addressing the merits of the allegations at issue."). See also ***Olin Corp.***, 268 NLRB at 574. The judge appears to retain the discretion, however, whether or not 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) (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 the respondent and the merits of the complaint); ***Bunge Milling, Inc.***, 33-CA-15997, unpub. Board order issued Dec. 30, 2011 (2011 WL 6886279) (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/dismiss. See, e.g., ****IAP World Services***, 358 NLRB 33 (2012) (affirming judge's decision deferring/dismissing the case pursuant to the parties' stipulation of facts); ***Spectrum Health Services***, 372 NLRB No. 21 (2022) (granting respondent's prehearing motion); ***Wonder Bread***, 343 NLRB 55 (2004) (same); ***Southern California Edison Co***, 310 NLRB 1229 (1993) (same), rev. denied 39 F.3d 1210 (D.C. Cir. 1994); ***Specialized Distribution Management, Inc.***, 318 NLRB 158 (1995) (finding that the judge properly deferred/dismissed the complaint pursuant to the respondent's motion). See also **§ 10–400**, Motions to Dismiss, below. But see ***BCI Coca-Cola Bottling Company of Los Angeles***, 361 NLRB 839 (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, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) deferral to the arbitration award is unwarranted.

Information Requests. "The Board has long adhered to a policy of refusing to defer to arbitration disputes concerning information requests." ***Borenstein Caterers, Inc***., 373 NLRB No. 23, slip op. at 7 (2024), citing ***General Dynamics Corp***., 268 NLRB 1432 (1984).

However, in evaluating whether an employer unlawfully refused to provide requested information to a union regarding a contractual grievance, the procedural validity and substantive merit of the grievance are irrelevant; such contractual issues are for an arbitrator to decide and are irrelevant to whether the employer's refusal to provide the information violated Section 8(a)(5) of the Act. See ***Research Medical Center***, 373 NLRB No. 36, slip op. at 3 (2024); ***Wilkes-Barre General Hospital***, 371 NLRB No. 55, slip op. at 12 (2022), and additional cases cited there.

Inextricably intertwined or related allegations. Allegations that are inextricably intertwined or related to an alleged unlawful workplace rule should not be deferred. See ***Intertape Polymer Corp***., 373 NLRB No. 82, slip op. at 3 (2024) (complaint allegations that employer unlawfully removed a letter posted by an employee on a bulletin board and disciplined him for posting the letter were inappropriate for deferral because they were inextricably intertwined with the complaint allegation that the employer's rule prohibiting unauthorized posting was unlawful).

§ 3–850 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***, 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 hearing. See ***Richard Mellow Electrical Contractors Corp.***, 327 NLRB 1112, 1112–1113 (1999).

See also **§ 9–620**, Reservation Clauses: Settlement Bar Rule; **§13–400**, Settlements; and **§ 16–402.4**, Evidence of Presettlement Conduct, below.

§ 3–860 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 posthearing brief to the judge is untimely. ***Vencare Ancillary Services***, 334 NLRB 965, 968–969 (2001), enf. denied on other grounds, 352 F.3d 318 (6th Cir. 2003).

CHAPTER 4. FILING AND SERVICE OF DOCUMENTS

§ 4–100 Filing of Documents

Under the Board's Rules, all post-charge unfair labor practice case documents filed with the Agency, including the Division of Judges, must be e-filed utilizing the Agency's website (www.nlrb.gov). If a party files such documents in paper format, it must explain why it could not e-file them or why doing so would be unduly burdensome. Documents may not be filed with the Agency via email without the prior approval of the receiving office. See Sec. 102.5(c).

The time requirements for filing are set forth in Section 102.2. In computing the time prescribed, the day the time period begins to run is not included; however, the last day is included unless it is a Saturday, Sunday, or legal holiday. When the time period is less than 7 days, intermediate Saturdays, Sundays, and holidays are excluded. See Sec. 102.2(a).

E-filed documents must be received by 11:59 p.m. of the time zone of the receiving office. Non-e-filed documents must be received before the official closing time of the receiving office. However, with certain exceptions (charges, EAJA applications, petitions to revoke subpoenas, and requests for extension of time to file a document), the Board will accept as timely filed documents which are deposited with a delivery service at least one day before the due date, as shown by the postmark or other record provided by the delivery service. Sec. 102.2(b).

As discussed in **§ 3-600**, above, with respect to filing of answers, Section 102.2(d) of the Board's Rules states that motions, exceptions, answers to a complaint or backpay specification, and briefs may be filed "within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result."

For an example of how this rule is applied, see ***M&M Affordable Plumbing, Inc***., 13–CA–121459, unpub. Board (ES) order issued May 3, 2018 (2018 WL 2086092). In that case, the respondent requested leave to file its exceptions and supporting brief with the Board in Washington D.C. after the deadline (April 6) because of (1) an unexpected emergency that arose on another legal matter on April 6 that diverted counsel's attention for most of the business day, (2) a previous family commitment that prevented counsel from remaining at the office after business hours on April 6 to complete the filing, and (3) intermittent difficulties establishing an internet connection from counsel's home computer on the evening of April 6, which prevented counsel from completing the filing from home until 12:23 a.m. (Chicago time) on April 7. The General Counsel opposed the request and the Board denied it stating:

> The asserted reasons for the late filing—that counsel was busy with other legal matters, and experienced technological problems—do not rise to the level of excusable neglect. *See* NLRB Rules and Regulations, Section 102.2(d), 102.24(b). Thus, the Board has rejected claims that filing attorneys were busy, finding they do not rise to the level of excusable neglect. See, e.g., *V. Garofalo Carting, Inc.*, 362 NLRB [1369, 1369–1370] (2015). The Board has similarly held that a user's technological problems when attempting to e-file do not constitute excusable neglect. Rather, parties who choose to file on the final day for doing so assume the risk that something can go wrong, particularly if, as here, the attempted filing takes place on the evening of the final day. As specifically stated in the Board's e-filing instructions [see the Board's website at https://apps.nlrb.gov/eservice/efileterm.aspx], "a user who waits until after close of business on the due date to attempt to E-File does so at [the user's] own peril."

See also ***Starbucks Coffee Co. v. NLRB*****,** No. 24-1123, 2025 WL 1135120, at *2-3 (D.C. Cir. April 17, 2025) (unpub.) (finding the Board did not abuse its discretion when it declined to accept exceptions filed 24 minutes late due to computer issues); ***NLRB v. Tri-County Electric Cooperative***, No. 21-60887, 2023 WL 5040960, at *2 (5th Cir. 2023) (unpub.) (same, where exceptions were filed 30 minutes late due to error in identifying the proper time zone of the receiving office).

Note, however, that the Board has accepted documents that were not timely filed with the appropriate office of the Agency where they were timely filed with another office of the Agency. See ***Eldeco, Inc***., 336 NLRB No. 82 (2001) (respondent's response to the Board's notice to show cause was misfiled with the Agency's regional office rather than the Board in Washington, D.C., assertedly because of a miscommunication between counsel); ***Central Apex Reproductions***, 330 NLRB 1163 (2000) (respondent's response to the Board's notice to show cause was misfiled with the Division of Judges in Washington, D.C. rather than the Board).

§ 4–200 Service of Documents

Service of documents on parties in Board proceedings is governed by the NLRA and the Board's Rules rather than the Federal Rules of Civil Procedure. ***Control Services***, 303 NLRB 481, 481–482 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992). See Section 11(4) of the Act and the following sections of the Board's Rules: 102.3 (date of service), 102.4 (service of process and papers by the Agency), 102.5 (service of papers by parties), and 102.14 (service of charges).

Pursuant to the foregoing provisions, depending on the type of document, service may be made by:

Personal service (charges, complaints, compliance specifications, ALJ decisions, Board orders, subpoenas, other Agency-issued documents, and documents served by a party on other parties).

Registered or certified mail (charges, complaints, compliance specifications, ALJ decisions, Board orders, subpoenas, other Agency-issued documents, and documents served by a party on other parties).

Private delivery service (charges, subpoenas, documents served by a party on other parties, and other Agency documents).

Leaving a copy at the principal office or place of business of the person required to be served (complaints, compliance specifications, ALJ decisions, Board orders, subpoenas, other Agency-issued documents, and documents served by a party on other parties).

Email (charges with the permission of the person receiving the charge, complaints, compliance specifications, ALJ decisions, Board orders, other Agency-issued documents, and documents served by a party on other parties unless otherwise provided in the Rules).

Regular mail (charges, documents served by a party on other parties, and other Agency documents).

Fax (charges, documents under 25 pages in length served by a party on other parties, and other Agency documents).

Any other means with the consent of the party being served (charges and documents served by a party on other parties).

Any other method authorized by law (complaints, compliance specifications, ALJ decisions, Board orders, subpoenas, and other Agency-issued documents).

Service of process on an authorized agent constitutes effective service on the agent's principal. See ***Spectrum Mechanical Services, LLC***, 368 NLRB No. 85, slip op. at 1 n. 1 (2019) (General Counsel's service of the complaint and reminder letters by certified and regular mail on the designated individual listed with the state division of corporations to receive service was sufficient service on the respondent company), and cases cited there.

Section 102.4(e) requires that pleadings or other papers served by the Agency must also be served on any attorney or other representative of a party. The attorney or representative may be served by any means permitted by the Rules, including regular mail. For cases addressing the failure to serve a party's attorney with a copy of a subpoena, see **§ 8-120**, below.

Note also that Section 102.5, which addresses service of documents by parties, states that, "unless otherwise specified elsewhere in these Rules, service on all parties must be made in the same manner as that used in filing the document with the Board, or in a more expeditious manner." See 102.5(f).

§ 4–300 Determining Date of Service

The date of service is specified in Section 102.3 of the Board's Rules as follows:

Personal delivery or fax: "the date on which the document is received." See also ***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).

Private delivery service: "the day when the document . . . is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service."

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

Email: "the day when the document . . . is sent by email."

§ 4–400 Proof of Service

Section 11(4) of the Act and Sections 102.4(d) and 102.5(g) of the Board's Rules specify certain methods of proof of service:

Personal service or delivery to a principal office or place of business: "the verified return by the serving individual, setting forth the manner of such service."

Registered or certified mail: "the return post office receipt."

Private delivery service: "the receipt from [the] service showing delivery."

However, the same sections of the Board's Rules state that the foregoing methods of service "are not exclusive; any sufficient proof may be relied upon to establish service." See also ***Mailhandlers Local 307 (Postal Service),*** 367 NLRB No. 144, slip op. at 1 (2019) (service of the complaint by certified mail may also be established by the Postal Service's online tracking system or by the Board agent's affidavit), and cases cited there. See also ***LIOX Cleaners, Inc***., 371 NLRB No. 64, slip op. at 1 n. 2 (2022) ("Affidavits of service by a Board agent constitute sufficient evidence of service, even in the absence of evidence of delivery by the Postal Service.")

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., ***California Truck Driving Academy, LLC***, 373 NLRB No. 95, slip op. at 1 n. 1 (2024); ***LIOX Cleaners***, above. See also ***Joy Luck Palace Restaurant***, 368 NLRB No. 108, slip op. at 1 n. 1 (2019) (same; also noting that the Region additionally sent copies of the complaint and amended complaint to the respondent's president/owner and its manager by electronic mail via the same email addresses that they had previously used to correspond with the Region, and there was "no indication that the Region's emails to the Respondent's officials were undeliverable").

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 481, 481–482 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992). 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.

§ 4–500 Failure of Service

A party's failure to make timely service on other parties is a basis for either "rejecting the document," or "[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. 102.5(i).

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); ***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); ***Acme Building Maintenance***, 307 NLRB 358, 359 n. 6 (1992) (answer to complaint). 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 because there had been "repeated efforts" by the Region to apprise the respondent of its obligations but service was never made.

§ 4–600 Efforts to Frustrate Service

"It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act." ***Frontline Security Services***, 367 NLRB No. 131, slip op. at 1 n. 1 (2019). Thus, in ***California Truck Driving Academy,*** above, the Board issued a default judgment against the respondent for failing to file an answer because, "even assuming" the General Counsel's "multiple efforts to serve the Respondent by a variety of methods" failed, "those failures support the conclusion that the Respondent itself failed to provide for appropriate service as our case law demonstrates." See also ***Apex Electrical Services***, 356 NLRB No. 172, slip op. at 1 n. 3 (2011) (issuing default judgment with respect to compliance specification).

§ 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 with the Agency and served on the charged party within the 6-month limitations period. Where service is made by regular mail, service is timely if the charge was deposited in the mail during the 10(b) period. See **§ 4–300** above; ***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 on the charged party. ***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***, 303 NLRB 481, 481–482 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992) ("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); ***NLRB v. O'Neill***, 965 F.2d 1522, 1528–1529 (9th Cir. 1992) .

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 a charge on a multi-employer association constitutes, under agency principles, 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, if 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, Secs. 102.4(a) and 102.15. With respect to necessary parties and parties in interest, see **§§ 6–510** and **6–520,** below. See also ***Postal Service***, 5–CA–122166, unpub. Board order issued June 25, 2015 (2015 WL 3932157) (attorney for a trade association failed to establish any interest in the case that might even arguably have entitled it to notification of the charge or complaint).

§ 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 service on the respondent. ***Star Grocery Co.***, 245 NLRB 196, 197 (1979); ***Cera International Corp.***, 272 NLRB 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 that the representation has been discontinued. ***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 **§4–500**, 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 must" file an answer and "immediately serve a copy" on the other parties.

§ 4–750 Subpoenas

"The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received." Sec. 102.31(b). See also **§ 8–120**, Service of Subpoena, below.

CHAPTER 5. TIME AND PLACE OF HEARING

§ 5–100 Before Hearing Opens

Section 102.15 of the Board's Rules requires that a complaint contain "a Notice of Hearing before an Administrative Law Judge at a fixed place and at 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 hearing, the Regional Director issuing a complaint may extend the date of the hearing or change the hearing location. But when there are less than 21 days before the scheduled hearing date and a party objects to a postponement, motions to reschedule should be filed with the Division of Judges, which rules only on whether to grant the motion to extend the hearing date. NLRB Rules and Regulations, Sec. 102.16(a). See also ***Carriage Inn of Steubenville***, 309 NLRB 383 (1992). "When a motion to reschedule has been granted, 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).

See also ***Hudson Institute of Process Research,*** 373 NLRB No. 11 (2024). In that case, the Board denied the General Counsel's special appeal of the ALJ's order directing an in-person hearing in Chicago instead of a video hearing originally set by the Regional Director. However, citing Section 102.16(b), the Board remanded the case to the RD to set a new date and location for the in-person hearing as the date for the in-person hearing ordered by the judge had passed.

§ 5–200 After Hearing Opens

A notice of hearing accompanying a complaint typically provides that the hearing 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 hearing opens the designated administrative law judge 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." 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); ***Liquor, Wine Sales Representatives, Local 3 (Sazerac Co.),*** 9–CC–298028, unpub. Board order issued Dec. 19, 2022 (2022 WL ----), at 2 n.2 (Regional Director did not abuse his discretion by issuing a prehearing order declining to transfer the hearing to a different location or to hold it by videoconference, but the trial judge "retain[s] discretion to transfer the case in accordance with . . . Section 102.43 or order a remote hearing in accordance with Section 102.34(a)(6) if, as the case proceeds, [the judge] determines that circumstances warrant such action"), and cases cited below.

§ 5–300 Requests for Continuance to Obtain Counsel

Typically, two situations are presented: (1) an unrepresented party seeks a continuance to obtain counsel or other representative; and (2) 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, 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. 1938) ("When the Company received the complaint . . . it should have secured . . . counsel who was free from other engagements to undertake the case with the instant attention contemplated by the Congress."). In striking that balance, 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 the pro se respondent's 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); ***Crusader-Lancer Corp.***, 144 NLRB 1309 n. 1 (1963) (trial examiner did not commit prejudicial error by denying respondents' 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 the bankruptcy court for authorization to appoint an attorney was not made until 3 days before the hearing); ***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 Aug. 14, 2015 (2015 WL 4910611) (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 postponement request where counsel for respondent's 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); ***Michalik, Joseph J***., 96 NLRB 10, 16 (1951) (the conflicting criminal trial was scheduled well after the notice of hearing in the unfair labor practice case, and

respondent's counsel failed to advise the court of the conflicting hearing date when the court asked him to suggest a trial date).

3) Length of continuance contemplated. ***Marine Engineers District 1 (Dutra Construction),*** 312 NLRB 55 (1993) (finding that the judge's denial of respondent counsel's motion for a postponement because of other pending litigation was not an abuse of discretion in part because of "the indefinite length of the requested postponement").

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; ***Franks Flower Express***, above.

6) Availability of substitute counsel. Compare ***Mississippi Valley Structural Steel Co. v. NLRB,*** above, with ***Franks Flower Express***, above; ***Wittek Industries***, 313 NLRB 579 (1993) (judge properly denied respondent's request for a postponement due to unavailability of its counsel of record, inasmuch as corporate counsel, who had some familiarity with the circumstances leading to the discharge of the alleged discriminatees, was available to try case); ***NLRB v. Glacier Packing Co.***, 507 F.2d 415, 416 (9th Cir. 1974) (judge did not abuse his discretion by denying respondent's request for a postponement due to counsel's conflicting legal engagements where other attorneys in the firm were qualified to handle the case). See also ***IATSE Local 720***, 369 NLRB No. 34, slip op. at 1 n. 2, and 6 (2020) (associate chief ALJ did not abuse his discretion by denying respondent's prehearing motion for a continuance due to counsel's scheduling conflict where, inter alia, another attorney with the same firm was involved in the proceeding and available).

§ 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); ***NLRB v. Glacier Packing Co.***, above (4 hours to secure substitute counsel from the same firm after pretrial denials of requests for further continuances).

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

When a continuance has been properly denied, it is not improper to go forward with the hearing without the presence of counsel. ***NLRB v. Glacier Packing Co.***, above; ***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) (judge properly proceeded with the hearing where the respondent's attorney left in the middle of the hearing after an objection to one of his cross-examination questions was sustained, and the attorney agreed to notify respondent that the hearing would proceed in his absence), enfd. 154 F. Appx. 23 (9th Cir. 2005). And see **§ 6–300**, Failure of Party to Appear at Hearing, 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, which afforded 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); ***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. ***Starbucks Corp.***, 373 NLRB No. 115, slip op. at 4 (2024); ***Batchelor Electric Co.***, 254 NLRB 1145 n. 1 (1981), enfd. mem. 716 F.2d 903 (6th Cir. 1983).

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

4) Failure to provide supporting details to explain absence of witness. ***Starbucks Corp.***, above; ***Skyline Builders, Inc.,*** 340 NLRB 109 (2003); ***Riverdale Nursing Home***, 317 NLRB 881 (1995); ***Florida Coca-Cola Bottling Co.***, 321 NLRB 21 n. 2 (1996).

5) Witness simply chose to do something other than attend the hearing. ***Greenpark Care Center***, 236 NLRB 683 n. 3 (1978) (witness chose to leave the country on vacation despite issuance of the notice of hearing almost 2 months before the hearing date); ***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 assert that witness was 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. ***Starbucks Corp.***, above (failure to propose alternatives to lengthy postponement

such as taking remote testimony by videoconference from Mexico); ***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

"Decisions regarding where to prosecute a complaint are primarily an administrative function within the GC's discretion . . . " ***FDRLST Media, LLC***, 2–CA–243109, unpub. Board order issued Feb. 7, 2020 (2020 WL 1182438), at 2, reaffd. 370 NLRB No. 49, slip op. at 1 n. 4 (2020), affd. on point but enf. denied on other grounds 35 F.4th 108, 120–121 (3d Cir. 2022). However, the General Counsel's decision is not unreviewable. See ***Flame of Miami, Inc.***, 159 NLRB 1103, 1105 (1966) (holding that it was "clearly reasonable" and not "an abuse of discretion" for the trial examiner to deny respondents' motion at the opening of the hearing 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 respondents did not contend that holding the hearing in Miami was unreasonable or burdensome); ***Altemose Construction Co. v. NLRB***, 514 F.2d 8, 12 (3d Cir. 1975) (ALJ committed reversible error by denying the respondent employer's motion to move to another location because of the "mob atmosphere" outside the federal building where the hearing was being held). See also **§ 12–500**, Remote Hearings by Video During the COVID-19 Pandemic, below. Thus, if a motion is filed to move all or part of the hearing to another location, the ALJ should consider and rule on it pursuant to the general authority granted in Section 102.35(a)(6) and (8) to regulate the course of the hearing and dispose of motions.

Guidance in ruling on a motion to relocate all or part of a hearing may 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 . . ."). The 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). 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 HEARING

§ 6–100 Representation at Hearing

"Any party has the right to appear at the hearing 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. "The Administrative Law Judge may limit the participation of any party as appropriate." NLRB Rules & Regs., Sec. 102.38.

§ 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); 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 (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 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, the judge 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

§ 6–210 Attorney as Witness

The Board will not police the canons of ethics of the various bar associations. For example, if 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 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 compare **§§ 6-220** and **6-230**, below. See also **§ 11–400,** discussing who is subject to a witness sequestration order.

§ 6–220 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 ***Supreme Airport Shuttle LLC***, 365 NLRB No. 27, slip op. at 1 (2017) ("The Board's decisions make clear that, in an unfair labor practice proceeding, an [ALJ], subject to the Board's review, has the authority to disqualify a party's counsel based on an impermissible conflict of interest."), citing ***Mack Trucks***, 277 NLRB 711 n. 1 and 715–723 (1985). See also ***Stericycle, Inc***., 32-CA-024230, unpub. Board order issued Jan. 28, 2010 (2010 WL ----) (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 cf. **§ 6–210**, Attorney as Witness, above.

For situations where a party's attorney is a former Board lawyer, and is therefore subject to the post-employment restrictions currently set forth in Section 102.120 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 the judge's conclusion that the 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 union, had no conflict under applicable Federal statutes and regulations because she did not do any work on behalf of the union while employed at the law firm and had not served as an attorney or consultant 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 & R" cases (where a complaint in an unfair labor practice case is consolidated for hearing with election objections or challenged ballots in a representation case), established Board and court precedent permits counsel for the General Counsel to also serve as the Regional Director's neutral representative for the objections/ballots portion of the case. See, e.g., ***Barrus Construction Co. v. NLRB***, 483 F.2d 191, 194–195 (4th Cir. 1973), and cases cited there. See also **§ 14–200**, Consolidated Representation Cases, below.

§ 6–230 "Skip Counsel" Violations

Rule 4.2 of the ABA Model Rules of Professional Conduct, sometimes referred to as the "skip counsel" rule, states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

This rule and similar state bar and federal court ethics rules generally prohibit an attorney from communicating directly with a represented person about the subject of the representation without prior consent from that person's attorney or legal authorization to do so. For a detailed discussion of issues that may arise under such skip counsel rules with respect to both current and former supervisors/agents and the evidentiary sanctions issued by courts for violations, see **ABA, Ann. Mod. Rules Prof. Cond. § 4.2** (10th Ed. 2023).

The General Counsel's policies with respect to unfair labor practice investigations are set forth in the NLRB Casehandling Manual (Part 1), Sec. 10058, and periodically in GC Memoranda. See also Lori Ketcham, *Skip Counsel Issues in NLRB ULP Investigations*, 16 No. 1 Prof. Law. 18, 20 (2005).

For Board cases addressing alleged skip counsel violations, see ***Operating Engineers, Local 17 (Hertz Equipment Rental Corp.)***, 335 NLRB 578 (2001) (finding that the Region's investigator properly took an affidavit of the respondent union's organizer and agent without the presence of respondent's counsel given that the investigator initiated contact and scheduled the interview before a notice of appearance had been filed, the union organizer voluntarily agreed to go forward with the interview after the notice of appearance was filed, and the investigator promptly left a phone message with the respondent's attorney advising him of the scheduled interview); and ***Success Village Apartments, Inc***., 347 NLRB 1065 (2006) (rejecting 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 under the GC's then-existing investigatory policy in Sec. 10058 of the NLRB Casehandling Manual; the applicable state rule of professional responsibility permitted ex parte contacts between a government agency and a former employee of a represented adverse party unless the former employee had become a trial consultant for the former employer in preparing for the litigation).

§ 6–300 Failure of Party to Appear at Hearing

When the respondent has filed an answer, but its lawyer or representative fails to appear at the hearing, 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 the respondent is found insufficient, a default or summary judgment may be appropriate. See **§§ 3–500**, and **10–400**.

§ 6–400 Rights of Charging Parties and Alleged Discriminatees

Charging Parties. Section 102.38 of the Board's Rules provides that:

> Any party has the right to appear at the hearing 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, except that the Administrative Law Judge may limit participation of any party as appropriate.

As indicated in **§ 8–110**, below, like other parties to the proceeding, a charging party has the right to subpoena relevant documents for the hearing. See, e.g., ***Amazon.com Services LLC***, 29–CA–261755, unpub. Board order issued Nov. 18, 2021 (2021 WL 5447980) (judge did not abuse his discretion in denying respondent's petition to revoke portions of the Acting General Counsel's subpoena duces tecum and the Charging Party's subpoena duces tecum).

Normally, the judge should specifically offer the charging party an opportunity to question each witness called by the other parties. See ***Cowin & Co.***, 322 NLRB 1091 n. 1 (1997) (the "better practice" is for the judge to "specifically offer" the charging party the opportunity to question each witness, although the failure of the judge to do so does not constitute a denial of due process absent a showing of prejudice).

As discussed in **§ 16–613.1,** Jencks Statements, below, the charging party also has the right on request, for purposes of cross-examination, to review the pretrial Board affidavit of a respondent agent after being called and examined by the respondent or by the General Counsel (as an adverse witness).

However, 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. The charging party therefore has no right to introduce evidence in support of an allegation or theory not asserted by the GC.

With respect to remedies, the responsibility for fashioning an appropriate remedy rests with the Board under Section 10(a) and (c) of the Act. See ***Aryzta, LLC***, 369 NLRB No. 55, slip op. at 4 and n. 6 (2020) (holding, for this reason, that the Board in a stipulated-record case "retains discretion to order remedies it deems necessary to effectuate the policies of the Act even if those remedies do not comport with the parties' stipulated remedies"). 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).

Alleged Discriminatees. Alleged discriminatees have no right to participate as a party unless they have filed an unfair labor practice charge or have moved to intervene and thereby become a party in the proceeding. See ***Lincoln Technical Institute, Inc.***, 256 NLRB 176 (1981) (alleged discriminate who failed to file either a charge or a motion to intervene had no right to file exceptions to the ALJ's decision), rev. denied 682 F.2d 427 (3d Cir. 1982).

As discussed in **§ 16–611.5**, below, the failure of an alleged discriminatee to appear and testify at the hearing in support of the complaint allegations does not warrant an adverse inference where the testimony is unnecessary.

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

§ 6–500 Intervention at Hearing

Section 102.29 of the Board's Rules permits "any person" to file a motion with the judge during the hearing to intervene. The motion must be in writing or made orally on the record at the hearing and "stat[e] the grounds upon which [the] person claims an interest."

For useful guidance in evaluating the timeliness of such motions, see **2 Moore's Manual–Federal Practice and Procedure § 14.101** (2023); and **Wright & Miller et al., 7C Fed. Prac. & Proc. Civ. § 1916** (3d ed. Apr. 2026 Update) (discussing timeliness of motions to intervene in federal court actions under FRCP 24). See also ***DirectSat USA, LLC***, 366 NLRB No. 141, slip op. at 2 (2018) (denying as untimely non-party DirecTV's motion to intervene to seek reconsideration of the Board's decision, as DirecTV was aware months before the case was submitted to the judge that a proceeding was underway that could affect its interests), enfd. 925 F.3d 1272 (D.C. Cir. 2019); ***Boeing Co***., 366 NLRB No. 128, slip op. at 2 and n. 3 (2018) (denying a non-party union's motion to intervene to seek reconsideration of the Board's decision, in part because, although the Board has permitted posthearing intervention in "rare instances," Section 102.29 does not provide for intervention after the close of the hearing); ***Postal Service***, 5–CA–122166, unpub. Board order issued June 25, 2015 (2015 WL 3932157) (denying as untimely a motion to intervene filed by a law firm representing a member of a trade association after the Board had adopted the judge's decision in the absence of exceptions); ***Hilton Hotels Corp***., 287 NLRB 562 n. 3 (1987) (denying an alleged discriminatee's motion to intervene as a party to join the charging party union's statement of position on remand from the court of appeals).

Whether to grant a motion to intervene is within the discretion of the judge or Board. See Section 10(b) of the Act (any person may be allowed to intervene and present testimony "in the discretion" of the judge or Board); and Section 102.29 of the Board's Rules (the judge "may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper"). See also ***DirectSat USA***, above (intervention in unfair labor practice proceedings is discretionary and not a matter of right). Accordingly, the ruling of the judge or Board will not be disturbed absent abuse or prejudice. ***Auto Workers v. NLRB***, 392 F.2d 801, 809 (D.C. Cir. 1967); ***Semi-Steel Casting v. NLRB*****,** 160 F.2d 388, 393 (8th Cir. 1947); Cf. ***J. P. Stevens Emp. Educ. Comm. v. NLRB***, 582 F.2d 326, 328–329 (4th Cir. 1978) (Board's denial of a motion to intervene is reviewable after the Board has issued its final order).
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The Board has addressed motions to intervene in a variety of situations.

Benefit fund trustees. The Board has held that 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 (1978). In that case, the judge concluded that the trustees would have no interest in the matter 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), 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 in its master labor agreement prohibiting subcontracting to employers who were delinquent in making payments to the funds.

Employer associations. 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).

Subcontractors See ***Postal Service***, 5–CA–140963, unpub. Board order issued Nov. 4, 2015 (2015 WL 6750316). In that case, the complaint alleged that the Postal Service had violated 8(a)(5) by unilaterally contracting out bargaining unit work to Staples and requested that the Postal Service be required to restore the unit work as a remedy. The Board held that the judge erred in granting Staples' motion to intervene as a party in the proceeding, as the complaint did not allege that Staples engaged in any unlawful conduct or that the contract between the Postal Service and Staples was invalid, or seek relief against Staples; rather, Staples' only interest appeared to be the potential impact of the remedy on its contract with the Postal Service. The Board therefore vacated the judge's order and directed the judge to "consider how best to afford Staples an opportunity, short of full-party status, to address its interest in remedial matters."

Parties in other pending cases. See ***Boeing Co***., above (denying a non-party union's motion to intervene to seek reconsideration of the Board's decision, in part because the union was a party in another case pending before the Board where it would have the opportunity to make the same arguments).

Alleged discriminatees. As discussed in **§ 6–400** above, the Board in ***Lincoln Technical Institute, Inc.***, 256 NLRB 176 (1981), rev. denied 682 F.2d 427 (3d Cir. 1982), held that alleged discriminatees who are not charging parties must timely move to intervene before the judge in order to have a right to file exceptions to the judge's decision. Nevertheless, alleged discriminatees rarely seek to intervene at the hearing, but instead rely on the General Counsel and the charging party to advocate and protect their interests. For a case where a judge granted a motion to intervene filed by the two alleged discriminatees, see ***Murray American Energy***, 6-CA-148388, JD–26–16 (2016 WL 1359359) at 1 n. 1, adopted in the absence of exceptions by unpub. Board order dated May 17, 2016 (2016 WL 2894515).

Decertification petitioners. See ***Chino Valley Medical Center***, 363 NLRB 963 n. 1 (2016) (judge did not abuse his discretion by denying the decertification petitioner's motion to participate as an intervenor in the 8(a)(5) case alleging that the employer unlawfully withdrew recognition from the union), enfd. 895 F.3d. 69 (D.C. Cir. 2018); ***Latino Express, Inc***., 360 NLRB 911 n. 2 (2014), reaffg. unpub. Board order issued Nov. 27, 2012 (2012 WL 5942293) (same); and ***Leggett & Platt, Inc***., 9–CA–194057, unpub. Board order issued Jan. 23, 2018 (2018 WL 549552) (same). See also ***Wyman Gordon Pennsylvania, LLC***, 4–CA–182126, unpub. Board order issued March 19, 2018 (2018 WL 1407026) (judge in 8(a)(5) withdrawal-of-recognition case did not abuse his discretion by granting the decertification petitioner only limited intervention to file a posthearing brief rather than full intervention).

Antiunion employees. See ***Hotel Del Coronado***, 345 NLRB 306 n. 1, JD. at 308 n. 1 (2005) (judge denied an antiunion employee's motion to intervene in the 8(a)(5) case to urge that a neutrality agreement 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); ***Aztec Bus Lines***, 289 NLRB 1021, 1033 n. 3 (1988) (Board reversed the judge and ruled that a nonstriker lacked standing to intervene on behalf of himself and other nonstrikers in the 8(a)(1), (3), and (5) case alleging various violations by the employer before, during, and after the strike); and ***McKinney v. Southern Bakeries, LLC***, 2014 WL 2812257 (W.D. Ark. June 23, 2014) (court denied antiunion employee's motion to intervene in the 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).

See also ***Affinity Medical Center***, 8-CA-90083, unpub. Board order issued April 30, 2013 (2013 WL 1809351), final decision and order issued 362 NLRB 654 (2015). There, 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 postelection objections proceeding on the ground that individual employees do not have standing to file objections. See *unpub. Board order issued Jan. 11, 2013 (2013 WL 143371). 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.

But see ***Washington Gas Light Co***., 302 NLRB 425 n. 1 (1991) (Board affirmed judge's ruling permitting an employee to intervene to represent his own interests in the 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 the 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 General Counsel's objection, and permitted 114 employees to intervene in the 8(a)(5) case to challenge the validity of their authorization cards), enfd. 441 F.2d 514 (5th Cir.); ***Spruce Pine Mfg.***, 153 NLRB 309 n. 1 (1965) (judge granted motion by 64 antiunion employees, who were represented by counsel, to intervene in the 8(a)(5) case, and many testified regarding the manner in which the union procured authorization cards), 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) (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).

Employees generally. 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). 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 the 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 intervention to white and Hispanic 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 indispensable 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 1704 n. 2, 1729 (2015) (holding UPMC, the parent entity of the respondent companies, liable for certain of the Board-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 normally 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); ***United States 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 the 8(a)(2) allegations, its joining or becoming a party to the settlement of the 8(a)(1) and (3) allegations was unnecessary).

Note, however, that the Region may name a decertification petitioner as a "party in interest" in a related unfair labor practice complaint solely for the purpose of receiving a copy of the order or other document that finally disposes of the proceeding. See NLRB Casehandling Manual (Part 1), Sec. 11733.2(b); ***BOC Group, Inc.***, 323 NLRB 1100 (1997). See also **§ 6–500,** above, regarding intervention by decertification petitioners.

§ 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. A brief recess may also help in certain circumstances. See ***Estate of Diaz v. City of Anaheim***, 840 F.3d 592, 604 (9th Cir. 2016) ("After all, lawyers and witnesses, like misbehaving children or rattled basketball players, sometimes need a timeout.").

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 Investigating Officer (the head of the Division of Operations Management, or designee) for investigation and appropriate action. Each of these is discussed in the following sections. See also **§ 3–620**, above (striking frivolous, irrelevant, or otherwise improper affirmative defenses in an answer), and **§ 15–400**, below (striking false or otherwise improper or unprofessional briefs).

§ 6–610 Exclusion of Counsel

Section 102.177(b) of the Board's Rules provides that "misconduct by any person . . . may 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). There, 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 on the record that counsel 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.).

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, 2006 WL 691192 (Mar. 15, 2006), 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 a default judgment imposing a 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); ***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 F. Appx. 911 (2d Cir. 2008); ***Space Expl. Techs. Corp. v. NLRB***, 151 F.4th 761, 775 (5th Cir. 2025). A formal admonition or reprimand declares the conduct improper and cautions or warns the offender that repeating the offense will result in more severe discipline. ***Sargent Karch***, 314 NLRB 482, 486 and n. 14 (1994) (citing ABA Standards and Black's Law Dictionary). See also ***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 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; repeatedly misidentifying an opposing party's representative in an unprofessional manner, ***National Assn. of Broadcast Employees and Technicians Local 51 (ABC)***, 371 NLRB No. 15, slip op. at 1 n. 4 (2021) (referral to the Investigating Officer for investigation and disciplinary action if appropriate); 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 Board rule, Section 102.21, specifically provides for disciplinary action against an attorney or representative for willfully filing an answer that is not supported by good grounds 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., ***Nursing Center at Vineland,*** 318 NLRB at 338 n.7; ***Graham-Windham Services***, 312 NLRB 1199 n. 2 (1993); ***Worldwide Detective Bureau***, 296 NLRB 148 n. 2 (1989); ***M. J. Santulli Mail Services***, 281 NLRB 1288 n. 1 (1986). See also ****Uzi Einy***, 352 NLRB 1178 (2008) (imposing 6-month suspension on the respondent's nonattorney 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 misconduct at the hearing," which is "of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions."

Procedure for referral of allegations. Under Section 102.177(e), any person, including the Board and its ALJs, can file an allegation of misconduct with the Investigating Officer—the Associate General Counsel, Division of Operations Management. After an investigation, the Investigating Officer makes a recommendation to the General Counsel who has final, unreviewable authority to initiate disciplinary proceedings against an attorney or other representative. See, e.g., ***Roemer Industries, Inc***., 367 NLRB No. 133, slip op. at 1 n. 2 (2019) (Board referred to the Investigating Officer allegations regarding a persistent pattern of misrepresentation by the respondent employer's attorney in briefs and other documents filed with the Board or its ALJs); ***Imperial Sales, Inc***., 365 NLRB 947, 949 n. 15 (2017) (Board referred allegations of hearing misconduct by the respondent employer's attorney to the Investigating Officer for investigation and appropriate disciplinary action).

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 the judge's 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 F. Appx. 911 (2d Cir. 2008); and ***McAllister Towing & Transportation***, 341 NLRB 394, 398 n.7 (2004), enfd. 156 F. Appx. 386 (2d Cir. 2005). See also ***Smithfield Packing Company, Inc.***, 344 NLRB 1, 19 n. 59 (2004) (agreeing with the judge's recommendation to refer perjury and subornation of perjury allegations to the

Investigating Officer 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 Investigating Officer 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 the 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 "must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those 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 ABA 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 that imposed a 6-month suspension on 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 a default judgment and imposed a 6-month suspension on the respondent employer's nonattorney representative for his misconduct during the trial in ***USA Remediation Services, Inc.***, 5–CA–31524, JD–20–06, 2006 WL 691192 (March 15, 2006), adopted in the absence of exceptions May 16, 2006); and ****Uzi Einy***, 352 NLRB 1178 (2008) (imposing a 6-month suspension on the respondent's nonattorney 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 a 2-1/2 year suspension to an attorney who had lied to the judge in one proceeding, purposely delayed other proceedings by engaging in frivolous delaying tactics, including failing to produce subpoenaed documents without filing a motion to revoke in three separate proceedings, and filing 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 a 1-year suspension to an 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 unpub. district court order dated Feb. 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 a criminal proceeding to subornation of perjury in a prior Board proceeding). See also ***Application and Motion of Horowitz***, 266 NLRB 755 (1983) (denying the same attorney's subsequent request for reinstatement of his right to appear before the 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, 1255 (2001). See also ***Chino Valley Medical Center***, 363 NLRB 963 n. 5 (2016); and ***Pacific Beach Hotel***, 361 NLRB 709, 711–712 (2014); and cases cited there.

But see ***HTH Corp. v. NLRB***, 823 F.3d 668, 678–679 (D.C. Cir. 2016), denying enforcement in relevant part of ***Pacific Beach Hotel,*** above, where the court held that the Board has neither inherent authority nor implicit authority under Sec. 10(c) of the Act to order a respondent to pay the litigation expenses of the General Counsel and the union. See also ***Veritas Health Services v. NLRB***, 895 F.3d 69, 86 (D.C. Cir. 2018), denying enforcement in relevant part of ***Chino Valley***, above, where "the Board agree[d] that its award of litigation costs and expenses was incorrect" and did not seek enforcement of those portions of its order, citing ***HTH Corp. v. NLRB.***

§ 6–650 Counsel Misconduct as Unfair Labor Practice

In certain circumstances, a respondent counsel's questions or statements to or in the presence of witnesses at the hearing may constitute an unfair labor practice. See ***AM Property Holding Corp.***, 350 NLRB 998 n. 4 (2007) (granting the General Counsel's motion to amend the complaint during the hearing and finding that the respondent's counsel violated Section 8(a)(1) and (4) of the Act by stating on the record, in the presence of the witness, that he would "have to get an investigator" and "find out whether [the witness] is here in this country illegally"); and ***Imperial Sales, Inc***., 365 NLRB 947, 949 n. 13–15, 959–960 (2017) (granting the General Counsel's motion to amend the complaint during the hearing and finding that the respondent's counsel violated Section 8(a)(1) by telling the alleged discriminatees in the hearing room that he would report them to the immigration authorities and that they would "not get a penny"), enfd. 740 F. Appx. 216 (2d Cir. 2018).

But compare ***Wendt Corp.***, 3–CA–21225, unpub. Board order issued Nov. 13, 2018 (2018 WL 5964286). In that case, the respondent's counsel asked a witness on cross-examination whether he had taken certain notes during his work time. The General Counsel objected and moved to amend the complaint to allege that counsel's question threatened the witness with potential discipline in violation of Section 8(a)(1) of the Act. The judge granted the motion to amend. However, he reserved ruling on the merits of the amendment. Nevertheless, the respondent filed an immediate request for special permission to appeal, and the Board

reversed, finding that the judge abused his discretion in permitting the amendment during the hearing. The Board reasoned that, although counsel's line of questioning was "inartfully expressed," it was "relevant to determining whether the notes taken by the witness had been recorded at the time the events occurred or sometime later," which counsel "immediately emphasized" in response to the GC's objection. The Board distinguished *AM Property* and *Imperial Sales* because they involved "very exceptional circumstances" where the "threatening questions or statements by counsel" were "unrelated to the unfair labor practices at issue." Accordingly, the Board directed the judge to "reject the complaint amendment, without prejudice to the General Counsel's right to litigate this issue in a separate proceeding."

§ 6–660 Referral for Possible Prosecution

Certain misconduct, whether committed by counsel, a party, or a witness, may violate Section 12 of the Act (interference with Board proceedings) or criminal statutes such as 18 U.S.C. §1001 (false statements) and 18 U.S.C. §1621 (perjury). See ***Pain Relief Centers, P.A***., 371 NLRB No. 70, slip op. at 4 (2022) ("The submission of fraudulent evidence in an NLRB proceeding is a serious matter and may warrant referral to the Department of Justice for possible criminal prosecution."), enfd. 2023 WL 5380323 (4th Cir. 2023). Where the record before the judge indicates that such misconduct occurred, the judge may recommend that the Board refer the matter to the appropriate authorities for possible prosecution. See, e.g., ***Multimatic Products***, 288 NLRB 1279 n. 2, 1336–1337 (1988) (judge recommended, and the Board agreed, that the charging party union's alleged submission of false evidence during the investigation and in the hearing should be referred to the appropriate authorities for possible prosecution). Compare ***Irwin Industries, Inc***., 325 NLRB 796, 797 n. 7 (1998) (Board declined to refer the charging party union's alleged misconduct to the Justice Department, as there was no showing that the union created any fraudulent evidence; rather, the judge simply credited one party's testimony over the other).

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, because the judge typically does not issue any final rulings on disputed issues during the calls, the calls are normally 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) (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 shortly before or during the calls, the judge may defer making any final rulings until later, either in a written order or at the hearing.

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 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 1084 (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. Section 102.118(a) of the Board's Rules prohibits the disclosure of documents in the General Counsel's possession, whether in response to a subpoena or otherwise, without the GC's written consent. As discussed in **§ 8–445**, below, Section 102.118(e) provides only a limited exception requiring production of Jencks statements by GC or charging party witnesses after they have testified.

The Board, with court approval, has historically followed this rule against pretrial discovery both 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); ***David R. Webb Co***., 311 NLRB 1135 (1993), and authorities cited there. See also ***Kenrich Petrochems, Inc. v. NLRB***, 893 F.2d 1468, 1484 (3rd Cir. 1990) ("[N]either the [C]onstitution nor the Administrative Procedure Act confer[s] a right to discovery in federal administrative proceedings."), vacated and remanded on other grounds 907 F.2d 400 (3d Cir. 1990) (en banc).

Thus, the judge may not order the General Counsel to provide the respondent with a witness list. See ***Beta Steel Corp***., 326 NLRB 1267 n. 3, 1268 (1998), enfd. mem. 210 F.3d 374 (2000); ***Bashas', Inc.***, 352 NLRB 661 (2008). See also **§ 3–230**, Bill of Particulars or More Definite Statement, above. Nevertheless, the GC in some instances may voluntarily provide the respondent with advance notice of 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, "[w]here 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 and Powers of Trial Judge, above.

However, the policy against pretrial discovery does not mean that production of subpoenaed documents cannot be compelled until the day the first witness is scheduled to testify. See, e.g., ***Quickway Transportation***, 09-CA-251857, unpub. Board order issued Oct.19, 2021 (2021 WL 4893957), at 2 (ALJ did not abuse his discretion by opening hearing solely to rule on subpoena issues and ordering respondent to immediately begin producing subpoenaed documents on a rolling basis, notwithstanding that the hearing was not scheduled to resume to take witness testimony until a month later).

Production of electronically stored information may also be compelled even before the hearing opens if the additional time would be needed to convert the produced ESI into a "reasonably usable" format. See ***Starbucks Corp.,*** 372 NLRB No. 147 (2023). In that case, respondent produced subpoenaed ESI in TIFF+ format when the hearing opened. However, the General Counsel asserted that ESI in that format would not be searchable electronically, and therefore not reasonably usable, for several days until the NLRB's vendor had processed it through Relativity. The ALJ therefore ordered that any ESI produced in TIFF+ format must be produced 4 days before the hearing resumed. The Board subsequently denied respondent's special appeal, stating,

> [I]t is within the judge's broad discretion, granted by the Board's Rules and Regulations, to require the Respondent's subpoena responses to be at a time and in format that is reasonably usable by the start of the hearing or, as in this instance, by the resumption of the hearing.

The Board added that "it is well within the judge's discretion, sua sponte or on request, to issue an order limiting the General Counsel's access to the documents should they be made available before the start of the hearing." See also **§ 8–340**, Electronically Stored Information, below.

§ 7–300 Depositions

Under Section 102.30 of the Board's Rules, the judge has "discretion" to grant an application to take testimony by deposition, including by videoconference, but only upon a showing of "good cause". See ***December 12, Inc.***, 282 NLRB 475 n. 1 (1986) ("The Board does not allow the taking of depositions to provide discovery in ordinary circumstances."); ***David R. Webb Co.***, 311 NLRB 1135, 1136 (1993) (same rule generally applies in compliance proceedings). See also ***Kenrich Petrochemicals v. NLRB,*** above (ALJ properly denied respondent's request to depose the General Counsel's witnesses, as the Board's rules normally do not permit prehearing discovery and the "good cause" exception is limited to instances where discovery is needed for the preservation of evidence, usually because the witnesses will not be available to testify at the hearing).

A respondent's failure to request permission to take a deposition of a nontestifying witness was cited as grounds for rejecting the witness's prior state court deposition in ***Goya Foods of Florida***, 347 NLRB 1118, 1119–1120 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008). The ALJ in that case denied the respondent's request to admit the witness's prior state court deposition

because 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 pursuant to Section 102.30 of the Board's Rules.

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

CHAPTER 8. SUBPOENAS

§ 8–100 Issuance of Subpoenas

§ 8–110 Application for Subpoena

"Any party" to the proceeding may file an application for a subpoena. Sec. 11(1) of the Act; Sec. 102.31 of the Board's Rules. Before the hearing, the application must be filed with the Regional Director; during the hearing, it must be filed with the judge. Ibid. As discussed in **§ 2–220**, above, the application may be made ex parte.

Upon receipt of the application, the subpoena(s) must be issued; there is no discretion. See Sec. 11(1) of the Act ("shall"); Sec. 102.31 of the Board's Rules ("will"). See also ***Lewis v. NLRB***, 357 U.S. 10, 14 (1958) ("The Act makes clear that issuance of subpoenas is mandatory. . . .The only function remaining is ministerial. Consequently, the Board supplies blank subpoenas bearing its seal and the facsimile signature of a Board member to its regional offices and [administrative law judges] . . . . Upon application of a proper party the [regional office or ALJ] automatically issues the subpoena to the applicant."). Indeed, for this reason, it is not inappropriate for the regional director to issue a requested subpoena after the hearing has opened if the judge is not available. See ***Free-Flow Packaging Corp.***, 219 NLRB 925, 926 (1975) (regional director issued subpoena over the weekend), enfd. in part 566 F.2d 1124 (9th Cir. 1978).

Thus, if requested to do so, the judge should issue the subpoena and await a petition to revoke, even if it is clear at the outset that a petition to revoke would be granted. See ***Canova v. NLRB***, 708 F.2d 1498, 1503 (9th Cir. 1983).

§ 8–120 Service of Subpoena

As discussed in **Chapter 4,** above, service of subpoenas may be made personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law. See Sec. 102.4(b) of the Board's Rules.

Principal office or place of business. In ***Starbucks Corp.***, 372 NLRB No. 147 (2023), the Board found that the ALJ did not abuse her discretion in ruling that service of a General Counsel subpoena ad testificandum was proper where it was served on the respondent's manager at the location where the alleged unfair labor practices occurred and where the manager occasionally worked, notwithstanding respondent's contention that it was not the manager's principal place of work.

Service by private delivery service. Service may be made by Federal Express or similar carrier. ***Offshore Mariners United***, 338 NLRB 745 (2002). There is no requirement that the subpoena be left with a person specifically authorized to accept service of subpoenas. See ***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).

Proof of service. A verified return by the serving individual, a return post office receipt, or any other sufficient proof may be relied upon to establish that service was made. NLRB Rules

and Regulations, Sec. 102.4(d). 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).

Service on attorney or representative. Pursuant to Section 102.4(e) of the Board's Rules, a copy of the subpoena must also be served on any attorney or representative who has entered an appearance for a party. If served by the Board or its agents, service on the attorney or representative may be made by any means of service permitted by the Rules, including regular mail. See also ***NLRB v. Vista Del Sol Health Services, Inc.***, 40 F.Supp. 3d 1238, 1258 (C.D. Cal. 2014).

However, absent a showing of prejudice, the failure to serve counsel does not constitute grounds for revoking a subpoena or invalidate it ab initio. See ***Haynes Security Services, Inc***., 12–CA–296934, unpub. Board order issued Dec. 2, 2022 (2022 WL 17416555), at 1 n. 3 (finding no prejudice where a timely petition to revoke was filed); ***Arizona 811***, 28–CA–182241, unpub. Board order issued Feb. 2, 2017 (2017 WL 971635), at 1 n. 3 (same), and court cases cited there. Further, a lawyer with actual notice of a subpoena must file a petition to revoke to raise a credible claim of prejudice, even if over 5 days have passed since service on the client. ***NLRB v. Fresh & Easy Neighborhood Market***, 805 F.3d 1155, 1161–1162 (9th Cir. 2015).

§ 8–125 Timing of Service of Subpoena

The General Counsel's Casehandling Manual states that subpoenas "should, where circumstances allow, normally be served at least 2 weeks prior to trial" to allow sufficient time to arrange for production of the witness or documents and for ruling on a petition to revoke before trial. NLRB Casehandling Manual (Part 1), Sec. 10340.

In ***McAllister Towing***, 341 NLRB 394 (2004), enfd. 156 F. Appx. 386 (2d Cir. 2005), the Board rejected the respondent's contention that 2 weeks was insufficient. In that case, 12 days before the hearing, the General Counsel properly served each of the two entities allegedly constituting a single employer with a subpoena duces tecum requesting approximately 30 categories of documents. The Respondent timely petitioned to revoke the subpoenas, arguing that they would require production of "hundreds of thousands of pages of documents stored in numerous locations throughout the world," that most of the documents were irrelevant, and that the GC timed the subpoenas "solely to interfere with [its] preparation for the hearing." At a conference call the morning before the hearing opened, the judge advised counsel that she would rule on the petition to revoke the following morning, but instructed that the respondent should be ready to "substantially comply" with the subpoenas at that time. She rejected the respondent's argument that it was not obliged to gather and produce the documents until she ruled on the petition.

When the hearing opened the next day, the judge revoked the subpoenas in part and ordered the respondent to comply with the remaining parts. The respondent, however, failed to produce any significant records, repeating its position that 2 weeks prior to trial was too short and that it was entitled to a reasonable time to comply after the ruling on the petition to revoke. At the GC's request, the judge therefore imposed certain evidentiary sanctions.

The Respondent excepted to the judge's ruling following issuance of her decision. However, the Board found that the ruling was not an abuse of discretion, stating, "We agree with the General Counsel 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." 341 NLRB at 397.

See also *__Voith Industrial Services, Inc__., 9-CA-75496, unpub. Board order issued Aug. 27, 2012 (2012 WL 3679872) (granting the General Counsel's special appeal and reversing the judge's order partially quashing a 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").

§ 8–130 Geographic Reach of Subpoena

Section 11(1) of the Act states that the Board may require the attendance of witnesses and production of evidence "from any place in the U.S. or any Territory or possession thereof, at any designated place of hearing."

§ 8–140 Fees and Mileage Required to be Paid

Witnesses subpoenaed for a hearing must be paid the same fees and mileage that are paid witnesses in the federal courts by the party who issued the subpoena. See Sec. 11(4) of the Act; Sec. 102.32 of the Board's Rules; __Zurn/NEPCO__, 329 NLRB 484, 486–487 (1999). See also 28 U.S.C. Sec. 1821; FRCP 45(b). This rule applies, not only to a subpoena ad testificandum, but also to a subpoena duces tecum if it requires a witness to appear at the hearing and produce the records. See __Colburn Electric Co__., 334 NLRB 532, 538 n. 2 (2001), enfd. 54 F. Appx. 793 (5th Cir. 2002).

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 the recipient may refuse 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); __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. See __Zurn/NEPCO__, above, citing 28 U.S.C. 1825(c). 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), enfd. 3 F. Appx. 116 (2d Cir. 2001).

However, the distance to be traveled may justify requiring that travel expenses be included with service of the subpoena by the GC. See __Zurn/NEPCO__, above (judge concluded that it was an "undue burden" under FRCP 45 to require an expert witness to advance his own costs for the 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

The standard fee for witnesses does not constitute sufficient 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/NEPCO***, 329 NLRB at 486–487.

§ 8–200 Revocation of Subpoenas

§ 8–205 Petition to Revoke "In Writing"

Section 102.31(b) of the Board's Rules provides that petitions to revoke "must" be filed "in writing." However, oral motions may be permitted to avoid delay. See ***G.W. Truck***, 240 NLRB 333 n. 1 (1979) (ALJ did not commit prejudicial error by granting the respondent's petition to revoke the General Counsel's subpoena duces tecum, notwithstanding that it was made orally rather than in writing); ***Harvey Aluminum, Inc***., 147 NLRB 1287 n. 1 (1964) (trial examiner did not commit prejudicial error by granting the General Counsel's oral motion to revoke the respondent's subpoenas duces tecum and ad testificandum). See also ***Earthgrains Co***., 336 NLRB 1119, 1122 (2001), enfd. per curiam 61 F. Appx. 1 (4th Cir. 2003).

§ 8–210 "Within 5 Business Days" Requirement

A petition to revoke must be filed "within 5 business days after the date of service of the subpoena." NLRB Rules and Regulations, Sec. 102.31(b). "The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received." Ibid. The date of service and intermediate Saturdays, Sundays, and holidays are not counted. Sec. 102.2(a).

The petition to revoke must be received on or before the last day for filing, i.e., the postmark rule does not apply. Sec. 102.2(b). If the petition to revoke is filed prior to the hearing, it must be filed with the Regional Director, who will refer it to the administrative law judge or the Board for ruling. If the petition is filed during the hearing, it must be filed with the judge. Sec. 102.31(b).

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) (quashing the respondent's subpoena duces tecum because the requested information was protected by the "reporter's privilege," notwithstanding that the reporter filed his petition to revoke more than 5 days after service), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998). 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"); ***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 (S.D. Ill. March 4, 2005) (following *Lutheran Social Services* with respect to documents protected by the attorney-client privilege and work product doctrine). See also **§ 8–220**, below, regarding a judge's authority to revoke or modify a subpoena sua sponte.

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); ***NLRB v. Uber Technologies, Inc.,*** 216 F.Supp. 3d 1004, 1008 (N.D. Calif. 2016) (likewise distinguishing *Lutheran Social Services* in part because the NLRB investigative subpoena specifically stated that a petition to revoke must be filed in writing within 5 days).

§ 8–215 Standing to File Petition to Revoke

Parties generally have limited standing under FRCP 45 to petition to revoke subpoenas served on third parties or nonparties. See **Wright & Miller et al., 9A Fed. Prac. & Proc. Civ. § 2459** (Apr. 2026 Update) ("Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought."). See also ***Anstead v. Virginia Mason Med. Ctr.***, 2022 WL 1166440, *3 (W.D. Wash. April 20, 2022) (finding that defendant employer in employment discrimination case lacked standing to petition to revoke plaintiff's subpoenas on third-party consultants based on irrelevance, overbreadth and undue burden, but had standing to assert that certain subpoenaed documents were protected by the attorney client privilege).

However, the Board appears to distinguish between private parties and the General Counsel in applying this general rule.

Private parties. Consistent with the federal practice, the Board has held that an employer lacks standing to petition to revoke subpoenas addressed to employees and other third parties unless it has a personal right or privilege with respect to the subpoenaed documents. ***Red Apple 180 Myrtle Avenue Development***, 29–CA–184816, unpub. Board order issued April 20, 2017 (2017 WL 1434208) (denying the employer's petition to revoke subpoenas ad testificandum addressed to employees as the employer failed to establish that it possessed any personal privacy rights to the information sought from them); ***Jones & Carter, Inc***., 16-CA-27969, unpub. Board order denying petition to revoke issued Oct. 20, 2011 (2011 WL 4994786), and unpub. Board order denying motion for reconsideration issued Dec. 30, 2011 (2011 WL 6936398) (holding that the employer's assertion of a contractual property interest in the services of its employees was not a legally sufficient basis to establish standing to petition to revoke subpoenas ad testificandum addressed to them).

See also ***Elite Ambulance, Inc***., 31–CA–122353, unpub. Board order issued July 25, 2017 (2017 WL 3229278). In that case, Respondent Elite Ambulance petitioned to revoke investigative subpoenas duces tecum issued by the Region to Bank of America, N.A. The subpoenas sought bank records of the Respondent's owner and her husband to investigate whether they or other related business entities should be held personally or otherwise derivatively liable as alter egos to remedy the Respondent's backpay obligations. The Board held that the Respondent lacked standing to file the petition to revoke, as it had "failed to substantiate its assertion that it has any personal right or privilege with respect to the bank records sought, which are the personal bank records of individuals who are not parties to this proceeding and not the corporate records of Elite Ambulance, Inc."

With respect to a union's standing to assert the rights of employee-members in opposition to a subpoena, see ***NLRB v. Raley's Drug Center***, No. 95-15192, 1996 WL 304762 (9th Cir. 1996) (unpub.) (union had standing to assert the first amendment associational rights of its

employee-members in opposition to enforcement of an NLRB subpoena issued to the employer during the NLRB's investigation of a rival union's charges that the employer unlawfully assisted and recognized the union).

General Counsel. Consistent with the general federal rule, the Board has held that the General Counsel may petition to revoke a subpoena issued to a third party or nonparty where the subpoena improperly calls for production of confidential NLRB affidavits or statements. See ***Santa Barbara News-Press***, 357 NLRB 452, 502 (2011), enf. denied on other grounds 702 F.3d 51 (D.C. Cir. 2012); ***H.B. Zachry Co***., 310 NLRB 1037 (1993).

The Board has also granted GC petitions to revoke third-party or nonparty subpoenas on the ground that the subpoenas seek irrelevant information or would otherwise undermine the integrity or efficacy of the Agency's proceedings. See ***King Soopers, Inc.***, 364 NLRB 1153, 1160, 1174 (2016) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the individual charging party seeking documentation of her search for work efforts and expenses, as the subpoenaed information was irrelevant at the merits stage of the proceeding), vacated in part on other grounds 859 F.3d 23 (D.C. Cir. 2017); ***Hoschton Garment Co***., 279 NLRB 565 n. 4 (1986) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the alleged discriminatee seeking evidence whether she had obtained a leave of absence under false pretenses, as such evidence was immaterial to the issues in the case); ***Modern Plastics Corp.,*** 155 NLRB 1126, 1136 n. 17 (1965) (granting the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the charging party union's business agent seeking the collective-bargaining agreements between the union and other employers, as the subpoenaed documents were irrelevant to the issues in the case), set aside on other grounds 379 F.2d 201 (6th Cir. 1967). See also ***Imperial Sales, Inc***., 365 NLRB 947, 953 n. 2 (2017) (granting the General Counsel's motion to quash subpoenas ad testificandum served by the respondent employer on a number of employees to examine them about certain complaint amendments), enfd. 740 F. Appx. 216 (2d Cir. 2018).

Although these cited decisions do not specifically discuss standing, they are consistent with the General Counsel's broader public interests and responsibilities with respect to Agency proceedings. See ***Alberici-Fruin-Colnon***, 226 NLRB 1315, 1316 (1976) ("Once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and duty of enforcing the Act in which the public has an interest . . ."), enfd. 567 F.2d 833 (8th Cir. 1977); ***NLRB v. Laborers Local 282***, 567 F.2d 833, 835–836 (8th Cir. 1977) ("Once an unfair labor practice charge is filed, the General Counsel proceeds in the public interest, not just in vindication of private rights."); ***Philip Carey Mfg. Co. v. NLRB,*** 331 F.2d 720, 734 (6th Cir. 1964) ("The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants.").

See also ***Leslie ex. rel. NLRB v. Starbucks Corp***., 2022 WL 7702642 (W.D.N.Y. Sept. 23, 2022) (NLRB Regional Director had standing in 10(j) injunction proceeding to object, both on privilege grounds and on undue burden grounds under FRCP 26(c)(1), to subpoenas the respondent employer served on individual employees and union representatives).

Judge's responsibility and ruling. As standing is jurisdictional in nature, it should be raised sua sponte by the judge even if no party has raised the issue. See ***Jones & Carter***, above. See also ***TMP Worldwide Advertising & Communications, LLC v. LATCareers, LLC***, 2008 WL 5348180 (W.D. Wash. Dec. 16, 2008). If standing is found lacking, the judge may deny the petition to revoke without considering the merits of the petition. See ***Jones & Carter***, above.

Note, however, that there is court authority for construing and considering an invalid FRCP 45 petition to revoke as a motion for a protective order under FRCP 26(c) if the subpoena seeks irrelevant information. See ***Washington v. Thurgood Marshall Academy***, 230 F.R.D. 18, 22 (D.D.C. 2005); ***Auto-Owners Insurance Co. v. Southeast Floating Docks, Inc***., 231 F.R.D. 426, 429 (M.D. Fla. 2005). See also ***Danzy v. IATSE Local 22***, 2020 WL 6887651 (D.D.C. Nov. 23, 2020); ***Agilysys, Inc. v. Hall***, 2018 WL 1229990 (N.D. Ga. Jan. 11, 2018); ***Uhler v. Van Cleave***, 2017 WL 553276 (W.D. Wash. Feb. 10, 2017); ***St. Clair v. Schlachter***, 2016 WL 2984107 (E.D. Cal. May 23, 2016); ***Sirpal v. Fengrong Wang***, 2012 WL 2880565 (D. Md. July 12, 2012). For a discussion of protective orders, see **§ 8–600**, below.

There is also authority indicating that judges may revoke a subpoena sua sponte in some circumstances. See **§ 8–220,** below.

§ 8–220 Judge's Authority to Revoke Sua Sponte

Under FRCP 26(b)(2)(C), a court has authority, and in fact is required, to limit discovery on its own motion where the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action"; or the proposed discovery is "outside the scope of Rule 26(b)(1)," i.e., the discovery is not limited to a "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ." See also ***Jiangmen Kinwai Furniture Decoration Co. Ltd. V. IHFC Properties, LLC,*** 2015 WL 5098791, *7 (M.D.N.C. Aug. 31, 2015) (relying on the court's inherent authority to supervise discovery).

In ***Brink's Inc***., 281 NLRB 468, 470 n.7 1986), the Board cited FRCP 26(b) as support for revoking an employer's subpoena request notwithstanding that the union failed to file a written petition to revoke that particular request as required by the Board's rules. Although the Board primarily relied on the lack of prejudice to the employer—the union orally requested to amend its petition to revoke at the hearing to include the request and the employer had an opportunity to argue against the amendment—the Board also noted that "FRCP 26(b)(1) permits a court to limit discovery 'upon its own initiative'."

For another Board case addressing the issue, see ***Electrical Energy Services***, 288 NLRB 925, 931 (1988). In that case, the General Counsel served a subpoena on the respondent seeking every document that the 8(a)(5) complaint alleged the respondent had unlawfully failed to provide to the union. The respondent petitioned to revoke the subpoena, and the judge granted it on the ground that the GC was attempting to use the subpoena duces tecum as a substitute for the Board order sought by the complaint. Although the GC argued that the respondent's petition to revoke was untimely filed, the judge found it unnecessary to consider the argument, stating, "Even if the petition was not timely filed, I would, on motion of the administrative law judge, revoke the subpoena duces tecum because of the manifest improper purpose it seeks to achieve." The GC subsequently filed exceptions to the judge's decision, but the Board affirmed the judge's rulings, findings, and conclusions.

See also ***Powerback Rehabilitation***, 365 NLRB No. 119, slip op. at 1 n. 2, and 15 (2017), a post-election objections proceeding, where, notwithstanding the absence of a petition to revoke, the Board majority found that the acting regional director did not abuse his discretion by refusing to file a petition for court enforcement of the employer's subpoena duces tecum on the ground that it was "at best, a fishing expedition."

§ 8–225 Grounds for Revoking Subpoena

Section 11(1) of the Act provides, in relevant part, that "[t]he Board … shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."

Section 102.31(b) of the Board's Rules states that a subpoena "will" 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),*** 29–CB–084077, unpub. Board order issued Aug. 29, 2014 (2014 WL 4302555), and cases cited therein.

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 the employer's subpoenas in a representation case). See also ***Clinton Food 4 Less***, 288 NLRB 597 n. 1, 618–619 (1988) (applying *Brink's* analysis in quashing the respondent employer's subpoena in an unfair labor practice case).

The asserted nonexistence of requested records is not grounds for revoking a subpoena. See ***Ironworkers Local 433***, 21–CB–129959, unpub. Board order issued Feb. 4, 2015 (2015 WL 471558), at n. 2 (denying respondent union's petition to revoke, noting that "[i]f no evidence responsive to any portion of the subpoena exists, the custodian of records must provide sworn testimony to that effect, including a description of the [Respondent's] efforts to identify and locate such evidence."). See also **§ 8-350**, Possession or Control, below.

A respondent's assertion that the Board lacks jurisdiction or that the allegations are barred by the section 10(b) statute of limitations are also not grounds for revoking a hearing subpoena, at least where Board jurisdiction is not plainly lacking or the limitations period has not clearly run. See ***NLRB v. Chapa De Indian Health Program, Inc.***, 316 F.3d 995, 1002 (9th Cir. 2003). See also, with respect to investigative subpoenas, ***NLRB v. Bakersfield Californian,*** 128 F.3d 1339, 1351 (9th Cir. 1997) (10(b)); ***Pasha Automotive Services***, 20–CA–195343, unpub. Board order issued June 22, 2018 (2018 WL 3109947) (10(b)); ***EEOC v. Kloster Cruise, Ltd****.,* 939 F.2d 920, 924 (11th Cir. 1991) (jurisdiction); ***NLRB v. Fortune Bay Resort Casino***, 688 F.Supp. 2d 858 (D. Minn. 2010) (jurisdiction); ***Philander Smith College***, 15–CA–278071, unpub. Board order issued Oct. 19, 2022 (2022 WL 11747339) (jurisdiction); ***Eulen America***, 12-CA-26948, unpub. Board order issued July 26, 2011 (2011 WL 3098547) (jurisdiction).

Ordinarily, the judge should not revoke a subpoena on grounds not asserted in the petition to revoke. See ***Postal Workers Local 64***, 340 NLRB 912 (2003). In that case, the Region had issued investigative subpoenas ad testificandum to the charged union's president and vice-president, and the union had petitioned to revoke the subpoenas for certain reasons. The Board majority found that those reasons were without merit. However, the dissenting Board member argued that the testimonial subpoenas should be revoked because the Region failed to make a more specific showing that the testimony was relevant and to describe with more particularity the testimony being sought. The Board majority rejected the argument, finding, contrary to the dissent, that the petition to revoke did not sufficiently raise those issues. The majority stated that, for "both legal (procedural due process) and practical (administrative economy and efficiency)

reasons," the Board should "generally limit[] [its] review" of subpoenas "to the issues and arguments raised by the parties." But see **§ 8–220,** above.

§ 8–230 Ruling on Petition to Revoke

Section 102.31(b) of the Board's Rules states that "[t]he Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke." It is within the judge's discretion whether to issue the ruling orally on the record or in writing. ***Woodford Reserve Distillery***, 373 NLRB No. 145, slip op. at 1 n. 2 (2024).

In ruling on a petition to revoke, the judge may evaluate the subpoena in light of any modifications or limitations that the subpoenaing party offers or agrees to in its opposition to the petition. See, e.g., ***Bannum Place of Saginaw***, 7–CA–211090, unpub. Board order issued Dec. 17, 2018 (2018 WL 6628927), at 1 n. 2; ***FCA US LLC***, 8–CA–185825, unpub. Board order issued Oct. 31**,** 2017 (2017 WL 5000838), at 1 n. 3.

The ALJ'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 ***McAllister Towing & Transportation***, 341 NLRB 394 (2004), discussed in § 8–125, above. See also ***San Luis Trucking***, 352 NLRB 211, 212 (2008), reaffd. 356 NLRB 168 (2010), enfd. 479 F. Appx. 743 (9th Cir. 2012).

In cases where a large number of documents has been subpoenaed, judges sometimes open the hearing solely to rule on pending subpoena disputes, and schedule the hearing to resume at some later date to begin receiving testimony. As indicated in **§ 7–200**, above, it is generally within the judge's discretion to require that the subpoenaed documents be produced before the resumption date in such circumstances, i.e., such an order does not violate the policy against pretrial discovery in Board proceedings. See ***Quickway Transportation***, 09-CA-251857, unpub. Board order issued Oct. 19, 2021 (2021 WL 4893957), at 2.

§ 8–235 Admitting Subpoena Ruling and Related Pleadings Into the Record

Section 102.31(b) of the Board's Rules provides that the ruling on the petition to revoke, as well as the petition, opposition, and response, "will not become part of the official record except upon the request of the party aggrieved by the ruling . . ."

The Board's Rules do not specifically address or limit when the subpoena itself may properly be made part of the record. However, the subpoena is usually an attachment to the petition to revoke and will be admitted along with the ruling and related pleadings when the aggrieved party offers them.

The subpoena is also typically offered and admitted (along with any related pleadings and rulings, notwithstanding the restrictive language in 102.31(b)) when the party serving the subpoena contends it was not fully complied with, so the record on appellate review will include the underlying information considered by the ALJ in determining whether to issue evidentiary sanctions for the alleged noncompliance. See, e.g., ***Cascades Containerboard Packaging–Niagara***, 370 NLRB No. 76, slip op. at 12–13 (2021); ***Queen of the Valley Medical Center***, 368 NLRB No. 116, slip op. at 8 n. 4, 38–40 (2019); ***Shamrock Foods Co***., 366 NLRB No. 117, slip op. at 15 n. 29 (2018), enfd. 779 F. Appx. 752 (D.C. Cir. 2019).

The subpoena is also sometimes offered by the subpoenaing party and admitted, along with related testimony or stipulations, to establish that no responsive documents were received and do not exist. See, e.g., ***Roemer Industries, Inc***., 367 NLRB No. 133, slip op. at 8 (2019) (employer's failure to produce any documents in response to General Counsel subpoena seeking all communications with the union regarding its information request supported a finding that the union never received the information), enfd. 824 F. Appx. 396 (6th Cir. 2020); ***Advanced Architectural Metals***, 351 NLRB 1208, 1211–1212 (2007) (employer's failure to produce any documents in response to GC's subpoena seeking documents reflecting the purported sale or other transfer of the company supported a finding that employer never sold part of the company).

§ 8–300 Scope of Subpoenas

§ 8–310 Material Must Be "Reasonably Relevant"

Generally, 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); ***McDonald's USA, LLC***, 363 NLRB 1362, 1376 (2016); ***Perdue Farms v. NLRB***, 144 F.3d 830, 833–834 (D.C. Cir. 1998) (information must be "reasonably relevant"). Thus, the requesting party need not show that the subpoenaed information would itself be admissible at the hearing. ***NLRB v. North American Van Lines, Inc***., 611 F.Supp. 760, 764–766 (N.D. Ind. 1985).

If the subpoenaed information is not reasonably relevant, the subpoena should be revoked. See ***UPMC***, 366 NLRB No. 185, slip op. at 1 n. 3 (2018) (trial judge did not abuse his discretion in revoking respondent's subpoenas to the extent they sought information regarding the unions' motives for their campaign, as such information was not relevant to whether respondent violated the Act as alleged); ***Hoschton Garment Co***., 279 NLRB 565 n. 4 (1986) (ALJ properly granted the General Counsel's petition to revoke the respondent employer's subpoena duces tecum to the alleged discriminatee seeking evidence whether she had obtained a leave of absence under false pretenses, as she was assertedly disciplined for violating the leave of absence by returning to the plant, not for obtaining it under false pretenses, and thus the subpoenaed evidence was immaterial to the issues in the case); ****Hispanics United of Buffalo***, 359 NLRB 368 (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); ***NLRB v. Jackson Hospital Corp***., 557 F.3d 301, 305–306 (6th Cir. 2009) (ALJ did not violate respondent's due process rights in the compliance proceeding by quashing its subpoena to the extent it sought the discriminatees' personal banking and other records relating to their private financial obligations, as the employer failed to establish a reasonable suspicion to believe that the discriminatees were hiding income), enfg. 352 NLRB 194 (2008).

See also ***Allied Waste Services of Fall River***, 01–CA–123082, unpub. Board order issued Dec. 31, 2014 (2014 WL 7429200). In that case, the Board denied the company's petition to revoke the Region's investigative subpoena duces tecum seeking the company's employee handbook as the document was "potentially relevant" to the alleged discriminatory discharge allegation. However, the Board noted that "if the record revealed that the Region invoked our subpoena power to obtain employee handbooks or policy statements for the purpose of initiating or expanding charges or investigations, this would be an 'improper purpose' that would

warrant revocation of the subpoena," citing ***SEC v. Brigadoon Scotch Distributors***, 480 F.2d 1047, 1056 (2d Cir. 1973).

With respect to employer subpoenas seeking information regarding after-acquired evidence, the immigration status of an alleged discriminatee or a witness, and collateral matters relevant to impeachment, see **§§ 16.402.5,** and **16.608.1,** below.

For cases involving testimonial subpoenas, compare ***NP Red Rock, LLC***, 28–CA–244484, unpub. Board order issued Dec. 2, 2020 (2020 WL 7075063), with ***Red Rock Resorts, Inc***, 28-CA-228052, unpub. Board order issued Oct. 13, 2021 (2021 WL 4786766).

In ***NP Red Rock***, the General Counsel served subpoenas ad testificandum on the respondent's top two corporate executives requiring them to appear and testify as 611(c) witnesses at the outset of the GC's case-in-chief regarding an alleged 8(a)(1) preelection grant of benefits violation. The ALJ granted the respondent's petition to revoke the subpoenas as the executives' testimony was not needed to establish a prima facie case and its relevance and probative value to rebutting the employer's defenses was speculative at that point. The judge noted that the GC could seek reconsideration of his ruling if and when the GC could show that their testimony would be relevant to any of the disputed allegations or issues and that its probative value would not be "substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence" under FRE 403. The GC subsequently filed a special appeal, but the Board found that the judge's ruling was not an abuse of discretion.

However, in ***Red Rock Resorts***, a different ALJ denied the respondents' petition to revoke the General Counsel's subpoenas ad testificandum on the same two top corporate executives requiring them to appear and testify as 611(c) witnesses in the General Counsel's case-in-chief regarding various allegations, including the respondents' alleged single-employer status. The respondents subsequently filed a special appeal, arguing, as they had to the judge, that requiring the top executives to testify was contrary to the "apex doctrine," which requires a showing that such high-level executives have unique personal knowledge that cannot be obtained by less intrusive means. The Board, however, rejected the argument. The Board noted that, although some federal courts apply the apex doctrine in pretrial depositions, the Board has never applied it to revoke a subpoena for trial testimony or otherwise. The Board also emphasized that the respondents did not demonstrate that the subpoenas were issued to harass the executives or were unduly burdensome. The Board therefore "decline[d] to second guess the judge's significant discretion to regulate the course of the hearing and direct the creation of the record."

§ 8–320 Request Must Not Be Vague or Overbroad

Vague requests. Several courts have held that subpoenas requesting all documents "relating to," "pertaining to," or "regarding" a general category of documents are generally too vague and do not describe with reasonable particularity what is being sought. See, e.g., ***Perez v. Tequila LLC***, 2014 WL 5341766 (N.D. Okla. Oct. 20, 2014), and cases cited there. See also ***Sack v. CIA***, 53 F.Supp. 3d 154, 164 (D.D.C. 2014), and cases cited there (same with respect to Freedom of Information Act requests).

For cases rejecting the argument that a subpoena duces tecum was too vague, see ***NLRB v. Carolina Food Processors, Inc***., 81 F.3d 507, 513 (4th Cir. 1996) (General Counsel's investigative subpoena in a post-election unfair labor practice case requesting payroll documents, W-4s, and I-9s for "all bargaining unit employees" was not too vague as the unit was sufficiently identified in the parties' stipulated election agreement and the union's preelection request for recognition); ***NLRB v. Vista Del Sol Health Services, Inc***., 40 F.Supp. 3d 1238, 1265

(C.D. Cal. 2014) (General Counsel's investigative subpoena requests for (1) the company's articles and certificate of incorporation, and (2) its directors, officers, and shareholders, were not too vague as to time as the company only had one set of articles and one certificate of incorporation, and the second request was written in the present tense, indicating that only the current directors, officers, and shareholders were being requested); ***SEIU United Healthcare Workers–West***, 20–CG–65, unpub. Board order issued Oct. 24, 2006 (General Counsel's subpoena duces tecum was not impermissibly vague where it asked for information in language borrowed from Board cases dealing with concerted refusals to volunteer for overtime in the healthcare industry). See also ***Perez v. Lasership, Inc***., 2015 WL 11109330, *6 (D. Conn. Sept. 18, 2015) (rejecting the respondent's argument that DOL's subpoena was too vague and ambiguous, as respondent had identified "with precision" the specific documents that DOL was requesting numerous times in its other objections to the subpoena).

For cases addressing testimonial subpoenas, 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); ***Offshore Mariners United***, 338 NLRB 745 (2002) (same). Accord: ***Welded Construction L.P.,*** 8–CA–190649, unpub. Board order issued June 28, 2017 (2017 WL 2830801); ***Christus St. Vincent Regional Medical Center***, 28-CA-149798, unpub. Board order issued Aug. 24, 2015 (2015 WL 5025387).

Overbroad requests. A subpoena may also be quashed to the extent it is overbroad, i.e., "needlessly broad" (***NLRB v. Station Casinos, LLC***, 2022 WL 18402549 (D. Nev. Nov. 8, 2022) (Mag. J.), adopted 2023 WL 362668 (D. Nev. Jan. 23, 2023), citing ***NLRB v. Int'l Medication Systems,*** 640 F.2d 1110, 1114 (9th Cir. 1981)).

See, for example, ***Brink's, Inc.***, 281 NLRB 468, 469 (1986). There, the respondent employer subpoenaed the union's meeting minutes, without limiting the request to meetings involving unit employees, and union membership lists, without specifying a time period. The Board granted the petitions to revoke those and other portions of the subpoenas that "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.

See also ***NLRB v. Fuyao Glass AM., Inc***., 2018 WL 1166628 (S.D. Ohio Mar. 5, 2018). There, the court narrowed an NLRB investigative subpoena in a discriminatory discharge case that sought the employment records for all 800 employees working in the same department. The court held that the subpoena was overbroad because, for purposes of the NLRB's disparate treatment theory, only those employees supervised by the alleged discriminatee's supervisor, who made the discharge decision on his own without consulting HR or other managers, were "similarly situated" to the alleged discriminatee. But see ***Genpack, LLC***, 372 NLRB No. 76, slip op. at 2 (2023) ("The fact that the disciplined employee received discipline from a different official does not, standing alone, distinguish that employee from a non-disciplined comparator.") (citing cases).

A subpoena may also be quashed as overbroad to the extent the subpoena on its face requests privileged or otherwise protected information. See ***Cherokee Marine Terminal***, 287 NLRB 1080, 1097 (1988); ***Harvey Aluminum***, 156 NLRB 1353, 1365 (1966); ***J. H. Rutter Rex Mfg. Co. v. NLRB***, 473 F.2d 223 (5th Cir.) (quashing respondent subpoenas seeking the General Counsel's entire investigative file), and the discussion of Board agent testimony and files in **§ 8–440,** below. See also ***In re Horn***, 976 F.2d 1314, 1318–1319 (9th Cir. 1992) (quashing a 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").

Note, however, that in ***Brink's, Inc.***, above, the Board stated that the hearing officer should not have revoked the employer's subpoena requests for all communications between the union and its law firm, even though "the possibility that some of this requested information would be privileged is clear and the subpoenas should have been drafted to minimize that possibility." The Board stated that the hearing officer "should have conducted an in camera inspection of the documents to determine whether any of them were subject to the attorney-client privilege." Accordingly, although the Board itself ultimately granted the petitions to partially revoke in their entirety because the challenged subpoena requests were clearly overbroad in other respects as well, the Board did so without prejudice to the employer obtaining "new subpoenas for documents that may have been excluded improperly" because of the hearing officer's ruling. See also the discussion of the procedures for handling privilege claims in **§ 8–500,** below.

Compare also ***NLRB v. Interstate Builders, Inc***., 351 F.3d 1020, 1031 (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").

Over-inclusive search terms. "Search terms are an important tool parties may use to identify *potentially* responsive documents in cases involving substantial amounts of [electronically stored information]." ***Youngevity International Corp. v. Smith***, 2017 WL 6541106, *10 (S.D. Cal. Dec. 21, 2017). However, where search terms are proposed, they should not be so common that they will return too many records to review or digest. See, e.g., ***S.E.C. v. Waymack***, 358 F.Supp. 3d 56 (D.D.C. 2019) (court found that the SEC's proposed search terms were over-inclusive because they were present in every email's signature line and ordered the SEC to "craft search terms that are targeted to identify relevant documents"). The problem may be resolved by "using more sophisticated search techniques, including additional filtering keywords or Boolean operators and connectors, to winnow the results to a manageable level." ***Government Accountability Project v. U.S. Dept. of Homeland Security***, 335 F.Supp. 3d 7, 13 n.3 (D.D.C. 2018) (addressing issue in the context of a FOIA request). See also **§ 8–340**, below, regarding electronically stored information.

§ 8–330 Burdensomeness of Production

FRCP 45(d)(3)(A)(iv) provides that, on timely motion, a court "must" quash or modify a subpoena that "subjects a person to undue burden." The party asserting burdensomeness under this provision 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; rather, the party must show that production of the subpoenaed information "would seriously disrupt its normal business operations." ***NLRB v. Carolina Food Processors,*** 81 F.3d 507, 513–514 (4th Cir. 1996), cited with approval in ***McAllister Towing & Transportation Co.***, 341 NLRB 394, 397 (2004), enfd. 156 F. Appx. 386 (2d Cir. 2005). See also ***NLRB v. Station Casinos, LLC***, 2022 WL 18402549, *3 (D. Nev. Nov. 8, 2022) (Mag. J.) (finding that respondent's claim that it had already produced thousands of documents to date in response to the General Counsel's subpoena "bel[ied] any such assertion of business disruption") adopted 2023 WL 362668 (D. Nev. Jan. 23, 2023).

Bare or general assertions that production would be seriously disruptive are insufficient. See ***NLRB v. AJD, Inc., a McDonald's Franchisee***, 2015 WL 7018351 (S.D.N.Y. Nov. 12, 2015) (whether a subpoena poses an undue burden "is typically a fact-intensive inquiry [requiring] a respondent to show that the actual costs of discovery are unreasonable in light of the particular size of the respondent's operations"; thus, the respondent franchisees' general allegations that

the burden of production would be "astronomical," that they have "virtually no" human resources to assist in production, and that production would require "countless hours" were insufficient); ***NLRB v. Kava Holdings, Inc***., 2017 WL 3841780, *4 (C.D. Cal. Aug. 8, 2017) (Mag. J.) (employer's assertion that its records were archived and that many of the people who created them were gone, without any actual evidence of the difficulty it would face in locating and producing responsive documents, was insufficient to establish that the records were not reasonably available or that compliance with the Board's subpoena would disrupt or hinder its normal business operations), adopted 2017 WL 3841797 (C. D. Cal. Aug. 31, 2017). *Compare* ***NLRB v. Fuyao Glass America, Inc.***, 2017 WL 1276728, *2 (S.D. Ohio April 6, 2017) (Mag. J.) (finding that the "knowledgeable and convincing" testimony of the employer's HR vice president regarding the burden of complying with the Board's subpoena warranted narrowing the subpoena "at least at the present time."), adopted 2018 WL 1166628 (S.D. Ohio March 5, 2018).

The burdensomeness of production may also be grounds for revoking or limiting a subpoena under the following balancing test set forth in FRCP 26(b)(1):

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The following are examples of common issues that arise relating to the burden of production. See also **§ 8–340**, below, regarding electronically stored information.

Marginally relevant information. Where subpoenaed information is only marginally relevant, other factors may weigh in favor of quashing the subpoena. See, e.g., ***Aladdin Gaming, LLC***, 345 NLRB 585, 588 (2005) (judge did not abuse his discretion in quashing the charging party union's subpoena given that the "marginal relevance" of the subpoenaed employer customer-contact information did not outweigh "the substantial privacy and business interests involved"), rev. denied 515 F.3d 942 (9th Cir. 2008). See also ***NLRB v. Detroit Newspapers***, 185 F.3d 602, 605 (6th Cir. 1999) ("'this court's task is to weigh the likely relevance of the requested material to the investigation against the burden . . . of producing the material'") (citation omitted).

Documents previously provided. The General Counsel may sometimes subpoena documents for hearing, even though they were already received from the respondent during the investigation, for purposes of authentication. See **§ 16–901.5**, Documents Obtained From Opposing Party, below. A stipulation as to authenticity may resolve the matter. See ***Kellermeyer Bergensons Services,* LLC,** 1-CA-341903, unpub. Board order issued Feb. 6, 2026 (2026 WL 575708) at 1, n. 2 (holding, with respect to investigatory subpoenas, that the respondent is not required to produce the same documents it already voluntarily provided to the General Counsel, but it must accurately describe the documents that were previously provided, identify to which subpoena paragraph(s) they are responsive, state whether those documents constitute all the documents being subpoenaed, and provide all of the subpoenaed information); ***Meharry Medical College***, 10-CA-314858, unpub. Board order issued Sep. 17, 2024 (2024 WL 4229692) at 1, n. 2; ***McDonald's Corp***., 372 NLRB No. 82, slip op. at 1 n. 2 (2023)With respect to subpoena requests for records that are similar but not identical to those previously provided, see ***Binstock ex rel. NLRB v. Midwest Terminals of Toledo Int'l***, No. 3-17-MC-41, 2019 WL 950104,*2 (N.D. Ohio Feb. 27, 2019) (ruling that the respondent company could not avoid the Agency's investigative subpoena by claiming it previously produced documents that were "nearly identical," "functionally equivalent," or "substantially the same.")

Cumulative or duplicative requests. FRCP 26(b)(2)(C)(i) states that a court "must" limit the frequency or extent of discovery if it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." In ***McDonald's USA, LLC***, 363 NLRB 1929 n. 2, 1932 (2016), the Board found that the trial judge did not abuse her discretion in applying this provision, along with FRCP 45(d)(3)(A)(iv), to quash subpoenas duces tecum McDonald's had served on several nonparties seeking information that was materially identical to information sought in its subpoenas served on parties.

Similarly, in ***Nissan North America***, 15–CA–171184, unpub. Board order issued Nov. 2, 2016 (2016 WL 6562347), the Board granted a nonparty's petition to revoke the Regional Director's investigative subpoena duces tecum, as the same information had been subpoenaed from the charged parties, which did not face the potential burden described by the nonparty. The Board did so, however, without prejudice to issuance of another subpoena to the nonparty in the event the Regional Director determined that the information is not available from the parties. See also ****Duncan & Son Lines***, 28–CA–079700, unpub. Board order issued Sept. 5, 2012 (2012 WL 3862635), at 1 n. 2 (employer was not required to produce "all" documents where the additional documents would be cumulative or duplicative).

The mere possibility that the requested information may be available from other sources, however, is not a basis to quash a subpoena. ***Bakery Workers***, 21–CA–171340, unpub. Board order issued Aug. 3, 2016 (2016 WL 4141212). In that case, the Region's investigative subpoena requested commerce information, and the employer argued that the Region could and should get the information from other sources. The Board rejected the argument, stating, "[T]he possibility that the requested information may be available from other sources is not a basis to quash a subpoena, as the requested documents may be necessary to corroborate or supplement the investigative file."

Requests to organize produced documents. As a general matter, a responding party may be required to organize its production in accordance with the subpoena duces tecum's definitions and instructions. See ***Starbucks Corp.***, 19-CA-297589, unpub. Board order issued Feb. 8, 2024 (2024 WL 519030) (finding that the ALJ did not abuse her discretion by ordering the respondent to do so).

Requests to compile evidence. A subpoena may also require a party to search for requested information in its possession and compile that information into document form for submission. ***Bruner Corp***., 9–CA–148668, unpub. Board order issued Nov. 12, 2015 (2015 WL 7074669). For example, courts have held that, subject to the provisions of FRCP 26(b)(2) (discussed in **§ 8–340**, below), a party may be required to query an existing electronic database to produce reports in document form. See, e.g., ***North Shore-Long Island Jewish Health Systems, Inc. v. MultiPlan, Inc***., 325 F.R.D. 36, 51 (E.D.N.Y. 2018) ("Courts regularly require parties to produce reports from dynamic databases, holding that the technical burden of creating a new dataset for litigation does not excuse production.") (internal quotations omitted), and cases cited there. Courts have also held that an employer may be required to compile requested information by examining files or other tangible items or by interviewing supervisors and other employees. See ***EEOC v. Maryland Cup Corp.***, 785 F.2d 471, 478–479 (4th Cir.) (EEOC, like the NLRB, has authority to subpoena "any evidence" and thus could require the company to inspect photo identification badges and interview supervisors and other employees to ascertain the race of former employees); ***EEOC v. Citicorp Diners Club, Inc***., 985 F.2d 1036 (10th Cir. 1993) (EEOC had authority to require company to compile summaries regarding its promotion policies by examining personnel files or interviewing employees), and additional cases cited there.

Information regarding methodology of document search. A subpoena may require the subpoenaed party to be prepared to provide information regarding the manner or methodology of its search for requested documents. See ***Starbucks Coffee Co***., 1–CA–177856, unpub. Board order issued May 19, 2017 (2017 WL 2241023), at 1 n. 1 (denying the employer's petition to revoke the Region's request, in its cover letter to the investigatory subpoena, that the employer "should be prepared" to provide information regarding the methodology of its electronic search for subpoenaed emails, including whose email was searched, what mailboxes, folders, archives, and document management systems were searched, and what search software and/or terms were used).

As discussed in **§ 8–225**, above**, i**f a respondent asserts that subpoenaed documents do not exist, the ALJ may direct that it produce the custodian(s) of record who performed the search(es) for the subpoenaed documents to testify. See also ***Starbucks Corp.***, 372 NLRB No. 147 (2023) (ALJ did not abuse her discretion by ordering respondent to make available the custodian(s) of record who had performed its search for documents to testify regarding that issue to the extent that respondent contended that the subpoenaed documents did not exist); ***Starbucks Corp.***, 9–CA–300652, unpub. Board order issued Dec.12, 2023 (2023 WL 8715751), at 1 (same).

§ 8–340 Electronically Stored Information (ESI)

Two common issues that arise with respect to electronically stored information (ESI) are: 1) the accessibility of the requested ESI; and 2) the format for production of the ESI.

1) Accessibility of Requested ESI

FRCP 26(b)(2)(B) states:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).

Rule 26(b)(2)(C) states that, on a party's motion or on its own, a court "must" limit the frequency or extent of discovery if: (i) the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive," . . . or (iii) "the proposed discovery is outside the scope permitted by Rule 26(b)(1)" [which, as discussed above, sets forth a balancing test]. See also FRCP 45(e)(1)(D) (containing same provisions as 26(b)(2)(B)).

In ***UPMC***, 366 NLRB No. 185, slip op. at 1 n. 3 (2018), the Board held that the judge did not abuse his discretion by revoking, as unduly burdensome, the respondent's subpoenas duces tecum issued to the charging party union and certain current and former employees and union organizers to the extent the subpoenas asked for all electronically stored information. The Board held that the judge properly relied on the factors set forth in the *Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,*

Second Edition (June 2007). Consistent with the most recent amendments to FRCP 26, the current, third edition of the *Sedona Principles* states as follows:

> When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

19 Sedona Conf. J. 1, 32, 35–36, 65 (2018).

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). 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).

For a further discussion of backup tapes and other sources of ESI that may be considered "not reasonably accessible" under FRCP 26(b)(2)(B), see ***Chen-Oster v. Goldman, Sachs & Co.,*** 285 F.R.D. 294, 301–308 (S.D.N.Y. 2012) (discussing how technological accessibility is addressed in the Advisory Committee Notes and the Sedona Principles, above).

2) Format for Production of ESI

FRCP 34(b)(2)(E) states:

> Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
>
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
>
> (iii) A party need not produce the same electronically stored information in more than one form.

An issue that frequently arises is whether ESI should be produced in its original or "native" format (with or without associated metadata) or some other common format, such as a Tagged

Image File Format (TIFF) or Adobe Portable Document Format (PDF). Each format may have advantages or disadvantages depending on the type of document (emails, spreadsheets, audio/video files, PowerPoints, etc.) and the needs and/or resources of the requesting and producing parties. See the *Sedona Principles*, 19 Sedona Conf. J., at 169–186.

In ***Starbucks Corp.*****,** 19-CA-297589, the Board found that the ALJ did not abuse her discretion by requiring respondent to produce ESI in native form or in both TIFF+ and PDF format. See unpub. Board order issued Feb. 8, 2024 (2024 WL 519030). As discussed in **§ 7–200,** above, the ALJ may alternatively order that, if a respondent elects to produce subpoenaed ESI in a format that would not be "reasonably usable" by the requesting party without further processing, the ALJ may direct that the ESI be produced sufficiently in advance of the hearing so that it can be processed and rendered "reasonably useable" by the start of the hearing. See ***Starbucks Corp***., 372 NLRB No. 147 (2023).

3) Use of Technology Assisted Review (TAR)

A respondent may also be required to notify the General Counsel whether it intends to use Technology Assisted Review (TAR), and, if so, for what classifications of documents or ESI. See ***Starbucks Corp.*****,** 19–CA–297589, above.

§ 8–350 Possession or Control

Section 102.31(a) of the Board's Rules provides that the Board shall, on written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence "in their possession or under their control." See also FRCP 45(a)(1)(A) (providing for issuance of subpoenas requiring production of documents in a person's "possession, custody, or control"). The subpoenaed party is required to conduct "a reasonable and diligent search" for all requested evidence within its possession or control, and to "affirmatively" represent to the subpoenaing party if no responsive evidence exists ***Micross Components***, 1-CA-323838, unpub. Board order issued June 6, 2024 (2024 WL 2880096), at 1, n. 3; ***Consolidated Waste Services Corp***., 12–CA–192990, unpub. Board order issued May 24, 2018 (2018 WL 2387581), at 1 n. 2 (investigative subpoena); ***Winthrop Management***, 29–CA–188433, unpub. Board order issued Feb. 8, 2018 (2018 WL 834316), at 1 n. 2.

An employer's production obligation "extends not only to information in its immediate possession, but also to information that it could obtain from other persons or companies." ***Cascades Containerboard Packaging–Niagara***, 370 NLRB No. 76, slip op. at 13 (2021), citing ***Clear Channel Outdoor, Inc***., 346 NLRB 696, 702 n. 10 (2006) ("In responding to a subpoena, an individual is required to produce documents not only in [the individual's] possession, but any documents that [the individual] had a legal right to obtain."); ***Kellermeyer Bergensons Services,* LLC, 1–CA–341903,** unpub. Board order issued Feb. 6, 2026 (2026 WL 575708) at 1**,** n. 2. For example, an employer may be required to produce information that is within the same corporate organization. ***Cascades Containerboard***, above (drawing adverse inference from respondent's failure to substantiate that it either searched its own records or sought unsuccessfully to obtain them from its parent corporation, the holding company, or some other part of the respondent's organization). It may also be required to produce communications by its supervisors or managers using company equipment in the course of conducting company business. See ***Consolidated Waste Services Corp***., above.

With respect to business communications by supervisors and managers using their personal equipment or accounts, see ***Starbucks Corp.*****,** 9–CA–300652, unpub. Board order

issued Dec. 12, 2023 (2023 WL 8715751), at 1-2. There, the ALJ ruled that, if the employer's managers, supervisors, and agents conducted company business on their personal cell phones, emails, or social media accounts, the employer had control over those communications and had to produce them, citing, e.g., ***Miramontes v. Peraton, Inc***., 2023 WL 3855603, *11–12 (N.D. Tex. 2023) (finding that the company had control over text messages between a supervisor and a manager that were contained on the supervisor's personal cell phone, as the company did not provide its employees with cell phones and they regularly conducted business on their personal cell phones). The employer filed a special appeal, but the Board found that the ALJ's ruling was not an abuse of discretion. Compare ***Consolidated Waste Services***, above (noting that if communications by managers and supervisors were made "using strictly personal equipment or accounts that were not within the [e]mployer's control," the employer was required to request the information and advise the Region if the supervisors and managers declined to provide it, whereupon the Region could seek the information directly from the managers and supervisors).

An employer may likewise be required in certain circumstances to request subpoenaed information that is not in its possession or control from subcontractors or vendors. If the request is denied, the employer must affirmatively represent this fact. See ***KMAC, Inc***., 18–CA–185912, unpub. Board order issued Dec. 22, 2017, at 1 n. 2 (subcontractors); ***Taylor Farms Pacific***, 32–CA–116854, unpub. Board order issued Feb. 6, 2015 (2015 WL 514108) (vendors); ***Kellermeyer Bergensons Services,* LLC,** 1–CA–341903, unpub. Board order issued February 6, 2026 (2026 WL 575708) at 1, n. 2. See also ***Winthrop Management***, above (documents from "persons or companies directly or indirectly employed by or connected with" the employer); ***Platinum Services Commercial Building Maintenance, Inc***., 20–CA–224943, unpub. Board order issued June 25, 2019 (2019 WL 2644153) (documents from one of three named companies that allegedly constituted a single employer and/or alter egos, which the other two companies asserted "no longer exists").

As discussed in **§ 8–720**, below, where a dispute arises over whether there has been full compliance with a subpoena, the judge may require the subpoenaed party to describe its efforts to comply, including whether it sought to obtain the subpoenaed documents from another person or company. However, the burden is generally on the party subpoenaing the documents to establish the subpoenaed party's right to obtain the documents from another person or company. See, e.g., ***United States v. Petroleum and Industrial Workers***, 870 F.2d 1450,1452 (9th Cir. 1989); ***Tiffany (NJ) LLC v. Qi Andrew***, 276 F.R.D. 143, 147 (S.D.N.Y. 2011) (citing cases).

§ 8–400 Privileged or Protected 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. For additional, in-depth analyses of attorney-client and work-product issues, see **Rice et al., Attorney-Client Privilege in the U.S.** (Dec. 2025 Update); **Gergacz, Attorney-Corporate Client Privilege** (March 2024 Update); **Greenwald, Schrantz, and Slachetka, Testimonial Privileges** (3d ed. Feb. 2023 Update).

§ 8–405 Attorney-Client Privilege

"The Board recognizes the fundamental principle that communications made in confidence between an attorney and [the attorney's] 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). This includes "both the communications which provided that advice

and the communications that flowed from client to attorney as a basis for generating the advice." ***Patrick Cudahy***, 288 NLRB 968, 971 (1988), quoting ***Upjohn Corp. v. United States*****,** 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 ***United States 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 [the member's] 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 [the attorney's] 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.

The burden is on the party asserting the privilege to establish that it applies. See, e.g., ***EEOC v. BDO USA, LLP***, 876 F.3d 690, 695 (5th Cir. 2017); ***United States v. Ruehle***, 583 F.3d 600, 608 (9th Cir. 2009); ***United States v. Construction Products Research, Inc***., 73 F.3d 464, 473 (2d Cir. 1996): ***U.S. v. White***, 950 F.2d 426, 430 (7th Cir. 1991); ***In re Sealed Case***, 737 F.2d 94, 99 (D.C. Cir. 1984). "Ambiguities as to whether the elements of a privilege claim have been met are construed against the proponent." ***EEOC v. BDO*****,** above. The privilege is interpreted narrowly because otherwise the factfinder would not be presented with relevant evidence. Ibid. But see **§ 8–410**, below, discussing the privilege and collective-bargaining records. See also **§ 8-510**, Privilege Logs, below.

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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 **Wright & Miller et al., 24 Fed. Prac. & Proc. Evid. § 5491** (2d ed. Apr. 2026 Update) (collecting cases). It appears that the Board has not directly addressed this issue.

Substance of communications. The privilege applies only to testimony or evidence that reveals the substance of communications to or from an attorney or the attorney's subordinate. For example, the privilege would normally apply to communications that reveal the client's motive in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law. However, it normally would not apply to the mere existence of an attorney-client relationship, including the identity of the client, the amount of the fee, and the general purpose of the work performed. See ***Clarke v. American Commerce National Bank***, 974 F.2d 127, 129 (9th Cir. 1992), cited with approval in ***Benedictine Health Center***, 18–CA–196456, unpub. Board order issued Dec. 27, 2017 (2017 WL 6728886), at 1 n. 1.

The privilege also would not normally apply to the mere fact that an attorney-client meeting or communication occurred about a general subject matter. See **Rice et al., 1 Attorney-Client Privilege in the U.S. § 6:22** (Dec. 2025 Update); ***Robinson v. Wells Fargo Bank, N.A.***, 2018 WL 1202826, *4 (S.D. Ohio March 7, 2018); ***Davine v. Golub Corp.***, 2017 WL 517749, *5 (D. Mass. Feb. 8, 2017), and cases cited there. See also ***United States v. Carillo***, 16 F.3d 1046,

1050 (9th Cir. 1994); ***Ferrand v. Schedler***, 2012 WL 3016219, *6–7 (E.D. La. July 23, 2012) (questioning opposing party witnesses about whether and when they met with and discussed their testimony with the party attorney before testifying does not violate the attorney-client privilege, as coaching is a proper subject of impeachment in cross-examination and such questions do not require the witnesses to disclose the substance or content of the communication).

Likewise, the privilege normally would not apply if the communication was not to or from an attorney and did not reveal the attorney's advice. 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.

However, courts have held that communications among corporate employees who are non-lawyers may be privileged in certain circumstances. See, e.g., ***EEOC v. George Washington Univ.***, 342 F.R.D. 161, 171 (D.D.C. 2022) ("communications among corporate employees who are not attorneys are entitled to protection if the purpose of those communications was to marshal facts for counsel to use in rendering legal advice"), citing, e.g., ***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 on attorney-client privilege grounds . . . . [D]ocuments 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"). See also ***Swartwood v. County of San Diego***, 2013 WL 6670545, *9 (S.D. Cal. Dec. 18, 2013) (text of email circulated among defendant county's employees was properly redacted as privileged because it mentioned the county's attorney and repeated her legal advice to the county).

Communications vs. facts. The privilege applies only to communications and not to facts. Witnesses may not refuse to disclose facts within their own knowledge simply because they incorporated those facts into a communication with their 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). See also ***Patrick Cudahy***, 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.").

With respect to internal reports containing factual information, see ***B.P. Exploration, Inc.***, 337 NLRB 887, 889 (2002) (Board held that the attorney-client privilege applied to safety reports because an attorney directed that the reports be created to provide legal advice regarding compliance with safety regulations and handling of citations; however, the Board emphasized that it was the reports, not the underlying information, that the union sought); ***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).

Outside vs. in-house attorneys. Consistent with at least some courts, the Board appears to apply a rebuttable presumption that company communications with an outside attorney are for the purpose of legal advice. See ***Patrick Cudahy***, 288 NLRB at 970. In that case, the respondent company asserted that certain documents subpoenaed by the General Counsel were privileged communications with the law firm it had hired to assist and give legal advice regarding contract negotiations with the union. In finding that the documents were privileged, the Board stated, "We start from the principle that 'a matter committed to a professional legal adviser is *prima facie so committed for the sake of legal advice* . . . for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.' 8 Wigmore, *Evidence* § 2296 (McNaughton rev. 1961) (emphasis original)."

See also ***Diversified Industries v. Meredith*****,** 572 F.2d 596, 610 (8th Cir. 1978) (en banc), also cited in *Patrick Cudahy* ("Here the matter was committed to Wilmer, Cutler & Pickering, a professional legal adviser. Thus, it was prima facie committed for the sake of legal advice and was, therefore, within the privilege absent a clear showing to the contrary."); ***United States v. Chevron Texaco Corp.***, 241 F.Supp. 2d 1065, 1073 (N.D. Calif. 2002) ("Communications between a client and its outside counsel are presumed to be made for the purpose of obtaining legal advice"), citing ***Diversified Industries***, above, and ***United States v. Chen***, 99 F.3d 1495, 1501 (9th Cir. 1996) ("If a person hires a lawyer for advice, there is a rebuttable presumption that the lawyer is hired 'as such' to give 'legal advice,' whether the subject of the advice is criminal or civil, business, tort, domestic relations, or anything else."); ***Wells Fargo Bank, N.A. v. ANC Vista I, LLC***, 2016 WL 3774124 (D. Nev. July 14, 2016) (same).

However, courts generally do not apply such a presumption to communications with an in-house attorney, at least not where the in-house attorney also has a nonlegal position or nonlegal responsibilities with the company. See, e.g., ***Hardy v. New York News, Inc***., 114 F.R.D. 633 (S.D.N.Y. 1987) (communications with attorney serving as vice president and director of employee relations not privileged where attorney was not functioning primarily as in-house counsel). See also **Rice et al., 1 Attorney-Client Privilege in the U.S. § 7:1** (Dec. 2025 Update) ("[T]he unstated operating presumption in situations involving outside retained counsel with limited responsibilities to the client . . . does not apply to in-house counsel because of the many nonlegal responsibilities in-house counsel assumes (whether given a separate position and title or not)."). Courts have held that such communications are privileged only upon a clear showing that the in-house attorney participated in a professional legal capacity. Ibid, citing, e.g., ***In re Sealed Case***, 737 F.2d 94, 99 (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"). See also ***United States v. Chevron Texaco Corp***., above, 241 F.Supp. 2d at 1076; ***Boca Investerings Partnership v. United States,*** 31 F.Supp. 2d 9, 11–12 (D.D.C. 1998). But see ***In re Google, Inc***., 462 F. Appx. 975, 978 (Fed. Cir. 2012) (same "clear showing" must be made even if the in-house attorney did not have distinct nonlegal responsibilities).

If a communication to or from an in-house attorney may have both a legal and a business purpose, the courts generally apply a "primary purpose" test. As formulated by the D.C. Circuit, a communication is protected under this test if obtaining or providing legal advice was "a primary purpose of the communication, meaning one of the significant purposes of the communication." ***In re Kellogg Brown & Root, Inc***., 756 F.3d 754, 759–760 (D.C. Cir. 2014) (rejecting the strict "but for" test applied by the district court). See also ***Pitkin v. Corizon Health, Inc***., 2017 WL 6496565, *3–4 (D. Or. Dec. 18, 2017); ***In re General Motors LLC Ignition Switch Litigation***, 80 F.Supp. 3d 521, 530 (S.D.N.Y. Jan. 15, 2015) (adopting and applying the D.C. Circuit's analysis).

Thus, for example, an email will not become privileged simply because in-house counsel was copied (cc'd) on it. See, e.g., ***Uban 8 Fox Lake Corp. v. Nationwide Affordable Housing***

Fund 4, LLC, 334 F.R.D. 149, 161 (N.D. Ill. 2020); ***Minebea Co. v. Pabst***, 228 F.R.D. 13, 21 (D.D.C. 2005). See also ***Slocum v. International Paper Co.***, 549 F.Supp. 3d 519, 524 (E.D. La. June 28, 2021). Likewise, the presence of in-house counsel at a meeting at which a discharge decision was made will not privilege communications generated and distributed at the meeting, where its primary purpose was business and the legal advice was merely incidental. ***Neuder v. Battelle Pacific Northwest National Lab.***, 194 F.R.D. 289, 293 (D.D.C. 2000).

For a Board case involving communications with in-house counsel, see ***Adams & Associates, Inc***., 363 NLRB 1923 (2016), enfd. 871 F.3d 358 (5th Cir. 2017). An issue in that case was whether the respondent company was motivated by anti-union animus in failing to hire several of its predecessor's employees. The ALJ found that it was, based in part on an email that the company's CEO had sent to two company HR executives, and other communications between the HR executives, indicating the CEO's displeasure that the transition team had failed to avoid a successorship bargaining obligation with the union. Although both HR executives were attorneys and one had a dual role as the company's general counsel, after reviewing the communications in camera the ALJ ruled that the communications were not privileged because they pertained principally to human resources or labor relations and not to legal advice. The Board affirmed the ALJ (see nn. 5 and 15 of the Board's opinion), and the court likewise agreed with the ALJ's determination after independently reviewing the communications (871 F.3d at 370 n. 3).

See also ***National Football League***, 309 NLRB 78, 97 (1992). A primary issue in that case was whether the NFL unlawfully discriminated against strikers by requiring them to report to work by Wednesday to be eligible to play the following weekend. In an effort to prove unlawful motivation, the General Counsel subpoenaed the minutes or notes taken by the Management Council's general counsel/assistant executive director, James Conway, at strike-strategy meetings. The Management Council moved to quash the subpoena on the ground that Conway's notes were privileged. However, after reviewing the notes in camera, the judge denied the motion, finding that the notes primarily reflected discussions of purely business matters, did not include Conway's mental impressions, and were taken as part of Conway's administrative functions as assistant executive director rather than as general counsel. The Management Council filed a special appeal of the judge's ruling, but the Board denied it.

Current and former employees. Another potential issue involves whether communications between an employer's attorney and a current or former employee of the employer constitute privileged attorney-client communications. The Supreme Court in ***Upjohn***, above, held that the privilege applies to communications from corporate employees to the corporation's attorneys, regardless of the employee's corporate position, if "the communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." 449 U.S. at 394.

Courts have since held that the privilege also extends to former employees, provided the communication relates to the former employee's conduct and knowledge gained during employment and is relevant and necessary for the attorney to provide advice to the corporation. See ***In re Allen***, 106 F.3d 582, 605–606 (4th Cir. 1997); ***Admiral Insurance Co. v. U.S. District Court for the District of Arizona***, 881 F.2d 1486, 1493 n. 6 (9th Cir. 1989); see also ***Vegnani v. Medlogix, LLC***, 2020 WL 5634349, *2 (D. Mass. Sept. 21, 2020); ***MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP***, 232 F.Supp. 3d 558, 569 (S.D.N.Y. 2017); ***Hanover Insurance Co. v. Plaquenmines Parish Government***, 304 F.R.D. 494, 498 (E.D. La. 2015), and cases cited there. See also Douglas R. Richmond, *The Attorney-Client Privilege and Former Employees*, 70 Catholic Univ. L. Rev. 39 (2021).

The burden is on the party asserting the privilege to establish that the requirements are met. See ***Sunbelt Rentals, Inc.,*** 372 NLRB No. 24, slip op. at 18, n. 43 (2022) (finding that the privilege did not apply to prehearing discussions between employer's attorney and employee she intended to call as a witness because (1) the attorney never filed a notice of appearance on behalf of the employee; (2) as reflected in *Upjohn*, above, a company's attorney typically does not represent employees questioned in preparing for litigation on behalf of the company; and (3) the "vague discussions on the record fail[ed] to establish that the communications were privileged").

Note that the Board has established certain safeguards in situations where an employer's attorney (or other agent) interviews current employees regarding protected activity in preparation for an unfair labor practice hearing. In such circumstances, the employer's attorney must communicate to the employees the purpose of the questioning, assure the employees that no reprisal will be taken against them, and obtain the employees' participation on a voluntary basis. ***Johnnie's Poultry Co***., 146 NLRB 770, 774–775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). See also ***Sunbelt Rentals***, above (reaffirming and adhering to *Johnnie's Poultry* and finding that the respondent employer violated Section 8(a)(1) of the Act by failing to provide the required assurances.)

Third-party consultants and contractors. Communications with third-party consultants and contractors may also be privileged in certain circumstances. See, e.g., ***B.P. Exploration, Inc.***, 337 NLRB at 889 (finding that a communication between employer's attorney and company consultants—specifically, asking them to do a walk-around of the facility and identify the exposure the employer was facing in a lawsuit—"clearly was communication between attorney and client to obtain information necessary to provide adequate legal advice").

See also ***Monterey Bay Military Housing, LLC v. Ambac Assurance Corp.***, 2023 WL 315072, *9 (S.D.N.Y. Jan. 19, 2023) and cases cited there (discussing the so-called "functional equivalent" doctrine applied by some courts, which holds that communications between a company's attorney and a consultant are protected by the attorney-client privilege where the consultant serves as a de facto employee of the company and possesses the information needed by the attorney in rendering legal advice).

Charging parties and alleged discriminatees. It is unclear whether the Board recognizes communications between the General Counsel and individual charging parties or alleged discriminatees as protected by the attorney-client privilege. However, such communications may arguably be privileged on the ground that the GC is their "de facto" attorney. See, e.g., ***Donovan v. Teamsters Local 25***, 103 F.R.D. 550 (D. Mass. 1984) (rejecting the defendant union's contention that the complaining witness in an action by the Department of Labor against the union under the LMRDA was not a true client of DOL's legal staff, as his sole legal recourse was through DOL and he accepted DOL's legal staff as his own lawyers in the case). Alternatively, the communications may be protected from disclosure under the "common interest" doctrine. See, e.g., ***United States v. Gumbaytay***, 276 F.R.D. 671 (M.D. Ala. 2011) (attorney-client privilege protected communications between alleged victims of housing discrimination and government counsel who brought the discrimination action against the defendant on their behalf under the Fair Housing Act, as the alleged victims and the government had a common legal interest). See also **§ 8–415**, Waiver of Attorney-Client Privilege, below, for a further discussion of the common interest doctrine.

Grievants. "It is well established, as a matter of law, that an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance." ***Gwin v. National Marine Engineers Beneficial Assoc***., 966

F.Supp. 4, 7 (D.D.C. 1997), affd. per curiam 159 F.3d 636 (D.C. Cir. 1998). Nevertheless, communications between a grievant and the union's attorney may be protected from disclosure under the "de facto" attorney or "common interest" doctrines discussed above. 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"); ***Bell v. Village of Streamwood***, 806 F.Supp. 2d 1052 (N. D. Ill. 2011) (finding that a union representative's role in disciplinary proceedings is "not unlike that of an attorney," and that an "employee-union representative privilege" should therefore be recognized and applied with respect to communications between a union representative and a union member in such proceedings to the same extent and with the same limitations as the attorney-client privilege).

With respect to communications between employees and their union other than during the course of grievance/disciplinary proceedings, see **§§ 8–455** (identity of union supporters) and **8–460** (collective-bargaining information), below.

§ 8–410 The Privilege and Collective-Bargaining and Business Records

Citing "labor law policy reasons," the Board in ***Patrick Cudahy***, 288 NLRB 968, 971 (1988), indicated that it would apply the attorney-client privilege broadly to communications relating to collective-bargaining. The complaint in that case alleged, inter alia, that the respondents violated the Act by refusing to bargain in good faith over a successor agreement with the union, and by entering negotiations with a fixed intent not to reach agreement in order to cause a strike, hire strike replacements, and displace the union as a viable bargaining agent. The General Counsel subpoenaed various records from the respondents, including bargaining notes, proposals, letters, memoranda, and strategies. Respondents petitioned to revoke the subpoenas to the extent they sought privileged attorney-client communications between the company and the law firm it hired to provide assistance and advice regarding the contract negotiations. Based on an in camera inspection of the subject documents, the ALJ denied the petition to revoke, concluding that the work the law firm was employed for and performed was more in the nature of affording business assistance than rendering legal advice. The Board, however, reversed. The Board recognized that "the process of collective bargaining invites the contribution of legal advice at all of its stages," and that "labor attorneys often advise an employer or a union in contract negotiations and may even serve as the party's chief negotiators." It also noted that "if collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure" (quoting ***Berbiglia, Inc***., 233 NLRB 1476, 1495 (1977), discussed in **§ 8–460**, below). It therefore held that, "when the legal advice relates to collective bargaining, we will not readily and broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present."

See also ***Taylor Lumber & Treating, Inc.***, 326 NLRB 1298 n. 2 (1998) (holding that the 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, as indicated in **§ 8–405,** above, the Board in ***Patrick Cudahy*** made clear that "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." 288 NLRB at 971 n. 13.

Further, the Board did not address whether notes of exchanges in bargaining sessions with other parties are protected if they are not intermingled with privileged communications. Ibid ("We are not considering notes recording the exchanges in a bargaining session with other parties except in one instance where such notes are intermingled with privileged communications."). For cases addressing this issue see **§ 8–460**, Collective Bargaining Information, below.

Finally, the Board emphasized that the analysis may be different in other, non-collective-bargaining situations. See 288 NLRB at 971 n. 12 ("In cases involving other types of unfair labor practices, when policy considerations such as those noted here are not involved, the analysis of the relationship of legal advice to business decisions and actions may be different and it may not necessarily result in as broad an application of the privilege as here.") For example, a narrower or stricter analysis typically applied by the courts may be warranted in 8(a)(3) cases where the communication relates to an employer's antiunion campaign strategy rather than legal advice. See, e.g., ***Adams & Associates, Inc***., 363 NLRB 1923 (2016), enfd. 871 F.3d 358 (5th Cir. 2017); ***National Football League***, 309 NLRB 78, 97 (1992), discussed in **§ 8–405,** above. See also ***Humphreys, Hutcheson & Moseley v. Donovan***, 568 F.Supp. 161, 175 (M.D. Tenn. 1983) (privilege was not applicable to communications between attorney and company where attorney acted as a labor consultant to persuade the company's employees to reject the union, rather than as a lawyer), affd. 755 F.2d 1211 (6th Cir. 1985).

§ 8–415 Waiver of Attorney-Client Privilege

Generally, disclosing a privileged communication to a third person who is not acting as an agent of either the client or the client's attorney waives the privilege. ***United States v. Evans***, 113 F.3d 1457, 1462 (7th Cir. 1997). The majority of courts appear to hold that the party asserting the privilege has the burden of proving nonwaiver where the opponent alleges that the privilege has been lost by disclosure. **Gergacz, Attorney-Corporate Client Privilege § 5:13** (March 2024 Update).

In the corporate or organizational context, waiver may occur if dissemination of the communication was not limited to those with a reasonable need to know its contents, or if the corporation or organization failed to take reasonable steps to preserve confidentiality. See **Gergacz**, above, **§ 5:48; Mueller and Kirkpatrick, 2 Federal Evidence § 5:34** (4th ed. Aug. 2023 Update); **Greenwald, Schrantz and Slachetka, 1 Testimonial Privileges § 1:83** (3d ed. Feb. 2023 Update). See also, with respect to communications in the presence of union officers or members, ***Jenkins v. Bartlett***, 487 F.3d 482, 490–491 (7th Cir. 2007) (presence of a union officer during the conversations between an employee and the attorney appointed by the union to represent the employee did not waive the privilege as the union officer was present to assist the attorney); ***Miller v. York Risk Services Group***, 2014 WL 11514550, *3 (D. Ariz. July 22, 2014) (presence of at least five union members who were not plaintiffs at a pre-litigation union meeting with plaintiffs' counsel waived the privilege).

For a waiver to occur, however, the substance of the privileged communication must have been disclosed to the third person. See ***Western United Life Assurance Co. v. Fifth Third Bank***, 2004 WL 2583916, *4 (N. D. Ill. Nov. 12, 2004) (disclosure of the mere fact that a conversation between attorney and client occurred and the topic of the conversation did not disclose any privileged information and therefore did not constitute a waiver).

Further, courts have recognized a so-called "common interest" or "joint defense" exception to waiver where the disclosure was made in confidence to a third person having a common legal interest in furtherance of that interest. See ***Parts Depot, Inc***., 332 NLRB 670, 677 (2000), enfd. 24 F. Appx. 1 (D.C. Cir. 2001); ***NLRB v. Jackson Hospital Corp***., 257 F.R.D. 302, 312–313 (D.D.C. 2009) (doctrine applies to communications between the charging party union and the General Counsel). See also ***Schaeffler v. United States***, 806 F.3d 34, 40–41 (2d Cir. 2015); ***United States v. BDO Seidman, LLP***, 492 F.3d 806 (7th Cir. 2007).

With respect to intentional and unintentional disclosures in a federal proceeding or to a federal agency, see FRE 502, which is discussed more fully in **§ 16–502**, below. With respect to waiver by failing to furnish an adequate privilege log, see **§ 8–510**, below.

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,*** 348 NLRB 833, 834 (2006). 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.

§ 8–420 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 ***Smithfield Packing Co.***, 344 NLRB 1, 14 n. 60 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006), discussed more fully below, where the Board rejected respondent's argument that the General Counsel failed to satisfy this burden of proof. The Ninth Circuit, however, has held that in civil cases "the party seeking disclosure must prove the crime-fraud exception applies by a preponderance of the evidence, meaning 'the relevant facts must be shown to be more likely than not.'" ***Eastman v. Thompson***, 594 F.Supp. 3d 1156, 1196 (C.D. Cal. 2022), quoting ***Napster, Inc. Copyright Litigation***, 479 F.3d 1078, 1094 – 95 (9th Cir. 2007), abrogated on other grounds by *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009).

The Board has declined to apply the crime/fraud exception to attorney-client communications in furtherance of unfair labor practices. ***Patrick Cudahy, Inc.***, 288 NLRB 968, 972–974 (1988).

However, in ***Smithfield Packing***, above, the Board held that the crime/fraud exception applied to otherwise privileged communications regarding the preparation of false affidavits about alleged unfair labor practices. In that case, a former manager for the respondent was called by the General Counsel to testify about the reasons why two employees were terminated. On cross-examination, the respondent introduced affidavits the manager had previously provided to its attorney that contradicted her testimony. The manager acknowledged signing the affidavits under penalty of perjury but testified that they were untrue. After further exchanges, the judge asked the manager if she was aware that the affidavits were false when she signed them. She replied that she was. The judge then asked if there were any communications between her and the respondent's attorney at the time indicating that the attorney was aware the affidavits were untrue. She replied that the attorney was aware of the false statements; that she told him they were incorrect, but he said she needed to make the statements as they appeared. She also testified that the final copies of the affidavits prepared by the attorney included statements that she never made.

Affirming the judge, the Board found that the communications between the manager and respondent's attorney were within the crime/fraud exception because "even assuming" they were privileged, "[the manager's] credited testimony indicates that the communications pertained to the alleged preparation of false affidavits and therefore involved the alleged future commission of one or more . . . crimes" (perjury, subornation of perjury, and knowing introduction of false statements of material fact). In support, the Board cited ***White v. American Airlines***, 915 F.2d 1414, 1423–1424 (10th Cir. 1990) (applying crime/fraud exception under Oklahoma law to the employer's outside counsel's request that employee commit perjury in deposition). 344 NLRB at 13–14.

The Board also rejected respondent's contention that the judge should have considered the evidence "in camera" before permitting the manager's testimony on the record. The Board noted that the assertedly privileged evidence was testimony rather than documents and the finder of fact was a judge rather than a jury. Id. at n. 60. See also **§ 8-520**, In Camera Inspection, below.

§ 8–425 Duration of Attorney-Client Privilege

In ***Swidler & Berlin v. United States***, 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 (S.D.N.Y. 2015) (citing cases) Moreover, those courts "hold[ing] that the privilege survives the dissolution of a corporation generally do so on the basis of state [privilege] law," id., which is not recognized in Board proceedings. See **§ 8–475,** State Confidentiality Rules, below.

§ 8–430 Work Product Doctrine

The work-product doctrine protects documents and tangible things 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) (Trial Preparation: Materials).

The burden is on the party asserting the work product doctrine to establish that it applies. See ***Public Service Co. of New Mexico***, 364 NLRB 1017, 1019 (2016). Specifically, the party must show that the materials were prepared or obtained because of the prospect of litigation, rather than in the ordinary course of business, i.e., they would not have been prepared but for the "fairly foreseeable" prospect of litigation. See ***Central Telephone Company of Texas***, 343 NLRB 987, 988 (2004) (finding that the privilege applied, and that the union was not entitled to notes taken by the respondent's HR 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 ***Ascension Borgess Hospital***, 372 NLRB No. 86, slip op. at 1 n. 1, and 9 (2023) (reaching opposite conclusion where investigation of employee misconduct was routine and conducted in a manner similar to all other such investigations, notwithstanding that the documents were labeled "confidential—prepared at the direction of legal counsel").

With respect to whether witness statements or affidavits constitute protected work product, there appears to be a split among the courts regarding both unsigned draft affidavits and signed affidavits. The majority or more recent view appears to be that an unsigned draft statement or affidavit is protected work product, but a signed statement or affidavit is not and

must therefore be produced on request even before the witness testifies. See ***Innovation Ventures, LLC v. Aspen Fitness Products, Inc***., 2014 WL 2763645, *3 (E.D. Mich. June 18, 2014) (unsigned draft affidavits): and ***Diaz v. Devlin***, 327 F.R.D. 26, 29–32 (D. Mass. Aug. 28, 2018) (signed affidavits). But see ***Bell v. Lackawanna County***, 892 F.Supp. 2d 647, 661 (M.D. Pa. 2012) (distinguishing between signed third-party affidavits and signed party affidavits, holding that the latter constitute protected work product). However, a signed statement or affidavit may be protected from disclosure before the witness testifies for other reasons. See **§§ 8–445** and **16–613.1**, below, regarding Jencks Statements.

Unlike the attorney-client privilege, the work product doctrine includes a substantial need/undue burden exception. FRCP 26(b)(3)(A)(ii) provides that work product may be discovered "if the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

For Board cases addressing this exception, see ***Central Telephone Company of Texas***, above (union failed to meet its burden with respect to the respondent's investigative notes as the respondent had provided the union with witness statements and the union was able to conduct its own witness interviews); ***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 a copy of the position statement submitted by the charging party to the General Counsel in support of its charge during the investigation).

Further, even if the substantial need/undue burden showing is made, the judge may only require disclosure of so-called "fact work product". Rule 26(b)(3)(B) requires the judge to protect against disclosure of the "mental impressions, conclusion, opinions, or legal theories of a parties' attorney or other representative concerning the litigation." Thus, so-called "opinion work product" is "virtually undiscoverable." ***United States v. All Assets Held at Bank Julius Baer & Co., Ltd.***, 315 F.R.D. 103, 108–109 (D.D.C. 2016). See also **2 Moore's Manual–Federal Practice and Procedure**, above.

§ 8–435 Waiver of Work Product Protection

Like the attorney-client privilege, work product protection may be waived by disclosure to third parties. See **§ 8–415**, Waiver of Attorney-Client Privilege, above. However, there are important differences. For example, there is no waiver of work product protection unless the third party was an adversary or the document was shared or disclosed in a manner that would materially increase the likelihood of disclosure to an adversary. See ***Anstead v. Virginia Mason Med. Ctr.***, 2023 WL 2541003, *4 (W.D. Wash. 2023); ***Miller UK Ltd. v. Caterpillar, Inc.***, 17 F.Supp. 3d 711, 735–736 (N.D. Ill. 2014); ***Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A***., 160 F.R.D. 437, 448 (S.D.N.Y. 1995). See also ***N.Y. Times Co. v. U.S. Dep't of Justice***, 939 F.3d 479, 494 (2d Cir. 2019) ("A party waives the work product protection by taking actions inconsistent with its purpose, such as disclosing work product to its adversary, or by placing privileged documents 'at issue' in a litigation.") (citations omitted).

Thus, unlike with the attorney-client privilege, the third party need not have a common legal interest with the party claiming work product protection to avoid waiver; a common business interest may be sufficient. See ***Miller UK Ltd***., above; ***Pecover v. Electronic Arts, Inc.***, 2011 WL 6020412 (N.D. Cal. Dec. 2, 2011); ***Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc***., 229 F.R.D. 441, 447 (S.D.N.Y. 2004), and cases cited there.

As with the attorney-client privilege, the courts do not appear uniform in assigning the burden of proof. Some courts hold that the party asserting work-product protection has the burden of proving nonwaiver. See, e.g., ***Pfizer, Inc. v. Regor Therapeutics, Inc.,*** 2023 WL 1766419, *4 (D. Conn. Feb. 3, 2023) ("Attorney-client privilege and work product claimants bear the burden of showing that they have not waived the protection") (citing cases). However, other courts place the burden on the party seeking disclosure of work product to prove waiver. See, e.g., ***Ecuadorian Plaintiffs v. Chevron Corp.,*** 619 F.3d 373, 379 (5th Cir. 2010); ***Miller UK Ltd***., 17 F.Supp. 3d at 737.

For a Board case addressing waiver of work product protection, see ***Ralphs Grocery Co.***, 352 NLRB 128, 129 (2008), reaffd. 355 NLRB 1279 (2010) (limited waiver respondent executed in a federal criminal proceeding did not waive work product protection 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***, 339 NLRB 829 (2003) (charging party does not waive work product protection by giving position statement to the General Counsel); with ***Evergreen America Corp.***, 348 NLRB 178, 187 (2006) (contrary rule applies where respondent submits position statement to the General Counsel). See also **§ 16–801.3,** Admission or Statement by Opposing Party**.**

For a discussion of waiver of work-product protection as a result of intentional and inadvertent disclosures in a federal proceeding or to a federal agency, see FRE 502, which is discussed in **§16–502**, below**.**

With respect to waiver by failing to furnish an adequate privilege log, see **§ 8–510**, below.

§ 8–440 Board Agent Testimony and Files

A respondent may not subpoena and obtain documents in the Regional Office's investigative files without the written consent of the General Counsel. See Section 102.118(a) of the Board's Rules, which states 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 GC (if the documents are in a Regional Office or in Washington, D.C. under the GC's control).

The Board has held that a respondent likewise may not "circumvent this rule by subpoenaing material from a party that it could not obtain from the General Counsel." ***Logmet, LLC***, 9–CA–247369, unpub. Board order issued April 26, 2021 (2021 WL 1814994), at 1. In that case, the respondent served virtually identical subpoenas duces tecum on both the Regional Director and the charging party union seeking a variety of materials that "support and/or evidence" the complaint allegations. The ALJ quashed both subpoenas to the extent they sought production of prehearing affidavits before the witness had testified, citing ***H.B. Zachry***, 310 NLRB 1037 (1993) (discussed in **§ 8–445** below regarding Jencks statements). However, the ALJ required the GC and the union to produce a variety of other subpoenaed materials, including correspondence, emails, text messages, and recordings, provided the materials did not disclose the identity of employees or their identifying information was redacted prior to production and the

materials were not claimed to be privileged. Both the GC and the union thereafter filed special appeals and the Board reversed the ALJ's order to the extent it required production of these materials. Citing Rule 102.118(a) and ***H.B. Zachry***, the Board held that, absent the GC's consent, neither the GC nor the union could be required to produce any of the subpoenaed materials. Accordingly, the Board directed that the subpoenas be revoked.

Pursuant to Section 102.118(b), the GC's written consent must also be given for a respondent or other party to subpoena an Agency employee or agent to testify. See also ***Laidlaw Transit, Inc.***, 327 NLRB 315, 316 (1998) ("[T]o avoid the appearance of partiality, the Board has a strong and longstanding policy against Board employees appearing as witnesses in Board proceedings. Special application must be made to the General Counsel in order for a Board agent to take the stand."); ***Sunol Valley Golf Co.***, 305 NLRB 493, 495 (1991) (Board "balanc[ed] the policy reasons for not involving Board employees as witnesses in Board litigation against the Respondent's mere speculation" about what the Board field examiner may have done, found that "the balance weigh[ed] against requiring the agent to testify," and therefore quashed the 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.

The failure of the party serving the subpoena to seek and obtain written consent under Section 102.118 is grounds for revoking or quashing the subpoena. See, e.g., ***Howard Johnson Co.***, 250 NLRB 1412 n. 2 (1980), enfd. mem. 671 F.2d 1383 (11th Cir. 1982); ***J.C. Penney Co***., 205 NLRB 1043, 1044 (1973), enfd. mem. 493 F.2d 1400 (3d Cir. 1974).

§ 8–445 Jencks Statements

A Jencks "statement" or affidavit given by a potential witness to the General Counsel is not subject to production by subpoena in advance of the hearing. The Board's longstanding rule is that 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(e) of the Board's Rules; ***Wendt Corp.***, 369 NLRB No. 135, slip op. at 1 n. 1 (2020) (citing cases), enfd. in part 26 F.4th 1002 (D.C. Cir. 2022).

This is true even if a copy of the statement was previously provided to the charging party union. See ***H. B. Zachry Co.***, 310 NLRB 1037, 1037–1038 (1993) (quashing the respondent employer's subpoena on the union to the extent it requested affidavits of non-testifying job applicants/alleged discriminatees in its possession that were taken by the General Counsel during the investigation of the case), citing ***NLRB v. Robbins Tire & Rubber Co****.,* 437 U.S. 214, 236–242 (1978) (prehearing disclosure of statements given to the Board during the investigation by potential witnesses "would interfere with enforcement proceedings" within the meaning of exemption 7(A) of FOIA, given the danger of witness intimidation or harassment, the risk that potential witnesses will be reluctant to give statements absent assurances against disclosure unless called to testify, and the possibility that the respondent could construct defenses to the alleged violations).

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

§ 8–450 Audio/Video Recordings

An audio or video recording of a conversation or incident is not a Jencks "statement" subject to Section 102.118(e) of the Board's Rules because it is "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 an employee); ***Dickens, Inc***., 355 NLRB 255 n. 7 (2010) (tape recordings of incidents occurring in the 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 respondent served a subpoena for any recordings on the alleged discriminatee (Snyder), but he did not produce a recording because he had given it to the GC during the investigation. The GC also refused to produce the recording pursuant to either the respondent's subpoena on Snyder or the Jencks rule (as the recordings were not "statements" under that rule). The judge ruled that production was required pursuant to the subpoena, stating that to do otherwise "would permit a party to hide evidence, in advance of any subpoena, by depositing it with his lawyer," and that requiring respondent to serve the GC with a subpoena and file a 102.118(a) request would be "nothing more than an exercise in wasting time." On special appeal, however, the Board reversed and held that the respondent was required to request the GC's consent to produce the recording under Section 102.118(a). See also **§ 8–440**, Board Agent Testimony and Files, above.

For a discussion of the admissibility and authentication of recordings in NLRB proceedings, see **§ 16–402.7** and **§ 16–901.2,** below.

§ 8–455 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 "potential chilling effect" on union activity. ***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 ***Pain Relief Centers, P.A.***, 371 NLRB No. 143, slip op. at 2 (2022) (employer violated 8(a)(1) by requesting in a state court proceeding documents the discriminatees submitted to the General Counsel in a prior unfair labor practice case, the identity of all persons with whom the discriminatee discussed the NLRB case, all the facts alleged to support a violation of the Act, and all persons whom the discriminatee had contacted about serving as a witness in the NLRB case); ***Chino Valley Medical Center***, 362 NLRB 283 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), enfd. sub nom. ***United Nurses Associations of California v. NLRB,*** 871 F.3d 767 (9th Cir. 2017); ***Guess?, Inc***., 339 NLRB 432 (2003) (employer violated 8(a)(1) by asking an employee during a deposition in a workers' compensation case to reveal the identities of other employees who attended union meetings); ***Wright Electric, Inc***., 327 NLRB 1194 (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 other types of materials that might reveal protected employee conduct. See ***Starbucks Corp***., 373 NLRB No. 101, slip op. at 7 (2024) (finding that employer violated 8(a)(1) by serving two employees with subpoenas seeking

information about employees' union activities, including their recordings of meetings about their union organizing, communications between employees, and related documents), vacated and remanded, 173 F.4th 230 (5th Cir. 2026); ***Sheraton Anchorage***, 19-CA-32148 et al., unpub. Board order issued Jan. 21, 2011 (granting the union's special appeal and quashing a respondent subpoena that sought all forms indicating that employees wanted continued representation by the union, notwithstanding that the General Counsel had introduced a few of them for impeachment purposes); ***Trump Ruffin Commercial, LLC***, 28–RC–153650, unpub. Board order issued July 28, 2016 (2016 WL 4036983) (affirming the hearing officer's ruling revoking the employer's subpoena, which requested "any and all photographs or records" in the petitioning union's possession relating to the employer's election objections, as production of such materials "could expose employee conduct protected by Section 7 of the Act that the Employer could not lawfully have photographed itself," and the material was "not probative of [the Employer's] specific objections" to the election).

Note that the D.C. Circuit has generally upheld the Board's protection of such materials. See ***Veritas Health Services, Inc. v. NLRB***, 671 F.3d 1267, 1274 (D.C. Cir. 2012) (citing *National Telephone* 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).

§ 8–460 Collective-Bargaining Information

Communications between the union and employees. The Board has held that employer subpoenas broadly requesting a union's records, including communications between the union and its members, are properly revoked to protect the bargaining process. See ***Berbiglia, Inc.***, 233 NLRB 1476, 1495 (1977). In that case, the General Counsel alleged that the respondent employer had violated Section 8(a)(3) of the Act by failing to properly reinstate employees following an unfair labor practice strike. Hoping to show that the strike, which occurred following failed contract negotiations, was an economic rather than unfair labor practice strike, the employer served a subpoena duces tecum on the union seeking a wide-ranging examination of the union's records, including communications between the union and its members and with other unions, persons, associations or organizations in correspondence or in meetings, that related to or tended to show the reasons for a strike. The ALJ, however, revoked the subpoena, stating:

> [R]equiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure.

The employer thereafter filed exceptions, but the Board summarily affirmed the ALJ's rulings.

See also ***Hooks ex. rel. NLRB v. Hood River Distillers, Inc.***, 2021 WL 3732751 (D. Ore. Mar. 30, 2021). There, the respondent employer subpoenaed the charging party union in the 10(j) injunction proceeding for its communications with its members regarding bargaining plans and issues, strike and picketing plans, and the employer's last and final offer. Applying the Board's *Berbiglia* doctrine, the district court found the documents privileged. The court also rejected the employer's argument that the union had waived that privilege by submitting to the Agency's regional office statements "describing some general communications" between itself and its members.

Note, however, that some courts have generally declined to recognize a broad "union relations" privilege covering communications between union members and their union other than during the course of disciplinary proceedings. See ***Leslie ex. rel. NLRB v. Starbucks Corp***., 2022 WL 7702642 (W.D.N.Y. Sept. 23, 2022) (denying, in a 10(j) injunction proceeding, the General Counsel's and the union's petitions to revoke the respondent's subpoenas based on the union-employee privilege, noting that "the Second Circuit does not recognize a union-employee privilege—at least not in this context"), citing ***Hernandez v. Office of the Commissioner of Baseball***, 331 F.R.D. 474, 478 (S.D.N.Y. 2019) (requiring plaintiff in Title VII action to produce subpoenaed communications between him and his union as there were no disciplinary proceedings instituted against him), and cases cited there. Compare cases involving communications between grievants and their union discussed in **§ 8–405**, above.

For example, in ***Ozark Automotive Distributors, Inc. v. NLRB***, the D.C. Circuit held that the hearing officer in a postelection proceeding involving the employer's election objections improperly revoked the employer's subpoena to the extent it sought communications between certain prounion employees and the union. The court held that because the subpoenaed communications were relevant to the employer's case (i.e., to whether the employees had actual or apparent authority to act on the union's behalf) and to the credibility of an employee witness for the union, the hearing officer should not have revoked the subpoena in its entirety. Rather, she should have required production of responsive information that did not infringe on any confidentiality interests under *National Telephone* (such as the mere date and time of calls between the union and the employee) and should have conducted an in camera review to determine if other responsive information that might infringe on employee confidentiality interests outweighed the employer's interests or to narrow the scope of the subpoena. 779 F.3d 576, 581–582 (D.C. Cir. 2015), denying enf. and remanding 357 NLRB 1041 (2011). See also ***Veritas Health Services, Inc. v. NLRB***, 895 F.3d 69, 81 (D.C. Cir. 2018) (*Ozark* found that quashing the subpoena was an abuse of discretion "because the missing evidence prejudiced a critical element of that case").

Bargaining notes and summaries. Parties frequently offer their own bargaining notes into evidence to support their respective positions regarding what occurred during negotiations. See, e.g., ***Hilton Anchorage***, 370 NLRB No. 83 (2021), enfd. 2022 WL 3010171 (9th Cir. July 29, 2022); ***First Hospital Wyoming Valley***, 370 NLRB No. 17 (2020). See also the cases cited in **§ 16–803.1** and **16–803.6**, below, regarding the hearsay exceptions for present sense impressions and records of regularly conducted activity.

However, following *Berbiglia*, the Board has limited the ability of employers and unions to subpoena or request each other's bargaining notes and summaries. See ***Champ Corp.***, 291 NLRB 803, 817–818 (1988) (revoking employer's subpoena that broadly sought all union notes, memoranda, transcripts, records or other writings describing or recording collective-bargaining negotiation sessions between the parties to show that a strike was not prolonged by the employer's alleged unfair labor practices), enfd. without addressing the subpoena issue 933 F.2d 688 (9th Cir. 1990); ***Stericycle, Inc.,*** 370 NLRB No. 89, slip op. at 1 n. 5 and 6 (2021) (employer lawfully refused to provide the union with requested bargaining notes regarding certain provisions of the collective-bargaining agreement, as *Berbiglia* "support[s] the proposition that bargaining notes are generally privileged," and "it is irrelevant whether an employer or a union requests or subpoenas the bargaining notes."). See also ***Boise Cascade Corp***., 279 NLRB 422, 432 (1986), where the ALJ found that the employer lawfully refused to comply with the union's request for a report that included a historical overview of the employer's negotiations with the union and the employer's negotiating strategy, as "[a] proper bargaining relationship between the parties mandates that [the employer] be able to confidentially evaluate possible interpretations of the existing labor agreement and . . . to plan in confidence a strategy for altering or changing" a

particular program). Although no exceptions were filed to the ALJ's finding, the Board later cited that finding as support for its decision in ***Stericycle***, above.

Note again, however, that this view appears not to have been embraced by the courts. See ***Chicago Bridge and Iron Company, N.V. v. Fairbanks Joint Crafts Council, AFL-CIO***, 2019 WL 2579627 (D. Alaska June 23, 2019) (declining, in a proceeding to determine pension obligations under a collective-bargaining agreement, to recognize a "labor relations privilege" and ordering the respondent union to produce notes and correspondence from its bargaining files that it had redacted or withheld from the employer), and other court cases cited there.

As discussed in **§ 8–410**, above, the Board has also applied *Berbiglia* in quashing a General Counsel subpoena to the extent it sought collective-bargaining information the respondent asserted was protected by the attorney-client privilege, including bargaining notes that were intermingled with such privileged communications. See ***Patrick Cudahy, Inc.***, 288 NLRB 968, 969–971 (1988).

However, courts have ordered disclosure of collective-bargaining information to the GC where no attorney-client privilege was asserted, holding that any concerns about maintaining confidentiality could be addressed by a protective order. See ***NLRB v. SEIU Local 521***, 2008 WL 152176 (N.D. Cal. Jan. 16, 2008) (court enforced GC investigative 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); ***NLRB v. Jackson Hospital Corp***., 257 F.R.D. 302 (D.D.C. 2009) (citing *SEIU Local 521*, the special master in a contempt proceeding rejected the respondent employer's assertion that it was privileged to withhold from the GC documents revealing bargaining strategy, and ordered the respondent to produce the subpoenaed documents to the GC subject to a protective order prohibiting disclosure of the bargaining-strategy information to the union).

See also ***ExxonMobil Corp., Beaumont Refinery***, 16–CA–276089, unpub. Board order issued Dec. 11, 2023 (2023 WL 8715745). Citing the above court decisions, the ALJ ruled that the General Counsel was not prohibited from introducing into evidence certain internal company notes containing a historical overview and impressions by the company's in-house attorney and two managers regarding recently completed contract negotiations and a related lockout and decertification campaign. The ALJ distinguished *Berbiglia* and *Patrick Cudahy* on the grounds that the notes were not subpoenaed by the union but were inadvertently posted by a manager and subsequently discovered by an Exxon employee on the company intranet; the company failed to establish that the notes constituted privileged communications or protected work product; and there were no significant confidentiality concerns regarding disclosure of the notes to the union as the employee had already provided the notes to the union. The company filed a special appeal of the ALJ's ruling, but the Board denied it, without prejudice to renewing the objections in exceptions to the ALJ's decision, on the grounds that the company had "failed to establish that the judge abused his discretion or that his rulings cannot be appropriately addressed at a later state of the proceeding." The Board also noted that, "to the extent the Respondent is concerned about the impact of disclosure of the interview notes on *future* negotiations with different parties, it can seek a protective order."

With respect to whether the General Counsel in an 8(a)(5) or 8(b)(3) refusal-to-provide-information case may subpoena the same information that the respondent employer or union allegedly refused to provide, see ***Electrical Energy Services***, 288 NLRB 925, 931 (1988) (GC's

hearing subpoena seeking each and every document the respondent employer had allegedly unlawfully refused to provide to the union was "improper" and "an abuse of the subpoena power"). See also ***National Nurses Organizing Committee (Corpus Christi Medical Center),*** 371 NLRB No. 132, slip op. at 7, n. 17 (2022). The complaint in that case alleged that the union had violated Section 8(b)(1)(A) of the Act during a decertification campaign by failing to provide the individual charging party with a "neutrality agreement" between the union and the employer. Prior to the hearing, the charging party served a subpoena on the employer seeking the same agreement. The Board found that the judge did not err in failing to review the document in camera or require its production. Citing *Electrical Energy Services*, the Board stated that it would be improper for the charging party to use a subpoena as a substitute for a Board order requiring disclosure of the information that was allegedly unlawfully withheld. The Board noted that, while the agreement might be the best evidence of its contents, it was "far from the *only* evidence that could be probative of whether it affects employee's terms and conditions of employment." The Board therefore rejected the GC's argument that "[t]he Board should hold that in a request for information case, whether it be . . . against an employer or a union, [*Electrical Energy Services, Inc*.] does not prohibit subpoena production of the at-issue document where the existence and substance of the document is highly relevant to a central, indeed dispositive issue, as in this case."

Compare ***Cascades Containerboard Packaging–Niagara***, 370 NLRB No. 76, slip op. at 12 n. 19 (2021) (distinguishing *Electrical Energy Services* and denying respondent's petition to revoke the GC's subpoena where the subpoenaed information was relevant to the complaint allegations that the respondent discriminatorily and unilaterally reduced employees' profit-sharing payments in violation of Sec. 8(a)(3) and (5) of the Act).

§ 8–465 Mediator's Privilege

A party may not compel a mediator to testify in Board proceedings. ***Success Village Apartments, Inc.***, 347 NLRB 1065 (2006); ***NLRB v. Joseph Macaluso, Inc.***, 618 F.2d 51 (9th Cir. 1980). Thus, a subpoena requiring a mediator to testify must be quashed.

§ 8–470 Reporter's Privilege

Consistent with many courts that have addressed the issue, the Board recognizes a "qualified" privilege for reporters or journalists which balances the need for the subpoenaed information against the interests favoring nondisclosure. See ***M. J. Mechanical Services***, 324 NLRB 812, 832 (1997) (granting reporter's petition to revoke the respondent's subpoena duces tecum seeking his notes and records relating to an article on the union's salting campaign at the respondent's work sites, as the remarks attributed to the persons in the article were either substantially admitted or not particularly relevant, the subpoena appeared to be simply a "fishing expedition" for any other unpublished statements that might help respondent's defense, and the respondent's need for the information therefore did not overcome the qualified reporter's privilege), enfd. mem. 172 F.3d 920 (D.C. Cir. 1998); ***Valley Camp Coal Co.***, 265 NLRB 1683 (1982) (denying newspaper editor's petition to revoke the General Counsel's subpoena ad testificandum seeking her testimony regarding certain statements she had attributed to the respondent's owner explaining his decision to close a mine, as there was no absolute reporter's privilege not to appear and testify in a judicial proceeding, the subject article did not involve a confidential source, there was no other non-media source for the information, and the respondent's owner denied the statement attributed to him in the article, so the GC could not rely on the article itself for impeachment).

See also ****CNN America, Inc.*****,* 352 NLRB 675, 676–677 (2008), supplemental proceedings 353 NLRB 891 (2009), final decision and order issued 361 NLRB 439 (2014), reconsideration denied 362 NLRB 293 (2015), rev. granted in part and denied in part 865 F.3d 740 (D.C. Cir. 2017). In that case, the General Counsel subpoenaed various documents relevant to CNN's newsgathering processes. CNN filed a petition to revoke on various grounds, including that the documents were protected from disclosure by the reporter's privilege. The judge denied CNN's petition, interpreting the privilege as applying only to confidential sources. CNN thereafter filed a special appeal, arguing that some courts of appeals have recognized a qualified privilege not only for confidential sources, but also for editorial and newsgathering processes. The Board found it unnecessary to decide if the qualified privilege applied. The Board found that, even assuming the privilege applied, the GC could overcome it under the balancing test developed by the courts because 1) the information sought was not available from an alternative source; 2) CNN's asserted defenses to the complaint had placed its newsgathering techniques at issue and made the information critical to the General Counsel's case; and 3) CNN did not contend that the subpoenaed information was obtained through a promise of confidentiality or that disclosure would likely lead to discovery of confidential information or sources. Finally, the Board noted that, to the extent CNN was concerned about disclosure of proprietary business information to third parties, it could seek a confidentiality agreement with the GC.

For a list of court cases and further discussion of the various issues that may arise in applying the qualified reporter's or journalist's privilege, see **Graham, 4 Handbook of Fed. Evid. § 501:1, n. 13** (10th ed. Nov. 2025 Update); **Greenwald, Schrantz, and Slachetka, 2 Testimonial Privileges § 8:5 et seq.** (3d ed. Feb. 2023 Update).

§ 8–475 State Confidentiality Rules

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 n. 3 (2007) (judge properly accepted into evidence statements made during a state court injunction proceeding and a related court-ordered mediation of state law claims, despite a claim of privilege under Wisconsin law); ***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 the Board proceeding), enfd. 243 F. Appx. 771 (4th Cir. 2007); ***Landscape Forms, Inc***., 7–CA–162398, unpub. Board order issued March 18, 2016 (2016 WL 1086677), at 1 n. 3 (rejecting the respondent's contention that the General Counsel's investigative subpoena should be revoked because the requested information was exempt from disclosure under Michigan state law); ***Diva Limousine***, 22–CA–091561, unpub. Board order issued Dec. 3, 2013 (2013 WL 6328060) ("objections [to subpoenas] made solely on the basis of a state code of civil procedure . . . are not cognizable in a Board proceeding"). See also ***Miller v. St. John's Health System***, 2011 WL 3890315 2011 (S.D. Ind. July 29, 2011) (denying motion to quash the employer's subpoena in an 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), and **§ 16–501** (FRE 501), below.

§ 8–480 Foreign Blocking Statutes

Like state confidentiality rules or laws discussed in the previous section, foreign "blocking" statutes—laws prohibiting the removal of documents from the foreign country or province pursuant to a subpoena issued by a judicial or administrative authority outside the country or province—are not grounds for quashing a Board subpoena. See ***Cascades Containerboard***

Packaging–Niagara, 370 NLRB No. 76, slip op. at 12 n. 20 (2021) (rejecting respondent's contention that Quebec law prohibited disclosure).

§ 8–500 Procedures for Evaluating Privilege Claims

§ 8–510 Privilege Logs

Consistent with FRCP 26(b)(5)(A) and 45(e)(2)(A), to the extent a party in good faith believes that certain subpoenaed documents are privileged or otherwise protected from disclosure, it must promptly submit a privilege log or index identifying those documents. See, e.g., ***Haynes Security Services, Inc.***, 12–CA–296934, unpub. Board order issued Dec. 2, 2022 (2023 WL 17416555), at 1, n. 3; ***Nestle Dreyers Ice Cream Co***., 31–CA–190625, unpub. Board order issued Jan. 23, 2018 (2018 WL 549553), at 1 n. 2. See also ***NLRB v. NPC International, Inc.***, 2017 WL 634713, *6–7 (W.D. Tenn. Feb. 16, 2017) (rejecting the company's argument that it had no obligation to produce a privilege log at the agency level); ***NLRB v. Sanders-Clark & Co***., 2016 WL 2968014 (C.D. Cal. April 25, 2016) (finding that the respondent waived the privilege by failing to timely submit a privilege log to the ALJ).

Detailed description required. The log must provide "sufficient detail to permit an assessment by the judge of the [party's] claims." ***Meadowlands Hospital*****,** above. See also FRCP 26(b)(5)(A)(ii) and 45(e)(2)(A)(ii)) (the person claiming the privilege must "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."). At a minimum, the log or index should 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." ***Tri-Tech Services***, 15–CA–16707, unpub. Board order issued July 17, 2003, quoted in ****CNN America, Inc.***, 353 NLRB 891, 899 (2009), final decision and order issued 361 NLRB 439 (2014), reconsideration denied 362 NLRB 293 (2015), rev. granted in part and denied in part 865 F.3d 740 (D.C. Cir. 2017). See also ***NLRB v. NPC International***, 2017 WL 634713 at *9 (company's "conclusory" descriptions of the allegedly privileged emails were "wholly inadequate to enable the Court to determine whether the items were properly withheld").

The particular privilege or doctrine relied on for withholding the document should also be identified. Failure to do so may constitute waiver. See, e.g., ***Monterey Bay Military Housing, LLC v. Ambac Assurance Corp.***, 2023 WL 315072, *10 (S.D.N.Y. Jan. 19, 2023); ***MSTG, Inc. v. AT&T Mobility LLC***, 2011 WL 221771 (N.D. Ill. Jan. 20, 2011), reconsideration granted in part, 2011 WL 841437 (N.D. Ill. March 8, 2011).

Each document and attachment must be described. Unless otherwise agreed or ordered, the descriptive information should be provided for each communication or document, including attachments. ***NLRB v. Interbake Foods, LLC***, 637 F.3d 492, 503 (4th Cir. 2011); ***United States v. White***, 950 F.2d 426, 430 (7th Cir. 1991). An attachment is not privileged simply because it is attached to a privileged communication, and it should therefore be separately identified and described in sufficient detail to evaluate the claim. See, e.g., ***Lee v. Chicago Youth Centers***, 304 F.R.D. 242, 249 (N.D. Ill. 2014); ***S.E.C. v. Beacon Hill Asset Mgt. LLC***, 231 F.R.D. 134, 145 (S.D.N.Y. 2004). See also ***Roberts Technology Group, Inc***., 2015 WL 4503547, *2 (E.D. Pa. July 20, 2015) ("[T]he privilege must be asserted on a document by document basis. The communication must be confidential and with the goal of furthering counsel's provision of legal advice. Where the attached communication is not confidential but merely contains readily

available or pre-existing information not prepared by counsel, it is not privileged.") (citations omitted).

Requiring additional information. Under the FRCP, a judge has discretion to 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. United States***, 909 F.2d 201, 204 (7th Cir. 1990); ***Alexander v. FBI***, 192 F.R.D. 42, 45 (D.D.C. 2000); ***Friends of Hope Valley v. Frederick Co***., 268 F.R.D. 643, 651-652 (E.D. Cal. 2010); ***In re Rivastigmine Patent Litigation***, 237 F.R.D. 69, 84 (S.D.N.Y. 2006). Any significant gaps or ambiguities in the factual bases for the privilege claim are construed against the proponent. Ibid. See also ***EEOC v. BDO USA, LLP***, 876 F.3d 690, 695 (5th Cir. 2017).

Post-charge documents. Courts are split on whether post-complaint documents in civil litigation are conclusively or presumptively protected and therefore exempt from the FRCP privilege-log requirement. Compare, for example, ***First Horizon National Corporation v. Certain Underwriters at Lloyds*****,** 2013 WL 11090763 (W.D. Tenn. Feb. 27, 2013) (rejecting party's blanket claim that all post-complaint documents were protected attorney-client communications or work product); with ***Prism Technologies, LLC v. Adobe Systems, Inc.***, 2011 WL 5523389 (D. Neb. 2011) (holding that communications between the parties and their attorneys that occurred after the date the litigation began need not be included on a privilege log, particularly in light of the extensive discovery requested), and cases cited there. See also the additional court decisions cited in **Rice et al., 2 Attorney-Client Privilege in the U.S. § 11:8** (Dec. 2025 Update) (arguing against such an exemption for post-complaint documents); Douglas C. Rennie, *Why the Beginning Should be the End: The Argument for Exempting Post-Complaint Materials from Rule 26(b)(5)(A)'s Privilege Log Requirement*, 85 Tul. L. Rev. 109 (2010) (arguing for such an exemption).

However, it appears that neither the Board nor any court to date has applied the exemption to post-charge or complaint documents in NLRB unfair labor practice proceedings. In ***NLRB v. Jackson Hospital***, 257 F.R.D. 302, 308 (D.D.C. 2009), the court stated that "sophisticated counsel [might] agree that a certain category of information is so clearly likely to be work product that it need not even be logged on a privilege log." But the court did not itself exempt all post-charge or complaint documents from the privilege-log requirement.

Failure to submit a privilege log. If the party asserting the privilege failed to timely identify the document as privileged or demonstrate that an identified document is at least prima facie privileged in response to a subpoena, the judge may find that the privilege has been waived. See, e.g., ***In re Grand Jury Subpoena***, above. See also ***Williams v. Sprint/United Management Co.***, 230 F.R.D. 640, 654–655 (D. Kan. 2005) (finding that defendant in age discrimination case waived its attorney-client privilege and work product claims with respect to withheld metadata associated with responsive documents by failing to raise or log those claims).

Courts consider various factors, including the scope of the subpoena, the amount of time the party had to respond to the subpoena, whether the party had been afforded one or more prior opportunities to properly identify and adequately describe the documents it now claims are privileged, and whether the failure to comply was flagrant, deliberate, or in bad faith. See, e.g., ***EEOC v. BDO USA, LLC***, 876 F.3d at 697; ***NLRB v. NPC International, Inc.***, 2017 WL 634713 at *9; ***In re Chevron Corp.***, 749 F.Supp. 2d 141, 180–186 (S.D.N.Y.), affd. 409 F. Appx. 393 (2d Cir. 1010); ***In re In-Store Advertising Securities Litigation***, 163 F.R.D. 452, 457 (S.D.N.Y. 1995), and cases cited there. See also ***NLRB v. Jackson Hospital Corp***., 257 F.R.D. at 307–308 (where a party fails to submit an adequate privilege log, the court 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).

Note that it is unsettled whether ALJs have the authority to make a such a waiver finding with respect to subpoenaed documents. In ***NLRB v. Sanders-Clark & Co***., 2016 WL 2968014 at *4–5, the district court held that the ALJ exceeded her authority in ruling that the respondent waived the attorney-client privilege by failing to submit a privilege log, as such a ruling "was, at base, a discovery sanction," and only the federal district courts may issue "binding discovery sanctions." The court relied on the Ninth Circuit's decision in ***NLRB v. International Medication Systems***, 640 F.2d 1110 (9th Cir. 1981) (holding that only the federal district courts have authority to issue sanctions for subpoena noncompliance), as well as two subsequent decisions by the Sixth and Fourth Circuits citing the decision with approval, ***NLRB v. Detroit Newspapers Agency***, 185 F.3d 602, 605 (6th Cir. 1999) (holding that a district court may not delegate to the ALJ responsibility for reviewing documents in camera to determine whether they are privileged); ***NLRB v. Interbake Foods***, 637 F.3d 492, 499 (4th Cir. 2011) (holding that, while an 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).

However, the Board, with the approval of the D.C. Circuit and some other circuit courts, holds that the General Counsel may seek, and ALJs may grant, evidentiary sanctions against a respondent for noncompliance with a subpoena ruling or order, including the failure to properly log materials claimed to be privileged, as an alternative to court enforcement. See **§ 8–720**, Failure to Produce Documents, below. Thus, Board precedent supports the authority of ALJs to make a waiver finding, whether or not the finding constitutes or is accompanied by any evidentiary sanctions for noncompliance.

For additional discussion of the burden of proving that subpoenaed documents constitute privileged attorney-client communications or protected work product, see **§§ 8–405 and 8–430**, above. For a general discussion of waiver of the attorney-client privilege and the work product doctrine, such as by intentional or unintentional disclosure, see **§§ 8–415 and 8–435**, above.

§ 8–520 In Camera Inspections

ALJ authority. There may be circumstances where in camera review of the documents is warranted prior to ruling. The authority of administrative law judges and hearing officers to conduct in camera inspections has been upheld by the Board. See ***Kaiser Aluminum & Chemical Corp.***, 339 NLRB 829 (2003) (work product); and ***Brink's, Inc.***, 281 NLRB 468, 470 (1986) (attorney-client privilege). See also ***Starbucks Corp.,*** 19-CA-297589, unpub. Board order issued Feb. 8, 2024 (2024 WL 519030) (ALJ did not abuse her discretion by ordering respondent to bring unredacted copies of documents it claimed to be privileged to the hearing for in camera review, if needed); ***Everport Terminal Services, Inc***., 32–CA–172286, unpub. Board order issued Aug. 15, 2017 (2017 WL 3531095) (ALJ did not abuse her discretion in ordering the respondent union and one of its non-party locals to submit documents listed in their privilege logs for in camera inspection and to produce some of those documents to the General Counsel based on her assessment that they were not privileged).

For additional examples where ALJs have exercised that authority, see ***Adams & Associates, Inc***., 363 NLRB 1923 (2016), enfd. 871 F.3d 358 (5th Cir. 2017), and ***National Football League***, 309 NLRB 78 (1992), discussed in **§ 8–405** (Attorney-Client Privilege: Outside

vs. in-house attorneys), above. See also ***Patrick Cudahy, Inc***., 288 NLRB 968 (1988), discussed in **§ 8–410** (The Privilege and Collective-Bargaining and Business Records), above, where the trial judge (and apparently the Board itself on special appeal) conducted an in camera inspection of the documents respondent asserted were protected by the attorney-client privilege.

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 in camera inspection may reveal evidence that is not protected by the privilege, the judge has discretion to order that the evidence be presented for such inspection, considering the amount of material to be reviewed, the material's relevance, and the likelihood that an inspection will reveal whether the documents are privileged. See ***United States v. Zolin***, 491 U.S. 554, 571 (1989); ***In re Grand Jury Investigation***, 974 F.2d 1068 (9th Cir. 1992). See also ***NLRB v. Interbake Foods***, 637 F.3d 492, 502 (4th Cir. 2011), and on remand, 2011 WL 6736435 (D. Md. Dec. 21, 2011) (finding that the General Counsel failed to present sufficient grounds to conduct an in camera inspection of email strings that respondent claimed were privileged attorney-client communications).

Procedures. If the ALJ determines that in camera inspection is warranted, an issue may arise whether it should be conducted by another ALJ acting as a special master. For a discussion of this issue, see **§ 8–530**, below.

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 or enforcement. 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, unpub. ALJ special master's report issued Aug. 17, 2011 (2011 WL 3625915).

In camera inspections may also be used in other contexts. For example, if a subpoena requests the minutes of union meetings, disclosure of those minutes might reveal the names of the employees who attended, which would normally be confidential. See **§ 8–455**, Identity of Union Supporters, above. Thus, if the meeting minutes are found relevant, the judge should view the minutes in camera and require redaction of any portions identifying individuals other than the alleged discriminatee(s). ****R.K. Mechanical***, 27–CA–18863, unpub. Board order issued June 23, 2008, at n. 2. See also **§ 16–613.1,** Jencks Statements**,** below.

Noncompliance with in camera inspection. As discussed in **§ 8–720** below, the Board, with the approval of some circuit courts, has upheld the authority of ALJs to issue evidentiary sanctions for noncompliance with subpoena rulings and orders. This includes orders requiring a party to submit withheld documents for in camera inspection. See ***Pioneer Hotel & Gambling Hall***, 324 NLRB 918, 920, 927 (1999) (drawing adverse inference in part because the respondent refused to submit withheld documents to the ALJ for in camera inspection to evaluate the claim of privilege), enfd. in relevant part 182 F.3d 939 (D.C. Cir. 1999).

§ 8–530 Special Masters

The ALJ assigned to conduct the hearing has discretion whether to request the Chief ALJ to appoint another ALJ as special master to address subpoena and privilege issues arising in connection with the hearing. See ***Starbucks Co.,*** 03–CA–285671, unpub. Board order issued Aug. 4, 2022 (2022 WL 3138542) (denying respondent's special appeal from ALJ's order declining to request appointment of a special master, finding that "the judge is in the best position,

in the first instance, to determine whether appointment of a special master would assist him with subpoena and privilege issues."); ***Starbucks Corp.***, 18–CA–295458, unpub. Board Order issued May 26, 2023 (2023 WL 5953952) (denying respondent's special appeal, finding that ALJ did not abuse her discretion by requesting appointment of a Special Master to decide privilege issues).

The Board has not to date set forth specific guidelines for determining when to request or use a special master. However, special masters have historically been used where an exceptionally large number of documents have been subpoenaed and the respondent claims that many of them are privileged attorney-client communications and/or protected work product. See, for example, ****CNN America, Inc***., 352 NLRB 675, 676 (2008) (directing the Chief ALJ to appoint an ALJ/special master because the subpoenas raised "complex issues due to their requests for electronically stored information 'in native form, with all metadata and attachments intact'," which required "extensive analysis under the Federal Rules and *The Sedona Principles"*; and the appointment would "minimize disruptions to the ongoing unfair labor practice hearing and allow [the trial judge] to focus on the litigation of the unfair labor practices alleged in the consolidated complaint."), supplemental proceedings *353 NLRB 891 (2009) (attaching and adopting the special master's report). See also ***McDonald's USA, LLC***, 368 NLRB No. 134, slip op. at 24 (2019) (trial judge requested and Chief ALJ appointed another ALJ to serve as special master to address hundreds of disputed entries on the respondents' privilege logs); ***Amazon.com Services, LLC***, 29–CA–277198, unpub. Board order issued Jan. 4, 2023 (2023 WL ---) (special master was appointed to conduct an in camera inspection and review of numerous withheld documents identified on respondent's privilege log).

Respondents may sometimes argue that appointment of a special master is *required* to conduct an in camera inspection because disclosure to the trial judge, as the trier of fact, would be prejudicial. However, this argument is not supported by Board law. See ***Starbucks Co.***, 2023 WL 5953952, and Board cases cited in **§ 8–520** (In Camera Inspections: ALJ authority), above. Nor is it generally supported by court decisions. See, e.g., ***NLRB v. Interbake Foods, LLC***, 637 F.3d 492, 500 (4th Cir. 2011) ("[W]e agree with the Board's argument that *in camera* review by an ALJ is not in conflict with its role as factfinder. The agency's structure ensures sufficient independence of ALJs to conduct hearings fairly, especially when they are subject to Board review and judicial review. We note that district judges sitting without a jury are permitted to review documents *in camera,* and we see no reason to conclude that ALJs are not likewise permitted to do so."); ***In re Kellogg Brown & Root, Inc.***, 756 F.3d 754 (D.C. Cir. 2014) (reversing the district court judge's ruling that certain company documents were not privileged, but denying the company's request to reassign the case to a different judge on remand notwithstanding that the judge had reviewed the documents in camera).

Nevertheless, there may be circumstances where the ALJ may wish to consider requesting a special master to avoid even the appearance of a partisan tribunal and the risk that the case might be ordered retried before a different ALJ following an appeal. See ***Patrick Cudahy***, 288 NLRB 968, 978 (1988), where the Board reversed the trial judge's ruling, following his in camera inspection, that the subpoenaed documents were not privileged attorney-client communications, and remanded for a hearing de novo before a different ALJ "to avoid even the appearance of a partisan tribunal."

The appropriate procedures to be followed after issuance of a special master's report are not well established. It therefore appears to be within the discretion of the Chief ALJ or the trial judge to determine in each case whether the trial judge will review the special master's report or whether a party may directly file a special appeal of the report with the Board. For a case where the former procedure was followed, see ***Amazon.com Services, LLC***, above (finding that the

respondent failed to establish that the trial judge abused her discretion in adopting the special master's report).

In any event, as indicated in **§ 8–520** above, neither the special master nor the trial judge should disclose or provide the disputed documents to the General Counsel or other parties. It is up to the respondent to decide whether to comply with the rulings of the special master, trial judge, and Board. If it does not comply, the General Counsel may petition a court for enforcement of the subpoena or request an adverse inference.

§ 8–600 Protective Orders

ALJ authority. "It is clear that judges do have [the] authority" to issue a protective order. ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010, 1011 n. 7 (2005), citing ***AT&T Corp***., 337 NLRB 689, 693 n. 1 (2002) (ALJ issued a protective order prohibiting the disclosure of any of the hearing exhibits to "outside sources"); ***United Parcel Service***, 304 NLRB 693 (1991) (ALJ issued a protective order with respect to certain documents subpoenaed by the General Counsel stating that "their use shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing"); ***National Football League***, 309 NLRB 78, 88 (1992) (Board ordered that "the protective order entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony [will] 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"). See also ***Exxon Corp. v. FTC***, 665 F.2d 1274, 1278–1279 (D.C. Cir. 1981) (rejecting the companies' argument that the Federal Trade Commission's administrative law judges lack the authority to issue protective orders).

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 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), at 1 n. 2 (denying respondent's request because it failed to establish either). The motion must be supported by a particular and specific demonstration of fact, as opposed to a mere conclusory or speculative claim of harm. See ***Waterbed World***, 289 NLRB 808, 809 (1988) (denying respondent's motion for a protective order in part because of the "scanty and conclusory nature of the respondent's averments"). See also ***Loomis v. Unum Group Corp***., 338 F.R.D. 225, 228–229 (E.D. Tenn. 2021); ***NLRB v. CEMEX, Inc***., 2009 WL 5184695 (D. Ariz. Dec. 22, 2009); ***Serrano v. Cintas Corp***., 699 F.3d 884, 901(6th Cir. 2012); ***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); ***In re Terra International, Inc***., 134 F.3d 302, 306 (5th Cir. 1998).

A particularly strong showing of harm may be required where a party seeks to prevent disclosure to a discriminatee. See ***Waterbed World***, above (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, in part because of the Board's policy of affording discriminatees the right to hear testimony except under certain circumstances). Likewise, a stronger showing may be required where the documents have been introduced and made part of the formal record, given the public's interest in and historical access to judicial records. See, e.g., ***NLRB v. CEMEX, Inc***., above, citing ***Kamakana v. City and County of Honolulu,*** 447 F.3d 1172 (9th Cir. 2006) (requiring "compelling reasons" to seal documents). See also ***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").

Routine employment information. 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 Aug. 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 the 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 GC's special appeal with respect to that information, noting that there had been no showing of prejudice from entry of the protective order. ***Richmond Times-Dispatch***, 346 NLRB 74 n. 1 (2005), enfd. 225 F. Appx. 144 (4th Cir. 2007). See also ***Hotel Bel-Air***, 31–CA–074675, unpub. Board order issued March 20, 2018 (2018 WL 1409571) (ALJ did not abuse her discretion by denying the respondent's motion for a protective order restricting the use of payroll records that respondent produced to the General Counsel pursuant to a Board subpoena and district court order).

Sensitive personal information. In ***IATSE Local 16***, 20–CB–213058, the Board ruled that the ALJ did not abuse his discretion by issuing a protective order sealing certain documents and preventing dissemination or disclosure to the public of certain sensitive personal information about the individual charging party. The Board noted that the information was irrelevant to the underlying unfair labor practice proceedings and that the respondent union had not challenged the sensitive nature of the information or demonstrated a significant interest in disseminating it. See unpub. order dated July 1, 2019 (2019 WL 2869824).

Provisions of order. If it is determined that a protective order is appropriate, the judge may ask the moving party to submit a proposed order. The judge can thereafter tailor the order to meet the legitimate needs of the moving party and the possible objections of other parties. See, e.g., ***Exxon Corp. v. FTC***, above, 665 F.2d at 1274. See also ***Wal-mart Stores, Inc***., 368 NLRB No. 24, slip op. at 1 n. 2, and 14 (2019) (judge properly granted the respondent employer's motion to enforce the terms of the protective orders the parties agreed to at the beginning of the hearing).

Protective orders typically address who may have access to the information, what the information may be used for, and how long the information may be retained. See the Board and court cases cited above. See also ***H & M International Transportation, Inc***., 22-CA-089596, unpub. Board order issued May 23, 2014 (2014 WL 2194514) (Board ordered that production of the discriminatee's cell phone memory card "should be subject to a protective order agreed upon by the parties, or formulated by the judge in the absence of such agreement, 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."); ***Pepsi-Cola***, 307 NLRB 1378, 1379 n. 1 (1992) (judge granted the employer's unopposed motion to issue a protective order directing that excerpts from its security manual be sealed and returned to it at the close of the proceedings), which the Board subsequently cited as an example in ***Securitas Critical Infrastructure Services, Inc.***, 18–RC–120181, unpub. Board order issued April 4, 2014 (2014 WL 1339670), at 1 n. 1, and ***G4S Secure Solutions (USA), Inc***., 12–RC–203988, unpub. Board order issued March 20, 2018 (2018 WL 1409568), at 1 n. 1.

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 (N.D. Ill. Sept. 13, 2010); ***Kelly v. City of New York***, 2003 WL 548400 (S.D.N.Y. Feb. 24, 2003). See also **§ 12–900,** below, regarding the required redaction of personal information from documents submitted into the record.

Applicability of the Freedom of Information Act. Where a party seeks a protective order from the ALJ that would prohibit or restrict Agency personnel from disclosing information to the public, the judge should consider and address the applicability of the Freedom of Information Act (FOIA), 5 U.S.C. 552. FOIA generally requires federal agencies to promptly disclose their records on request unless one or more exemptions apply. The burden is on the agency to demonstrate that an exemption applies. ***U.S. Dept. of State v. Ray***, 502 U.S. 164, 173 (1991). If an agency declines to disclose a record, it must explain the basis for nondisclosure under FOIA; it cannot simply rely on its own administrative protective order designating the record confidential at the time it was received. ***General Electric Co. v. NRC***, 750 F.2d 1394, 1400 (7th Cir. 1984).

Various FOIA exemptions may apply to records submitted to the NLRB by private parties, including exemption 4, which exempts from disclosure matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential," and exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. Sec. 552(b)(4) and (6).

The Board's FOIA regulations specifically address "business information," i.e., "commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4." Among other things, the regulations state that, subject to certain exceptions, the Agency will provide a submitter with "prompt written notice" of a FOIA request or administrative appeal seeking business information that the submitter has designated in good faith as protected, or the Agency has reason to believe may be protected, and "a reasonable time" to respond and object to disclosure. See Sec. 102.117(c)(2)(iv) of the Board's Rules.

These regulatory provisions may provide legally sufficient protection with respect to such business information to render a protective order unnecessary or unwarranted. See ***Cannacruz, Inc.***, 32–CA–291904, unpub. Board order issued Oct. 28, 2022 (2022 WL 16550254), at 1 n. 2 (denying the employer's request for a non-disclosure/confidentiality agreement covering its subpoenaed commerce data as such data submitted to the Board "is deemed confidential and is not available for public inspection"), citing ***Illinois School Bus Co***., 231 NLRB 1 n. 2 (1977) (denying the employer's motion for a protective order covering the commerce information it had submitted to the Agency). See also ***EEOC v. City of Milwaukee***, 54 F.Supp. 2d 885, 891–896 (E.D. Wisc. 1999); ***EEOC v. Morgan Stanley & Co***., 132 F.Supp. 2d 146, 154–155 (S.D.N.Y. 2000); ***U.S. Dept. of Education v. NCAA***, 2006 WL 3198822, *9 (S.D. Ind. Sept. 8, 2006), affd. 481 F.3d 936 (7th Cir. 2007); ***EEOC v. Dept. of Developmental Services***, 2009 WL 10693211, *3 (E.D. Cal. June 23, 2009).

Compare ***NLRB v. CEMEX, Inc***., above. In that case, the court issued a protective order barring the General Counsel from disclosing the respondent employer's customer lists and profit/loss statements, which the GC had subpoenaed for the administrative hearing before the ALJ, to the charging party unions or the public. The court only addressed FOIA in the context of the employer's additional request to seal the documents. The court denied that additional request because it was premature, i.e., because courts generally do not seal documents placed under a protective order at the "discovery" stage; because sealing documents is subject to a stricter "compelling reasons" standard; and because FOIA and the Board's regulations provided sufficient protection in the event a FOIA request was made for the documents. In support, the court cited

EEOC v. AON Consulting, Inc., 149 F.Supp. 2d 601, 607–608 (S.D. Ind. 2001) (declining to follow *EEOC v. City of Milwaukee* and granting the employer's request for a protective order prohibiting disclosure of employment tests and validation studies to the charging parties during the EEOC's investigation of the charges, but finding that FOIA provided sufficient protection after the EEOC's investigation concluded).

Alternatively, the FOIA provisions may provide guidance in formulating a protective order. See ***Exxon Corp. v. FTC,*** above, 665 F.2d at 1279 (protective order issued by FTC ALJ was sufficient because it guaranteed that the companies would be given 10 days' notice prior to release of confidential documents so that they could challenge the disclosure).

Sealing Documents. If the protective order forbids or restricts disclosure of an entire document that has been admitted into the record, it is essential that the judge place the document under seal. The failure to do so may undermine subsequent attempts to enforce the order. See ***United Parcel Service****,* 304 NLRB at 694. It is also advisable to include the protective order in any recommended order issued by the judge. See ***National Football League***, 309 NLRB at 88; ***Carthage Heating & Sheet Metal***, 273 NLRB 120, 123 (1984).

Violations of order. Violating a protective order may constitute misconduct under Section 102.177 of the Board's Rules. See ***United Parcel Service***, above, and **§ 6**–**600,** Misconduct by Attorney or Representative, et. seq., above.

§ 8–700 Noncompliance with Subpoena

§ 8–710 Failure of Witness to Appear and Testify

The failure of a party witness (i.e. an officer or agent of a party) to appear and testify in compliance with a subpoena may warrant evidentiary sanctions, including prohibiting the noncomplying party from calling the same witness and drawing adverse inferences against that party. ***Rogan Bros. Sanitation, Inc***., 362 NLRB 547, 549 n. 9 (2015), enfd. 651 F. Appx. 34 (2d Cir. 2016), and ***Carpenters Local 405***, 328 NLRB 788 n. 2 (1999), and cases cited there. See also ***IATSE Local 720***, 369 NLRB No. 34, slip op. at 1 n. 2, and 6–7 (2020) (judge did not abuse her discretion by striking the testimony of the respondent union's business representative on direct examination by respondent given respondent's previous refusal to make him available to the General Counsel on the unjustified basis that the GC's subpoena had not been properly served).

If a subpoenaed nonparty witness appears but refuses to answer questions, the judge should advise that, absent a Fifth Amendment or other valid privilege, the witness is required by the subpoena to answer any and all relevant and appropriate questions posed by counsel. If necessary, the judge should also inform the witness about the consequences of refusing to answer, including that the Board may request a federal court to enforce the subpoena and to impose contempt sanctions if the witness thereafter declines to obey the court's order. See generally ***Barnett v. Norman***, 782 F.3d 417, 422–424 (9th Cir. 2015) (discussing a district court judge's obligations if a subpoenaed witness refuses to testify).

§ 8–720 Failure to Produce Documents

A party has an obligation "to begin a good faith effort to gather responsive documents upon service" of a subpoena; accordingly, "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at [the party's] 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 subpoenas upon issuance of the judge's order partially denying its petition to revoke on the first day of hearing), enfd. 156 F. Appx. 386, 388 (2d Cir. 2005). See also ***San Luis Trucking***, 352 NLRB 211, 212 (2008), reaffd. 356 NLRB 168 (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 from unrequested materials, and did not produce the requested documents as they were kept in the usual course of business or organized and labeled to correspond to the categories of the demand as required by FRCP 45 and 34), enfd. without addressing the sanctions issue 479 F. Appx. 743 (9th Cir. 2012).

Evaluating whether a good faith effort was made; custodian of records. A respondent may be required to make a custodian of records available to testify regarding the nature of its search for documents and to authenticate them, unless the parties can reach a stipulation regarding their authenticity. See ***Starbucks Corp.*****,** 19-CA-297589, unpub. Board order issued Feb. 8, 2024 (2024 WL 519030) (finding that the ALJ did not abuse her discretion by ordering respondent to do so).

A respondent also may be required to make its custodian of records available to testify if no responsive documents are produced or a dispute arises over the completeness of the production, in order to evaluate whether the respondent exercised due diligence. See, e.g., ***Starbucks Corp****.*, 372 NLRB No. 147 (2023) (finding that the ALJ did not abuse her discretion by ordering respondent to make available the custodian(s) of record who had performed its search for documents to testify regarding that issue to the extent that respondent contended that the subpoenaed documents did not exist); ***Cascades Containerboard Packaging–Niagara***, 370 NLRB No. 76, slip op. at 13 (2021) (judge rejected respondent's assertion that it did not have possession of subpoenaed documents, as respondent failed to call a custodian of records to substantiate that it searched its own records for the documents or sought unsuccessfully to obtain them from its foreign parent corporation, notwithstanding respondent's prior assurance to the judge that it would present the custodian of records' testimony).

See also ***Chipotle Services, LLC***, 363 NLRB 336, 342 (2015) (judge called a witness to question him about respondent's efforts toward subpoena compliance), enfd. 849 F.3d 1161 (8th Cir. 2017); ***V5 Technologies v. Switch, Ltd.***, 332 F.R.D. 356, 366–367 (D. Nev. 2019) (court found that the subpoenaed individual's conclusory assertions of a good faith search were insufficient, given that certain otherwise identified responsive documents were not produced, and ordered her to use certain electronic search terms proposed by the party seeking the documents and to provide a sworn declaration identifying with particularity the details of the search); ***Advanced Laboratories International, LLC v. Valentus, Inc***., 2017 WL 6209297 (N.D. Cal. Dec. 8, 2017) (court ordered the subpoenaed individual to provide a sworn declaration "describ[ing] in detail the steps he took to locate documents responsive to [the] subpoena, including the date(s) of each search performed, the locations searched (e.g., home office), the devices searched (e.g., phone, home computer, office computer), the types of files searched (e.g., email, Word, Skype logs, text messages, Facebook messages), and the methods used to perform the searches (e.g., the search terms used)").

However, the judge has no obligation to press for specific information about the subpoenaed party's compliance efforts where it is clear that no significant efforts were made to gather the subpoenaed documents. See ***McCallister Towing***, 341 NLRB at 398.

Imposing evidentiary sanctions. As indicated by ***McAllister Towing*** and ***San Luis Trucking***, above, the Board has repeatedly affirmed the authority and discretion of ALJs to

impose evidentiary sanctions against a noncomplying party where the General Counsel has elected not to initiate court enforcement proceedings (see **§ 8–800**, below). See also ***Starbucks Corp.***, 18-CA-295458, et al., unpub. Board Order issued May 26, 2023 (2023 WL 5953952) (denying respondent's special appeal, finding that the ALJ did not abuse her discretion by imposing evidentiary sanctions where respondent provided vague and inadequate information regarding its search for subpoenaed materials and refused to produce a custodian of the records). And the D.C. Circuit and certain other circuit courts have generally agreed. See ***Perdue Farms Inc. v. NLRB***, 144 F.3d 830, 834 (D.C. Cir. 1998), and additional court decisions cited below. However, as discussed in **§ 8–510** above, the Fourth, Sixth, and Ninth Circuits have held to the contrary.

Several sanctions are available where a party refuses or fails to timely or properly comply with a subpoena. The judge may:

1) Draw an adverse inference. See, e.g., ***Shamrock Foods Co.***, 366 NLRB No. 117, slip op. at 1 n. 1, and 15 n. 29 (2018) (respondent's contumacious failure to produce subpoenaed records regarding the duties of its floor captains warranted adverse inference that they would have corroborated the testimony of employees and provided additional evidence that the floor captains had Section 2(11) supervisory authority), enfd. per curiam 779 F. Appx. 752 (D.C. Cir. July 12, 2019); ***Sparks Restaurant***, 366 NLRB No. 97, slip op. at 9–10 (2018) (respondent's failure to produce subpoenaed records of shifts worked by striker replacements warranted adverse inference that the records would not have supported respondent's position that the strikers were permanently replaced before their unconditional offer to return), enfd. 805 F. Appx. 2 (D.C. Cir. 2019); ***Chipotle Services, LLC***, above, slip op. at 1 n. 1, and 8 (respondent's failure, despite repeated warnings by the judge, to produce numerous documents or conduct a diligent search for documents subpoenaed by the General Counsel and charging party warranted adverse inference that they would have revealed disparate treatment and supported the complaint allegation that the named discriminatee was unlawfully terminated); ***Metro-West Ambulance Service***, 360 NLRB 1029, 1030 and n. 13 (2014) (respondent's unexplained failure, in an 8(a)(3) discrimination case, to produce subpoenaed accident reports over the previous 3 1/2 years warranted an adverse inference that they would not have supported respondent's position that it treated the discriminatee the same as other similarly situated employees); ***Essex Valley Visiting Nurses Assn***., 352 NLRB 427, 441–444 (2008), reaffd. 356 NLRB 146 (2010), enfd. 455 F. Appx. 5 (D.C. Cir. 2012) (respondent's failure to produce subpoenaed documents warranted an adverse inference supporting the General Counsel's allegation of single-employer status).

See also ***Starbucks Corp***., 374 NLRB No. 8, slip op. at 5–6 (2024). There, the respondent refused to produce certain documents in response to the General Counsel's subpoena or submit them to the ALJ for in camera inspection to evaluate its privilege claims. The Board drew an adverse inference that the documents would not have contradicted the testimony of the GC's witnesses, but it did so based on the respondent's failure to *introduce* the documents. In support, the Board cited, e.g., ***Community Hospitals of Central California v. NLRB***, 335 F.3d 1079, 1086–1087 (D.C. Cir. 2003) (observing that the ALJ "would have been justified in drawing the adverse inference [that unproduced subpoenaed documents would have been unfavorable to the employer] . . . even if no subpoena had been issued"); ***Auto Workers v. NLRB***, 459 F.2d 1329, 1338–1339 (D.C. Cir. 1972) ("[W]hile the adverse inference rule in no way depends upon the existence of a subpoena . . . the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference . . . . [T]he rule does not deprive the suppressing party of [its] constitutional right to an enforcement hearing on the subpoena, since [it] is not required to produce the evidence in question. Rather, the tribunal simply utilizes the commonsense inference that if the evidence would do the suppressing party any good, [it] would readily produce it.").

An adverse inference should be drawn unless there is a valid reason for the judge not to do so. See ***Metro-West Ambulance Service***, above (granting the General Counsel's exception and drawing an adverse inference notwithstanding the ALJ's conclusion that it was unnecessary to do so because the evidence presented was sufficient to prove the alleged violation), citing ***Auto Workers v. NLRB***, 459 F.2d 1329, 1338–1344 (D.C. Cir. 1972) (absent a valid reason for bypassing the adverse inference rule, "the inference should actually be drawn and its impact evaluated"). See also ***Zapex Corp***., 235 NLRB 1237, 1239–1240 (1978) (judge improperly failed to draw an adverse inference that the respondent had not satisfied its burden of proving its defense where the respondent failed to produce subpoenaed records relevant to the issue), enfd. 621 F.2d 328 (9th Cir. 1980).

Valid reasons for declining to draw an adverse inference include the following.

Subpoena was unclear. See, e.g., ***Sisters Camelot***, 363 NLRB 162, 169 (2015) (unrepresented charging party could reasonably conclude that the respondent's subpoena did not seek certain emails he had forwarded to the General Counsel, as the subpoena's description of the requested documents suggested that it pertained only to personnel or work records).

Satisfactory explanation was provided. See, e.g., ***Shamrock Foods Co***., above, slip op. at 1 n. 1, and 9 n. 8 (subpoenaed recordings, if they even existed, were not in the charging party union's possession or control); ***CPS Chemical Co.***, 324 NLRB 1018, 1019 (1997) (union president testified that he had searched for the subpoenaed attendance list but could not find it, and the company advanced no argument that his testimony was unworthy of belief), enfd. 160 F.3d 150 (3d Cir. 1998); ***Hansen Bros. Enterprises***, 313 NLRB 599, 608 (1993) (discriminatee credibly testified that old tax returns did not exist); ***Champ Corp.***, 291 NLRB 803 (1988) (charging party union presented credible testimony concerning its good-faith but unsuccessful search for meeting notes, and other evidence supported a reasonable inference that the notes could have been inadvertently destroyed or misplaced), enfd. 933 F.2d 688 (9th Cir. 1990) .

Documents were claimed to be privileged. See ***United States ex rel. Barko v. Halliburton Co***., 241 F.Supp. 3d 37, 54–55 (D.D.C. 2017), affd. 709 F. Appx. 23, 29 (D.C. Cir. 2017), and cases cited there (adverse inference cannot be drawn from the invocation of the attorney-client privilege). But see ***Pioneer Hotel & Gambling Hall***, 324 NLRB 918, 920, 927 (1999) (drawing adverse inference in part because respondent refused to permit in-camera inspection of the withheld documents to evaluate the claim of privilege), enfd. in relevant part 182 F.3d 939 (D.C. Cir. 1999); ***Chromalloy Mining and Materials***, 238 NLRB 688, 691, 696 (1978) (drawing adverse inference because respondent refused to produce the withheld document even after the ALJ reviewed it in camera and concluded that the claimed privilege did not apply), enfd in part without reaching issue 620 F.2d 1120, 1128 n. 5 (5th Cir. 1980). See also ***Starbucks Corp.***, above.

Documents are irrelevant to disputed issues. See ***CPS Chemical Co.***, above (judge properly declined to draw an adverse inference from the unions' failure to produce documents identifying employees who had joined the local union, as the relevant issue was whether the employees were eligible to join not whether they actually joined, and the absence of the documents therefore did not prevent the respondent company from proving any relevant point in the case or prejudice it).

Additional adverse inference unnecessary. See ***CVS Pharmacy,*** 372 NLRB No. 91, slip op. at 1 n. 1, and 7 nn. 3 and 4 (2023) (ALJ properly declined to impose adverse inference based on respondent's failure to produce subpoenaed documents where the weight of the evidence

supporting the General Counsel's case, and a separate adverse inference the ALJ imposed based on respondent's failure to call a witness rendered the additional adverse inference unnecessary); ***Compañia Cervecera de Puerto Rico, Inc. v. NLRB***, 150 F.4th 601, 613 (D.C. Cir. 2025) (no requirement that the Board draw an adverse inference where "the party has otherwise presented sufficient evidence of violations").

2) Bar the noncomplying party from introducing the unproduced responsive documents and other documentary or testimonial evidence about the same subject matter. See, e.g., ***New York Paving, Inc***., 371 NLRB No. 139, slip op. at 38–40 (2022) (excluding notes of telephone conversation and testimony about them where respondent failed to produce the notes in response to the General Counsel's subpoena and otherwise failed to make a good faith effort to comply with the subpoena by failing to produce text messages and emails or to prepare a privilege log with respect to documents it asserted were privileged), enfd. 2023 WL 7544999 (D.C. Cir. Nov. 14, 2023).

See also FRCP 37(c)(1) ("If a party fails to provide information . . . as required by Rule 26(a) . . ., the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: . . . (C) may impose other appropriate sanctions, including [an order under Rule 37(b)(2)(A)(ii) 'prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence']"); **Wright & Miller et al., 8B Fed. Prac. & Proc. Civ. § 2289.1** (3d ed. Sept. 2024 Update) (discussing the court's discretion and the relevant factors considered in determining whether to impose sanctions under FRCP 37(c)(1)).

3) Bar the noncomplying party from cross-examining witnesses about the same subject matter. ***Shamrock Foods Co***., above; ***NLRB v. C. H. Sprague & Son***, 428 F.2d 938, 942 (1st Cir. 1970). See also ***McAllister Towing & Transportation***, 341 NLRB at 396 (noting that, although the judge did not impose this particular sanction, judges have the authority to do so).

4) Permit the disadvantaged party to introduce secondary evidence about the same subject matter. See ***Bannon Mills***, 146 NLRB 611, 614 n. 4, 633–634 (1964); ***American Art Industries***, 166 NLRB 943, 951–953 (1967), affd. in pertinent part 415 F.2d 1223, 1229–1230 (5th Cir. 1969) (permitting the 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 the respondent failed to produce). See also ***Shamrock Foods Co***., above, slip op. at 1 n. 1, and 24 n. 61 (permitting the General Counsel to introduce secondary evidence, including hearsay testimony, regarding wage increases granted by the respondent); ***Roofers Local 30 (Associated Builders and Contractors, Inc.),*** 227 NLRB 1444, 1449 (1977) (same, regarding the identity of those who were present during and participated in the alleged incidents).

5) Strike pleadings or witness testimony that related to the same subject matter. See ***Equipment Trucking Co***., 336 NLRB 277 n. 1 (2001) (striking respondent's answer with respect to certain allegations); ***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).

Sanctions against the Charging Party. As suggested in some of the cases cited above, one or more of the foregoing evidentiary sanctions may be available where a charging party fails or refuses to fully comply with a respondent subpoena. See also ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010, 1011 (2005) (judge could have imposed evidentiary sanctions against the charging party employer for refusing to comply with the respondent union's subpoena

duces tecum, including permitting the respondent to use secondary evidence, precluding the charging party from rebutting that secondary evidence or cross-examining witnesses about it, and drawing adverse inferences against the charging party).

Sanctions against the General Counsel. An issue may occasionally arise whether sanctions should be issued against the General Counsel for the contumacious failure of a charging party or a discriminatee to fully comply with a respondent subpoena.

In ***Marquez Bros. Enterprises***, Inc., 21–CA–039581, unpub. order issued Sept. 7, 2017 (2017 WL 3953408), the Board majority ruled that it was improper for the ALJ to issue evidentiary sanctions against the General Counsel because of the individual discriminatees' failure to fully comply with subpoenas duces tecum served on them by the respondent employer in the backpay proceeding. The ALJ had prohibited the GC from questioning any witnesses other than the compliance officer concerning the discriminatees' interim earnings. The majority reversed on the grounds that the GC acts on behalf of the Agency in the public interest rather than to vindicate private rights, and that the Board's backpay remedy is likewise a public rather than a private right. The majority found that the ALJ "therefore . . . improperly penalized the General Counsel for conduct that he did not control." The majority also noted that the discriminatees were not represented, one of them lacked reasonable proficiency in English, both were willing to and did testify about their production of documents and attempts to comply with the subpoena requests, and there was no indication that their failure to comply fully with the subpoenas was willful.

Marquez Bros. and its reasoning were subsequently applied to an unfair labor practice proceeding in ***Queen of the Valley Medical Center***, 368 NLRB No. 116 (2019). In that case, the ALJ barred the charging party union, which was represented by counsel, from examining certain witnesses as a sanction for failing to fully or timely provide all responsive documents subpoenaed by the respondent employer for the hearing. However, the ALJ declined to issue additional sanctions against the union as its failure to do so was not contumacious. Relying on *Marquez*, the ALJ also denied the employer's request to bar the General Counsel from questioning the witnesses as a sanction for the union's failure to fully or timely produce all subpoenaed documents (slip op. at 44). The employer subsequently challenged both rulings on exceptions, but the Board affirmed them. (While the Board's decision only specifically addresses the employer's argument that the ALJ should have issued additional sanctions against the union (slip op. at 1 n.4), the employer also specifically excepted and argued in its brief to the Board that the ALJ erred in denying its request to impose sanctions on the GC.)

But see ***Skylawn Funeral Home***, 369 NLRB No. 145 (2020). There, the General Counsel sought to introduce, as GC Exhibit 14, certain text messages sent by the charging party union's shop steward to the union's president. The ALJ, however, rejected and excluded the GC exhibit as a sanction for the union's failure to produce them to respondent in response to its subpoena. The ALJ reasoned that the text messages were in the union's possession but the union had not made any effort to comply with respondent's subpoena request or to file a motion to quash it. The ALJ, however, denied respondent's request to strike the shop steward's testimony, finding that such a sanction was "too severe." (Slip op. at 7–8.) Respondent subsequently excepted, arguing, inter alia, that the ALJ should have issued additional sanctions. The Board disagreed, stating:

> Despite the Respondent's arguments to the contrary, we find that the judge did not abuse her discretion in determining what sanctions to impose for the Union's noncompliance with the Respondent's subpoenas. We therefore affirm the judge's decision to exclude only GC Exh. 14.

(Slip op. at 1 n. 1.) Note, however, that neither the ALJ nor the Board discussed *Marquez* or *Queen of the Valley* (which issued after the ALJ's decision) in their decisions. Further, the GC did not file exceptions to the ALJ's decision, and the ALJ's exclusion of GC Exhibit 14 was therefore not directly at issue before the Board. Thus, it is at least questionable whether the Board's decision is precedent on that issue.

Dismissal of Complaint. "The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance." ***Sisters Camelot***, above, 363 NLRB No. 13, slip op. at 8. Thus, noncompliance with a subpoena normally does not by itself warrant the dismissal of a complaint. See ***Teamsters Local 917 (Peerless Importers)***, above. In that case, 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. See also ***Queen of the Valley***, above, slip op. at 44.

§ 8–730 Failure to Preserve Evidence (Litigation Holds and Spoliation)

A duty to preserve discoverable information arises when a reasonable party in the same factual circumstances would have reasonably foreseen litigation. The duty requires that the party take reasonable and proportionate steps to preserve relevant and discoverable information within its possession and control. Depending on the scope of such information and other circumstances, this may include implementing a "litigation" or "legal" hold to ensure that the organization's key custodians or data stewards take steps to preserve such information and to prevent losses due to routine business or system operations. The failure to take reasonable and proportionate steps may warrant curative measures or evidentiary sanctions, including adverse inferences. See ***Mannina v. District of Columbia,*** 437 F.Supp. 3d 1, 9–13 (D.D.C. 2020), and cases cited there. See also **Ashworth et al., 10A Fed. Proc., L. Ed. § 26:553** (Nov. 2023 Update) (discussing duty to preserve evidence for production and inspection); *Sedona Conference Commentary on Legal Holds*, *Second Ed.: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019) (summarizing the above principles and offering guidelines).

Merely asserting that the documents were not produced in discovery, without any evidence that they existed or were destroyed, is insufficient to support a negative inference. ***Brisbon v. Tischner***, 639 F.Supp. 3d 164, 178 (D.D.C. 2022), affd. per curiam 2023 WL 5162363 (D.C. Cir. Aug. 9, 2023). Courts require a party seeking an adverse inference based on spoliation of evidence to establish that: (1) there was an obligation to preserve the evidence at the time of destruction or alteration, i.e., the party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation; (2) the records were destroyed with a "culpable state of mind"; and (3) the evidence was relevant to the extent that a reasonable factfinder could find that the evidence would support the party's claims or defenses. See ***National Assn. of Broadcast Employees and Technicians (American Broadcasting Companies, Inc.),*** 371 NLRB No. 15, slip op. at 5 (2021), citing ***Zubulake v. UBS Warburg, LLC***, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). See also ***Mannina v. District of Columbia,*** above, 437 F.Supp. 3d at 6; ***Apple Inc. v. Samsung Electronics Co***., 888 F.Supp. 2d 976, 989–990 (N.D. Cal. 2012).

With respect to hard-copy documents and tangible things, courts disagree about the level of culpability necessary for an adverse inference. Some hold that mere negligence is sufficient. See, e.g., ***Mannina v. District of Columbia,*** above, 437 F.Supp. 3d at 12–13. Others require gross negligence or bad faith. See, e.g., ***Hodge v. BP Exploration & Production***, 2023 WL

2302956, *10 (E.D. La. March 1, 2023) ("Negligence is not enough to support the imposition of sanctions for spoliation, 'for it does not sustain an inference of consciousness of a weak case.'"), citing ***Vick v. Texas Employment Comm'n***, 514 F.2d 734, 737 (5th Cir. 1975). See also *Sedona Conference Commentary*, above.

With respect to electronically stored information (ESI), FRCP 37(e), as amended in 2015, specifically states that where ESI is lost due to a party's failure to take reasonable steps to preserve it, and cannot be restored or replaced through additional discovery, the court may presume that the lost ESI was unfavorable to the party "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." See also *Hoffer v. Tellone*, 128 F.4th 433 (2d Cir. 2025). Intent may be established by circumstantial evidence, including the timing, method, and selectivity of the destruction, whether the destruction was inconsistent with preservation policies, the party's conduct throughout the litigation, and whether there is a credible explanation for the failure to preserve relevant ESI. See ***Bistrian v. Levy***, 448 F.Supp. 3d 454, 475 (E.D. Pa. 2020); ***In re Petters Company, Inc***., 606 B.R. 803, 827 and n. 217 (Bankr. D. Minn. 2019), and cases cited there. See also ***Burris v. JPMorgan Chase & Co.***, 566 F.Supp. 3d 995, 1017 (D. Ariz. 2021) (finding that plaintiff's "systemic efforts" to destroy ESI from multiple electronic devices "evince an unusually clear level of intent to deprive" his former employer of potentially relevant ESI).

However, absent sufficient direct or circumstantial evidence of intent, an adverse inference is improper, even if it has been shown that the ESI was likely relevant and its loss prejudicial. See ***Bistrian***, above (denying adverse inference for this reason with respect to a hallway video that was overwritten). See also ***Youngevity International v. Smith***, 2020 WL 7048687 (S.D. Cal. July 28, 2020); ***Alsadi v. Intel Corp***., 2020 WL 4035169 (D. Ariz. July 17, 2020), and cases cited there.

Lesser sanctions, such as precluding the spoliating party from presenting certain other evidence, may also be improper if their effect would be essentially the same as an adverse inference, for example if the party was precluded from presenting any evidence in support of its central or only claim or defense in the case. See ***Bistrian***, above, at 478; ***Youngevity***, above, at *5 (citing Advisory Committee Notes to 2015 amendments to FRCP 37(e)(1)). However, it is generally appropriate to consider the destruction of the ESI as a factor along with all other factors in making the relevant factual finding. See ibid.

For Board cases addressing the duty to preserve evidence for an unfair labor practice proceeding, see ***Queen of the Valley Medical Center***, 368 NLRB No. 116, slip op. at 41–44 (2019) (applying the three-part test described above and denying the respondent employer's request for adverse inferences against the charging party union for spoliation of records); ***McDonald's USA, LLC***, 364 NLRB 1929, 1930 n. 5 (2016) (Board found that it was premature to decide whether McDonald's preservation efforts had been sufficient and what sanctions would not be appropriate until after McDonald's had completed searching all sources available to it within the scope of the court-enforced subpoena); ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614, 636 (2007) (rejecting the General Counsel's request in an 8(a)(3) termination/reduction-in-force case for an adverse inference based on the supervisors' destruction of the worksheets they used during the termination selection process, as the respondent had no legal duty to retain the records and there was no business or personal reason for the supervisors to keep them).

Regarding the duty to preserve evidence for a compliance/backpay proceeding, see ***Lucky Cab Co***., 366 NLRB No. 56, slip op. at 7 (2018) (rejecting the employer's request in the backpay proceeding for a "negative spoliation inference" based on the discriminatee's failure to

retain expense receipts, as the employer had the burden in a backpay proceeding to establish fraudulent concealment, and there was no direct or circumstantial evidence that the discriminatee had willfully destroyed the receipts to prevent them from being discovered), enfd. mem. 818 F. Appx. 638 (9th Cir. 2020). See also ***Santa Barbara News-Press***, 370 NLRB No. 119, slip op. at 5–6 (2021) (rejecting the employer's argument in the backpay proceeding that all of the union's claimed bargaining expenses should be denied because the underlying receipts had been shredded, as they were destroyed pursuant to the union's normal document destruction policy or to clear up work space, and there was ample other evidence of the claimed expenses, including detailed contemporaneous expense reports), enfd. sub nom. ***NLRB v. Ampersand Publishing, LLC***, 2022 WL 3305974 (9th Cir. Aug. 11, 2022).

See also ***Dauman Pallet, Inc.***, 314 NLRB 185, 213 (1994). In that case, 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.

For a case addressing evidence-preservation letters, see ***National Assn. of Broadcast Employees and Technicians (American Broadcasting Companies, Inc.),*** above, 371 NLRB No. 15 (finding that the respondent union violated Sec. 8(b)(1)(A) by sending the individual charging party and his legal counsel evidence-preservation demand letters detailing an extensive duty to preserve a wide variety of types of data—including data not remotely relevant—and threatening to seek damages should he fail to satisfy the asserted duty).

§ 8–740 Interference with Subpoena Compliance

It is a violation of the Act for an employer to:

(1) State or imply to a subpoenaed employee that compliance with the subpoena is optional. ***Bobs Motors, Inc.***, 241 NLRB 1236 (1979) (employer violated 8(a)(1) by telling employee that the Board's subpoena was not enforceable and it was up to him to decide whether to appear at the hearing), and cases cited there.

(2) Attempt to dissuade a subpoenaed employee from appearing at the hearing. See ***Alterman Transport Lines, Inc.***, 127 NLRB 803, 804 (1960) (finding 8(a)(1) violation where the employer told the subpoenaed employee on the day of hearing that it needed him to remain at work and did not want him to appear at the hearing, and gave him the phone number of the employer's counsel).

(3) Threaten to treat the subpoenaed employee's attendance at the hearing as an absence subject to discipline or other adverse action, or to impose conditions on attendance, such as trading shifts. See ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46, 54–55 (1998) (employer violated 8(a)(4) and (1) by telling employee that he needed to exchange shifts with another employee to avoid incurring an absence subject to discipline); ***United States Precision Lens***, 288 NLRB 505 n. 3 (1988) (employer violated 8(a)(4) and (1) by treating employee's days of attendance at hearing as absences that would count against her in the employer's "excellent attendance" program).

An ALJ who learns that such conduct may be occurring should at least warn the employer against it.

§ 8–800 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 the same rule to subpoena enforcement contempt proceedings). Nor is the GC required to initiate enforcement proceedings where the subpoena is incapable of being enforced. See ***Champ Corp.***, 291 NLRB 803 (1988) (respondent was not prejudiced by the GC's failure to seek enforcement of respondent's subpoena duces tecum on the charging party union as the evidence showed that the subpoenaed documents were unavailable through no fault of the union), enfd. 933 F.2d 688 (9th Cir. 1990). See also ***NLRB v. RadNet Mgt., Inc***., 818 F. Appx. 663, 667 (9th Cir. June 17, 2020) (hearing officer in postelection objections case did not err by refusing to enforce certain employer subpoenas as they "were mere 'fishing expeditions' with no basis of belief or knowledge that they would provide any probative information"); ***Equinox Holdings, Inc. v. NLRB***, 883 F.3d 935, 940 (D.C. Cir. 2018) (hearing officer in postelection objections case did not unreasonably refuse to enforce the company's subpoena of an employee witness, as the company never made a proffer that the testimony might have warranted setting aside the election); ***Powerback Rehabilitation***, 365 NLRB No. 119, slip op. at 1 n. 2 (2017) (Acting Regional Director did not abuse his discretion in postelection objections case by refusing to enforce the employer's subpoena duces tecum on one of its supervisors to determine if she had made objectionable preelection prounion statements because the subpoena was "at best, a fishing expedition," notwithstanding that the supervisor had not filed a petition to revoke the subpoena).

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 ***Station Casinos, LLC***, 28-CA-22918, unpub. Board order issued March 3, 2011 (2011 WL 828422) (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 1), 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 at the earliest possible stage. 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's first contact with the parties is in a prehearing conference conducted by phone or video. 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), enfd. 12 F. Appx. 75 (2d Cir. 2001); ***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

At their discretion, ALJs may offer parties an opportunity to settle at the hearing. As indicated in **§ 1–100**, Judge's Opening Statement, above, ALJs typically do so before going on the record, at the close of the General Counsel's case, and/or after all the evidence has been introduced. See ***J. Westrum Electric***, 365 NLRB 1479 n. 1 (2017) (ALJ did not demonstrate bias against respondents by encouraging settlement after the GC's case had been presented and again at the close of the hearing; the judge stated at the beginning of the hearing that she would do so at those times, and she did not display bias against any party or create the impression that she had prejudged the case), enfd. 753 F. Appx. 421 (8th Cir. 2019).

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, 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 Hearing Opens

Pursuant to Section 3(d) of the Act and Sections 102.18 and 102.19 of the Board's Rules, a Regional Director's decision to approve a settlement and withdraw a complaint prior to the opening of the hearing is not reviewable by the administrative law judge or the Board. The charging party's sole avenue of review in such circumstances is to file an appeal with the General Counsel in Washington, D.C., whose determination is final. See ***NLRB v. Food & Commercial Workers Local 23***, 484 U.S. 112, 124–126 (1987). The same appears to be true if the hearing has opened but no evidence has been introduced. See ***Sheet Metal Workers Local 28 (American Elgen),*** 306 NLRB 981, 981–982 (1992) (reversing the ALJ and holding 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 is ripe for adjudication on the parties' pleadings alone), and other cases discussed in **§ 3–500**, Withdrawal or Dismissal, above.

However, there is no such limitation on Board review where the General Counsel *rejects or opposes* a proffered settlement executed by the respondent and the charging party. The Board may rule on the adequacy of such a settlement pursuant to a timely prehearing motion to dismiss the complaint under Section 102.24 of the Board's Rules. ***Fairmont Hotel***, 314 NLRB 534 n. 4 (1994).

Judges have also reviewed and approved or rejected such settlements prior to the hearing or before any evidence has been introduced pursuant to their general authority to rule on prehearing motions under Sections 102.25 and 102.35(a)(8) of the Board's Rules. See, for example, ***Kiss Electric, LLC***, 4–CA–164351, unpub. Board order issued June 27, 2017 (2017 WL 2794211). In that case, the Board upheld the judge's approval of an informal settlement over the General Counsel's objections that it did not provide backpay for the discriminatees, require instatement of one of the discriminatees, or include any provision for a default judgment. Although not reflected in the Board's order, the record before the Board indicated that the judge had issued his written order approving the settlement the day before the scheduled hearing. See also ***Flint Iceland Arenas***, 325 NLRB 318 (1998) (ALJ reviewed and approved a non-Board settlement executed by the respondent and the charging party over the General Counsel's objection at the beginning of the hearing and before any evidence was introduced; although the Board subsequently reversed the ALJ and rejected the settlement on appeal, it did so on the merits, not because the ALJ lacked authority to rule on the settlement); and ***Beverly Enterprises, Inc***., 341 NLRB 296, 298 (2004) (ALJ considered and rejected the respondent's proposed settlement on the merits several months prior to opening the hearing).

As discussed in **§ 9–500**, below, the judge should ensure that the parties' positions for and against such a proposed settlement are placed on the record. One option, which has been used successfully by judges, is to open the hearing by telephone in advance of the scheduled date with a court reporter present. See **§ 12–200**, Opening the Hearing by Telephone or Mail, below**.** The settlement is placed into the record as an exhibit along with the formal papers; the parties and the discriminatees, if any, are provided an opportunity to state their positions on the record; and the judge rules on the settlement, either immediately on the record or afterwards in a written order. This procedure saves the parties, witnesses, counsel, and judge the time and expense of preparing for trial and traveling to the hearing site in the event the settlement is approved. It may also preserve the scheduled hearing date in the event the settlement is not approved.

§ 9–330 Settlements After Hearing Opens and Before Decision Issues

If an informal settlement is reached after the hearing opens and evidence has been introduced but before a decision is issued, it must be submitted to the trial judge for review and approval. See Section 101.9(d)(1) of the Board's Statements of Procedure. See also **§§ 3–500 and 9–320, above.** This applies to all settlements, including formal settlements providing for issuance of a Board order. See ***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 issues an order approving the settlement over objection, or rejecting the settlement, an aggrieved party may file a special appeal with the Board pursuant to Section 102.26 of the Board's Rules. See **§ 10-600,** "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 unfair labor practice and compliance cases pending before the Board. See Section 102.45(c) of the Board's Rules for the applicable procedures.

§ 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 Board order and court enforcement) or informal (not involving 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 and affirmative order based on the record.

A third type of settlement, a non-Board settlement, involves an adjustment strictly between the respondent(s) and the charging party(ies). The General Counsel is not a party to a non-Board settlement, even though the GC may be involved in the settlement discussions and post-settlement compliance. Thus, the GC 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 1), Section 10164.1 states:

> 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,*** 348 NLRB 998 (2006), where the Board majority rejected a 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 GC 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 a 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 the subject non-Board settlements in that case. Although the settlements were opposed by the General Counsel, did not resolve the 8(a)(3) refusal-to-hire allegation regarding one of the four charging parties/discriminatees, provided only 10 percent backpay to the other three charging parties/discriminatees, and did not provide for posting a notice, the Board approved the settlements as they were reached before the hearing, were signed by the three charging parties/discriminatees and approved by the union, and gave them employment with retroactive seniority.

See also ***Permobil Inc.***, 374 NLRB No. 32 (2026) (rejecting non-Board settlement where General Counsel opposed it and agreement failed to provide a remedy to all of the employees who were subjected to an unlawful employment agreement); ***Blue Fox Heating and Cooling LLC***, 25–CA–297685, unpub. Order issued December 31, 2024 (2024 WL 5262300), at 1 n. 1 (affirming the ALJ's approval of a non-Board settlement notwithstanding the absence of default language); ***Amazon.com Services, LLC***, 09–CA–298870, unpub. Board order issued April 18, 2024 (2024 WL 1701258), at 1 n. 1 (finding that the ALJ did not abuse his discretion by approving a non-Board settlement after the hearing opened that provided 100 percent backpay and an additional 50 percent front pay to the alleged discriminatee); ***Starbucks Corp.***, 12–CA–295949, unpub. Board order issued June 26, 2023 (2023 WL 5953883), at 1 n. 1 (finding that the ALJ did not abuse his discretion by approving a non-Board settlement after the hearing opened that provided 100 percent backpay to the alleged discriminatee, notwithstanding the General Counsel's objections that, in light of the numerous other pending charges and complaints against the respondent across the country, the settlement improperly included a nonadmission clause, did not include default language, included a notice that did not address four of the complaint allegations, and removed oversight of compliance from the Region).

The Board also applies the *Independent Stave* factors to both informal and formal settlements. See, e.g., ***Kiss Electric, LLC***, 4–CA–164351, unpub. Board order issued June 27, 2017 (2017 WL 2794211). In that case, the complaint alleged that the employer had unlawfully refused to consider and hire five union salts. The Board upheld the judge's approval of a prehearing informal settlement of the allegations notwithstanding the General Counsel's objections that the settlement did not provide backpay for the discriminatees, require instatement of one of the discriminatees, or include any provision for a default judgment. See also ***Woodworkers Local 3–433 (Kimtruss Corp.)***, 304 NLRB 1, 2 (1991) (upholding the judge's approval of a posthearing informal settlement of 8(b) allegations against the respondent union over the objections of the respondent employer in the companion 8(a) case); and ***KW Electric Inc.***, 327 NLRB 70 (1998) (approving a formal settlement over the charging party's objection after the judge's decision issued).

For other cases approving settlements applying the above factors, see ***McKenzie-Willamette Medical Center***, 361 NLRB 54 (2014) (approving a posthearing non-Board settlement of the 8(a)(5) failure-to-provide-information allegations over the General Counsel's objection that it did not provide for posting a notice or otherwise fully remedy the allegations); ***Hospital Perea Unidad***, 356 NLRB 1204, 1204–1205 (2011) (reversing the ALJ and approving a prehearing non-Board settlement of an 8(a)(5) unilateral change allegation notwithstanding the General Counsel's objection that the respondent had committed similar unlawful conduct 2–3 years earlier); ***American Pacific Pipe Co.***, 290 NLRB 623, 623–624 (1988) (approving a prehearing non-Board settlement of a backpay claim notwithstanding the General Counsel's objection that it provided the discriminatee only about half of the total amount set forth in the specification); ***Longshoremen ILA Local 1814 (Amstar Sugar),*** 301 NLRB 764, 764–765 (1991) (approving a non-Board settlement of the 8(b)(3) illegal strike allegation against the union over the General Counsel's objection, notwithstanding that the judge had already issued a decision on the stipulated record finding a violation and the settlement did not require the union to post a notice).

For a case approving a settlement involving an alleged joint employer, see ***McDonald's USA, LLC, a joint employer, et al.,*** 368 NLRB No. 134 (2019), rev. denied sub nom. ***Fast Food Workers Committee & Service Employees Int'l Union v. NLRB***, 31 F.4th 807 (D.C. Cir. 2022). In that case, the Board reversed the ALJ and approved informal settlements over the charging parties' objections, notwithstanding that the settlements were not executed by the General Counsel and the respondents until near the close of the 150-day hearing and respondent McDonald's did not guarantee compliance with the remedies as a joint employer of the respondent franchisees. The Board noted that the settlements required the franchisees to provide an immediate remedy for all 181 violations of the consolidated complaints, including full backpay for all 8(a)(3) violations and premium backpay for the discriminatees who waived reinstatement. The Board also noted that there was no history of recidivism by the respondents; that the settlements imposed certain remedial obligations on McDonald's in lieu of a guarantee of joint and several liability; and that there was no significant probability of prevailing on the complaint's joint-employer allegation. The Board also found that the lack of electronic posting of the notice was not a sufficient basis for rejecting the settlements, noting that there was no evidence that the respondents *regularly* communicated with employees electronically.

For cases rejecting settlements, see ***Texas Transeastern***, 16–CA–280275, unpub. Board order issued Dec. 8, 2022 (2022 WL 21829070) (reversing the ALJ and rejecting a non-Board settlement opposed by the General Counsel where the complaint alleged that the employer prohibited employees from discussing wages in the workplace and discharged an employee for doing so but there was no notice posting or reinstatement remedy, and the settlement included a broad confidentiality provision and an enforcement mechanism allowing for money damages in

case of a breach); ***Postal Service***, 01–CA–176465, unpub. Board order issued July 27, 2018 (2018 WL 3642688) (rejecting a formal settlement of the complaint's 8(a)(5) allegations that the Postal Service unreasonably delayed providing the union with information, even though both the General Counsel and the charging party union agreed to the settlement, as the Postal Service was a recidivist and the stipulated order would allow it to seek modification or dissolution of the judgment after 5 years); ***International Shipping Agency, Inc***., 24–CA–091723, unpub. Board order issued April 20, 2015 (2015 WL 1802717) (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) (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); ***Flint Iceland Arenas***, 325 NLRB 318, 318–319 (1998) (same).

See also ****Goya Foods of Florida***, 358 NLRB 345 (2012) (finding that all four criteria favored rejecting the non-Board settlement); ***Frontier Foundries, Inc.***, 312 NLRB 73 (1993) (rejecting a non-Board settlement that provided only 6 percent backpay plus additional amounts as "liquidated damages," allegedly to avoid being taxed as income, did not require posting any notices, and did not contain assurances against future misconduct); ***Flyte Time Worldwide***, 362 NLRB 393 (2015) (Board declined to apply the *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); and ***Fred Meyer Stores, Inc***., 19–CA–032908, unpub. Board order issued Oct. 20, 2015 (2015 WL 6156743) (Board declined to remand a pending proceeding where the parties refused to disclose the terms of their non-Board settlement).

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.

Finally, the Board also applies the same *Independent Stave* analysis in evaluating whether private termination or severance agreements containing waiver and release provisions bar the unfair labor practice complaint allegations. See, for example, ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614 (2007), where the Board applied the *Independent Stave* factors and found that the 8(a)(3) discharge allegations were barred by private termination agreements containing waiver and release provisions that all of the alleged discriminatees signed in exchange for enhanced severance benefits. See also ***A.S.V., Inc***. ***a/k/a Terex***, 366 NLRB No. 162 (2018), where the Board found that severance agreements containing waiver and release provisions signed by 11 of the 13 alleged discriminatees did not bar the 8(a)(3) layoff allegations or prevent the Board from fully remedying the discrimination against them, both because the agreements were inadequate under *Independent Stave*, and because the severance agreements were offered to the employees "as part of a broader scheme to eliminate union supporters"). (A further discussion of such waiver and release provisions is found in **§9**–**640**, below.)

§ 9–440 Settlement by Consent Order

A trial judge may also be asked by a respondent to approve a settlement by "consent order"—that is, a unilateral settlement offered by the respondent but not agreed to by either the General Counsel or the charging party. In ***Hospital Metropolitano Rio Piedras***, 373 NLRB No. 89 (2024), the Board overruled precedent and eliminated a trial judge's authority to approve consent orders. The Board reasoned that Section 102.35(a)(7) of its rules appears to prohibit consent orders. That section authorizes the Board's administrative law judges to "[h]old conferences for the settlement or simplification of the issues by consent of the parties, *but not to adjust cases*" (emphasis added). The Board also found that its longstanding practice of approving consent orders created administrative challenges and inefficiencies, interfered with the General Counsel's statutory prosecutorial authority, and failed to effectuate the policies of the Act. The Board's ruling applied to all pending and future cases.

Nevertheless, the Board's previous decisions approving consent orders under the *Independent Stave* four-factor analysis may provide guidance in evaluating settlements where either the General Counsel or a charging party objects. The following are some examples.

Heil Environmental, 10-CA-114054, unpub. Board order issued June 20, 2014 (2014 WL 2812204). The complaint in that case alleged a variety of 8(a)(1) violations during an organizing campaign. The General Counsel objected to the respondent's proposed informal consent order because 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. The Board rejected the GC's objections, 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." Citing *Independent Stave*, the Board therefore found that the consent order substantially remedied the alleged violations.

Laborers Local 872, 28–CB–118809, unpub. Board order issued Jan. 12, 2015 (2015 WL 153954). 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.

UPMC, 365 NLRB No. 153 (2017). There, the only allegation against UPMC was that it was a single employer with Presbyterian Shadyside (PS), the respondent company that allegedly committed the violations. Prior to litigating the single-employer allegation (which was severed pending resolution of related subpoena disputes to avoid delaying the substantive allegations against PS), UPMC offered to "guarantee the remediation of any violation" found against PS, and "as a guarantor . . . [be] liable for [PS's] compliance with any remedy ordered" and to "take any necessary action to ensure compliance" "to the extent PS fails to remediate any unfair labor practices on its own." The General Counsel and the union objected to UPMC's offer because it was not equivalent to the full joint and several liability that would obtain if UPMC was ultimately adjudicated to be a single employer, which would allow the GC to hold UPMC primarily and

directly liable for any violations committed by PS. However, the Board majority found that the GC's and the charging party's opposition were outweighed by the following "countervailing factors": (1) UPMC's remedial guarantee was "as effective as" a finding of single-employer status; (2) there was no allegation or evidence presented at trial that UPMC had independently committed any unfair labor practices, and thus PS "*should* be primarily responsible to remedy its own violations"; (3) rejecting UPMC's offer would run the risk that UPMC might ultimately be found not to be a single employer and thus bear no responsibility for remedying the alleged violations; and (4) accepting UPMC's offer would greatly expedite the resolution of the proceeding by avoiding lengthy litigation of the single-employer allegation. Id. at 6–9.

El Super, 28–CA–170463, unpub. Board order issued June 10, 2019 (2019 WL 2435789). In that case, the General Counsel objected to the proposed consent order because there was a history of prior alleged violations by the respondent and the proposed consent order included a nonadmission clause and did not include "default" language providing for a Board order and court judgment in the event of noncompliance. The Board rejected the GC's objections and found that the consent order was properly approved under *Independent Stave* because (1) the consent order contained traditional remedies for the alleged violations; (2) the previous alleged violations had been resolved pursuant to a nonadmission informal settlement and a nonadmission consent order and thus did not establish a proclivity to violate the Act; and (3) an alternative enforcement mechanism existed in which the GC could issue a new complaint in the event of noncompliance.

§ 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. 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 Alleged Discriminatees. In settlements involving alleged 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. 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 alleged 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 on the record, this 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 alleged discriminatees).

Judge's Ruling or Order. As indicated in **§§ 9–320 and 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. See also ***El Super***, 367 NLRB No. 34, slip op. at 1 n. 1 (2018) (judge did not err by including in the hearing record his prehearing decision denying the respondent's motion for approval of a consent order, together with the motion papers and exhibits). 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 issues an order approving the settlement over objection or rejecting the settlement, aggrieved parties 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 and Remanding Pending Compliance. Ordinarily, if a judge approves a settlement on the record, the judge should recess the trial indefinitely pending compliance.

If the settlement is informal, the standard NLRB informal settlement form (NLRB Form 5378) states that the settlement agreement is remanded to the Regional Director to secure compliance with its terms. Form 5378 also provides that, upon notification of compliance, a motion to withdraw the complaint should be filed and the judge should issue an order approving withdrawal of the complaint as well as the answer. See also ***IATSE Local 16 (Various Employers)***, 20–CB–213058, unpub Board order issued June 4, 2019 (2019 WL 2408687) (judge acted in accordance with the terms of the informal settlement agreement and Sec. 10154.4 of the Board's Casehandling Manual in remanding the case to the regional director to secure compliance before entertaining a motion to withdraw the complaint). But cf. ***McDonald's USA, Inc***., 368 NLRB No. 134, slip op. at 8 (2019) (approving informal settlements notwithstanding that they required the General Counsel to move for withdrawal of the consolidated complaints within 10 days after approval, before compliance was effectuated, given the unusual complexity of the consolidated complaints and the Regional Director's ability to reinstate the relevant charges and complaint allegations if the respondents commit post-settlement conduct that violated the terms of the settlement or the Act), rev. denied sub nom. ***Fast Food Workers Committee & Service Employees Int'l Union v. NLRB***, 31 F.4th 807 (D.C. Cir. 2022).

If the settlement is a non-Board settlement that does not include similar provisions, the judge may approve withdrawal of the charge(s), dismiss the complaint, and remand the case to the Regional Director to handle compliance without further involvement by the judge. See, e.g., ***Longshoremen ILA Local 1814 (Amstar Sugar),*** 301 NLRB 764, 765 (1991). 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. See **§ 9–800**, below, Setting Aside Settlement Agreements.

With respect to formal settlements, see **§ 9–420,** above.

§ 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 the judge's rejection of a formal settlement after the close of the hearing, 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), enfd. 800 F.2d 1136 (3d Cir. 1986).

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); ***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 1) 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

As previously discussed in **§3–750**, above, 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. See also **§ 13–400**, Reliance on Settlements**,** and **§ 16–402.4**, Evidence of Presettlement Conduct, below.

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 practice proceedings. 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).

For a discussion of the General Counsel's right to use evidence of settled conduct as background to establish motive or objective of a respondent's other conduct occurring before or after the settlement, see **§ 16–402.4**, Evidence of Presettlement Conduct, below.

§ 9–630 Joint and Several Liability

A settlement proposal limited to one of a number of alleged 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 Waiver and Release Provisions

The Board has held that a provision waiving and releasing a respondent from all claims by an employee is a permissible and lawful part of a settlement or severance agreement, unless it prohibits filing future unfair labor practice charges that are unrelated to the past dispute or employment, or prohibits providing evidence in the investigation of charges filed by other employees. See ***First National Supermarkets***, 302 NLRB 727, 727–728 (1991) (employer did not unlawfully require discharged employee to sign a release, as a condition to settling a grievance, that prohibited the employee from filing any future charges arising out of "[his] total employment and [his] discharge," as the most sensible interpretation of this phrase, in the context of the release and the surrounding circumstances, was that it only prohibited claims that related to his pre-discharge employment); ***Clark Distribution Systems, Inc.***, 336 NLRB 747, 748–749 (2001) (employer violated Section 8(a)(1) by conditioning acceptance of its severance package on a requirement that employees "will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company," as this language was broad enough to include charges filed by or concerning other employees).

With respect to whether the waiver and release language is sufficient to bar charges involving past conduct, compare ***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), with ***Quality Roofing Supply Company***, 357 NLRB 789 (2011) (distinguishing *Septix* and finding that the release did not waive the union's right to file a charge regarding conduct that occurred before the settlement, as the conduct was different from any alleged in the settled charges and the release did not contain similar language waiving any charges that "could have been" raised at the time of the settlement.)

§ 9–650 Non-disparagement and Confidentiality Provisions

In ***McClaren Macomb***, 372 NLRB No. 58 (2023), the Board overruled prior decisions and held that an employer may not offer employees severance and grievance settlement agreements that broadly prohibit them from making statements that could disparage or harm the image of the employer and prohibit them from disclosing the terms of the agreement. The Board held that such provisions unlawfully interfere with employee rights under Section 7 of the Act, and that an employer therefore violates Section 8(a)(1) of the Act by offering agreements to employees that contained such provisions.

See also ***Texas Transeastern***, 16–CA–280275, unpub. Board order issued Dec. 8, 2022 (2022 WL 21829070). The complaint in that case alleged that the employer unlawfully prohibited employees from discussing wages in the workplace and discharged an employee for doing so.

The Board rejected the settlement because, among other things, it did not provide for notice posting or a reinstatement remedy and included a broad confidentiality provision, and thus provided no mechanism for informing the employees of their statutory rights.

§ 9–660 Taxability

Backpay is generally taxable as income in the year it is received. See ***Tortillas Don Chavas, LLC,*** 361 NLRB 101, 104 (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 both back and front pay under Title VII, ADEA, and ERISA are "wages" subject to statutory withholding of income and FICA taxes. See ***Noel v. New York State Office of Mental Health***, 697 F.3d 209, 213 n. 4 (2d Cir. 2012), and cases cited there.

§ 9–700 Grievance/Arbitration Settlements

As discussed in **§ 3–740**, Deferral to Grievance Arbitration, the Board applies the same deferral principles to grievance/arbitration settlements as it does to arbitral awards.

§ 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. This includes the authority to set aside only part of a settlement. ***Geodis Logistics, LLC***, 372 NLRB No. 128 (2023).

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, 416–417 (1995); ***Norris Concrete Materials***, 282 NLRB 289, 291 (1986). See also ***Starbucks Corp.***, 12–CA–295949, unpub. Board order issued June 26, 2023 (2023 WL 5953883), at 1 n. 3; ***Electrical Workers Local 611,*** 28-CA-273757, unpub. Board order issued June 6, 2022 (2022 WL 2063166), at 1 n. 3.

The Regional Director's action in setting aside the settlement and reactivating the case is reviewable by the judge and the Board in the proceeding on the new complaint. For cases upholding the Regional Director's action, see ***Sidhal Industries, LLP***, 356 NLRB 422 (2010) (Regional Director set aside settlement and reissued complaint pursuant to the settlement's default language, where the employer complied with the 8(a)(3) remedial provisions of the settlement, but not the 8(a)(5) provisions); ***Nations Rent, Inc.***, 339 NLRB 830, 831 (2003) (employer reinstated and made whole the employee, but continued to maintain an overbroad rule and failed to notify the employee in writing that his discipline had been expunged); ***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 the original case on compliance pursuant to a settlement agreement precluded an unfair labor practice complaint predicated on the company's failure to furnish certain information not provided at the time of compliance).

For a case finding an abuse of discretion, see ***East Brunswick European Wax Center, LLC v. NLRB***, 23 F.4th 238 (3d Cir. 2022) (denying enforcement of the Board's default judgment where the Regional Director reissued the complaint and the Board granted the General Counsel's motion for default judgement because the employer emailed the notice to employees instead of texting it as required by settlement, which the court found was a "hyper-technical and relatively insignificant violation" of the settlement).

Where a settlement has been set aside, a full remedy should normally be issued on request for the alleged presettlement conduct, less any amounts already paid pursuant to the settlement. See ***Sidhal Industries***, above, at n. 2. But see ***Totilleria La Poblanita***, 357 NLRB 191, 194 (2011). In that case, the General Counsel's motion for default judgment specifically requested only that the respondent be ordered to pay the unpaid balance of the backpay amount provided in the settlement. Although the motion also generally requested "that the Board grant such further and other relief as may be appropriate," the Board concluded that the GC was not seeking remedies beyond those specified in the settlement and therefore limited its remedial order accordingly. See also ***Midwestern Video Personnel, Inc***., 363 NLRB No. 120, slip op. at 2–3 (2016); ***Frontline Security Services, Inc***., 367 NLRB No. 130, slip op. at 3–4 (2019).

If the General Counsel fails to prove non-compliance, the agreement should be reinstated and the applicable allegations dismissed. ***Geodis Logistics*****,** above.

New Unfair Labor Practices. Subsequent or continuing unfair labor practices will ordinarily justify setting aside a settlement agreement. ***Quickway Transportation, Inc***., 372 NLRB No. 127, slip op. at 21 (2023) (Region properly vacated and set aside two informal settlements when respondent committed additional violations shortly after entering into the settlements), enfd. 117 F.4th 789 (6th Cir. 2024). See also ***ConAgra Foods, Inc***., 365 NLRB No. 102, slip op. at 2–3 (2017); ***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).

However, new unfair labor practices will not warrant setting aside a settlement if they are "isolated" or "insubstantial." See ***Diamond Electric Mfg. Corp.***, 346 NLRB 857, 862–863 (2006) (finding a 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 the settlement. See ***Doubletree Guest Suites Santa Monica***, 347 NLRB 782, 782–783 (2006) (setting aside an informal settlement because the "WE WILL NOT" provision of the notice at issue was ambiguous and neither of the interpretations advanced by the parties resolved the ambiguity); ***IATSE, Local 659***, 197 NLRB 1187 (1972) (setting aside informal settlement where the circumstances indicated that there was no meeting of the minds when the settlement was executed regarding the formula that would be used by the Regional Director to determine the backpay amount), enfd. mem. 477 F.2d 450 (D.C. Cir. 1973).

Compare ***Jam Productions, Ltd***., 367 NLRB No. 30 (2018) (finding that an informal settlement's silence regarding whether the terminated employees were entitled to seniority on the on-call list indicated that the parties specifically agreed not to include such a requirement; that the settlement was therefore not ambiguous; and that the judge therefore erred in setting aside the agreement because there was no meeting of the minds); and ***Inter-Lakes Engineering Co***., 217 NLRB 148 (1975) (declining to set aside settlement because of the parties' dispute over its meaning, as the settlement's meaning was clear on its face). See also ***McDonald's USA, LLC***, 368 NLRB No. 134, slip op. at 10 n. 37 (2019) (rejecting the ALJ's finding that there was no meeting of the minds between the General Counsel and respondent McDonald's based on their apparently conflicting statements at the hearing, as their subsequent statements and briefs to the ALJ and the Board demonstrated "a coherent and consistent understanding of their obligations under the settlement agreements"), petition for rev. denied sub nom. ***Fast Food Workers Committee & Service Employees Int'l Union v. NLRB***, 31 F.4th 807 (D.C. Cir. 2022).

§ 9–900 Default Judgment for Noncompliance with Settlement

As indicated in **§ 9-800** above, informal settlements often include provisions for issuance of a default judgment if the respondent fails to comply with the settlement's terms. However, the provisions typically require the Regional Director to give the respondent at least 14 days' notice of such noncompliance before filing the motion for default judgment. See, e.g., ***Nursing Center at University Village***, 367 NLRB No. 43 (2018). Further, the Board has held that it is a denial of due process to issue a default judgment for noncompliance with a settlement without giving the respondent prior notice and an opportunity to be heard regarding the alleged noncompliance. See ***ConAgra Foods***, above, slip op. at 3.

If the respondent's response raises a genuine issue of material fact regarding the alleged noncompliance, the parties are entitled to a hearing on the disputed issue(s) before an ALJ. See, e.g., ***Village Plumbing and Heating NY, Inc.***, 374 NLRB No. 96 (2026) (denying the General Counsel's motion for default judgment because the parties' conflicting representations created a genuine issue of material fact as to whether a settlement agreement had been breached); ***Star Garden Enterprise***, 373 NLRB No. 76 (2024) (denying the General Counsel's motion for default judgment based on respondent's alleged noncompliance with a settlement, where a genuine issue of material fact existed over whether respondent reopened its business operations as required in the settlement); ***Indy Core***, 373 NLRB No. 70 (2024) (same, where factual dispute existed over whether respondent's response to information requests complied with the settlement agreement).

However, if the respondent's response fails to raise any such material factual issue, it is appropriate to rule on the General Counsel's motion for default judgment without a hearing. ***American Backflow & Fire Prevention*****,** 373 NLRB No. 71 (2024) (granting GC's motion for default judgment where settlement agreement required respondent to recognize and bargain with the union and respondent admittedly withdrew recognition from it without proffering any factual basis for lawfully doing so). See also ***Bristol Manor Health Care Center***, 360 NLRB 38 (2013) (respondent's contention that certain requested information had been provided to the union as required by the settlement did not raise a material factual issue because respondent did not directly deny that certain other information had still not been provided); ***Rogan Bros. Sanitation, Inc***., 357 NLRB 1655 (2011) (respondent's contention that its general manager lacked authority to enter into the settlement and was coerced into signing it by the Board agent did not raise a material factual issue because the respondent had ratified the agreement by its subsequent conduct and the Board agent's alleged statements simply informed the manager of the Board's processes and the possible consequences of refusing to settle).

Of course, a hearing is also unnecessary if the parties stipulate to the material facts. See ***Outokumpu Stainless USA, LLC***, 365 NLRB No. 127 (2017) (affirming the ALJ's finding, based on a stipulated record, that the respondent employer breached an informal Board settlement by posting, next to the Board's remedial notice, a side letter that undermined the effectiveness of the notice, and that a default judgment was therefore warranted pursuant to the noncompliance provisions of the settlement)., enfd. 773 F. Appx. 531 (11th Cir. 2019).

§ 9–1000 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 (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.

§ 9–1100 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 of the Administrative Law Judge assigned to hear a case, or upon the Chief Judge, Deputy Chief Judge or Associate Chief Judge's own motion, the Chief Judge, Deputy Chief Judge or an Associate Chief Judge may assign a Judge other than the trial judge to conduct settlement negotiations. In exercising this 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. However, no such assignment will 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. Where feasible, settlement conferences will 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 must not unduly delay the hearing.
>
> (4) All discussions between the parties and the settlement judge will be confidential. The settlement judge must 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 will 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 a 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 is 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," a settlement judge was assigned to be the trial judge in the absence of any objections in ***Kingsbridge Heights Rehabilitation and Care Center***, 353 NLRB 631, 633 n. 5 (2008).

Note that the settlement judge has no authority to rule on a motion to approve a settlement over objections. Such a motion should be made to the trial judge.

CHAPTER 10. MOTIONS AND SPECIAL APPEALS

Motions and requests for special permission to appeal ALJ rulings are addressed in Sections 102.24 through 102.26 of the Board rules, respectively. Section 102.24(a) describes where to file motions made before, during, and after the hearing but before transfer of the case to the Board. Section 102.24(b) addresses motions for summary judgment or dismissal. And Section 102.24(c) states that the party filing a motion may file a reply to an opposition to the motion within 7 days of receipt of the opposition; however, further responses are not permitted absent special circumstances warranting leave to do so.

Section 102.25 addresses prehearing motions and motions made after opening of the hearing that are ruled on by the administrative law judge designated to conduct the hearing.

Section 102.26 addresses motions and related rulings and orders that will be made part of the record and requests to the Board for special permission to appeal a ruling by the judge.

As discussed below, specific types of motions are addressed in more detail in other sections of the rules or in Board decisions.

§ 10–100 Motions In Limine

Judges have authority to rule on motions in limine seeking to limit the issues or evidence to be litigated or presented at a hearing. See, e.g., ***Trader Joe's East***, 02–CA–306679, unpub. Board order issued June 24, 2024 (2024 WL 3160636) (ALJ did not abuse his discretion in denying respondent's motion in limine seeking to exclude the restoration remedy sought by the General Counsel); ***TNT Logistics***, 346 NLRB 1301 n. 1 (2006) (ALJ properly granted the GC's prehearing motion in limine to strike seven of the respondent's eight affirmative defenses as they were not relevant to the complaint allegations), enfd. 246 F. Appx. 220 (4th Cir. 2007); ***Farm Fresh Company, Target One***, 361 NLRB 848 n. 1 (2014) (ALJ did not abuse his discretion by granting the GC's motion in limine to exclude certain direct questions about the alleged discriminatees' immigration status); ***Operating Engineers Local 18 (Nerone & Sons)***, 8–CD–135243, unpub. Board order issued July 12, 2016 (2016 WL 3743256) (ALJ did not abuse his discretion by granting the charging party employer's prehearing motion in limine to bar the respondent union from relitigating in the 8(b)(4)(ii)(D) unfair labor practice proceeding threshold issues that had been addressed by the Board in the prior related 10(k) jurisdictional work-assignment proceedings); ***VNS Federal Services, LLC***, 9–CA–262035, unpub. Board order issued June 21, 2021 (2021 WL 2582176) (ALJ did not abuse his discretion by granting Acting GC's motion in limine to exclude evidence related to issues properly raised in a compliance proceeding rather than the unfair labor practice proceeding); ***Cargill, Inc.,*** 7–CA–270555, unpub. Board order issued April 20, 2021 (2021 WL 1814988) (ALJ did not abuse his discretion by granting in part motions in limine filed by the Acting General Counsel and the charging party union to exclude certain evidence pursuant to the parol evidence rule).

See also ***Voith Industrial Services***, 363 NLRB No. 109, slip op. at 1 n. 2 (2016) (ALJ granted GC's motion in limine to prevent litigation of the respondent employer's successorship status and duty to bargain, issues that had been previously litigated and decided by a different ALJ in a case that was pending before the Board on exceptions). For a discussion of relying on ALJ decisions that are pending before the Board on exceptions, see **§ 13–300**, below.

§ 10–200 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 the parties consent and waive a hearing and decision by the judge. Alternatively, under the same section, the parties may agree to waive a hearing and stipulate facts to the judge for issuance of a decision. In that event, the judge should make sure the stipulation is complete enough to support a decision on all relevant issues.

If the stipulated record is sufficient, the judge may approve it even over the objection of the charging party. However, the charging party should be given an opportunity to make an offer of proof regarding the contrary evidence or additional material facts it would introduce at a hearing. See ***Hobby Lobby Stores, Inc***., 363 NLRB No. 195, slip op. at 1 n. 2 (2016) (rejecting the charging party's argument that the judge improperly approved the joint motion of the General Counsel and the respondent to resolve the case on a stipulated record, as the stipulation included sufficient evidence to evaluate the complaint, and the additional evidence that the charging party sought to introduce exceeded the scope of the GC's theory), reaffirmed 367 NLRB No. 78, slip op. at 1 n. 1 (2019). See also ***Borg-Warner Corp.***, 113 NLRB 152, 154 (1955), rev. denied 231 F.2d 237 (7th Cir. 1956).

The Board has long held that a stipulation of fact is conclusive, precluding withdrawal or further dispute by a party to the stipulation after it has been accepted. See ***T-Mobile USA, Inc.***, 363 NLRB 1638, 1650 n. 7 (2016) (denying respondent's motion to supplement stipulations with declarations and other submissions), ***Woodland Clinic***, 331 NLRB 735, 741 (2000), citing ***Kroger Co., Houston Div.***, 211 NLRB 363, 364 (1974). See also ***Academy of Art College***, 241 NLRB 454, 454–455 (1979) (rejecting respondent's contention that it was "manifestly unjust" to assert discretionary jurisdiction over it based on stipulations of fact that had been entered into the hearing record), enfd. sub. nom. ***Stephens Institute v. NLRB***, 620 F.2d 720, 725 (9th Cir. 1980).

Similarly, where the parties have stipulated to the issues for resolution, only those issues should be considered. ***Dynamic Nursing Services, Inc***., 369 NLRB No. 49, slip op. at 3 n. 2 (2020) (declining for this reason to consider the respondent's argument that the complaint allegation should be dismissed pursuant to the Board's postarbitral deferral standard).

For a discussion of how courts have addressed requests to withdraw from stipulations, see ***United States v. Kanu***, 695 F.3d 74 (D.C. Cir. 2012). See also **Graham, 6 Handbook of Fed. Evid**. **§ 801:26** (10th ed. Nov. 2025 Update).

§ 10–300 Motions for Summary Judgment or Default Judgment

Section 102.24(a) of the Board's Rules provides that all prehearing motions for default judgment, summary judgment, or dismissal must be filed with the Board. Section 102.24(b) further provides that all motions for summary judgment or dismissal must be filed with the Board no later than 28 days before the scheduled hearing. If no hearing is scheduled, or the hearing is scheduled less than 28 days after the date for filing an answer, the motion must be filed with the Board "promptly."

Therefore, if a motion for default judgment, summary judgment, or dismissal is filed with the assigned administrative law judge or the judge's division prior to the hearing, it should be transferred to the Board. See, e.g., ***Starbucks Corp***., 03–CA–296757, unpub. Board order issued March 23, 2023 (2023 WL 5828722), at 1 n. 2 (motion for summary judgment); ***Starbucks Corp***., 01-CA-302321, unpub. Board order issued April 13, 2023 (2023 WL 5828719), at 1 n. 3

(motion to dismiss). See also ***Mexican Radio Corp***., 372 NLRB No. 77, slip op. at 1 n. 6 (2023) (motion for partial summary judgment in compliance proceeding). The Board will rule on any procedural and substantive issues raised by the motion. See ***Starbucks Corp***., 02–CA–303077, unpub. Board order issued April 13, 2023 (2023 WL 5954027) ("As [Respondent's motion to dismiss] was filed prior to the opening of the hearing, the Board is the proper entity to rule on it."). See also ***Pfanstiehl, Inc***., 13–CA–247694, unpub. Board order issued July 26, 2022 (2022 WL 2981151), at 1 and n. 1 (denying respondent's motion to dismiss because it was untimely filed 27 days before the hearing, without prejudice to respondent's right to renew its dismissal argument before the ALJ); ***William Beaumont Hospital***, 07–CA–244615, unpub. Board order issued Aug. 27, 2020 (2020 WL 5824488) (denying respondent's motion to dismiss because it was untimely filed 17 days before the hearing); ***American Federation for Children***, 28–CA–246878, unpub. Board order issued March 2, 2021 (2021 WL 450670), at 1 n. 2 (accepting respondent's motion to dismiss or for summary judgment as timely filed, notwithstanding the Acting General Counsel's argument that the motion should be rejected because it was filed with the Division of Judges rather than the Board and there were now less than 28 days prior to the hearing, "in light of the fact that no party has shown that it was prejudiced by the Respondent's procedural error").

Motions for default judgment, summary judgment, or dismissal at the hearing must be made in writing to the ALJ or stated orally on the record. Sec. 102.24(a). The judge has authority under Section 102.35(a)(8) of the Board's Rules to rule on such motions at the hearing even if the moving party could have but failed to file the motion with the Board at least 28 days prior to the hearing. See ***Calyer Architectural Woodworking Corp.,*** 338 NLRB 315 n. 1 (2002).

Summary judgment is warranted only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See, e.g., ***Brooklyn 181 Hospitality, LLC***, 373 NLRB No. 125 (2024) (granting General Counsel's motion); ***Amazon.Com Services, LLC***, 373 NLRB No. 40 (2024) (granting GC's motion and denying respondent's cross-motion); ***Mercedes-Benz U.S. International, Inc.***, 365 NLRB No. 67, slip op. at 1 (2017) (denying GC's motion); ***Leukemia and Lymphoma Society***, 363 NLRB 1084 (2016) (denying respondent's motion). See also ***Southwest Key Programs, Inc.***, 28–CA–298718, unpub. Board order issued Dec. 22, 2023 (2023 WL 888952) (denying respondent's motion to dismiss complaint as time barred under Sec. 10(b)).

It is not necessary for the party opposing summary judgment to submit affidavits or other evidence establishing a factual dispute. Section 102.24(b) of the Board's Rules states:

> Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist.

See also ***Leukemia and Lymphoma Society***, 363 NLRB at 1084 n. 1.

§ 10–400 Motions to Dismiss

As indicated above, the same procedural rules in Sections 102.24(a) and (b) governing motions for summary or default judgment also apply to motions to dismiss the complaint.

In ruling on a motion to dismiss at the hearing based on the pleadings, the judge should follow the same standard the Board uses in ruling on prehearing motions to dismiss; 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 **§ 3–220**, Adequacy of Complaint, above.

Where the motion to dismiss is filed at the close of the General Counsel's case, the judge should evaluate whether the GC had "satisf[ied] his duty to establish a prima facie case by presenting evidence sufficient to demonstrate the occurrence of an unfair labor practice." ***Yale University***, 330 NLRB 246, 247 (1999) (affirming the judge's dismissal of the 8(a)(3) discrimination allegations at the close of the General Counsel's case in chief as the GC had failed to make a prima facie showing that the alleged discriminatees' conduct was protected, an essential element of the case against the employer). See also ***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); ***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 704, 705 (2012), reaffd. 362 NLRB 292 (2015) (discussing the Board's earlier Oct. 18, 2010 unpublished ruling granting the General Counsel's special appeal of the judge's order granting the respondent union's motion to dismiss), vacated and remanded 851 F.3d 21 (D.C. Cir. 2017).

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.

Regarding amendments to the complaint while a motion to dismiss is pending, see ***Starbucks Corp***., Case 10–CA–291616, unpub. Board order issued Nov. 9, 2022 (2022 WL 16851736), discussed in **§ 3–310**, above.

§ 10–500 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. The judge is authorized to rule on such a procedural motion under Section 102.35(a)(8) of the Board's Rules.

Section 102.35(a)(8) does not set forth any standards for ruling on such contested motions. Thus, ALJs appear to have considerable discretion. See, e.g., ***New Otani Hotel & Garden***, 325 NLRB 928, 946 (1998) (denying the charging party union's motion to reopen the record, filed 9 months after the hearing ended and while the ALJ decision was in the final stages of preparation, to present evidence of certain events 1-2 months earlier that the union argued tended to show the alleged discriminatees had been disparately treated).

However, the provisions in Section 102.48(c) [formerly 102.48(d)] of the Board's Rules, which are applied by the Board in ruling on motions to reopen, may provide guidance. See, e.g., ***Lockheed Martin Tactical Aircraft Systems***, 331 NLRB 1407 n. 1, 1413 (2000) (ALJ cited the rule in denying respondent's motion to reopen the hearing to introduce portions of the transcript

from an ancillary 10(j) injunction proceeding in federal court); ***Apex Investigation & Security Co***., 302 NLRB 815 n. 1, 816 n. 1 (1991) (ALJ cited the rule in denying respondent's motion to reopen the hearing to receive certain evidence respondent claimed supported its position that the union did not represent a majority of the employees). Section 102.48(c) states in relevant part:

> (1) . . . A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.
>
> (2) . . . [A] motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

To qualify as newly discovered or previously unavailable under 102.48(c)(1), the evidence must have existed at the time of the hearing. ***ILWU Local 4***, 367 NLRB No. 64, slip op. at 5–6 (2019), enf. denied and remanded on other grounds 978 F.3d 625 (9th Cir. 2020); ***Circus Circus Las Vegas***, 366 NLRB No. 110, slip opinion at 1 n. 1 (2018), enf. denied and remanded on other grounds 961 F.3d 469 (D.C. Cir. 2020); ***Security Walls, Inc***., 365 NLRB No. 99, slip op. at 7 and n. 17 (2017), rev. denied 921 F.3d 1053 (11th Cir. 2019); ***Ford Store San Leandro***,349 NLRB 116 n. 1 (2007); ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46 n. 1 (1998); and cases cited there. See also ***Coreslab Structures (Tulsa) Inc.***, 372 NLRB No. 31, slip op. at 1, n. 1 (2022) (denying respondent's motion to reopen the record to receive a posthearing statement by its witness), enfd. denied in part on other grounds 94 F.4th 969 (10th Cir. 2024).

The movant must also show that it was "excusably ignorant" of the newly discovered or previously unavailable evidence and "acted with reasonable diligence to uncover and introduce the evidence." ***Circus Circus Las Vegas***, above (denying the respondent's motion to reopen to introduce certain work-order records, as they were routinely created and maintained electronically and respondent was certainly aware of their existence). See also ***Fitel/Lucent Technologies***, above (finding that the respondent's mere assertion that the evidence was not found before the hearing despite a diligent search of its records fell short of the requisite showing); ***Walden Security, Inc***., 366 NLRB No. 44, slip op. at 1 n. 2 (2018) (denying the respondent's motion to reopen as the evidence respondent sought to introduce was apparently in its possession at the time it agreed to submit the case to the judge on a stipulated record).

The movant must also demonstrate that the evidence would require a different result. ***Security Walls, Inc***., above; ***Fitel/Lucent Technologies***, above; ***County Waste of Ulster***, 354 NLRB 392 (2009), reaffd. 355 NLRB 413 (2010).

Finally, under 102.48(c)(2), the motion to reopen must be filed "promptly." See, e.g., ***Labor Ready, Inc.***, 330 NLRB 1024 (2000) (motion to reopen following issuance of Board's decision was not filed "promptly" where it was not filed until 3 months after the evidence was subpoenaed); ***Michigan State Employees Assoc***., 364 NLRB No. 65, slip op. at 1 (2016) (motion to reopen following issuance of ALJ's decision was not filed "promptly" where the motion was not filed until 2 1/2 months after the evidence was obtained through discovery in a state court proceeding). See also ***Purple Communications, Inc***., 28–CA–179794, unpub. Board order issued Feb. 24, 2021 (2021 WL 738732) (denying respondent's motion to modify remedy in Board's decision as it was essentially a motion to reopen to admit evidence of certain events; the events had occurred 1–3 years before the motion was filed; and respondent failed to explain why the evidence was not presented previously or promptly upon discovery).

Note that, while Section 102.35(a)(8) is somewhat unclear, it appears that ALJs have the discretion to reopen the record sua sponte at least in some circumstances, such as to revisit and reconsider an evidentiary ruling. See ***Local 3, Electrical Workers***, 257 NLRB 1358,1362 n. 11 (1981) (judge reopened the record sua sponte to reconsider one of his evidentiary rulings and, after receiving additional testimony, reversed that evidentiary ruling).

For a case where the Board held that reopening the record sua sponte was an abuse of discretion, see ***New York Paving, Inc.***, 370 NLRB No. 44, slip op. at 1 n. 2 (2020), enfd. per curiam 2021 WL 6102199 (D.C. Cir. Dec. 10, 2021). In that case, the ALJ reopened the record sua sponte to add the collective-bargaining agreement between the charging party union and the respondent, which had been included in the record in two previous cases involving the parties and which the judge believed was necessary to complete the record and evaluate certain representations in the General Counsel's posthearing brief. On exceptions, the Board found that the judge's ruling "abused her discretion," but affirmed, based on the other record evidence, her conclusion that the respondent violated the Act.

For a discussion of the authority and discretion of federal courts to reopen the record on their own motion, see ***Keith v. Volpe***, 858 F.2d 467, 478–479 (9th Cir. 1988) (reopening the record sua sponte to receive additional evidence is "unusual" but "within the discretion of the trial court" where the evidence is "both important as a matter of preventing injustice and reasonably . . .available.").

See also **§ 16–201**, below (discussing the authority of ALJs to take judicial notice).

§ 10–600 Interlocutory Special Appeals from Judges' Rulings

Section 102.26 of the Board's Rules permits a party to file a request to the Board for "special permission to appeal" ALJ rulings or orders on motions. The request must be filed "in writing promptly and within such time as not to delay the proceeding." See ***Starbucks Corp.*, 13**–CA–305908, unpub. Board order issued March 25, 2026 (– WL –) (granting respondent's special appeal from ALJ's ruling denying respondent's request that hearing be conducted in person and finding no compelling circumstances for video hearing based on the number of witnesses who would have to travel, the nature of their testimony, and the fact that many of the issues could be litigated with documentary evidence; ***Starbucks Corp.***, 373 NLRB No. 87 (2024) (denying respondent's special appeal from ALJ's ruling granting the General Counsel's request to present just-and-proper evidence during the unfair labor practice hearing where respondent did not file the request for 7 weeks after the ruling); ***Alivio Medical Center, Inc.***, 13–CA–300158, unpub. Board order issued September 30, 2024 (2024 WL 4357867) (denying respondent's special appeal from ALJ's ruling revoking subpoenas where respondent waited approximately 5 months to file its appeal request); ***Amazon.com Services, LLC***, 29–CA–277198, unpub. Board order issued June 15, 2022 (2022 WL 2191112) (denying respondent's special appeal from ALJ's ruling to hear the case by videoconference where respondent waited 9 days to file its appeal request and then did so 20 minutes before the close of business just one business day before the hearing was to commence); ***Hampton Roads Shipping Assoc***., 5–CA–176015, unpub. Board order issued March 13, 2018 (2018 WL 1325100) (denying the General Counsel's special appeal from certain ALJ subpoena and evidentiary rulings during the first several days of hearing, without prejudice to raising the same arguments on exceptions, as the appeal was not filed with the Board until 2 months later, during a recess in the hearing). Compare ***Texas Transeastern***, 16–CA–280275, unpub. Board order issued Dec. 8, 2022 (2022 WL 21829070), at 1 n. 2 (finding that the GC's special appeal from the ALJ's order accepting a non-Board settlement was not untimely

under the rule, notwithstanding that it was filed 43 days after the ruling, in the absence of any showing of prejudice). The request and any responses must also be served on the parties and the judge.

A judge is not required to grant a recess in the hearing pending a special appeal and may continue with and close the hearing without waiting for the Board to rule. See, e.g., ***Custom Excavating, Inc***., 228 NLRB 285, 286 (1977). See also ***Cargill, Inc.,*** 7–CA–270555, unpub. Board order issued April 20, 2021 (2021 WL 1814988) (leaving "to the discretion of the judge" the respondent's request to postpone the hearing pending the Board's ruling on the respondent's special appeal of the judge's ruling granting in part motions in limine filed by the Acting General Counsel and the union). 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 specific resumption date and resume the hearing on that date if the special appeal is not filed within a certain period of time (no less than one week).

If the Board grants the request for special permission to appeal and upholds or reverses the ALJ's ruling, that Board's order normally establishes "the law of the case, which governs the future course of proceedings." ***Teamsters Local 75 (Schreiber Foods),*** 349 NLRB 77, 80 (2007), enfd. in part and remanded in part 522 F.3d 423 (D.C. Cir. 2008).

CHAPTER 11. SEQUESTRATION OF WITNESSES

§ 11–100 In General

Federal Rule of Evidence 615(a) requires a judge, "at a party's request," to "order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony," subject to certain exceptions. The judge may also do so sua sponte. In addition, under FRE 615(b), the judge "may" (1) "prohibit disclosure of trial testimony" to excluded witnesses, and (2) "prohibit witnesses from accessing trial testimony."

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 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***, 237 NLRB 1306, 1307 (1979); ***Greyhound Lines,*** 319 NLRB 554 (1995) (setting forth a model sequestration order); FRE 615(a) ("[a]t a party's request, the court must order witnesses excluded from the courtroom" unless one of the listed exceptions apply).

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***, 237 NLRB at 1306–1307. Specific situations addressed by the Board and courts are discussed in the sections below.

§ 11–200 Scope of Sequestration Order

The model sequestration order in the Board's 1995 ***Greyhound Lines*** decision is set forth in **§ 1–300**, above. As indicated there, it is appropriate for an ALJ, not only to exclude potential witnesses from the courtroom during the hearing, but also to bar potential witnesses from discussing their testimony with each other until the hearing is concluded. It is also appropriate to instruct counsel not to inform potential witnesses of testimony by other witnesses (except those for the other side to prepare to rebut such testimony) either by showing them transcripts or otherwise. Reading the testimony of another witness violates a Rule 615 sequestration order, as does being told of another witness's testimony. ***United States v. Graham***, 123 F.4th 1197,1258 (11th Cir. 2024).

Pursuant to FRE 615(b), the ALJ may also prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom and prohibit excluded witnesses from accessing trial testimony, except for circumstances allowed under ***Greyhound Lines***. According to the Advisory Committee Notes, "[t]he rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony." For example, a court could prohibit witnesses from monitoring trials that are being streamed or have been posted online. **Goode & Wellborn, Courtroom Handbook on Fed. Evid. Rule 615** (Apr. 2026). The Board has not yet addressed the limits of an ALJ's discretion in fashioning such an order.

As discussed in the next section, an ALJ may also properly impose certain limits on witnesses conferring with counsel during recesses in their testimony.

§ 11–210 Conferring with Counsel

Nonparty witnesses. 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. United States,*** 425 U.S. 80, 87–88, (1976).

Party witnesses. 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); ***United States v. Garcia***, No. 24-11052, 2025 WL 286602, at *5–6 (11th Cir. 2025). See also ***United Chrome Products***, 288 NLRB 1176 n. 1 (1988), where the Board rejected the respondent's contention that the judge improperly directed its general manager not to discuss his testimony with respondent's counsel during a 10-minute recess. The Board noted that the recess occurred during the General Counsel's direct examination of the general manager as a hostile witness; the judge stated that the general manager could talk with respondent's counsel during the recess about anything except "what he testified and how to change it"; and the judge also stated that the general manager could be prepared for questioning by respondent's counsel on completion of the GC's direct examination.

In ***Geders***, above, the Court held that the trial judge deprived the criminal defendant of the Sixth Amendment right to the assistance of counsel by prohibiting him from consulting with his counsel about anything during a 17-hour overnight recess after the conclusion of his direct testimony. The Court reasoned that it is common practice for an accused to discuss matters other than testimony with counsel during a long recess, including trial tactics and strategy and information relevant to the case. And the Court noted that 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. Indeed, such questioning may properly include "whether [the defendant] met with his attorney and whether his testimony was discussed at those meetings." ***United States v. Carrillo***, 16 F.3d 1046, 1050 (9th Cir.1994) (prosecutor in jury trial did not violate the attorney-client privilege by asking the defendant on cross-examination whether he had met with his attorney and whether his testimony was discussed at those meetings, and by then exposing a subtle difference in the witness's testimony before and after a recess during direct examination to raise an inference of coaching, as the prosecutor's questions did not reach the substance of the legal advice given to the defendant). The questioning may also include the substance of the conversations with counsel, pursuant to the crime/fraud exception, where there is reason to believe the witness was coached to testify falsely. See ***United States v. Townsley***, 843 F.2d 1070, 1086 (8th Cir. 1988) (crime or fraud exception applied where lawyer actively coached witnesses to present a uniform, knowingly untruthful story). See also ***Smithfield Packing Co.***, 344 NLRB 1, 14 and n. 60 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006), discussed in **§ 8–420**, above (crime/fraud exception applied to otherwise privileged communications regarding the preparation of false affidavits).

In ***Potashnick v. Port City Construction Co***., 609 F.2d 1101, 1117 (5th Cir. 1980), citing ***Geders***, the Fifth Circuit reached a similar conclusion in a civil case, based on the Fifth Amendment right to due process. The court held that the trial judge erred in barring the defendant corporation's president and sole shareholder from having any discussions with the corporation's counsel from the time his testimony commenced until it was completed, which effectively barred him from talking to counsel for 7 days, including during several overnight recesses. Id.

While a complete overnight conferral ban is improper, in ***Villarreal v. Texas***, 607 U.S. ---- (2026), 146 S.Ct. 756, the Supreme Court found proper a sequestration order that prohibited the lawyer for a defendant witness from "managing" the witness's testimony during an overnight

recess. The Court noted that while a defendant has a constitutional right to consult with counsel during an overnight recess about trial matters, (such as strategy, plea bargains, etc.) a sequestration order that prohibits consultation about the testimony itself ("testimony for its own sake" or "testimony qua testimony") is proper, as such discussions threaten to shape the witness's testimony and undermine the trial's search for truth.

§ 11–300 Requests to Separate Witnesses

As indicated above, if a request is made, the judge is required to order witnesses excluded. FRE 615(a) ***Unga Painting***, 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); ***Curlee Clothing Co.***, 240 NLRB 355 n. 1 (1979) (finding no prejudice where the 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***, 343 NLRB at 433 n. 4, and authorities cited there. But see ***Alpert's, Inc.***, 267 NLRB 159 n. 1 (1983) (upholding the judge's denial of a 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 the judge's own motion, i.e., even if not requested. FRE 615(a).

Finally, the judge also has discretion to order that witnesses be excluded before opening statements so that they do not hear counsel's summaries of what the trial evidence will show. See ***United States v. Baca***, 447 F.Supp. 3d 1232, 1236 n. 3, 1237–1238 (D. N.M. 2020) (collecting cases discussing FRE 615).

§ 11–400 Who Should and Should Not Be Separated

All potential witnesses should be excluded from the trial. ***Unga Painting***, 237 NLRB at 1307; ***Greyhound***, 319 NLRB at 554. However, both FRE 615 and the Board recognize several exceptions; the party opposing sequestration has the burden of demonstrating why the pertinent exception applies. ***Opus 3 Ltd. v. Heritage Park, Inc.***, 91 F.3d 625, 628 (4th Cir. 1996).

Party who is a natural person. See FRE 615(a)(1) ("a party who is a natural person") and ***Greyhound***, above ("natural persons who are parties"). But see alleged discriminatees who are charging parties, below.

Officer or employee of a non-natural party who is designated as its representative by its attorney. The Board read this exception as limiting a corporate respondent to its attorney and one other representative. ***Unga Painting***, 237 NLRB at 1308 n. 16. As amended in 2023, FRE 615 also makes clear that the exception is limited to one designated representative per entity. See FRE 615(a)(2) ("one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney"). However, as stated in the Advisory Committee Notes on the 2023 amendment, a court has discretion to allow an entity to swap representatives as the trial progresses, so long as only one representative is

exempt at any one time; in such a situation, the entity needs to show that each individual representative is "essential" as defined in FRE 615(a)(3).

With respect to who may be a party representative, see ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d at 630, where 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(a)(3) ("any person whose presence a party shows to be essential to presenting the party's claim or defense"); ***Greyhound,*** 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." ***United States v. Jackson***, 60 F.3d at 135. See also ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d at 628 (the burden is on the party asserting that the witness's presence is essential). While courts have not developed a precise test for determining whether a witness's presence is essential, "[i]t is clear that the test is not whether the witness' testimony may be important but, rather, whether the witness is needed in the courtroom when that witness is not testifying." **29 Wright & Miller et al., *Federal Practice & Procedure*** § 6245 (2d ed.) (April 2026 Update). The ALJ retains considerable discretion in determining which witnesses are 'essential' within the meaning of the rule. ***Tasty Baking Co. v. NLRB***, 254 F.3d 114, 123 (D.C. Cir. 2001).

For guidance on whether a person is "essential," see **29 Fed. Prac. & Proc. Evid.** § 6245 (collecting cases). See also ***United States ex rel. Bahrani v. ConAgra, Inc***., 624 F.3d 1275,1296–1297 (10th Cir. 2010) (district court acted within its discretion in allowing witness to remain in courtroom throughout the trial as an "essential" person, given that he was, inter alia, "the person most knowledgeable about the history and complex factual details of the matters at issue, and with whom counsel needed to confer during trial"); ***Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co. of New York***, 519 F.Supp. 668, 678–679 (D. Del. 1981) ("What must be shown is that a witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness or that the witness would be unable to present essential testimony without hearing the trial testimony of other witnesses.")

The Advisory Committee Notes on the 2023 amendment to FRE 615 state that nothing therein prohibits a court "from exempting from exclusion multiple witnesses if they are found essential under (a)(3)."

Alleged discriminatees. The Board has adopted a special rule for alleged discriminatees, regardless of whether they are also charging parties in the case. 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***, 237 NLRB at 1307. See also ***Greyhound***, 319 NLRB at 554.

However, the judge retains some discretion in applying this rule. Thus, in ***Unga Painting***, the Board stated that the judge may decline to follow the rule if the judge believes "there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying." 237 NLRB at 1307. 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.

Alleged discriminatees designated essential representative. Consistent with the Board's footnote in ***Unga Painting***, judges have permitted a discriminatee who was designated as an essential representative by the General Counsel or charging party to remain in the hearing room after testifying. See ***Impact Industries***, 285 NLRB 5, 6 (1987), remanded on other grounds 847 F.2d 379 (7th Cir. 1988); **Weis Markets, Inc**., 325 NLRB 871, 872 (1998), modified in part 265 F.3d 239 (4th Cir. 2001). In the latter case the Fourth Circuit on appeal expressed disapproval of what it termed the judge's "departure from Board precedent," but rejected the respondent's contention that it was prejudiced by the judge's ruling. 265 F.3d at 245–246.

Counsel who is also a witness. In ***Napleton Cadillac of Libertyville***, 13–CA–187272, unpub. Board order issued Jan. 29, 2018 (2018 WL 620366), the Board held that the trial judge did not abuse his discretion by applying the sequestration order to one of the respondent's two co-counsel (Hendricks) who would be called by respondent as a witness. The respondent subsequently challenged the sequestration ruling again before the court of appeals, but the court found it unnecessary to address the merits of the challenge because, even assuming it was valid, respondent had failed to show prejudice. The court noted that respondent acknowledged Hendricks was not lead counsel and that it "failed to offer anything concrete or to explain what Hendricks would have done" that the lead counsel or another attorney could not have handled. ***Napleton 1050, Inc. v. NLRB***, 976 F.3d 30, 50 (D.C. Cir. 2020), enfg. 367 NLRB No. 6 (2018). Cf. ***Nord Hodges v. Albritton***, No. 8:24-CV-879-CEH-UAM, 2025 WL 1531291, at *2 (M.D. Fla. May 28, 2025) (in bench trial, judge exempted plaintiff's lead counsel from sequestration, but ordered him to testify first in order to alleviate any risk that the testimony would be influenced by hearing other witnesses, and prohibited him from examining any witnesses who will testify to facts that potentially overlapped with his testimony).

Rebuttal witnesses. The Board's decisions in ***Unga Painting*** and ***Greyhound*** do not recognize a blanket exception for rebuttal witnesses. Thus, unless otherwise exempted from a sequestration order, any witnesses that a party anticipates may be called in rebuttal should be excluded. See, e.g., ***United States v. Ell***, 718 F.2d 291, 293 (9th Cir. 1983) (district court erred by denying the defendant's request to exclude government witnesses after they testified in the case-in-chief and by later permitting them to testify as rebuttal witnesses); ***United States v. Baca***, 447 F.Supp. 3d 1232, 1238 (D.N.M. 2020) (citing *Ell* as support for applying sequestration orders equally to direct and rebuttal witnesses).

However, "[i]t is often difficult to know in advance who may be called to rebut evidence which has not yet been presented." ***United States v. Bramlet***, 820 F.2d 851, 855 (7th Cir. 1987). And judges retain discretion to consider this and other relevant circumstances in determining whether to allow rebuttal witnesses to testify notwithstanding that they heard the testimony of other witnesses for the same side and were not exempted from the sequestration order. See, for example, ***Servomation, Inc***., 235 NLRB 975, JD. n. 1 (1978), where the ALJ permitted a General Counsel rebuttal witness to testify, even though he had remained in the hearing during a portion of the hearing, given that the GC had not intended to call him but found it necessary to do so on rebuttal. See also ***Conair Corp***., 261 NLRB 1189, 1230 n. 157 (1982) (ALJ permitted GC rebuttal witness to testify, even though he had been present in the hearing room during the GC's case, as the GC represented that he was being called to rebut specific allegations made against him during the respondent's case), enf. denied in part 721 F.2d 1355 (D.C. Cir. 1983), overruled on other grounds *Gourmet Foods*, 270 NLRB 578 (1984).

§ 11–500 Violation of Sequestration Order

A prerequisite to finding a violation of a sequestration order is the issuance of the order itself. See ***United States v. Williams***, 136 F.3d 1166, 1168–1169 (7th Cir. 1998) (the 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,*** 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); ***North Hills Office Services***, 342 NLRB 437 n. 2 (2004) (Board rejected the 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"). Nevertheless, violating a sequestration 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. ***United States v. Wilson***, 103 F.3d 1402, 1406 (8th Cir. 1997) (holding that the trial court "clearly acted within its discretion in concluding that [the witness] could not be called to testify at the last minute after sitting in the courtroom and listening to much of the case"); ***United States v. Holmes***, 137 F.4th 734, 740 (8th Cir. 2025), reh'g denied, No. 24-1140, 2025 WL 1923662 (8th Cir. July 14, 2025) (where defendant relayed trial testimony to his father and provided him advice "as to what information he needed to convey at the stand," court did not abuse its discretion by excluding father's testimony to remedy the sequestration order violation). But see ***United States v. Graham***, 123 F.4th 1197, 1258 (11th Cir. 2024) (district court erred by excluding testimony of witness who violated sequestration order without making a finding that the other side would likely suffer prejudice if the testimony was allowed).

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 the attorney for 6 months after his second violation).

CHAPTER 12. THE HEARING RECORD

§ 12–100 Public hearings

Section 102.34 of the Board's Rules provides that hearings "will 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 Hearing by Telephone or Mail

A judge may open a hearing by telephone or by mail in the interests of saving time and expenses for all concerned. As discussed in **§ 9–320**, above, this is typically done to consider and address objections to a respondent's proposed settlement. See, e.g., ***Operating Engineers Local 181 (Marathon Petroleum Co.)***, 9–CB–155016, unpub. Board order issued April 14, 2017 (2017 WL 1374032).

A similar procedure is also used in lengthy hearings involving the production of voluminous subpoenaed documents. See, e.g., *****Station Casinos, LLC***, 358 NLRB 1556, 1563 n. 11 (2012). The hearing is opened by telephone, and the judge rules on disputed issues raised in the petition to revoke the subpoena during the recorded conference call. The judge then travels to the hearing site when the parties are ready to resume. The Board has rejected a subpoenaed respondent's argument that employing such a procedure violates the Board's policy against pretrial discovery. See ***Quickway Transportation***, 09-CA-251857, unpub. Board order issued Oct. 19, 2021 (2021 WL 4893957) and discussion at **§ 7–200** and **§ 8–230**, above.

§ 12–300 Taking Testimony by Telephone

In ***Westside Painting, Inc.***, 328 NLRB 796, 796–797 (1999), the Board held that, "under Section 102.30 of the Board's Rules, witnesses in Board unfair labor practice proceedings may not testify by telephone." The Board emphasized that telephonic testimony does not permit the judge to observe the demeanor of the witness, impairs a party's right of cross-examination, and makes it impossible as a practical matter to ensure the witness is not reading from documents or being influenced by someone while testifying. See also ***Morrison Healthcare***, 369 NLRB No. 76, slip op. at 2 (2020) (holding that the Regional Director may not direct preelection hearings in a representational proceeding by telephone when witness testimony will be taken).

Nevertheless, in ***Team Clean, Inc.***, 348 NLRB 1231 (2006), which involved information requests made by the union, the judge conducted the hearing by telephone and issued a bench decision; the transcript of the entire hearing, including the decision, was less than 50 pages. It does not appear that any witnesses testified, as the judge noted "the facts are fully set forth in the stipulation of facts." Id. at 1232. Presumably, the parties agreed with this process, as no exceptions were taken to the procedure and the matter was not before the Board on review.

§ 12–400 Taking Testimony by Videoconference

This section addresses whether and when it is appropriate to permit an individual witness to testify remotely by videoconference. For a discussion about how the Board held entire hearings remotely by videoconference during the COVID-19 pandemic, see **§12–500**, Remote Hearings by Video During the COVID-19 Pandemic, below.

Section 102.35(c) of the Board's Rules, which was adopted effective Sept. 29, 2017 (82 FR 43695), states:

> Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

Federal courts have recognized that remote witness testimony by video "is to be the exception and not the rule." ***Lopez v. NTI, LLC***, 748 F. Supp. 2d 471, 479 (D. Md. 2010). As the court noted in ***United States v. Nippon Paper Indus. Co.***, 17 F. Supp. 2d 38, 42 (D. Mass. 1998), "[i]n the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact." The "truth is more likely to emerge with face to face communication between accused and accuser, played out before the fact-finder . . . [e]qually important is the formality that attaches to the ceremony." Id. at 43. Simply put, "confrontation through a video monitor is not the same as physical face-to-face confrontation." ***United States v. Yates***, 438 F.3d 1307, 1315 (11th Cir. 2006).

"Good cause based on compelling circumstances." The standard for allowing testimony by videoconference in Section 102.35(c) is not further defined or explained in the Rule or the Federal Register notice announcing it. However, it is identical to the standard set forth in FRCP Rule 43(a) which generally calls for witness testimony to be taken in "open court" but states that, "[f]or 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 1996 Advisory Committee Notes to FRCP 43 state:

> Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial. The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend the trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other—and perhaps more important—witnesses might not be available at that time Other possible justifications for remote transmission must be approached cautiously.

For a Board case denying a motion to take testimony by videoconference under Section 102.35(c), see ***Tesla, Inc.***, 32–CA–197020, unpub. Board order issued July 16, 2018 (2018 WL 3436889). In that case, the General Counsel filed a motion to take the testimony of an alleged discriminatee by videoconference from the Agency's regional office in Buffalo, New York, where he lived, on the basis that traveling to the hearing in Oakland, California, would impose a "significant financial burden" upon him. The respondent opposed the motion and the ALJ denied it, finding that the costs of travel were not "so compelling as to override the need for in-person testimony of an alleged discriminatee." The GC filed a special appeal, arguing that the discriminatee was the only witness who could testify about certain alleged one-on-one conversations, and the Agency's budget constraints prevented the GC from subpoenaing him and paying his travel costs. The Board, however, denied the appeal because the GC had "failed to establish that the judge abused her discretion." Compare ***DH Long Point Mgt. LLC***, 369 NLRB No. 18, slip op. at 5 n. 9 (2020), enfd. per curiam 858 F. Appx. 366 (D.C. Cir. 2021), where the ALJ granted the General Counsel's motion, over the respondent's objection, to allow a corroborating witness to testify at the Los Angeles hearing by live video transmission from the Board's Philadelphia office, finding that under the specific circumstances of the case "good cause based on compelling circumstances" existed and that sufficient conditions/safeguards were listed

to protect the integrity of the testimony. See also the Board decisions discussed in **§12–500**, below (finding that the COVID-19 pandemic constituted "compelling circumstances" warranting a remote unfair labor practice hearing).

There is no indication in the Federal Register notice accompanying Section 102.35(c) that the new rule was intended to change the Board's prior policy or practice with respect to videoconferencing. Board decisions prior to the new rule may therefore also provide useful guidance. See, for example, the following Board decisions issued within a year or two before 102.35(c) was adopted: ***MPE, Inc.***, 9–CA–084228, unpub. Board order dated Jan. 29, 2015, 2015 WL 400660 (reversing the judge and ruling that, over the respondent's opposition, the General Counsel should be permitted to take the testimony of the alleged discriminatee by videoconference because he was incarcerated in federal prison several hundred miles from the hearing site and was not scheduled to be released for over a year); ***EF International Language Schools, Inc.***, 363 NLRB 199 n. 1 (2015) (affirming the judge's ruling in the 8(a)(3) discharge case that the respondent was not denied due process by permitting the General Counsel to take the testimony of a corroborating witness who resided in Madrid, Spain, by videoconference from the U.S. Embassy there), enfd. 673 F. Appx. 1 (D.C. Cir. 2017).

For court cases permitting live video testimony under FRCP 43, see ***Ever Win International Corp. v. Prong, Inc.***, No. CV-15-6433-DMG, 2017 WL 1654063, (C.D. Cal. Jan. 6, 2017) (finding that one witness's "overseas residency" and another's "East Coast residency" presented "good faith compelling circumstances" to grant the defendant's request to permit both witnesses to testify by videoconference); ***FTC v. Swedish Match North America, Inc.***, 197 F.R.D. 1 (D.D.C. 2000) (granting the plaintiff's motion to permit a witness in Oklahoma to testify by videoconference to avoid the "serious inconvenience" of traveling "across the continent"); ***Sprint Nextel Corp. v. Yoak***, No. 4:13-CV-01292-AFG, 2014 WL 6796074 (E.D. Mo. Dec. 2, 2014) (granting the plaintiff's motion to permit a non-party witness to testify by videoconference in order to "spare the witness the serious inconvenience in traveling from Seattle a second time" as the witness had previously traveled to the trial but was unable to testify primarily because of delays caused by defendant), vacated for unrelated reasons, 2014 WL 12727212; ***Virtual Architecture, Ltd. v. Rick***, No. 08-CIV-5866-SHS, 2012 WL 388507 (S.D.N.Y. Feb. 7, 2012) (granting the plaintiff's motion to permit a 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 ***Medina v. Angrignon***, No. 15-CV-427-RJA-MWP, 2024 WL 108669, (W.D.N.Y. Jan. 10, 2024) (granting video testimony from the Dominican Republic as there was no dispute the plaintiff could not legally reenter the U.S.); ***Zamora v. Ljubica Contractors LLC***, No. 18-CV-419-VSB, 2025 WL 2494271 (S.D.N.Y. Aug. 29, 2025) (witness's "inability to lawfully enter the United States constitutes good cause in a compelling circumstance.").

For court cases denying live video testimony under FRCP 43, see ***Rodriguez v. SGLC, Inc.***, No. 2:08-CV-01971-MCE, 2012 WL 3704922 (E.D. Cal. Aug. 24, 2012) (expenses associated with travel, standing alone, do not rise to the level of good cause to justify testimony via videoconferencing from Mexico, particularly where no showing was made that witnesses were denied visas permitting them to travel from Mexico to California for purposes of the trial); ***SEC v. Yang***, No. 12-C-2473, 2014 WL 1303457 (N.D. Ill. March 30, 2014) (denying the 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), affd. 795 F.3d 674 (7th Cir. 2015); ***Sille v. Parball Corp.***, No. 2:07-CV-00901-KJD, 2011 WL 2680560 (D. Nev. July 8, 2011) (denying the 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); ***Wilson v. U.S***., No. 2:18-CV-1241, 2023 WL 2795866 (D. Nev.

April 5, 2023) (denying plaintiff's motion to allow an expert witness to testify remotely because of his "extensive scheduling conflicts that only allow him to testify on certain days in very limited time slots," as the hearing had been scheduled for 6 months and the motion was not filed until the week of trial); ***Maseru v. Univ. of Cincinnati***, No. 1:18-CV-106, 2022 WL 19039626, at *1 (S.D. Ohio Oct. 4, 2022) (in race/gender refusal to hire case, defendant's motion for live video testimony due to the fact the witness was former employee who lived out of state, and video testimony would save both time and expense, was denied as such reasons do not rise to the level of "good cause in compelling circumstances."); ***Callier v. Jascott Invs.***, LLC, No. 3:22-CV-00301-LS, 2025 WL 97846, at *1 (W.D. Tex. Jan. 14, 2025) (the judge denies a defendant's motion for live video testimony of a witness living in a foreign country, noting that the limited exceptions in FRCP 43 "cannot be permitted to swallow the live-testimony rule," and that "any issues with obtaining [the witness's] testimony were reasonably foreseeable and cannot establish good cause.").

If all parties agree to videoconferencing a witness's testimony, the 1996 Advisory Committee Notes to FRCP 43 state that "good cause and compelling circumstances may be established with relative ease." The judge "is not bound by a stipulation, however, and can insist on live testimony," considering, "among other factors, . . . the apparent importance of the testimony in the full context of the trial."

For examples where ALJs have approved taking testimony by videoconference in the absence of any objection, see ***Spurlino Materials, LLC***, 357 NLRB 1510,1511 n. 2 (2011) (by agreement of all parties, the ALJ held the "relatively short" last day of hearing, which had been preceded by a 3-week recess, by video), enfd. 805 F.3d 1131 (D.C. Cir. 2015); ***SRC Painting***, 357 NLRB 27 (2011) (ALJ conducted the 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 JD n.1 (2008) (After judge overruled objection to having witness retestify due to court reporter having failed to transcribe the original testimony, without objection the trial reconvened by videoconference so witness could be recalled and his testimony made part of the record.), enfd. 2010 WL 1255942 (D.C. Cir. 2010).

"Appropriate safeguards." Section 102.35(c)(2) of the Board's Rules states that appropriate safeguards "must ensure that the [ALJ] has the ability to assess the witness's credibility and the parties have a meaningful opportunity to examine and cross-examine the witness." The safeguards must also include "at a minimum" measures ensuring that:

- party representatives have the opportunity to be present at the remote location;

- the judge, participants, and the reporter are able to hear the testimony and observe the witness;

- the camera view is adjustable to provide a close-up view of counsel and the witness and a panoramic view of the room;

- exhibits used in the witness's examination are exchanged in advance of the examination; and

- video technology assistance is available to assist with technical difficulties that arise during the examination.

ALJs may also impose additional safeguards. The Board and the courts have often required that remote testimony take place at a Federal facility, or similar neutral site, to protect the integrity of the hearing process. See e.g., ***EF International Language School, Inc.***, 363 NLRB 199 n. 1, 201 (2015), enfd. 673 F. App'x 1, 4 (D.C. Cir. 2017) (approving use of video testimony where witness testified from the U.S. Embassy in Madrid, Spain); ***Katzin v. United States***, 124 Fed. Cl. 122, 125–26 (2015) (approving video testimony where witness testified from Federal Courthouse in Miami); ***Nippon Paper Indus. Co.***, 17 F. Supp. 2d 38, 42–43 (D. Mass. 1998) (court grants government's request for video testimony where witness testified from U.S. embassy in Tokyo). Other safeguards can include having a court reporter, or other neutral individual, present at the remote location to ensure the integrity of the remote testimony. ***Securities and Exchange Commission v. Yang***, 12-C-2473, 2014 WL 1303457, at *5 (N.D. Ill. Mar. 30, 2014), aff'd sub nom. ***S.E.C. v. Yang***, 795 F.3d 674 (7th Cir. 2015) (court conditions video testimony upon a "person duly authorized to administer oaths" being present at the remote location who "will be required to verify that no one else is present during the course" of the witness's testimony and that the witness "does not confer with anyone during the course of her testimony."); see also ***Pain Relief Centers***, 371 NLRB No. 70, slip op. at 1 n. 2 (2022), further explained in § 12–500 below.

Application for videoconferencing testimony. Such applications must be made in writing to the Administrative Law Judge pursuant to Section 102.35(c)(1) of the Board's Rules.

§ 12–500 Remote Hearings by Videoconference During the COVID-19 Pandemic

Recognizing what was the "worst public health crisis in the last century," ***XPO Cartage, Inc.***, 370 NLRB No. 10 (2020), the Board held that the COVID-19 pandemic constituted "good cause based on compelling circumstances" allowing ALJs to order that an entire hearing be conducted remotely by video. ***William Beaumont Hospital***, 370 NLRB No. 9 (2020) (judge did not abuse his discretion in finding the COVID-19 pandemic constituted "compelling circumstances" warranting a remote video hearing); ***XPO Cartage, LLC***, above. (same). The Board found that ALJs have such discretion pursuant to their general authority to "regulate the course of the hearing" under Section 102.35(a)(6) of the Board's rules and that, while Section 102.35(c) is not controlling with respect to remote hearings, the same framework is properly applied, i.e., a judge may order a remote hearing upon a showing of "good cause based on compelling circumstances and under appropriate safeguards." ***William Beaumont Hospital***, slip op. at 2; ***XPO Cartage***, slip op. at 1. The "appropriate safeguards" are to be "informed but not controlled by those listed in Section 102.35(c)(2) of the Board's rules." ***William Beaumont***, slip op. at 2. Finally, the Board stated that the trial judge has the discretion to determine whether a case is too complex or cumbersome to be heard remotely; parties can raise concerns about a remote hearing directly to the trial judge in the first instance, or on exceptions pursuant to Section 102.46 of the Board's Rules in the event a party receives an adverse ruling. ***William Beaumont***, slip op. at 2; ***XPO Cartage***, slip op. at 2.

During the COVID-19 pandemic, the Board repeatedly found that ALJs acted within their discretion in ordering, or not ordering, that certain procedures be followed during remote hearings. See, e.g., ***New York Presbyterian Hudson Valley Hospital***, 372 NLRB No. 15, slip op. at 1 n. 2 (2022) (judge instructed witness to turn off the virtual background), enfd. 2023 WL 8715731 (2d Cir. 2023); ***Amazon.com Services, LLC***, 29–CA–277198, unpub. Board order issued June 15, 2022 (2022 WL 2191112) (judge did not abuse her discretion by failing to provide for party representatives to be present at the remote location from which each witness would testify); ***Pain Relief Centers***, 371 NLRB No. 70, slip op. at 1 n. 2 (2022) (judge had a Board-side attorney, who was subsequently recused from working on the case, act as a "courtroom deputy"

to assist with technical aspects of the remote hearing), enfd. 2023 WL 5380323, (4th Cir. 2023); and ***Oxarc, Inc.***, 19–CA–230472, unpub. Board order issued Sept. 23, 2020 (2020 WL 5735979) (judge's request that parties upload documents prior to the video hearing was proper, as the respondent failed to ask for an alternative method and did not object to the request in response to the prehearing order or at the prehearing conference).

Once the Agency resumed in-person operations, but before the COVID-19 pandemic officially ended, ALJs could choose to hold in-person or partially in-person hearings as long as they conducted any such hearings in compliance with the Board's Rules and Regulations and health and safety protocols. ***Pizza Piazza, Inc.***, 6-CA-279445, unpub. Board order issued March 14, 2022 (2022 WL 789275); ***Phillips 66 Co.***, 15-CA-263723, unpub. Board order issued March 14, 2022 (2022 WL 789280). The Board also found that it was not an abuse of discretion for a judge to direct the General Counsel to secure a location that would allow the hearing to be held in-person in compliance with such protocols. See ***3 Corners, LLC***, 28–CA- 273948, unpub. Board order issued July 5, 2022 (2022 WL 2467405).

On May 11, 2023, the U.S. Department of Health and Human Services ended the COVID-19 Public Health Emergency. ***Allan v. Minnesota Dep't of Hum. Servs.***, 127 F.4th 717, 719 (8th Cir. 2025), cert. denied, 146 S. Ct. 94 (2025). The Board has made it clear that the COVID-19 pandemic "no longer constitutes compelling circumstances to justify holding fully remote hearings." ***Starbucks Corp.***, 13-CA-305908, unpub. Board order issued March 25, 2026. Since the end of the pandemic, the Board has clarified that certain other non-pandemic related circumstances are insufficiently compelling to justify directing a remote hearing over a respondent's objection. For example, in ***Hudson Institute of Process Research***, 373 NLRB No. 11 (2024), the Region scheduled a video hearing because witnesses were scattered all over the country and an in-person hearing would cause unnecessary expense and inconvenience. The respondent objected and filed a motion to hold the hearing in person. The ALJ granted the motion, finding that expense and inconvenience alone were not sufficient compelling circumstances for a full video hearing. The General Counsel thereafter filed a special appeal, but the Board found that the GC failed to show that the judge's ruling was an abuse of discretion. Similarly, in ***Amazon.com Services LLC***, 12–CA–308502, unpub. Board order issued May 7, 2024 (2024 WL 2049869), the Region scheduled a video hearing primarily because the charging party/discriminatee had moved from Florida, where the alleged violation occurred, to New York. The respondent objected and filed a motion to hold the hearing in person, in Florida. The ALJ denied the motion, but the Board granted the respondent's special appeal and found that "the judge abused his discretion in denying the Respondent's motion in the absence of good cause based on compelling circumstances justifying holding a hearing via videoconference over a party's objection." And, in ***Starbucks Corp.***, 13-CA-305908, above, after the Region had scheduled a video hearing, respondent appealed the ALJ's denial of its motion for an in-person hearing. The Board concluded that the judge abused his discretion by finding that a video hearing was appropriate based upon the number of witnesses who needed to travel, the nature of their testimony, the issues in the case, and the belief that much of the case could be litigated by documentary evidence. Because the scheduled hearing date had passed, the Board remanded the matter to the Region "to set a new hearing date and arrange for an in-person hearing."

§ 12–600 Tape Recorders in Hearing

The use of a tape recorder by parties to record the hearing 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 trial examiner's ruling in that case, the court indicated that, "to the extent electronic tape may be used without interfering with or slowing down the hearing, . . . refusal of permission is arbitrary and capricious." 417 F.2d at 178. Nevertheless, the Board subsequently upheld a trial examiner's discretion to deny a respondent's request to use a tape recorder in ***Daisy's Originals, Inc.***, 187 NLRB 251 n. 1 (1970). The respondent's counsel requested permission to use the tape recorder "to implement our taking of notes and to help us prepare our defense," arguing that the recorder would not conflict with the official reporting service "except insofar as . . . there is an error in the transcript." The trial examiner denied the request on the ground he would not be able to police its use. The Board found that this ruling was not an abuse of discretion, noting that "the Trial Examiner, the General Counsel, and the Charging Party are equally 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.

§ 12–700 Television Cameras in Courtroom

The Board's policy is that its hearings 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 hearing. Although the letter stated that the policy may be reviewed later, there has been no change to date.

Such restrictions are constitutional. See **Davis, et al., 33 Fed. Proc., L. Ed. § 77:242** (May 2026 Update) (discussing the reasons for such restrictions and listing court decisions upholding them).

§ 12–800 The Hearing Transcript

The Board utilizes court reporting services to audiotape and prepare and certify an official transcript of its hearings. Such official transcripts are generally "deemed prima facie a correct statement of the testimony taken and the proceedings had." 28 U.S.C. Sec. 753(b) (addressing the use of reporters in federal court proceedings). Thus, the judge should attempt to make sure, to the extent possible, that the hearing testimony is adequately recorded (e.g., that a witness's testimony is audible) and transcribed by the reporting service.

If a transcription error occurs, corrections may be made pursuant to a stipulation or motion filed with the judge. See, for example, ***Teamsters Local 705 (Pennsylvania Truck Lines)***, 314 NLRB 95 n. 2 (1994). In that case, the Board rejected the General Counsel's attempt, for the first time on exceptions to the judge's decision, to supply the surname of an additional discriminatee whose name was inaudibly described in the transcript. The Board stated that "the burden was on the General Counsel, not the court reporter, to identify the discriminatees," and indicated that the GC should have filed a posthearing motion or proposed stipulation to clarify the matter. See also NLRB Casehandling Manual (Part 1), Sec. 10412.

If a party files a motion, or the judge believes there has been a material transcription error, the parties should be notified and provided an opportunity to state their positions. The judge should not unilaterally correct the transcript except for obvious typographical errors. ***Serv-Air, Inc.***, 161 NLRB 382 n. 1 (1966), enfd. 395 F.2d 557 (10th Cir. 1968); ***W. B. Jones Lumber Co.***, 114 NLRB 415 n. 1 (1955), enfd. 245 F.2d 388 (9th Cir. 1957).

With respect to the timing of a motion to correct the transcript, it is obviously preferable that the motion be filed before the due date for filing posthearing briefs, particularly if the asserted transcription error is significant. However, the Board's rules do not specifically require that motions to correct the transcript be filed before the due date for filing briefs. See ***Pacific Green Trucking, Inc***., 368 NLRB No. 14, slip op. at 3 n. 2 (2019) (granting the General Counsel's motion to correct, notwithstanding the respondent's objection that it was filed 5 days after the due date for filing briefs, as the Board had no "hard and fast rule" requiring that a motion to correct be filed before the due date for filing briefs; the parties had agreed to an expedited briefing schedule; the identified transcript errors were minor; and the respondent did not dispute the accuracy of the proposed corrections or contend that it would have to revise its brief if they were approved).

Where disputes arise over the accuracy of the transcript, the judge may request the reporting service to review the audiotape and provide a revised transcript if the original was incorrect. See, e.g., ***Metro One Loss Prevention Services Group***, 356 NLRB 89, 95 n. 7 (2010). Motions requesting that the ALJ direct the reporting service to provide one or more of the parties with a copy of the audiotape to determine the accuracy of the transcript have generally been denied. See, e.g., ***Dickens, Inc***., 355 NLRB 255, 259 n. 1 (2010) (ALJ denied respondent's motion for an order directing the reporting service to furnish it with copies of the audio files from which the transcript was typed to determine if corrections were warranted). See also ***Machinists District Lodge 160***, 373 NLRB No. 39 (2024), where the Board denied the respondent union's request to remand the case and direct the reporting service to provide the tape backup to the parties, as the errors were "inadvertent and harmless" and did not impede the Board's ability to decide the case or justify delaying the proceeding. However, if the ALJ finds that good cause has been demonstrated and grants such a motion, the reporting service should be directed to provide a copy of the recording to all parties, not just the party requesting it. The judge, who must make the ultimate determination with respect to such disputes, should also receive and review a copy of the recording.

Where an accurate transcription of testimony cannot be determined (for example because the audiotape has been lost), reopening the hearing to retake the testimony may be necessary, absent an agreement or stipulation otherwise. See, e.g., ***Kentucky River Medical Center,*** 340 NLRB 536, 549 n. 21 (2003) (witnesses were recalled to repeat lost portions of their prior testimony); ***Lucky Stores, Inc***., 245 NLRB 647 n. 1 (1979) (parties stipulated to the substance of the lost testimony and waived the right to further examination or cross-examination).

§ 12–900 Exhibits

Incorporating by Reference. 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.

Similarly, the Board also appears to disfavor allowing a party to "incorporate by reference" portions of other records into a pleading***. Superior Industries Intern.***, 295 NLRB 320, 322 n. 8 (1989) (granting motion to strike portions of respondent's answer that generically incorporated "all the documents, transcripts and exhibits" in certain related Board and federal court proceedings).

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

• Date and/or place of birth
• Social Security number
• Mother's maiden name
• Driver's license number / passport number / other government-issued unique ID number
• Financial account number
• Credit or debit card number
• Biometric data

See https://apps.nlrb.gov/myAccount/#/FileCaseDocument/TermsConditions

If a party submits an exhibit that contains irrelevant SPII, the judge should direct that the SPII be redacted. If the SPII is relevant to the issues in the case, or irrelevant SPII was included in documents filed or admitted into the hearing record, the judge should take steps to protect against public disclosure of the SPII. See, e.g., ***Kansas City Cement Masons Pension Fund v. Lan-Tel Communications Services, Inc.***, 2018 WL 2207984 (W.D. Mo. March 7, 2018) (court temporarily sealed summary judgment documents containing personally identifiable information that had been filed by the parties and directed counsel to file properly redacted versions of the documents to substitute for the sealed versions); ***Doe v. United States***, 210 F.Supp. 3d 1169 (W.D. Mo. 2017) (court sealed unredacted deposition transcripts containing SPII that the FTC had inadvertently attached as exhibits to its preliminary injunction brief). See also **§ 8–600**, Protective Orders, above.

Rejected Exhibits. Rejected exhibits should be placed in a separate rejected exhibits file so that they may be reviewed by the Board in the event a party challenges the judge's rulings on exceptions to the judge's decision. See ***Omaha World-Herald***, 357 NLRB 1870, 1872 n. 13 (2011) (judge erred in not placing rejected exhibits in a rejected exhibits file). But see ***Bethlehem Temple Learning Center, Inc***., 330 NLRB 1177, 1182 (judge declined to include rejected prehearing witness affidavits in a rejected exhibits file as the portions bearing on credibility had already been read into the record). It is improper, however, for a party's posthearing brief to cite rejected exhibits as if they were received into evidence rather than rejected. ***Pain Relief Centers, P.A.***, 371 NLRB No. 70, slip op. at 6 n. 2 (2022), enfd. 2023 WL 5380323 (4th Cir. 2023).

CHAPTER 13. BOARD PRECEDENT AND RELITIGATION OF ISSUES

§ 13–100 Board Precedent

Administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself. See, e.g., ***Western Cab Co***., 365 NLRB 761 n. 4 (2017); ***Pathmark Stores, Inc.***, 342 NLRB 378 n. 1 (2004). See also ***D.L. Baker, Inc***., 351 NLRB 515, 529 n. 42 (2007) (summarizing the reasons for the Board's nonacquiescence policy).

Judges are 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, n. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). See also ***Planned Building Services, Inc.***, 347 NLRB 670 n. 2 (2006), overruled on other grounds ***Pressroom Cleaners***, 361 NLRB 643 (2014); ***Stark Electric, Inc.***, 327 NLRB 518 n. 1 (1999) (judge properly relied, at least in part, on findings in prior Board decisions involving the same respondent to find animus), and **§ 13–600**, Relitigation of Issues, below.

§ 13–200 ALJ Decisions Adopted in the Absence of Exceptions

Cases involving different parties. 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 involving other parties. See**,** e.g., ***Starbucks Corp.,*** 373 NLRB No. 44, slip op. at 1 n. 3 (2024); ***Colorado Symphony Assoc***., 366 NLRB No. 122, slip op. at 1 n. 3 (2018), enfd. 798 F. Appx. 669 (D.C. Cir. 2020); ***Carpenters Local 370 (Eastern Contractors Assn.),*** 332 NLRB 174, 175 n. 2 (2000), and cases cited there.

Therefore, 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 no exceptions were filed 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.

Cases involving the same parties. 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 the respondent's argument that such decisions should be given no more effect than a settlement agreement). See also ***New York Paving, Inc***., 371 NLRB No. 139, slip op. at 5 n. 11 (2022) (finding circumstantial evidence of animus based on a prior ALJ decision that was adopted in the absence of exceptions), enfd. 2023 WL 7544999 (D.C. Cir. 2023); ***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), and cases cited there. For cases addressing the requirements for collateral estoppel, see **§ 13–600**, Relitigation of Issues, below.

§ 13–300 ALJ Decisions Pending Before 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 310 n. 3 (2015), enfd. per curiam 672 F. Appx. 1 (D.C. Cir. 2016). See also ***Richfield Hospitality, Inc.***, 369 NLRB No. 111 n. 1 (2020) (finding that ALJ correctly refused to apply collateral estoppel to findings by another ALJ in a prior case then pending before the Board).

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 690 n. 1 (2012) (holding that the trial judge properly barred respondent from relitigating the lawfulness of a 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). See also ***Voith Industrial Services, Inc***., 363 NLRB 1020 n. 2 (2016) (trial judge properly relied on a finding by another ALJ in a previous case that the respondent was a legal successor, even though that finding was pending before the Board on exceptions, as the Board subsequently affirmed that finding); ***Longshoremen ILWU (ICTSI Oregon, Inc.),*** 363 NLRB 460 n. 3 (2015) (same, where the judge relied on the findings by another ALJ in an earlier 8(b)(4) secondary boycott case against the respondent union), enfd. per curiam 705 F. Appx. 3 (D.C. Cir. 2017); ***Detroit Newspapers Agency***, 326 NLRB 782 n. 3 (1998) (same, where the trial judge relied on an earlier decision by another ALJ that a strike was an unfair labor practice strike), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000); ***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., ***Truck Drivers Local No. 100 (Beta Productions LLC),*** 370 NLRB No. 36, slip op. at 2 (Oct. 21, 2020); ***Detroit Newspapers***, above; and ***Ironworkers Local 103***, 195 NLRB 980, 983 (1972). Thus, the judge should consider whether the same conclusions would be reached even without relying on the findings in the prior case. If so, the judge should either not rely on the prior findings or state in the decision that the same conclusions would be reached without relying on them.

§ 13–400 ALJ Credibility Resolutions

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) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness").

§ 13–500 Settlement Agreements

Informal or non-Board settlements that do not contain an admission, and formal settlements that contain a nonadmission clause, may not be relied on in subsequent cases. See ***Sheet Metal Workers Local 28 (Astoria Mechanical Corp.)***, 323 NLRB 204 (1997). See also ***Cablevision Systems Corp***., 367 NLRB No. 59 (2018) (non-Board settlement that did not contain an admission that the employer committed the alleged unfair labor practices provided no basis for refusing to reinstate a decertification petition which had been blocked pending resolution of the allegations, as "the nonadmission of wrongdoing applies to both findings of fact and conclusions of law").

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. ***Amerinox Processing, Inc***., 371 NLRB No. 105, slip op. at 2 (2022), enfd. per curiam 2023 WL 2818503 (D.C. Cir. April 7, 2023); ***Teamsters Local 122***, 334 NLRB 1190, 1192 n. 11 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003); ***Painters District Council 9 (We're Associates***), 329 NLRB 140, 143 (1999); ***Teamsters Local 945 (Newark Disposal Service),*** 232 NLRB 1, 3–4 (1977), enfd. mem. 586 F.2d 835 (3d Cir. 1978). See also ***El Super***, 367 NLRB No. 34, slip op. 1 n. 4 (2018) ("[T]he only type of settlement agreement that can be used to establish a proclivity to violate the Act is a formal settlement agreement without a non-admission clause.")

With respect to whether a formal settlement without a nonadmission clause may be relied on as support for finding a violation regarding other allegations or cases, see ***Stern Produce Co.,*** 372 NLRB No. 74 (2023), enf. denied 97 F.4th. 1 (D.C. Cir. March 26, 2024). There, the Board reversed the ALJ and found that the employer unlawfully issued a written warning to an employee. In finding animus and an unlawful motive for the discipline, the Board relied in part on a formal settlement of previous allegations that the employer had unlawfully failed to recall him from a layoff, which required the employer to reinstate him with backpay (see 2021 WL 2347342 (June 7, 2021)). As support for relying on the settlement, the Board cited ***St. Mary's Nursing Home***, 342 NLRB 979 (2004), enfd. 240 F. Appx. 8 (6th Cir. 2007) (finding animus based, in part, on evidence from settled unfair labor practice cases that involved the employer's actions outside the Sec. 10(b) limitations period). Slip op. at 4–5.

The D.C. Circuit, however, denied enforcement. The court found *St. Mary's Nursing Home* distinguishable; that it "merely holds that 'evidence from [a] settled case' is relevant and admissible for the purpose of determining an employer's motive." The court found that the Board in *Stern Produce* instead improperly "treated the [settled] charges as if they were evidence." 2024 WL 1281072, at *8.

For a further discussion of *St. Mary's Nursing Home*, see **§ 16–402.4**, Evidence of Presettlement Conduct, below.

§ 13–600 Res Judicata and Collateral Estoppel

Res judicata is sometimes defined to include both claim and issue preclusion. However, in its narrow sense it refers only to claim preclusion, which forecloses relitigation of matters that should have been raised in an earlier action but were not. Collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation of a matter that has already been litigated and decided. See ***Taylor v. Sturgell***, 553 U.S. 880, 892 (2008) ("Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.' Issue preclusion, in contrast, bars 'successive litigation of an issue of fact or law actually litigated and

resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim.") (citation omitted).

Because relitigation may unnecessarily waste judicial resources, the trial judge may raise res judicata or collateral estoppel sua sponte, i.e., even if a party has failed to properly do so. See ***A.W. Farrell & Son, Inc***., 362 NLRB 1195, 1204 n. 28 (2015); ***Park v. Board of Trustees of University of Illinois***, 754 F. Appx. 437, 439 (7th Cir. Nov. 21, 2018); ***Stanton v. D.C. Court of Appeals,*** 127 F.3d 72, 77 (1997), and cases cited there.

The doctrines of res judicata and/or collateral estoppel have been applied to Board proceedings in a variety of circumstances.

Relitigating representation case issues in subsequent unfair labor practice case. In the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent may not relitigate in a Section 8(a)(5) refusal-to-bargain case issues that were or could have been litigated in the prior representation proceeding. See, e.g., ***Import Motors II, Inc***., 372 NLRB No. 112, slip op. at 1 (2023); ***La Mirada Imaging,*** 368 NLRB No. 89, slip op. at 1 n. 3 (2019), enfd. sub nom. ***RadNet Management, Inc. v. NLRB***, 992 F.3d 1114, 1128 (D.C. Cir. 2021); ***Nursing Center at Vineland***, 318 NLRB 901, 903 (1995), enfd. mem. sub nom. ***Konig v. NLRB***, 51 LRRM 2736 (3d Cir. 1996); and ***Western Temporary Services***, 278 NLRB 469 n. 1 (1986), enfd. 821 F.2d 1258 (7th Cir. 1987).

See also ***FedEx Freight, Inc***., 362 NLRB 762 n. 1 (2015) (treating respondent's request to admit additional evidence in the refusal-to-bargain proceeding as a motion to reopen the representation proceeding and denying the request because the respondent failed to establish that the evidence existed but was unavailable at the time of the representation hearing or could not have been discovered with reasonable diligence; that the evidence would change the result; and that respondent moved promptly to present the evidence), enfd. 816 F.3d 515 (8th Cir. 2016); ***Kaweah Manor***, 367 NLRB No. 22 (2018) (rejecting the respondent's argument that there were special circumstances warranting reconsideration of the appropriate bargaining unit in the 8(a)(5) refusal-to-bargain proceeding because respondent, as a successor, was not a party to the prior representation proceeding and the predecessor failed to request Board review of the regional director's unit determination in that proceeding); ***Cristal USA, Inc***., 368 NLRB No. 141 (2019) (finding special circumstances and denying General Counsel's motion for summary judgment where there was an intervening change in the legal standard applicable to the bargaining-unit determination, which the Board found should be applied retroactively notwithstanding the union's previous certification in that unit).

The same policy has been applied to parties in unfair labor practice proceedings involving violations of other Sections of the Act. See ***Bannum Place of Saginaw, LLC***, 370 NLRB No. 117, slip op. at 1 n. 1 (2021) (affirming judge's denial of respondent's motion to dismiss the Sec. 8(a)(4), (3), and (1) complaint for lack of jurisdiction based on respondent's claim that it was a joint employer with the Federal Bureau of Prisons, as the respondent's joint-employer claim was considered and rejected in representation case), rev. denied 41 F.4th 518 (6th Cir. 2022); ***Local 340, New York New Jersey Regional Joint Board (Brooks Brothers)***, 365 NLRB No. 61, slip op. at 1, n. 6 (2017) (precluding respondent union in Section 8(b)(1)(A), (2) and (3) case from relitigating scope of unit previously determined in unit clarification proceeding); ***Allied Trades Council (Duane Reade, Inc.)***, 342 NLRB 1010, 1012–1013 (2004) (precluding respondent union in Sec. 8(b)(3) case from relitigating the scope of the bargaining unit by raising the issue of accretion, an issue that could have been raised in the prior representation proceeding); and ***American Tempering, Inc.***, 296 NLRB 699 (1989) (adopting ALJ's reliance, in a Sec. 8(a)(1), (2), and (3) case, on a "no accretion" finding in a prior unit clarification decision that was affirmed

by the Board on review, in light of parties' failure to identify any new evidence regarding the accretion issue), enfd. 919 F.2d 731 (3d Cir. 1990). See also Sec. 102.67(g) of the Board's Rules and Regulations. But see ***Leonard Niederriter, Co., Inc.***, 130 NLRB 113, 117 n. 2 (1961) (representation case finding that specific individual was not a supervisor did not finally and conclusively resolve the issue for purposes of case involving alleged 8(a)(3) and (1) violations of the Act.); ***Clark & Wilkins Indus.***, 290 NLRB 106 n. 2 (1988) (Regional Director's approval of election stipulation involving voter eligibility in representation proceeding has preclusive effect only to related subsequent unfair labor practice proceedings, i.e., 8(a)(5) refusal-to-bargain cases, but 8(a)(1) and (3) discrimination cases are not related proceedings); ***Amalgamated Clothing Workers of America, AFL-CIO v. NLRB***, 365 F.2d 898, 900–905 (DC. Cir. 1966) (Regional Director's finding that "floorladies" were supervisors in representation case does not preclude relitigating the issue in an 8(a)(1) case involving "interference with rights of organization, [as] the proceedings are not so related as to foreclose presentation to the Board of the underlying issues.").

Relitigating 10(k) proceeding issues in 8(b)(4)(ii)(D) case. In ***Longshoremen Local 12 (Southport Lumber Co.)***, 368 NLRB No. 88, slip op. at 1–2 (2019), the Board summarized its law in this area as follows:

> After the [Board's] 10(k) award [determining which union has jurisdiction over disputed work], both parties to an 8(b)(4)(D) charge may offer new evidence, and the respondent need not offer previously unavailable evidence to be entitled to a hearing on that allegation. ***Longshoremen ILWU Local 6 (Golden Grain)***, 289 NLRB 1, 2 (1988); see also [***NLRB v.***] ***Plasterers Local 79***, 404 U.S. [116,] 122 fn. 10 [(1971)]. In addition, "[t]he findings conclusions in a 10(k) proceeding are not res judicata on the unfair labor practice issue in the later § 8(b)(4)(D) determination." ***Golden Grain***, 289 NLRB at 2; quoting ***Plasterers Local 79***, 404 U.S. at 122 fn. 10. The Board, however, will not relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation, e.g., the existence of an agreed-upon method of resolving the dispute, ***Golden Grain***, 289 NLRB at 2 fn. 4, nor will it relitigate the Board's 10(k) determination in the subsequent 8(b)(4)(D) case, ***International Longshore & Warehouse Union and International Longshore & Warehouse Union Local 4 (Kinder Morgan)*****,** 367 NLRB No. 64, slip op. at 5 (2019).

Note, however, that the Ninth Circuit denied enforcement of the Board's decision in the cited ***Kinder Morgan*** case. Contrary to the Board, the court held that the Board's prior 10(k) decision did not preclude the respondent union from reasserting its work preservation defense in the subsequent 8(b)(4)(D) proceeding. ***International Longshore and Warehouse Union v. NLRB***, 978 F.3d 625 (9th Cir. 2020). The Ninth Circuit is currently reviewing a similar issue en banc. See ***Int'l Longshore & Warehouse Union v. NLRB,*** 161 F.4th 1135 (Mem) (9th Cir. 2025), granting en banc review and vacating 140 F.4th 1170.

Relitigating ULP case issues in compliance/backpay proceeding. A respondent may not relitigate in a compliance proceeding matters decided in the underlying unfair labor practice proceeding. See, e.g., ***Alaris Health at Rochelle Park***, 371 NLRB No. 66, slip op. at 4 (2022) (precluding respondent from relitigating its remedial obligations set forth in the Board's underlying decision and order regarding the calculation of backpay and interest and the filing of backpay allocation reports); ***Tito Contractors, Inc.***, 370 NLRB No. 133, slip op. at 4 (2021) (precluding respondent from relitigating in the compliance proceeding whether it unlawfully encouraged a third party to discharge employees because of their union and other protected concerted activities); ***New York Party Shuttle, LLC***, 365 NLRB No. 147, slip op. at 2 (2017) (precluding respondent

from relitigating in the compliance proceeding whether reinstatement of the discriminate was unwarranted because he was operating a competing business), and unpub. Board order issued May 8, 2018 (2018 WL 2148460), slip op. at 1 n. 2 (precluding respondent from relitigating in the compliance proceeding whether the discriminatee was an independent contractor rather than a statutory employee), and cases cited there. See also ***Somerset Valley Rehabilitation and Nursing Center***, 371 NLRB No. 86, slip op. at 2–3 (2022) (rejecting respondent's assertion that certain ordered remedies should be modified for equitable reasons due to the Board's substantial delay in issuing the order); ***Santa Barbara News-Press***, 368 NLRB No. 65, slip op. at 2 (2019) (holding that respondent's contention that merit increases were discretionary was impermissible to the extent it was an attempt to relitigate the Board's prior finding that the failure to continue the merit increases was unlawful).

Relitigating ULP case issues in another ULP case. With respect to issues in an unfair labor practice proceeding that were litigated and decided in a prior unfair labor practice proceeding, see ***Starbucks Reserve Roastery***, 373 NLRB No. 140, slip op. at 3 (2024) (General Counsel was not collaterally estopped from alleging that Starbuck's one-pin rule at its Manhattan Reserve Roastery was unlawful, as the employee dress code at the Roastery was not "virtually identical" to the dress code at Starbuck's basic neighborhood stores involved in the prior litigation); ***Casino Pauma***, 363 NLRB at 536 n. 1 (2015) (respondent tribal casino was collaterally estopped from contesting jurisdiction where the issue had been litigated and decided in a prior case and the facts had not changed); ***Allied Mechanical Services, Inc.***, 352 NLRB 662, 664 (2008) (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), reconsideration denied 356 NLRB 2 (2010), enfd. 668 F.3d 758 (D.C. Cir. 2012); ***Great Lakes Chemical Corp.***, 300 NLRB 1024, 1025, nn. 3 & 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 a prior proceeding involving the same parties), enfd. 967 F.2d 624 (D.C. Cir. 1992); ***Harvey's Resort***, 271 NLRB 306 (1984) (respondent was collaterally estopped from relitigating whether floormen were supervisors as the issue had been fully litigated and decided in a prior Board case and there had been no significant change in the job). See also ***Wolf Creek Nuclear Operating Corp***., 365 NLRB No. 55 (2017) (the burden is on the party asserting preclusion to demonstrate that the identical issue was fully litigated, and on the party opposing preclusion to show that circumstances have changed materially).

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,** above.

Relitigating non-NLRB case issues in an NLRB case. With respect to prior non-NLRB case issues, the Board applies 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." ***Precision Industries***, 320 NLRB 661, 663 (1996) (rejecting respondent's argument that the ULP complaint was barred by res judicata because respondent had prevailed in an ERISA suit brought by the charging party union and certain former employees and retirees), enfd. 118 F.3d 585 (8th Cir. 1997).

See also ***Field Bridge Associates***, 306 NLRB 322, 322–323 (1992) (declining to give collateral estoppel effect to state court proceedings that the Board was not a party to), enfd. sub nom. ***Service Employees Local 32B–32J v. NLRB***, 982 F. 2d 845 (2d Cir. 1993); ***Roadway Express***, 355 NLRB 197 (2010), enfd. 427 F. Appx. 838 (11th Cir. 2011) (declining in

consolidated 8(a)(1) discharge and 8(b)(1)(A) duty of fair representation case to give collateral estoppel effect to alleged discriminatee's unsuccessful hybrid Sec. 301/DFR claim against employer and union as the General Counsel was not a party to the federal court lawsuit or in privity with the alleged discriminatee and the court dismissed the DFR claim on the ground that the discriminatee 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, the Board has distinguished these two circuit court decisions based on their particular facts. See ***Field Bridge Associates***, 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***, 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"); ***Roadway Express***, 355 NLRB at 201 (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). Cf. ***Galaxy Towers Condominium Assn***., 361 NLRB 364 n. 3 (2014) (Board denies motion asking for the application of judicial estoppel based on arguments made by union in a federal district court case involving an arbitration award noting ["w]e adhere to the general rule not to apply judicial estoppel where the Government was not a party to the prior proceeding.").

General Counsel's dismissal of a charge. The General Counsel's dismissal of a charge has no preclusive effect in subsequent litigation. See ***Postal Service*****,** 372 NLRB No. 119**,** slip op. at 3 (2023) (ALJ erred in finding that the Regional Director's dismissal of a previous charge precluded consideration of evidence prior to that date in assessing the complaint allegations); ***Thryv, Inc***., 20–CA–250250, unpub. Board order issued March 8, 2023 (2023 WL 5828727), at 1 n. 1 (Regional Director's dismissal of a charge alleging that employer unlawfully implemented its last best final offer did not prove there was an impasse or lawful implementation), citing ***UFCW Local 576 v. NLRB***, 675 F.2d 346, 352 n. 7 (D.C. Cir. 1982) ("Although the General Counsel's decision to dismiss represents an estimate of the merits of the charge and operates to foreclose Board consideration of that charge, it is not a decision on the merits with res judicata effect."); ***Aircraft & Engine Maintenance Employees, Local 290 v. E. I. Schilling Co***., 340 F.2d 286, 289 (5th Cir. 1965) ("Surely, the mere refusal by the general counsel to issue a complaint is not res judicata and can not constitute a collateral estoppel. The failure of the general counsel to issue a complaint is not necessarily based on the evidence or the merits of a case.") Cf. ***Dodd v. Int'l Longshoremen's Ass'n Loc. 1475***, No. 24-13050, 2025 WL 2328439, at *4–6 (11th Cir. Aug. 13, 2025) (dismissal of charge by Regional Director, and the General Counsel's denying the appeal of the dismissal, cannot form the basis of collateral estoppel in duty of fair representation lawsuit).

§ 13–700 Judicial Estoppel

Judicial estoppel is a doctrine distinct from the doctrines of issue and claim preclusion. ***New Hampshire v. Maine***, 532 U.S. 742, 748–749 (2001). As summarized by the D.C. Circuit,

> The doctrine of judicial estoppel is that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position

> . . .” *New Hampshire v. Maine*, 532 U.S. at 749. The doctrine “protects the integrity of the judicial process,” *Davis v. D.C.*, 925 F.3d 1240, 1256 (D.C. Cir. 2019), by “prohibiting parties from deliberately changing positions according to the exigencies of the moment,” *New Hampshire v. Maine,* 532 U.S. at 750 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). The Supreme Court has said there is no “exhaustive formula for determining the applicability of judicial estoppel.” *Id*. at 751. Nevertheless, the Court has set forth three key factors that “inform the decision” whether “the balance of equities” favors applying the doctrine in a particular case: (1) whether the party’s later position is “clearly inconsistent” with its earlier position; (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* at 750–751.

Temple University Hospital, Inc. v. NLRB, 929 F.3d 729, 733 (D.C. Cir. 2019), granting review and remanding 366 NLRB No. 88 (2018).

It is unclear whether or when judicial estoppel applies in NLRB proceedings. In ***Precision Industries,*** 320 NLRB at 663, the Board “assum[ed] arguendo” that the doctrine is applicable to Board proceedings but found 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 them was based on antiunion animus. The Board noted that neither the GC nor the charging party union was a party in the EEOC proceeding, and that, “in any event,” there was “nothing inconsistent in alleging race or age discrimination in one forum and discrimination based on union membership in another,” as the discriminatees “may have believed in good faith that the Respondent had more than one illegal motive for declining to hire them.” See also ***Galaxy Towers***, 361 NLRB at 364 n. 3 (Board adheres to the general rule not to apply judicial estoppel where the Government was not a party to the prior proceeding).

In ***Temple University Hospital***, above, a representation case, the Board found it unnecessary to decide the issue because, even “assuming arguendo” the doctrine applies, the union was not estopped from filing an election petition with the Board by the fact that it had successfully taken the position in a prior proceeding before the Pennsylvania Labor Relations Board (PLRB) that the PLRB rather than the NLRB had jurisdiction. The Board noted that there was no evidence the union had misled the PLRB and no adequate basis to believe the PLRB would have reached a different result had the union taken some contrary position. See the Board’s unpub. Order dated Dec. 29, 2016 (2016 WL 7495062), at 1 n. 2.

On appeal from the Board’s subsequent bargaining order, the D.C. Circuit likewise did not address whether the doctrine applies in NLRB proceedings. However, the court concluded that the Board had misapplied the doctrine. Specifically, the court held that the second factor above does not require that the party’s inconsistent position be a “but-for cause” of the first tribunal’s decision or that the party misled the first tribunal. The court also noted that, unlike with issue preclusion, it did not matter that the Board was not a party to the prior proceeding. Accordingly, the court remanded for the Board to address whether judicial estoppel is available in NLRB proceedings, and if so, whether the respondent hospital made a sufficient showing of unfair advantage or unfair detriment and whether the balance of equities favors its application to the facts of the case. 929 F.3d at 734–736.

On remand, the Board held that judicial estoppel is not available in Board proceedings "where the Board's jurisdiction is at issue," i.e., "where application of that doctrine could compel the Board to surrender its jurisdiction." 370 NLRB No. 106, slip op. at 1–2 (2021). Accordingly, the Board reaffirmed its original decision asserting jurisdiction. However, the Board found it unnecessary to address the court's second question whether, if judicial estoppel is available in such circumstances, the balance of equities favored applying it on the facts presented. Slip op. at 4 n. 12. The Board also did "not foreclose the possibility that a future case may present circumstances under which judicial estoppel may be appropriately applied." Slip op. at 2.

CHAPTER 14. SUPPLEMENTAL OR RELATED PROCEEDINGS

§ 14–100 Compliance Proceedings

"[I]n compliance matters the General Counsel does not act on his own initiative as he does in the issuance of complaints but as the Board's agent in effectuating the remedy ordered." ***Ace Beverage Co***., 250 NLRB 646, 648 (1980). As discussed below, the Board has adopted certain special procedural rules governing such compliance/backpay proceedings.

§ 14–110 Compliance Specification

Section 102.54(a) of the Board's Rules provides that, if a controversy exists regarding compliance with the Board's order that cannot be resolved informally, the Regional Director "may issue and serve on all parties a compliance specification in the name of the Board."

Contents of Specification. With respect to the alleged backpay amount due, the specification

> will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

Sec. 102.55(a). With respect to other compliance matters, the specification

> will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent, and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

Sec. 102.55(b).

Amendments to Specification. The Regional Director may amend the specification before the hearing opens. However, after the hearing opens, the specification may be amended only "upon leave of the Administrative Law Judge or the Board, upon good cause shown." Sec. 102.55(c). See, e.g., ***ILWU (Pacific Crane Maintenance Co.),*** 370 NLRB No. 104, slip op. at 1 n. 3 (2021) (judge properly exercised her discretion in allowing the General Counsel to amend the specification during and after the hearing, as the respondent was put on notice of the GC's intended changes, the GC's delay was the result of an oversight, and all issues were fully litigated by the parties).

Consolidated Complaint and Specification. Sec. 102.54(c) of the Board's Rules states:

> Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to §102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation.

Where consolidation occurs, it is usually done by the Regional Director before the hearing opens, and, consistent with 102.54(c), the consolidated specification sets forth the backpay due for the same allegations set forth in the complaint. See, e.g., ***Airgas USA, LLC***, 366 NLRB No. 92 (2018), enfd. 760 F. Appx. 413 (6th Cir. 2019). But see ***Airport Bus Service***, 273 NLRB 561 n. 4 (1984) (judge properly granted the General Counsel's motion to consolidate the unfair labor practice cases with a backpay specification in prior cases since both proceedings involved the alleged responsibility of a successor employer to remedy unfair labor practices committed by respondent). For a discussion of consolidation and severance generally, see **§ 3–400**, et seq., above.

Note that Section 102.54(c) of the Board's rules further provides that "issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order." See also Section 101.16 of the Board's Statements of Procedure, which states that the Regional Director "has discretion" to issue a backpay specification, or "in the alternative . . . a notice of hearing only, without a specification," containing "a brief statement of the matters in controversy."

§ 14–120 Answer to Compliance Specification

Section 102.56(b) of the Board's rules states:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

The failure to do so is an admission. Sec. 102.56(c).

For a case applying the above rule to a respondent employer, see ***Alaris Health at Rochelle Park***, 371 NLRB No. 66 (2022). In that case, the Board granted the General Counsel's motion for partial summary judgment because the respondent failed to specifically deny allegations regarding the backpay period, gross backpay formulas, hourly wage rate, regular hours, overtime hours and wage rates, methods for calculating gross backpay, adverse tax consequences, and reimbursement for additional benefits. Slip op. at 2-3. However, the Board remanded for hearing on the issues of net earnings and expenses, pension contributions, meal benefits, and uniform allowances as respondent had no knowledge of interim earnings and expenses on which these calculations relied. Therefore, the respondent's general denials were sufficient for those allegations. Slip op. at 3-4.

See also ***Tito Contractors, Inc.***, 370 NLRB No. 133, slip op. at 3 (2021) (respondent's answer insufficient insofar as it failed to adequately support respondent's general denials with specific alternative formulas, supporting figures, or calculations); ***Swyear Amusements,Inc***., 370 NLRB No. 82, slip op. at 2 n. 10 (2021) (respondent's denials of the key allegations of the compliance specification, including that it employed the named employees and that they worked 12 hours each scheduled day, were entirely unsubstantiated); ***Rogan Bros. Sanitation, Inc***., 369 NLRB No. 53, slip op. at 4 (2020) (respondent's denial of the GC's gross backpay calculations on the ground that there were unidentified "offsets" to those calculations was insufficient because respondent did not provide alternative gross backpay calculations); ***Santa Barbara News-Press***,

368 NLRB No. 65, slip op. at 2–3 (2019) (respondent's general denial of the GC's merit-increase backpay calculations was insufficient as the unit employees' performance evaluations and records demonstrating the amount of work performed were within the control of the respondent); ***Ace Unlimited,*** 360 NLRB 197 (2014) (respondent's answer failed to propose alternative dates constituting the backpay period, provide a position as to the compliance specification's premises or computations of backpay, or furnish alternative figures), supplemented 363 NLRB 1741 (2016), enfd. 700 F. Appx. 19 (2d Cir. 2017); ***Flaum Appetizing Corp.***, 357 NLRB 2006, 2007 (2011) (respondent's answer failed to specify the basis of its disagreement with the compliance specification's backpay computation or offer any alternative formula, furnish supporting figures for the amounts owed, or offer an explanation for its failure to provide an adequate answer).

For cases applying the rule to a respondent union, see ***Operating Engineers Local 627***, 368 NLRB No. 39, slip op. at 3 n. 5 (2019) (respondent union's general denial of the backpay period, without providing alternative dates, was insufficient); ***Mine Workers Local 1575 (Peabody Coal)***, 295 NLRB 873 (1989) (respondent union's general denials of the allegations in the backpay specification regarding amounts claimed for wages and expenses were sufficient because there was no evidence that the union was in any position to know the actual wages earned by the discriminatees or the expenses they incurred).

Pro se respondents. The Board also applies the above rule to pro se respondents. See ***Edwards Painting, Inc.***, 370 NLRB No. 69, slip op. at 2 (2021). There, the Board granted the GC's motion for default judgment with respect to gross backpay figures as the respondent's answer did not deny those allegations. The Board noted that, while it "grants a degree of leniency to pro se litigants" it "has found that a general denial of an allegation in a compliance specification is not sufficient under Section 102.56(b) for a pro se litigant concerning any matter within that party's knowledge, as figures for calculating gross backpay would typically be," citing ***SK USA Cleaners, Inc***. 365 NLRB No. 20, slip op. at 3 (2017). The Board, however, denied the GC's motion with respect to the discriminatees' interim earnings, as the respondent's answer had questioned whether the discriminatees had adequately mitigated their damages.

Alleged successor, joint employer, single employer, or alter ego. Where the compliance specification names an additional respondent as a successor, joint employer, single employer, or alter ego of the original respondent employer in the underlying unfair labor practice proceeding, the additional respondent will be bound by the failure of the original respondent employer to file an adequate answer to the specification in the event the General Counsel proves such a relationship exists. See ***Mexican Radio Corp.***, 372 NLRB No. 77, slip op. at 1 n. 4 (2023); ***Kolin Plumbing***, 337 NLRB 234, 236 (2001); ***Carib Inn Tennis Club & Casino***, 320 NLRB 1113, 1114 n. 4 (1996), enfd. 114 F.3d 1169 (1st Cir. 1997).

As discussed in **§ 13–600,** Relitigation of Issues, above, a respondent may not seek to relitigate in a compliance proceeding matters decided in the underlying unfair labor practice proceeding. A respondent's answer may therefore be struck to the extent it attempts to do so.

§ 14–130 Rights of Charging Parties and Discriminatees

The initial determination regarding a respondent's compliance obligations under the Board's order is made by the Regional Director. See Sec. 102.52 of the Board's Rules ("As appropriate, the Regional Director will make a compliance determination and notify the parties of that determination"). If the charging party disagrees with any aspect of the Regional Director's determination, it may file an appeal with the General Counsel in Washington, D.C., and, if the appeal is denied, a request for review with the Board. See Sec. 102.53 of the Board's Rules; 53

FR 37754-01 (Sept. 28, 1988) (Sec. 102.53 specifies an appeals process which implements ***Ace Beverage Co.***, 250 NLRB 646, 647 (1980), where the Board granted the individual charging party-discriminatee's motion challenging the backpay formula adopted by the General Counsel, and extends that process to any aspect of a compliance determination). For an example where the Board granted a request for review under 102.53, see ***Page Litho, Inc.***, 325 NLRB 338, 338–339 (1998) (granting the charging party union's request for review and remanding for a hearing on whether the respondent made a valid offer of reinstatement and whether certain employees waived their right to reinstatement), enfd. 202 F.3d 269 (6th Cir. 1999).

The Board's rules and regulations do not address whether a non-charging party discriminatee or other employee beneficiary under the Board's make-whole order may likewise seek Board review of the General Counsel's compliance determination. However, the Board in at least one case has considered and granted such a request for review. See ***Port Printing Ad and Specialties***, 15–CA–17976, unpub. Board order issued Dec. 30, 2011 (2011 WL 6936390) (Board granted request for review filed by one of the employees who was entitled to a backpay remedy under the Board's order and remanded for issuance of an amended compliance determination addressing the appropriate date for calculating his vacation and sick pay and the basis for the Region's overtime calculations, recalculating his interim expenses, and making further computation revisions). See also ***PCMC/Pacific Crane Maintenance Co***., 32–CA–021925, unpub. Board order issued Sept. 20, 2017 (2017 WL 4179867) (discussing and distinguishing *Port Printing*).

With respect to the compliance hearing, Section 102.59 of the Board's Rules provides that "the procedures provided in §§ 102.24 through 102.51" regarding complaints "will be followed insofar as applicable" after issuance of the compliance specification and notice of hearing. This includes Section 102.38, which addresses the rights of parties to appear and participate in hearings on a complaint (see **§ 6–400**, above), as well as the other sections governing such hearings (Secs. 102.34–102.44). The procedure in Section 102.53 for appealing Regional Director compliance determinations, discussed above, does not apply to compliance specifications. ***ILWU (Pacific Crane Maintenance Co.),*** 370 NLRB No. 104, slip op. at 1 n. 5 (2021).

As for whether a charging party may assert and present evidence at the compliance hearing in support of a position that is inconsistent with the General Counsel's position, see ***Mike-Sells Potato Chip Co.***, 366 NLRB No. 29 (2018), enfd. 761 F. Appx. 5 (D.C. Cir. 2019). In that case, the charging party union sought to introduce evidence at the compliance hearing in support of its theory that the respondent's backpay obligations relating to commission-based pay should account for drivers working additional hours due to the respondent's unlawful unilateral change. The union's theory had been rejected by the Regional Director and by the General Counsel on the union's appeal. However, the union did not thereafter file a request for review with the Board as provided in Section 102.53 of the Board's Rules. The judge ruled that the union was precluded from presenting evidence at the hearing in support of its different theory, as one of the purposes of the appeal and request-for-review procedure in Section 102.53 was to resolve such disputes between the charging party and the GC before the hearing. Slip op. at 6. The union subsequently filed exceptions to the judge's ruling, but the Board affirmed it.

§ 14–140 Burdens of Proof and Production

General Presumptions

The finding of an unfair labor practice "creates a rebuttable presumption" that backpay or other compensation is owed. ***Thryv, Inc.,*** 372 NLRB No. 22, slip op. at 12 (2022), enf. denied in part on other grounds 102 F.4th 727 (5th Cir. 2024); ***St. George Warehouse***, 351 NLRB 961, 963 (2007); ***Cobb Mechanical Contractors***, 333 NLRB 1168 (2001), enfd. in part 295 F.3d 1370 (D.C. Cir. 2002); ***Arlington Hotel Co***., 287 NLRB 851, 855 (1987), enfd. 876 F.2d 678 (8th Cir. 1989).

Where there is dispute over the amount of backpay owed or other compliance issues, uncertainties or ambiguities in the evidence may be resolved against the respondent whose unlawful actions created the dispute. See ***Thryv, Inc.,*** above; ***Teamsters Local 25***, above, slip op. at 2; ***Lucky Cab Co***., 366 NLRB No. 56, slip op. at 6 (2018), enfd. 818 F. Appx. 638 (9th Cir. 2020); ***Total Security Management Illinois 1, LLC***, 364 NLRB 1532, 1546 n. 41 (2016), overruled on other grounds, ***River Road Operating Co***., 369 NLRB No. 109 (2020), and cases cited there. But see ***Domsey Trading Corp.***, 351 NLRB 824, 833 (2007) (declining to apply this general rule where the doubt about the discriminatee's interim earnings was "created not by the Respondent but by the discriminatee's own social security records—the very evidence relied on by the General Counsel to establish backpay liability," and "neither the General Counsel nor [the discriminatee] sought to resolve the discrepancy prior to trial."), enf. denied on other grounds, 636 F.3d 33 (2nd Cir. 2011); ***Parts Depot***, 348 NLRB 152,154 (2006) (General Counsel failed to establish that the discriminatee's second resignation from his interim job was reasonable, as the discriminatee was aware of the transportation difficulties when he returned to work, and his only explanation for resigning was that it was hard to get to work with the vehicle he had at the time, which "fail[ed] to clarify whether he was forced to quit for reasons beyond his control or merely chose to terminate his employment by his own choice"), enfd. 260 F. Appx. 607 (4th Cir. 2008).

Gross Backpay

The General Counsel has the burden of proving the amount of gross backpay due the discriminatee. ***Teamsters Local 25***, above; ***St. George Warehouse***, 351 NLRB at 963. The GC is not required to establish the exact amount due, but only that the gross backpay formula used and the resulting amounts in the compliance specification are reasonable and not an arbitrary approximation. ***The Lorge School***, 355 NLRB 558, 560 (2010). But see ***New York Party Shuttle, LLC v. NLRB,*** 18 F.4th 753 (5th Cir. 2021) (reversing Board's gross backpay determination as arbitrary where it disregarded compliance manual and "engaged in impermissible speculation" by extrapolating a one-year period of pay across a four-year span of the discriminatee's employment). However, if the respondent offers an alternative formula, the judge must determine the "most accurate" formula. ***Performance Friction Corp***., 335 NLRB 1117 (2001). In doing so, the judge may borrow elements from each of the suggested formulas. Ibid.

The General Counsel often relies on the testimony of compliance officers to show the reasonableness of the gross backpay formula and amounts set forth in the specification. See, e.g., ***Cobb Mechanical Contractors***, 333 NLRB at 1168; and ***Cibao Meat Products***, 348 NLRB 47, 52 (2006). See also NLRB Casehandling Manual (Part 3), Secs. 10660.1 and 10664.1. However, a compliance officer's testimony is subject to the Board's usual policies regarding uncorroborated hearsay. See, e.g., ***Performance Friction Corp***., 335 NLRB at 1122, 1139–1141; ***A-1 Schmidlin Plumbing & Heating Co***., 312 NLRB 191, 199 (1993). See also **§ 16–802**, below.

If a respondent refuses to cooperate in efforts to ascertain the amount of gross backpay, this may also be relied on to establish that the backpay calculations in the specification are reasonable. ***Gimrock Construction, Inc.*****,** 356 NLRB 529, 538-539 (2011), enfd. in relevant part 695 F.3d 1188 (11th Cir. 2012).

Unreported Tips

A discriminatee's admitted failure to report tip income to the IRS while employed by the respondent employer does not preclude such tips from being considered and included in calculating gross backpay. Further, the amount of the unreported tips may be established solely by the discriminatee's testimony where it appears to be a reasonable approximation. See ***New York Party Shuttle,*** 370 NLRB No. 19, slip op. at 11 (2020), affd. in relevant part, 18 F.4th 753 (5th Cir. 2021), and cases cited there.

Interim Earnings

Interim earnings are deducted from gross backpay only where the violation resulted in cessation of the discriminatee's employment. See, e.g., ***Mimbres Memorial Hospital***, 361 NLRB 333 (2014) (interim earnings are not properly deducted where a respondent unlawfully reduced the hours of the discriminatees but did not terminate them), affd. sub nom. ***NLRB v. Community Health Services***, 812 F.3d 768 (10th Cir. 2016); and ***Tec-Cast, Inc****.*, 372 NLRB No. 90, slip op. at 1 n. 2 (2023) ("[T]he Board neither awards interim expenses nor deducts interim earnings as part of the limited backpay for effects-bargaining violations provided under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).").

Further, only those interim earnings derived from working the same number of hours the discharged discriminatee would have worked for the respondent are counted; earnings from additional or extra hours worked during the backpay period are not deducted from gross backpay. See ***Lou's Transport, Inc***., 366 NLRB No. 140, slip op. at 5 (2018), enfd. 945 F.3d 1012 (6th Cir. 2019), and cases cited there. See also **§ 14–150**, Specific Remedial Issues, below.

The net backpay due (gross backpay minus interim earnings) is computed on a quarterly basis. ***Lucky Cab***, 366 NLRB No. 56, slip op. at 14 n. 59. The respondent has the burden to prove the amount of interim earnings that should be deducted in each quarter. Id., slip op. at 7. Where interim earnings are derived from self-employment, the respondent's burden includes establishing that any claimed business expenses should not be deducted in calculating the total net amount earned. Although the General Counsel generally provides respondents with information in its possession regarding the interim earnings of discriminatees, this is done only as a matter of "administrative courtesy." Ibid.

Social Security records may provide reliable information regarding interim earnings. ***Cobb Mechanical Contractors***, 333 NLRB at 1190. See also ***Domsey Trading***, 351 NLRB at 833 (discriminatee's bare denial that he performed interim work for an employer did not trump SSA records showing otherwise; the mere possibility that someone else might have used the discriminatee's social security number was not a sufficient basis to disregard the official records), enf. denied on other grounds 636 F.3d 33 (2nd Cir. 2011).

Tax records likewise may be a good source of information regarding interim earnings. See, e.g., ***New York Party Shuttle, LLC***, 370 NLRB No. 19, slip op. at 12; ***J.J. Cassone Bakery, Inc.***, 356 NLRB 951, 963 (2011); and ***Parts Depot***, 348 NLRB at 154. They are especially useful in determining net interim earnings where the discriminatee engaged in self-

employment during the backpay period. See ***Lucky Cab***, 366 NLRB No. 56, slip op. at 7 and passim.

A discriminatee's job applications may also be a good source of determining interim earnings, particularly from jobs where the discriminatee may have been paid cash that was not reported to the SSA or IRS. See, for example, ***Parts Depot***, 348 NLRB at 153, where the ALJ discredited the discriminatee's denial that she worked on a cash basis at a laundry, given her subsequent job application listing the laundry as prior employment.

Fraudulent Concealment

Discriminatees are expected to cooperate with efforts to determine interim earnings. See ***Iron Workers Local 373 (Building Contractors),*** 295 NLRB 648, 655–656 (1985), enfd. mem. 70 F.3d 1256 (3rd Cir. 1995). The Board will deny backpay in those quarters for which the discriminatee intentionally concealed interim earnings from the Board, ***American Navigation Co.***, 268 NLRB 426 (1983), and will deny backpay entirely if the claimant's willful deception makes it impossible to ascertain the amount of interim earnings. ***Ad Art, Inc.,*** 280 NLRB 985 (1986).

It is the respondent's burden to show fraudulent concealment. ***Lucky Cab***, above, slip op. at 7. And this burden is generally not met merely by showing that the discriminatee engaged in poor recordkeeping. See ibid and cases cited there. See also ***Marquez Brothers Enterprises***, 21–CA–039581, unpub. Board order issued Sept. 7, 2017 (2017 WL 3953408) (discriminatees' failure to produce all responsive documents regarding their interim earnings did not warrant evidentiary sanctions where there was no indication that their failure to fully comply with the respondent's subpoenas was willful).

Failure to Mitigate

A discriminatee is not entitled to backpay, i.e., backpay is tolled, for any period where the discriminatee failed to seek interim employment and thereby incurred a willful loss of earnings. As the failure to mitigate is an affirmative defense, the respondent has both the initial burden of production and the ultimate burden of persuasion. Thus, the respondent must produce evidence and prove that there were substantially equivalent jobs available in the relevant geographic area and that the discriminatee's job search was unreasonable. ***St. George Warehouse***, 351 NLRB at 961, 964. This burden is not met merely by producing evidence that some jobs were available; the respondent must produce evidence and prove that the available jobs were substantially equivalent in terms of pay, hours, job duties, required qualifications or skills, and/or working conditions. ***Teamsters Local 25***, 366 NLRB No. 99, slip op. at 2–3; ***Lucky Cab***, above, slip op. at 5 (finding that the respondents failed to meet this burden).

However, once the respondent has produced evidence that there were substantially equivalent jobs available to the discriminatee, the General Counsel has the burden to produce evidence concerning the reasonableness of the discriminatee's job search, including the nature and extent of the discriminatee's efforts to obtain the substantially equivalent available jobs identified by the respondent or the reasons for not applying for the jobs. ***St. George Warehouse***, above.

The General Counsel can meet this burden solely by producing the discriminatee to testify about the discriminatee's efforts to find employment, or by introducing other competent documentary or testimonial evidence regarding the discriminatee's job search. ***Teamsters Local 25***, above, slip op. at 2 n. 4; ***St. George Warehouse***, above. See also ***M.D. Miller Trucking***, 365

NLRB 611, 615 (2017) (receipt of unemployment benefits is prima facie evidence of a reasonable search where state eligibility rules require a recipient to actively seek work), enfd. 728 F. Appx. 2 (D.C. Cir. 2018). The GC is not required to additionally produce evidence that the other jobs the discriminatee applied for were substantially equivalent to the former job with respondent. ***Lucky Cab***, above.

In determining the reasonableness of the discriminatee's job search, the Board examines "the entire circumstances" to determine whether the discriminatee made an "honest, good faith effort" to mitigate losses. ***Lucky Cab***, above. Compare also ***G4S Solutions (USA) Inc***., 368 NLRB No. 1, slip op. at 4–5 (2019) (discriminatee's temporary cessation of filing any job applications during the holiday season would not be sufficient to toll backpay), with ***Grosvenor Resort***, 350 NLRB 1197, 1201-1202, 1208 (2007) (discriminatees' failure to begin searching for work until more than 2 weeks after their discharge was not justified under all the circumstances).

If a discriminatee refuses an interim job offer, the respondent has the burden to show that the refusal was a "clearly unjustifiable refusal to take desirable new employment," to establish a willful loss of earnings. ***Moran Printing, Inc.***, 330 NLRB 376 (1999). See also ***Gimrock Construction***, 356 NLRB at 539 (respondent failed to satisfy its burden where the evidence showed that the two job offers the elderly discriminatee turned down required operating equipment that he had never used, and one involved high climbing).

If a discriminatee takes a job that pays less than the prior job with respondent, the respondent has the burden to show that the jobs were not substantially equivalent and that the discriminatee could have done better with the exercise of reasonable diligence. ***Moran Printing***, above; and ***E & L Plastics Corp***., 314 NLRB 1056, 1057 (1994). See also ***Santa Barbara News-Press***, 370 NLRB No. 119, slip op. at 8 n. 5 (2021) (employer failed to show that the discriminatees should have obtained an interim job that provided health insurance and vacation time), enfd. sub nom. ***NLRB v. Ampersand Publishing, LLC***, 2022 WL 3305974 (9th Cir. Aug. 11, 2022).

The same is true if a discriminatee accepts a job that is only part-time or offers fewer hours than the prior job with respondent. See ***G4S Solutions (USA),*** above, slip op. at 5 (rejecting the respondent's contention that the discriminatee's backpay should be reduced because his interim job employed him for less than the 50 hours a week he had worked for respondent), and cases cited there.

If a discriminatee is terminated from an interim job, the respondent must show that the termination was the result of "deliberate or gross misconduct" by the discriminatee to establish a willful loss of earnings. ***Gimrock Construction***, 356 NLRB at 540. See, for example, ***G4S Solutions (USA)***, above, slip op. at 4 (respondent failed to meet its burden where the discriminatee was fired from an interim job for placing funds in a wrong account, as he did not attempt to steal, was never charged with theft, never placed the funds in his own name, and gave unrebutted testimony that a former supervisor had told him to handle transactions that way); ***California Gas Transport, Inc.***, 355 NLRB 465, 471 (2010) (respondent failed to satisfy its burden where the discriminatee was terminated by an interim employer for a work-related truck accident, as the respondent failed to show that the accident was the result of deliberate or gross misconduct).

However, where a discriminatee voluntarily quit an interim job, it is the General Counsel's burden to show that the decision to quit was reasonable. ***Lucky Cab***, above, slip op. at 13. See also ***Santa Barbara News-Press***, above, slip op. at 8–9 (GC met burden by showing that discriminatee quit because of increased work demands, high housing costs, and lack of familial

support he encountered after relocating to perform the interim job); ***Gimrock Construction***, 356 NLRB at 539 (GC met the burden by presenting the discriminatee's unrebutted testimony that he quit because of unsafe working conditions and harassment); ***Parts Depot***, 348 NLRB at 154 (GC met the burden with respect to the discriminatee's first resignation, because it was the result of immediate transportation difficulties caused by the company's relocation, but not with respect to his second resignation, as the discriminatee was well aware of the transportation difficulties when he returned to work and his only explanation for resigning was that it was hard to get to work with the vehicle he had at the time, which "fail[ed] to clarify whether he was forced to quit for reasons beyond his control or merely chose to terminate his employment by his own choice").

Leaving an interim job to seek self-employment is not considered equivalent to voluntarily quitting, and the General Counsel has no obligation to show that doing so was reasonable. ***California Gas Transport,*** 355 NLRB at 470. The Board has found self-employment to be a proper way to mitigate damages, even if it is less lucrative. ***Grosvenor Resort***, 350 NLRB at 1202, citing ***Fugazy Continental Corp***., 276 NLRB 1334, 1338–339 (1985), enfd. 817 F.2d 979 (2d Cir. 1987).

Duration of Backpay Period

The backpay period generally runs from the date of the discrimination until the discriminatee accepts or rejects a valid offer of reinstatement or, if the discriminatee fails to respond, within a reasonable time after the valid offer was made. See ***Cliffstar Transportation Co.,*** 311 NLRB 152, 154–155 (1993); ***Esterline Electronics Corp***., 290 NLRB 834 (1988). See also ***Lou's Transport, Inc***., above, 366 NLRB No. 140, slip op. at 3 (discriminatee's testimony at the underlying unfair labor practice hearing, in response to respondent's questioning, that he did not want to return to work for respondent, did not toll the backpay period because the respondent had not made an unconditional offer of reinstatement and allowed him a reasonable time to respond).

There is a rebuttable presumption that a discriminatee would have remained employed with the respondent during the entire backpay period absent the discrimination. ***Diamond Walnut Growers, Inc***., 340 NLRB 1129, 1132 (2003). The respondent bears the burden of establishing that backpay should be tolled during all or part of that period because of the discriminatee's unavailability or abandonment of the work force, respondent's elimination of the position, or for some other reason unrelated to the discrimination. ***Mastro Plastics Corp***., 136 NLRB 1342, 1346 (1962). See also ***Somerset Valley Rehabilitation and Nursing Center***, 371 NLRB No. 86, slip op. at 4 (2022) (backpay is not tolled simply because a discriminatee moves out of state); ***Weldun International, Inc***., 340 NLRB 666, 680 (2003) (respondent failed to establish that the discriminatee had a period of incapacity during the backpay period); ***1849 Sedgwick Realty LLC***, 337 NLRB 245, 255–256 (2001) (respondents failed to show that the discriminatee retired from the workforce); ***Fort Vancouver Plywood Co***., 252 NLRB 1009, 1011–1012 (1980) (respondent failed to prove that it would have eliminated any of the discriminatees' jobs due to a decline in the industry).

Where a discriminatee is incapacitated due to disabling injuries sustained at an interim job, backpay will generally be tolled during the period of incapacity if the interim job was similar to the job with the respondent. Compare ***City Disposal Systems***, 290 NLRB 413 n. 2 (1988) (tolling backpay during the period of the discriminatee's work-related disabling injury as the General Counsel failed to show that "the nature of the interim employment that [the discriminatee] was performing [over-the-road truckdriving] was so unusual or dissimilar from work he performed for the Respondent [driving a tractor-trailer 37 miles back and forth between two cities] that [his] injury would not have occurred in the absence of the Respondent's discrimination against him");

with ***Coronet Foods, Inc***., 322 NLRB 837, 843 (1997) (declining to toll backpay during the period of the discriminatee's work-related disabling injury as the discriminatee's interim employment [working as a "miscellaneous driver" for a concrete company] was "so dissimilar from his job as an over-the-road driver for Respondent that his disabling injury would not have occurred had not Respondent terminated him."), enfd. denied in part on other grounds 158 F.3d 782, 801 (4th Cir. 1998). See also ***J.J. Cassone Bakery, Inc***., 356 NLRB 951, 956, 962 (2011) (declining to toll backpay where the discriminatee, who worked as a laborer for the respondent bakery, was injured at an interim job performing yardwork); ***American Mfg. Co. of Texas***, 167 NLRB 520, 523 & n. 14 (1967) (declining to toll backpay where the discriminatee was injured at his interim job while trying to physically unload or "spill" pipe from his truck, because he would not likely have been required to do such work for the respondent, for whom he hauled mostly heavy equipment and mud that was unloaded with mechanical aid, and only occasionally pipe and scrap).

If the discriminatee is a striker, the respondent must present "unequivocal evidence of an intent to permanently sever [the striker's] employment relationship," to establish that the striker abandoned employment during the strike. ***KSM Industries***, 353 NLRB 1124 n.5, 1129 (2009), reaffd. 355 NLRB 1344 (2010), enfd. 682 F.3d 537 (7th Cir. 2012). The fact that the striker resigned to accept another job or obtain pension or retirement funds during the strike is not sufficient by itself to establish abandonment. See ibid, and cases cited there.

The presumption of continued employment applies even in the construction industry, ***Dean General Contractors***, 285 NLRB 573 (1987), unless the discriminatee was a union salt, ***Oil Capitol Sheet Metal, Inc***., 349 NLRB 1348, 1351 (2007), rev. denied 561 F.3d 497 (D.C. Cir. 2009). The General Counsel has the burden to show that a union salt would have remained for the portion of the backpay period set forth in the compliance specification. Such evidence may include, inter alia, the discriminatee's personal circumstances, contemporaneous union policies and practices with respect to salting campaigns, specific plans for the targeted employer, instructions or agreements between the discriminatee and the union concerning the anticipated duration of the assignment, and historical data regarding the duration of employment of the salt/discriminatee and other salts in similar salting campaigns. Ibid. See also ***Lederach Electric, Inc***., 359 NLRB 616 n.2, 624 (2013), reaffd. 361 NLRB 242 (2014).

Validity of Reinstatement Offer

The Board's standard reinstatement order requires the respondent employer to offer the discriminatee full reinstatement to the discriminatee's former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to the discriminatee's seniority or any other rights or privileges previously enjoyed. Thus, a respondent must offer a discriminatee reinstatement to the former job, unless respondent shows that the job no longer exists. See ***KSM Industries***, 353 NLRB at 1141 n. 60, and cases cited there.

The respondent's reinstatement offer must be "specific, unequivocal, and unconditional" to toll backpay, i.e., the respondent must show that its offer was sufficiently specific on its face to apprise that the discriminatee was being offered unconditional and full reinstatement to the discriminatee's former position or to a substantially equivalent one. ***Midwestern Personnel Services***, 346 NLRB 624, 624 (2006), enfd. 508 F.3d 418 (7th Cir. 2007) (finding that respondent's offers were insufficient because the offered positions paid 20–30 percent less and the offer stated that the discriminatees would not retain their seniority). See also ***Johnston Fire Services, LLC***, 371 NLRB No. 56, slip op. at 1–2 (2022) (finding that respondent's initial offers were insufficient because they each offered the discriminatees only one-day's work, i.e., day labor, and did not specifically offer them reinstatement to their former regular full-time employment).

Unless and until respondent has made such a showing, no evaluation of the discriminatee's reasons for declining the offer is necessary or appropriate. Ibid. See also ***Lou's Transport, Inc***., 366 NLRB No. 140, slip op. at 3 (2018) (discriminatee's prior testimony, in response to questions by respondent's attorney at the unfair labor practice hearing, that he did not want to be reinstated did not toll backpay as the attorney's questions did not meet the specific standards required in making an unconditional offer), enfd. 945 f.3d 1012, 1020 (6th Cir. 2019).

The Respondent must also show that it made a good faith attempt to communicate the valid offer to the discriminatee. Compare ***Performance Friction***, 335 NLRB at 1118–1119 (tolling backpay where the respondent made a good faith attempt to communicate the offer to the discriminatee by mailing it to her last known address, notwithstanding that the discriminatee had moved and never received it), with ***G & T Terminal Packaging Co***., 356 NLRB 181, 182 (2010) (distinguishing *Performance Friction* and declining to toll backpay where the respondent had the discriminatee's last known address, but mailed the reinstatement offer to the wrong employee at the wrong address and made no effort to verify the accuracy of the mailing), enfd. 459 F. Appx. 19 (2d Cir. 2012).

Job-Search and Employment Expenses

The General Counsel has the burden of establishing a discriminatee's search-for-work expenses and interim-employment expenses that exceed what would have been incurred working for the Respondent. ***King Soopers, Inc***., 364 NLRB 1153, 1157–1161 (2016), enfd. in pertinent part 859 F.3d 23, 36 (D.C. Cir. 2017). Such expenses are awarded if they are "both reasonable and actually incurred," "regardless of the discriminatees' interim earnings and separately from taxable net backpay, with interest." Ibid. Accord: ***Advanced Masonry Systems***, 366 NLRB No. 57, slip op. at 6 (2018), enfd. 781 F. Appx. 946 (11th Cir. 2019). See also ***Lou's Transport, Inc***., above, 366 NLRB No. 140, slip op. at 6 (respondent was liable for the discriminatee's additional commuting expenses to and from his interim employer regardless of his interim earnings).

Burdensomeness of Compliance

It is respondent's burden to show that compliance with the Board's order would be unduly burdensome. See, e.g., ***Lear Siegler, Inc***., 295 NLRB 857, 861–862 (1989) (respondent may present evidence in the compliance proceeding that was unavailable at the time of the merits hearing to establish that compliance with the Board's order requiring restoration of the unlawfully transferred work would be unduly burdensome). See also ***Dorsey Trailers, Inc***., 327 NLRB 835 n. 2 (1999), enf. denied in part 233 F.3d 831 (4th Cir. 2000).

A perfectly clear successor that unlawfully imposed new terms of employment on the employees it hired must restore the predecessor's terms until it bargains with the union in good faith to agreement or impasse. It is not permitted to present evidence in the compliance proceeding purporting to show what terms the parties would, or would not, have reached if it had met its bargaining obligations. ***Pressroom Cleaners***, 361 NLRB 643, 647-648 (2014).

§ 14–150 Specific Remedial Issues

Direct or foreseeable harms. The Board has historically declined to order respondents to reimburse discriminatees or other affected employees for consequential damages. See, e.g., ***Advanced Masonry Systems***, above, 366 NLRB No. 57, slip op. at 1 n. 4. However, in 2022, the Board revisited and clarified this policy and practice. The Board affirmed that it will continue to

deny "'consequential damages' as that term is used in other areas of the law." Slip op. at 10. However, the Board stated that, in all cases warranting a standard make whole remedy, it will order the respondent to compensate affected employees for "all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practices." The Board stated that such relief

> must be specifically calculated and requires the General Counsel to present evidence in compliance demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice. [Slip op. at 6.]

Thryv, Inc., 372 NLRB No. 22 (2022), enf. denied in part on other grounds 102 F.4th 727 (5th Cir. 2024).

The Board's *Thryv* remedy was approved by the Ninth Circuit in ***Macy's, Inc. v. NLRB***, 155 F.4th 1023 (9th Cir. 2025) (holding that the Board's revision of its definition of "make-whole" relief to expressly include direct and foreseeable pecuniary harms suffered by affected employees furthered the policy of the Act and was not an abuse of discretion), rehearing en banc denied therein, cert. denied --- S.Ct. ----, 2026 WL 1717973 (Mem) (June 15, 2026). In contrast, the *Thryv* remedy was rejected by the Third Circuit in ***NLRB v. Starbucks Corp***., 125 F.4th 78 (3d Cir. 2024) (holding that the remedy exceeded the Board's authority under the NLRA), denying enf. in part of 372 NLRB No. 50 (2023), reconsideration denied 372 NLRB No. 102 (2023). It likewise was rejected by the Sixth Circuit in ***NLRB v. Starbucks Corp***., 159 F.4th 155 (6th Cir. 2025) (same). And it was rejected by the Fifth Circuit in ***Hiran Management, Inc. v. NLRB***, 157 F.4th 719 (5th Cir. 2025) (same). Nonetheless, the Board's decision in *Thryv* remains valid precedent under the Board's nonacquiescence policy unless and until it is overruled by the Supreme Court or the Board itself. See ***Airgas USA, LLC***, 373 NLRB No. 102, slip op. at 1 n. 2 (2024). See also **§ 13–100**, Board Precedent, above.

The Board's *Thryv* remedy was rejected by the Third Circuit in ***NLRB v. Starbucks Corp***., 125 F.4th 78 (3d Cir. 2024) (holding that the remedy exceeded the Board's authority under the NLRA), denying enf. in part of 372 NLRB No. 50 (2023), reconsideration denied 372 NLRB No. 102 (2023). However, the Board's decision in *Thryv* remains valid precedent under the Board's nonacquiescence policy unless and until it is overruled by the Supreme Court or the Board itself. See ***Airgas USA, LLC***, 373 NLRB No. 102, slip op. at 1 n. 2 (2024). See also **§ 13–100**, Board Precedent, above.

Supplemental earnings. As discussed in **§ 14–130** above (interim earnings), if a discriminatee worked more hours during the backpay period than would have been worked for the respondent, any regular or overtime pay received for those additional hours is not deducted from the discriminatee's gross backpay. See ***Lou's Transport,*** above, 366 NLRB No. 140, slip op. at 5 (overtime hours in excess of those the discriminatee would have worked at respondent); and ***EDP Medical Computer Systems***, 293 NLRB 857, 858 (1989) (hours in excess of the 32-hour week the discriminatee worked at respondent), enfd. mem. 959 F.2d 1101 (D.C. Cir. 1992). See also ***Regional Import and Export Trucking Co.***, 318 NLRB 816, 818 (1995).

Similarly, if a discriminatee worked a second job ("moonlighted") while working for respondent, subsequent earnings derived from that job during the backpay period are not

deducted from gross backpay. See, e.g., ***Cumberland Farms Dairy***, 266 NLRB 855 (1983). See also ***New York Party Shuttle, LLC***, 370 NLRB No. 19, slip op. at 11 (2020), affd. in relevant part 18 F.4th 753 (5th Cir. 2021), on remand 372 NLRB No. 5 (2022). However, if a discriminatee worked more hours at the second job during the backpay period to mitigate damages, the income from those extra hours would be considered interim earnings. ***U.S. Telefactors Corp***., 300 NLRB 720 n. 1 (1990).

Fringe benefit contributions. Fringe benefit contributions made by an interim employer are generally not counted as interim earnings or deducted from the discriminatee's gross backpay. See ***G4S Solutions (USA) Inc***., 368 NLRB No. 1, slip op. at 5 (2019) (interim employer's contributions to a retirement fund), and citations there.

Unemployment compensation. The amount of unemployment compensation received by a discriminatee is likewise not deducted from gross backpay. See, e.g., ***Lou's Transport,*** above, slip op. at 1 n. 2; and ***Ji Shiang, Inc***., 357 NLRB 1292, 1293 n. 5 (2011), citing ***NLRB v. Gullet Gin Co***., 340 U.S. 361, 364 (1951). See also ***Red Roof Plus San Antonio Downtown-Riverwalk***, 374 NLRB No. 98, slip op. at 1 n. 2 (2026) (rejecting respondent's argument that backpay award to discriminatee should have been reduced by direct payments it made to her to receive a reduced Texas state unemployment insurance tax rate).

Workmen's compensation. As discussed in **§ 14–130** above (duration of backpay period), a discriminatee's eligibility for backpay may continue, even during periods when the discriminatee is unavailable to work due to a disabling injury, if the injury was sustained at an interim job that was dissimilar to the job held at the respondent. In that event, any worker's compensation received by the discriminatee as temporary disability benefits to compensate for lost wages is considered deductible interim earnings. ***American Mfg. Co***., 167 NLRB 520, 522–523 (1967).

Strike benefits. Strike benefits a discriminatee received from the union are considered interim earnings deductible from gross backpay if they were in exchange for or contingent upon services provided to the union, rather than collateral benefits flowing from the discriminatee's association with the union. ***Domsey Trading Corp***., 351 NLRB 824, 825 (2007), enf. denied and remanded on other grounds 636 F.3d 33 (2d Cir. 2011). As with other interim earnings, the burden is on the respondent to show that the strike benefits are interim earnings. The Board will consider all the circumstances, including what the picketers were told about the benefits, the picketers understanding of what was required to qualify for the benefits, whether the benefits were tied to time spent on the picket line, and whether the benefits were paid from a fund to which the picketers contributed. Ibid.

Identity of impacted employees. The identity of, and amounts owed to, similarly situated employees impacted by a violation may be determined at the compliance stage. A common example is where it is alleged and found that an employer made discriminatory and/or unilateral changes in terms and conditions of employment that would have affected employees generally. See ***Grand Rapids Press***, 325 NLRB 915, 915–916 (1998) (employers changed their referral systems for hiring substitute employees in violation of Section 8(a)(3) and (5)), enfd. 208 F.3d 214 (6th Cir. 2000); ***Livingston Pipe & Tube***, 303 NLRB 873 n. 4 (1991), enfd. 987 F.2d 422 (7th Cir. 1993) (employer unilaterally implemented a revised absenteeism and tardiness program in violation of Section 8(a)(5)). For other examples, see ***Tec-Cast, Inc.***, 372 NLRB No. 90, slip op. at 1 n. 2 (2023) (employer failed to engage in effects-bargaining); ***Governed United Security Professionals***, 373 NLRB No. 66, slip op. at 1 n. 4 (2024) (union failed to honor employees' requests to revoke their dues-checkoff authorizations following deauthorization vote).

Missing discriminatees. If a discriminatee cannot be located to determine whether gross backpay should be reduced to account for interim earnings, the respondent should be ordered to pay the specified backpay to the Regional Director to be held in escrow for a period not exceeding one year from the date the respondent deposits the backpay into escrow or the date the Board's supplemental decision and order becomes final, including enforcement thereof, whichever is later. In the event the discriminatee has not been located at the end of the one-year escrow period, the award will lapse and the backpay amount will be returned to the respondent. ***Starlite Cutting***, 280 NLRB 1071 (1986), as clarified 284 NLRB 620 (1987). See also ***G & T Terminal Packaging***, 356 NLRB at 182.

Deceased discriminatees. Where a discriminatee dies during the backpay period, backpay ceases to accrue as of the date of death. ***United States Service Industries***, 325 NLRB 485, 487 (1998). Backpay for the period prior to death is payable to the legal administrator of the individual's estate or to any person authorized to receive such payment under applicable state law. ***Gimrock Construction***, 356 NLRB at 541 n. 45.

Derivative liability. The General Counsel may elect to litigate derivative liability at the compliance stage rather than in the underlying unfair labor practice proceeding. See, e.g., ***Mexican Radio***, 372 NLRB No. 77, slip op. at 1 n. 4 (2023) (single employer); ***Rogan Bros. Sanitation, Inc.***, 369 NLRB No. 53, slip op. at 5 n. 6 (2020) (*Golden State* successor); ***2 Sisters Food Group, Inc***., 361 NLRB 1380 (2014) (same).

Additional or modified remedies. It is generally inappropriate to order additional or modified remedies in the compliance proceeding. See ***ILWU (Pacific Crane Maintenance Co.)***, 370 NLRB No. 104, slip op. at 1 n. 5 (2021) ("[A] party cannot seek to add, at the compliance stage, remedies that were not included in the Board's Order at the merits stage."); ***2 Sisters Food Group, Inc***., 361 NLRB 1380 (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). See also ***Somerset Valley Rehabilitation and Nursing Center***, 371 NLRB No. 86, slip op. at 2–3 (2022) ("[W]e have no jurisdiction to modify a court-enforced order"); ***G4S Secure Solutions (USA), Inc***., 368 NLRB No. 1, slip op. at 1 n. 2 (2019) (the Board is "powerless to modify a court-enforced remedy"); ***Whole Foods Market, Inc***., 366 NLRB No. 77, slip op. at 1 and n.4 (2018) ("The Board has no jurisdiction to modify an order that has been enforced by a court of appeals."); ***NLRB v. Gimrock Construction, Inc.***, 695 F.3d 1188, 1193 (11th Cir. 2012) (the Board cannot modify an order that the court has enforced in a final judgment, but must petition the court to either modify the order due to changed circumstances or hold the respondent in contempt and enter a modified order to purge itself of the contempt).

It is likewise inappropriate to approve, over the charging party's objection, a compliance settlement that provides less of a remedy than the Board's court-enforced order. See ***Dupuy v. NLRB***, 806 F.3d 556, 563–565 (D.C. Cir. 2015), which the Board also cited in ***Whole Foods Market***, above. The court there held that the General Counsel and the Board improperly rejected the individual charging party-discriminatee's objections to the terms of the compliance/backpay settlement accepted by the Regional Director, including the settlement's waiver of interest during the installment payment period. The court stated that "the "Board has no power to deal away particular elements of [a court enforced remedial order], even if [the Board] sincerely believes that deal-making would be in the charging party's best interest."

Other remedial issues. For a discussion of other issues that may arise in the compliance proceeding, including instatement of applicants in refusal-to-hire cases, discriminatee

misconduct/after-acquired evidence, and immigration status, see **§ 16–402.5,** Evidence Affecting Remedy, below.

§ 14–200 Consolidated Representation Cases

Section 102.69(c)(1)(ii) of the Board's Rules specifically provides that the regional director "may consolidate the hearing concerning [postelection] objections and challenges with an unfair labor practice proceeding before an administrative law judge." Consolidating such "C & R" cases is a longstanding and customary procedure used to avoid unnecessary costs or delay. See ***Fruehauf Corp***., 274 NLRB 403, 405 (1985); ***Brescome Distributors Corp***., 179 NLRB 787 n. 4 (1969), enfd. 452 F.2d 1312 (D.C. Cir. 1971), and cases cited there. Examples of such consolidated proceedings are legion. See, e.g., ***Needham Excavating, Inc***., 371 NLRB No. 146 (2022) (8(a)(1) and (3) allegations consolidated with union and employer election objections and challenges); ***Pacific Coast Sightseeing Tours & Charters****,* 365 NLRB No. 131 (2017) (8(a)(1) allegations consolidated with union's election objections); ***Oberthur Technologies of America Corp***., 362 NLRB 1820 (2015), enfd. 865 F.3d 719 (D.C. Cir. 2017) (8(a)(1) and (3) allegations consolidated with union's election objections and challenges); ***Greenbrier Rail Services***, 364 NLRB 279 (2016) (pre and postelection 8(a)(1), (3), (4), and (5) allegations consolidated with union's election objections); ***Big Ridge, Inc***., 358 NLRB 1006 (2012), reaffd. 361 NLRB 1372 (2014), enfd. 808 F.3d 705 (7th Cir. 2015) (pre and postelection 8(a)(1) and (3) allegations consolidated with employer's election objections). For a discussion of consolidation and severance generally, see **§ 3–400** et seq., above.

Role of administrative law judge. In such a consolidated proceeding, the ALJ assumes the same role as a hearing officer with respect to postelection representation issues. The ALJ's powers and duties in that role are similar to those exercised with respect to unfair labor practice issues. See the Board's Rules, Secs. 102.69(c)(1)(iii) and, by reference, 102.64–102.66; and NLRB Casehandling Manual (Part 2), Secs. 11424.3 and 11428.1, regarding the role of the hearing officer in a postelection representation proceeding. See also the Agency's Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings (aka NLRB Guide for Hearing Officers).

Role of counsel for the General Counsel. Unlike an unfair labor practice hearing, a postelection hearing on challenges and/or objections is investigatory rather than adversarial, at least as far as the Agency is concerned. See NLRB Casehandling Manual (Part 2), Sec. 11422. Nevertheless, where C & R cases have been consolidated for hearing, counsel for the General Counsel in the unfair labor practice case typically also serves as the Region's representative with respect to the representation case. As discussed in **§ 6–220**, above, it is not a disqualifying conflict of interest for counsel to do so.

With respect to those representation issues that do not coincide or overlap with the consolidated unfair labor practice allegations, the procedures applicable to representation hearings apply, i.e., the employer and union are expected to carry the burden of ensuring that a full record is made, and the Region's representative, while authorized to participate to the same extent as the parties (e.g., to call, examine, cross-examine, and impeach witnesses), is expected to be impartial.

However, where representation and unfair labor practice issues overlap (such as where an employee's discharge during the critical preelection period is both an alleged unfair labor practice and an asserted objection warranting a rerun election), the procedures applicable to unfair labor practice hearings apply, i.e., counsel for the General Counsel is expected to be an

advocate and prove the allegations by making a persuasive record. See NLRB Casehandling Manual (Part 2), Secs. 11420.1, 11424, and 11424.4(b). See also NLRB Casehandling Manual (Part 1), Secs. 10380 and 10380.4.

Applicability of rules of evidence. In unfair labor practice hearings, administrative law judges are required to follow the federal rules of evidence "so far as practicable." See **§ 16–100**, below. However, the federal rules of evidence are not controlling in representation hearings. See Secs. 102.66(a) and 102.69(c)(1)(iii) of the Board's Rules. Nevertheless, in a consolidated C & R proceeding, it is appropriate for the ALJ to be guided by those rules in making rulings with respect to representation issues. See ***Vitek Electronics***, 268 NLRB 522, 549 (1984), enfd. 763 F.2d 561 (3d Cir. 1985). See also NLRB Casehandling Manual (Part 2), Sec. 11216 (although the rules of evidence are not controlling, "they should be followed whenever possible.")

Order of receiving evidence. In postelection representation hearings, the party that filed the objections or made the challenges normally proceeds first. See NLRB Casehandling Manual (Part 2), Sec. 11428.4. In consolidated C & R cases, it is usually more efficient for the General Counsel to proceed first, putting in evidence with respect to the unfair labor practice issues, including those that overlap with representation issues. However, the judge has the discretion to determine the order of presentation considering all the circumstances, including the degree of overlap between the unfair labor practice and representation issues and the availability of witnesses. See **§ 16–611**, Mode and Order of Examining and Presenting Evidence, below. This is something that should be discussed with the parties during a prehearing conference call.

Issuance of decision. The judge usually addresses both the unfair labor practice and the representation issues in a single decision. However, the judge has discretion to sever the cases for decision if the judge believes it would expedite final resolution of the representation case. See ***Independence Residences, Inc***., 355 NLRB 724, 725 n. 14 (2010) (ALJ did not commit prejudicial error by severing the C & R cases for decisional purposes, even though the ALJ had previously denied the employer's motion to sever them for hearing purposes). For an example of an order severing cases for decisional purposes, see ***PVM I Associates, Inc***., 12–CA–16368, unpub. ALJ order issued July 26, 1995 (1995 WL 1918042).

If the election was held pursuant to a consent election agreement, upon issuance of the decision the judge should sever the representation case (assuming it was not previously severed for decision as above) and transfer it to the Regional Director for further processing. Sec. 102.69(c)(1)(ii) of the Board's Rules, and NLRB Casehandling Manual (Part 2), Secs. 11420.1 and 11432. See, e.g., ***Hartz Mountain Corp***., 260 NLRB 323 (1982), enfd. mem. 738 F.2d 422 (3d Cir. 1984). Otherwise, the judge's recommendations on objections and challenges are ruled on by the Board along with the judge's unfair labor practice findings if exceptions are filed. Ibid.

§ 14–300 Remands

Generally, the judge should limit a hearing on remand to the issues included in the Board's remand order. See, e.g., ***Wye Electric Co***., 348 NLRB 61, 93 (2006) (judge declined to reconsider issues that were not included in the Board's remand order); ***Cassis Mgt. Corp***., 324 NLRB 324, 325 n. 5 (1997) (judge properly declined to address issue outside scope of Board's remand order), enfd. 152 F.3d 917 (2d Cir. 1998). See also ***Monark Boat Co.***, 276 NLRB 1143 n. 3 (1985) (ALJ in the post-certification refusal-to-bargain case properly denied the employer's request to expand the scope of the hearing on remand beyond the employer's election objections that the circuit court had specifically remanded for a hearing and further consideration by the Board), enfd. 800 F.2d 191 (8th Cir. 1986).

However, the judge may revisit the appropriate remedy on remand even if not directed to do so in the remand order. See ***Shamrock Foods Co***., 369 NLRB No. 140, slip op. at 1 nn. 4 & 8–9 (2020) (holding that, following the Board's remand to reconsider various handbook rules under a new legal standard, the ALJ's supplemental decision properly required respondent to post the remedial notice at all of its locations, even though the judge's original decision did not do so, no exceptions were filed to that portion of the decision, and the issue was not included in the Board's remand order, as the respondent's former HR manager testified at the hearing on remand that the handbook was applicable at all facilities). But see ***Hotel Bel-Air***, 371 NLRB No. 27, slip op. at 1–2 (2021) (judge on remand erred in omitting modifications the Board had previously made to her order because doing so exceeded the scope of the Board's remand, which was limited to a specific remedial issue, and that order was currently within the court of appeals' exclusive jurisdiction pursuant to the parties' cross-petitions for review or enforcement).

§ 14–400 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 provisions for proceedings by a governmental unit to enforce its police or regulatory powers." ***Moon Nurseries, Inc.***, 371 NLRB No. 75, slip op. at 1 n. 1 (2022) (citing cases). 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); ***NLRB v. 15th Avenue Iron Works***, 964 F.2d 1336, 1337 (2d Cir. 1992).

§ 14–500 Injunction Proceedings

Section 10(j) of the Act authorizes the Board, upon issuance of a complaint, to file a petition in federal district court "for appropriate temporary relief or restraining order." 29 U.S.C. § 160(j). The usual process is for the Regional Office to submit a 10(j) recommendation to the General Counsel's Office in Washington, D.C., which, if it agrees with the recommendation, will forward it to the Board along with a cover memorandum summarizing and further supporting the recommendation and requesting the Board's approval. If the Board approves the request, the Regional Director will then file the petition "for and on behalf of the Board" with the federal district court, which, after due notice, may grant such temporary relief or restraining order as it deems "just and proper." See the GC's Section 10(j) Manual User's Guide.

Section 102.94 of the Board's rules provides that, whenever such relief or order "has been procured by the Board," the case "will be heard expeditiously and . . . given priority by the Board in its successive steps . . . over all other cases except cases of like character and cases under 10(l) [boycotts and strikes to force recognition of uncertified labor organizations] and (m) [priority of cases] of the Act."

Admitting "just and proper" evidence at ALJ hearing. It is not unusual for the ALJ hearing to be held even before the 10(j) petition has been filed with the district court. Indeed, the Region may prefer to wait until after the hearing has been completed so that the administrative record can be filed with the court. See, e.g., ***Hitterman v. List Industries***, No. 2:21-CV-395, 2022 WL 2663400 (N.D. Ind. July 11, 2022); ***Fernbach ex rel. NLRB v. Recycling***, 17-CV-5694, 2017 WL 4286327 (S.D.N.Y. Sept. 26, 2017).

In such circumstances, the General Counsel may request the ALJ to allow testimony at the hearing regarding the chilling effect the respondent employer's alleged unfair labor practices

has had on the employees' union activity and support. Although such evidence is generally irrelevant in the administrative proceeding, it has been considered by some courts in evaluating whether temporary injunctive relief is "just and proper" to prevent irreparable harm. See, e.g., ***Lineback v. Spurlino Materials, LLC***, 546 F.3d 491, 501 (7th Cir. 2008); ***Overstreet v. David Saxe Productions, LLC***, No.: 2:18-cv-02187, 2019 WL 332406, *7 (D. Nev. Jan. 24, 2019). And courts often rely on the administrative record in deciding whether to grant 10(j) injunctive relief, including evidence of chilling effect where the ALJ allowed such evidence at the hearing. See, e.g., ***NLRB v. Electro-Voice, Inc***., 83 F.3d 1559, 1572 (7th Cir. 1996); ***Denholm v. Smyrna Ready Mix Concrete, LLC***, No. 5:20-CV-320, 2021 WL 207571, *6 (E.D. Ky. Jan. 28, 2021); ***Chester ex rel. NLRB v. Grane Healthcare Co***., 666 F.3d 87, 102 (3d Cir. 2011); ***Moore-Duncan v. South Jersey Sanitation Corp***., No. 11–00041, 2011 WL 2038761, *5–8 (D. N.J. May 23, 2011). See also ***Diaz v. Professional Transportation, Inc***., 996 F.Supp. 2d 1215, 1223 and n. 4 (M.D. Fla. 2014) (denying injunction).

For these reasons, the Board in ***Starbucks Corp***., 3–CA–285671, unpub. Board order issued Aug. 4, 2022 (2022 WL 3138540), found that the ALJ did not abuse his discretion by granting the General Counsel's request to allow chilling-effect evidence at the hearing over the respondent's objection. Note, however, that at the time the ALJ issued his ruling in that case, the Board had granted the GC's request for authorization to seek 10(j) injunctive relief and the district court in the 10(j) proceeding had issued an order that implicitly contemplated that such evidence would be presented at the administrative hearing. At least some ALJs in other cases have refused to allow such evidence, both before and after the Board authorized the GC's request for authorization to seek 10(j) injunctive relief.

If the ALJ allows the General Counsel to present testimony and other evidence of chilling effect, a number of related issues may arise. The respondent will likely want to cross-examine the GC's witnesses and present contrary evidence, which may lead to disputes regarding the permissible scope of cross-examination and respondent's right to subpoena other relevant evidence. There may also be credibility issues with respect to the testimony. See, e.g., ***Moran v. LaFarge North America, Inc***., 286 F.Supp. 2d 1002, 1007, 1015 (N.D. Ind. 2003) (court considered credibility of witnesses who testified in 10(j) proceeding regarding impact of unfair labor practices in making findings whether injunction was just and proper); ***Diaz v. Professional Transportation***, above (noting that the ALJ specifically stated at the hearing that he would not make credibility resolutions with respect to the just and proper evidence). See also the discussion below regarding the courts' deference to the ALJ's findings.

Timely issuance of ALJ decision. The ALJ's timely issuance of a decision after reviewing the hearing record and posthearing briefs may also benefit the parties and the court. In evaluating whether injunctive relief is appropriate, the courts consider several factors, including whether the General Counsel is likely to succeed on the merits. And the courts may "give some measure of deference to the view of the ALJ" in assessing this factor. ***Harrell ex rel. NLRB v. American Red Cross***, 714 F.3d 553, 556 (7th Cir. 2013). See also ***Silverman ex rel. NLRB v. J.R.L. Food Corp***., 196 F.3d 334, 335 (2d Cir. 1999) (holding that, in denying a 10(j) injunction, the district court failed to give appropriate deference to the well-supported credibility determinations and factual findings by the ALJ); ***Garcia ex rel. NLRB v. Fallbrook Hospital Corp***., 952 F.Supp. 2d 937, 956 (S.D. Cal. 2013) (considering the relevant findings and legal determinations of the ALJ in granting a 10(j) injunction).

Court's 10(j) findings not binding on ALJ. In the event the court's decision in the 10(j) injunction proceeding issues before the ALJ's decision, the ALJ is not bound by the court's findings. See ***Coronet Foods, Inc. v. NLRB***, 981 F.2d 1284, 1287–1288 (D.C. Cir. 1993)

(district court's finding in the section 10(j) proceeding that an interim restoration remedy for respondent's alleged retaliatory closing of its trucking department would create a financial hardship on respondent did not preclude the ALJ and the Board from subsequently ordering restoration). See also, with respect to interim injunction proceedings under Section 10(l) of the Act, ***International Union of Operating Engineers, Local 150 (Donegal Services, LLC)***, 371 NLRB No. 28, slip op. at 1 n. 1 (2021) (district court's denial of 10(l) injunction was not binding on the Board when deciding the respondent union's alleged 8(b)(4) violations on the merits), and cases cited there.

CHAPTER 15. OPENING AND CLOSING STATEMENTS, BRIEFS, AND DECISIONS

§ 15–100 Opening Statements

Section 102.35(a)(12) of the Board's Rules provides that ALJs have authority to "request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies)." Pursuant to this provision, judges typically request the parties to make opening statements before the first witness is called, as they can be very helpful in understanding the parties' positions and theories in the case and evaluating relevance and other evidentiary objections during the hearing. See NLRB Casehandling Manual (Part 1), Sec. 10386. However, given the Board's liberal pleading rules and lack of pretrial discovery, occasionally a respondent may request, and the ALJ may permit, deferring its opening statement until after the General Counsel and charging party have presented their evidence.

§ 15–200 Pretrial or Trial Briefs

The Board's Rules do not specifically provide for pretrial or trial briefs. However, the Board has held that ALJs have the discretion to require such briefs. See ***Bunge Milling, Inc***., 33-CA-15997, unpub. Board order issued Dec. 30, 2011 (2011 WL 6886297) (ALJ 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). See also Mullins, Manual for Administrative Law Judges, Admin. Conf. of the U.S. 3rd ed. (1993) at 47, available at https://www.acus.gov/report/manual-administrative-law-judges, which states:

> 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.

§ 15–300 Closing Arguments

Section 102.42 of the Board's Rules specifically provides that "any party is entitled, upon request, to oral argument, for a reasonable period at the close of the hearing, . . . [which] will be included in the transcript of the hearing." However, in practice, most parties request an opportunity to file posthearing briefs in lieu of closing arguments.

§ 15–400 Posthearing Briefs

Section 102.42 of the Board's Rules provides that the filing of posthearing briefs is "in the discretion of the Administrative Law Judge." See also ***K.O. Steel Foundry & Machine****,* 340 NLRB 1295 (2003) (rejecting the dissent's assertion that a remand was warranted because the judge refused the General Counsel's request to file a posthearing brief, as no party was permitted to file a brief; the judge permitted each party to present oral argument; and "whether to permit the parties to file posthearing briefs is a matter committed to the sound discretion of the administrative law judge" under Section 102.42 of the Board's Rules).

However, Section 102.42 further provides that the judge must give the parties notice "at the opening of the hearing or as soon thereafter as practicable" if they will not be given an opportunity to file posthearing briefs.

Further, in the vast majority of cases, judges will allow parties to file posthearing briefs as they can be quite helpful. The relatively infrequent exceptions are discussed in **§ 15–600**, Expedited Decision Without Briefs; and **§ 15–700**, 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 from the close of the hearing (counting intermediate weekends and holidays, see Sec. 102.2(a)). Requests for extension of time must be filed with the Chief, Deputy Chief, or Associate Chief Judge, as appropriate.

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 hearing that briefs should be filed in the office to which the judge is assigned.

Filing and Service Requirements. See **CHAPTER 4**, "Filing and Service of Documents," above.

Reply or Answering Briefs. There is no provision in the Board's Rules for the filing of posthearing reply or answering briefs. 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.

NOTE: The judge should not use excerpts from the parties' briefs as a substitute for the judge's own 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.

Striking briefs. See, e.g., ***Roemer Industries***, 367 NLRB No. 133, slip op. at 1 n. 2 (2019) (judge granted General Counsel's motion to strike portions of counsel for respondent's posthearing brief that misrepresented portions of the transcript and/or included facts that were not in the transcript), enfd. 824 F. Appx. 396 (6th Cir. 2020).

§ 15–500 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 1221 (2011), enfd. per curiam 472 F. Appx. 1 (D.C. Cir. 2012); ***Vanguard Fire & Security Systems***, 345 NLRB 1016, 1020 (2005), enfd. 468 F.3d 952 (6th Cir. 2006).

§ 15–600 Expedited Decision Without Briefs

Section 102.42 of the Board's Rules permits an ALJ to issue an expedited decision, without waiting for the filing of posthearing briefs, provided the ALJ notifies the parties "at the opening of the hearing or as soon thereafter as practicable that [the ALJ] may wish to hear oral argument in lieu of briefs." Thus, after giving the required notice and hearing oral arguments, the judge may proceed to review the record and prepare and issue a written decision in the usual manner.

An expedited decision may be preferred as an alternative to a bench decision, discussed below in **§15–700**. It avoids the sometimes hurried approach and potential pitfalls of a bench decision, which must be delivered orally at the close of the trial.

§ 15–700 Bench Decision

§ 15–710 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).

§ 15–720 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), pet. for rev. 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 hearings; cases involving a well-settled legal issue where there is no dispute [over] the facts; short record 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, [the bench decision procedures] would likely not be appropriate." Proposed Board Guidelines on Bench Decisions, 59 Fed. Reg. 65942, 65943 (Dec. 22, 1994), adopted as a final rule, 61 Fed. Reg. 6940 (Feb. 23, 1996).

As indicated above, Sec. 102.42 of the Board's Rules states that the judge must put the parties on notice "at the opening of the hearing or as soon thereafter as practicable" that posthearing briefs are unnecessary. See also ***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).

§ 15–730 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. As indicated above, 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(a) of the Board's Rules provides, in part:

> If the Judge delivers a bench decision, promptly upon receiving the transcript the Judge will 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 serve a copy on each of the parties. Upon the filing of the decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order. Service of the Administrative Law Judge's decision and of the order transferring the case to the Board is 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.

§ 15–800 Contents of Judge's Decision

Section 102.45(a) of the Board's Rules requires that decisions "will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case." 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 is issued, the judge may issue an erratum. ***Daniel Construction Co.***, 239 NLRB 1335 n. 2 (1979), enfd. mem. 634 F.2d 621 (4th Cir. 1980). 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." Id.

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, NLRB Statements of Procedure, Sec. 101.10(a).

The Board holds that it is not required to apply the Federal Rules of Evidence (FRE) strictly. ***Times Union, Capital Newspapers***, 356 NLRB 1339, n. 1 (2011); ***Conley Trucking***, 349 NLRB 308, 310 (2007), enfd. 520 F.3d 629 (6th Cir. 2008); ***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 (3d Cir. 2011) ("[W]e have recognized the Board's power to construe the rules of evidence liberally."); ***3750 Orange Place Ltd. Partnership v. NLRB***, 333 F.3d 646, 666 (6th Cir. 2003) ("[T]he ALJ was not obliged to strictly adhere to the Federal Rules of Evidence."), and cases cited there.

Further, "it is well established that the Board will affirm an evidentiary ruling of a judge unless that ruling constitutes an abuse of discretion." ***Pain Relief Centers, P.A.,*** 371 NLRB No. 70, slip op. at 2 n.3 (2022), enfd. No. 22-1366, 2023 WL 5380323 (4th Cir. Aug. 22, 2023). See also ***CEMEX Construction Materials Pacific, LLC***, 372 NLRB No. 130 (2023); ***Aladdin Gaming, LLC***, 345 NLRB 585, 587 (2005), rev. denied sub nom. ***Local Joint Executive Board of Las Vegas v. NLRB***, 515 F.3d 942 (9th Cir. 2008). Appellate courts likewise will review an ALJ's evidentiary rulings only for abuse of discretion and will require prejudice to set them aside. See e.g., ***CenturyTel of Montana, Inc. v. NLRB***, 164 F.4th 110, 118 (D.C. Cir. 2026); ***Cadillac of Naperville, Inc. v. NLRB***, 14 F.4th 703, 712 (D.C. Cir. 2021); ***NLRB v. Bakers of Paris***, 929 F.2d 1427, 1434 (9th Cir. 1991).

However, where the ALJ and/or the Board purports to rely on the Federal Rules of Evidence, the reviewing court may evaluate whether it did so correctly. See ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479 (7th Cir. 1992) (Board correctly applied FRE 804(a)(5) to exclude an affidavit because the respondent failed to show that the declarant was unavailable to testify); ***NLRB v. United Sanitation Service,*** 737 F.2d 936, 940–941 (11th Cir. 1984) (Board incorrectly relied on the residual hearsay exception in FRE 804(b)(5) [now 807] to admit the affidavit of a deceased alleged discriminatee, as the General Counsel failed to demonstrate the requisite guarantees of trustworthiness).

The Board also holds that it is not bound by state rules of evidence. ***R. Sabee Co.***, 351 NLRB 1350 n. 3 (2007). See also **§ 8–475** (State Confidentiality Rules); **§ 16–402.7** (State Wiretapping Laws); **§§ 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

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

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. This may be accomplished by promptly and properly ruling on the parties' motions in limine and evidentiary objections, or on the judge's own motion. See **§ 10–100**, above; **§ 16–103.1**, below.

The judge may also be presented with circumstances where the evidence is relevant but could result in significant delay in the hearing. In these circumstances, the judge should 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 . . . 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) 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 Timing of Objections

An objection (or a motion to strike) should be made as soon as the ground for it becomes apparent. See **Graham, 2 Handbook of Fed. Evid. § 103:3** (10th ed. Nov. 2025 Update); **Wright & Miller et al., Fed. Prac. & Proc. Evid. § 5038** (2d ed. Apr. 2026 Update) **Goode & Wellborn, Courtroom Handbook Fed. Evid. 103** (Apr. 2026 Update). Under FRE 103, the failure to do so forfeits or waives a claim of error on review or appeal. The distinction between forfeiture and waiver is therefore crucial, because "forfeiture does not preclude appellate consideration of a claim in the presence of plain error, whereas waiver necessarily 'extinguishes' the claim altogether." ***United States v. Williams***, 930 F.3d 44, 64–65 (2d Cir. 2019) (citations omitted).

However, the trial judge retains discretion whether to sustain an untimely objection. See ***Belmont Industries, Inc. v. Bethlehem Steel Corp***., 512 F.2d 434, 437 (3d Cir. 1975). In that

case, the court held, consistent with several other circuits, that "[w]hen evidence has been admitted without objection, the district court has discretion in deciding whether or not to grant a motion subsequently made to strike the testimony on hearsay or best evidence grounds."In ***Culp v. Remington of Montrose Golf Club, LLC***, 133 F.4th 968 (10th Cir. 2025), a Title VII sexual harassment and retaliation case, the Tenth Circuit discussed the interplay between FRE 103(a)'s timeliness requirement and trial court authority over evidentiary objections. The court emphasized that, to preserve an objection, a party must "timely object[] or move[] to strike" with specificity—but this case also illustrates that the consequence of an untimely or insufficiently specific objection is a shift to plain error review on appeal, not a categorical bar to the trial court's own exercise of discretion.

Courts weigh several factors in deciding whether to sustain an untimely objection: (1) whether the objecting party had a reasonable basis for the delay; (2) whether excluding the evidence would prejudice the offering party; (3) whether admitting the evidence would confuse the jury or cause undue delay; and (4) whether the opposing party had an opportunity to cure any evidentiary defect. ***Jerden*** makes clear that, where granting a belated motion to strike would deprive the proponent of any chance to cure the foundational defect, the balance tips heavily against exercise of that discretion. See ***Jerden v. Amstutz***, 430 F.3d 1231, 1235–1238 (9th Cir. 2005) (trial court abused its discretion by granting the defendant's untimely motion to strike key portions of expert's testimony for lack of foundation and limiting the jury's consideration of that testimony without providing the plaintiff an opportunity to cure the defect by laying a proper foundation).

It is generally held that a trial judge has the authority to exclude improper evidence even in the absence of an objection. See **Arthur and Hunter, Federal Trial Handbook: Civil § 10:20** (Sept. 2025 Update); **Larsen, Navigating the Federal Trial § 7:7** (Jul. 2025 Update), citing ***Haynes v. American Motors Corp***., 691 F.2d 1268 (8th Cir. 1982) and ***Alquero v. Duenas***, 319 F.2d 40 (9th Cir. 1963). See also ***United States v. Del Llano***, 354 F.2d 844, 847 (2d Cir. 1965); ***Chapman v. Ensco Offshore Co***., 463 F. Appx. 276, 280 (5th Cir. 2012). But see **1 McCormick on Evid. § 55** (9th ed., Feb. 2025 Update) ("[M]any types of technically inadmissible evidence such as reliable affidavits or copies of writings can be probative and trustworthy. When the evidence falls into this category, absent an objection, the trial judge would be unjustified in excluding the evidence. The judge should exercise her discretionary power to intervene only when the evidence is irrelevant, unreliable, misleading, or prejudicial as well as technically inadmissible.")

The trial judge also has discretion to grant a standing (a/k/a continuing, running, or durable) objection to avoid repeated objections on the same previously overruled grounds to questions along the same specific line of inquiry. See **Graham,** above, **§ 103:2;** 31 **Wright & Miller et al**., above, **§ 5037.5.**

Some circuits recognize a co-party preservation doctrine finding that a proper objection or offer of proof by one party (sometimes referred to as a "vicarious objection") will act to preserve the question for review on appeal when raised by a co-party aligned in interest. See, e.g., ***United States v. McGuire***, 163 F.4th 882, 896 (5th Cir. 2025) ("It is sufficient, in a case with multiple defendants, for one party to object on behalf of all."). Other circuits, however, take the contrary position. See, e.g., ***United States v. Zapata***, 546 F.3d 1179, 1189–1190 (10th Cir. 2008) ("an objection by one defendant is not sufficient to preserve the issue for appeal for another defendant, at least when there is no agreement among the defendants that an objection by one defendant will count as an objection by all defendants"). Because the Board has not weighed in on this issue, the ALJ, to avoid multiple, "me-too" objections, may instruct the parties

that, unless otherwise indicated, an objection by one party will be received as an objection by any of its co-parties in interest.

§ 16–103.2 Specificity of Objections

Pursuant to FRE 103(a)(1)(B), objections must also be sufficiently specific to alert the judge and the offering party to the ground for the objection, unless it is apparent from the context. ***United States v. Pires***, 138 F.4th 649, 665 (1st Cir. 2025) ("a 'lack of specificity bars the party aggrieved by the admission of the evidence from raising more particularized points for the first time on appeal'") (citation omitted); ***United States v. Gomez-Norena***, 908 F.2d 497, 500 (9th Cir.1990) (an objection only preserves the specific ground or grounds named).

For a Board case considering this requirement, see ***Starbucks Corp***., 373 NLRB No. 90, slip op. at 2 n. 11 (2024). In that case, the respondent, during its opening statement, characterized a specific recording as lacking a chain of custody but failed to state this specific ground for objection when the General Counsel later proffered it. The Board found that the respondent's failure to do so reasonably led the judge and the General Counsel to believe respondent was satisfied that the chain of custody had been established.

Compare ***Werner v. Upjohn Co., Inc***., 628 F.2d 848, 853 (4th Cir. 1980) (specific ground for objection was not required where objecting party had filed a pre-trial motion in limine with supporting memoranda asking that the evidence be suppressed). But see ***United States v. Pires***, above at 664 (objection not preserved by motion in limine where trial judge's ruling on motion is "preliminary, conditional or 'tentative,'" and thereby "invites" the offer of the evidence at trial).

§ 16–103.3 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). See also ***F.W. Means & Co***., 157 NLRB 1434 n. 1 (1966) (trial examiner erred by refusing to permit the General Counsel to make offers of proof regarding proposed testimony that the trial examiner had excluded as irrelevant), enf. denied on other grounds 377 F.2d 683 (7th Cir. 1967).

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 able 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); ***Auto Workers v. NLRB***, 231 F.2d 237, 242–243 (7th Cir. 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").

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, consistent with FRE 103(c), the judge may also direct that the offer be made by questions and answers (Q & A). See, e.g., ***Smithfield Packing Co.***, 344 NLRB 1, 13 (2004) (judge properly permitted the General Counsel to elicit testimony as an offer of proof about communications between respondent's managers and respondent's attorney in support of the GC's contention that the crime/fraud exception applied to the attorney-

client communications), enfd. 447 F.3d 821 (D.C. Cir. 2006).

The Q & A procedure can be useful if the judge is uncertain about the evidentiary 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 may outweigh these 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 in which the offer of proof is rebutted by a "counteroffer of proof" by the opposing party. See, e.g., ***United States v. Adams***, 271 F.3d 1236, 1241–1242 (10th Cir. 2001).

Documentary offers of proof. Courts sometimes permit a party to proffer written statements of anticipated testimony. Typically, this would be a written statement of the witness's testimony signed by the witness and offered as part of the record. Less commonly, examining counsel may submit a statement describing the answers the proposed witness would give if permitted to testify. See **1 McCormick on Evid. § 51** (9th ed., Feb. 2025 Update); ***United States v. Adams***, above.

At the request of a party, such statements or other documents offered as part of a rejected offer of proof should be placed in the rejected exhibits file. See ***Crown Corrugated Container, Inc.***, 123 NLRB 318, 320 (1959). See also **§ 12–900**, above.

Co-parties.Certain circuits that follow a co-party preservation doctrine regarding objections will apply it to offers of proof, meaning that an offer of proof by one party will preserve the question for review on appeal by a co-party aligned in interest. See ***Howard v. Gonzales***, 658 F.2d 352, 355–356 (5th Cir. 1981). However, this will not be the case in circuits reject that reject the co-party preservation doctrine. See discussion of "vicarious objections" in **§ 16–103.1**, above.

Waiver. If a party presents evidence on the same subject that was covered by an opposing party's earlier offer of proof, that offer of proof may become evidence as well. See ***Goski Trucking Corp.***, 325 NLRB 1032 (1998). There, the charging party, without objection, cross-examined the respondent's witness on the same subject addressed in the respondent's earlier testimonial offer of proof. The Board affirmed the ALJ's ruling that the charging party thereby "opened up the matter," and that the witness's "entire testimony could be considered as evidence, including his earlier testimony proffered as an 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.
> **. . . .**

Under FRE 104(a), hearsay and other non-privileged material that generally would be excluded under the Federal Rules of Evidence may be considered in determining whether other proffered evidence is admissible. See **Graham, 2 Handbook of Fed. Evid. § 104:1** (10th ed. Nov. 2025 Update); **Wright & Miller, et al., 21A Fed. Prac. & Proc. Evid. § 5054** (2d ed. Sept. 2025 Update). See also ***In re International Management Associates, LLC***, 781 F.3d 1262, 1268 (11th Cir. 2015) (court may properly consider hearsay testimony in deciding whether proffered documents are admissible as business records under the FRE 803(6) hearsay exception for such records); ***Doali-Miller v. SuperValu, Inc***., 855 F.Supp. 2d 510, 520 n. 11 (D. Md. 2012) (same); ***Bestland, Inc. v. Colony Insurance Co.***, No. 2:21-cv-01750, 2021 WL 3163800, *2 n. 1 (C.D. Cal. Jul. 22, 2021) (same). However, it is within the judge's discretion whether to do so. See **Wright & Miller**, above § 5054.

Note that the authenticity of a document is considered a question of relevance governed by FRE 104(b). This is because evidence can only have a tendency to make the existence of a disputed fact more or less likely if the evidence is what its proponent claims. See **Graham**, above § 104:2. See also ***United States v. Browne***, 834 F.3d 403, 409 (3d Cir. 2016); ***United States v. Branch,*** 970 F.2d 1368, 1370 (4th Cir. 1992); ***United States v. Sliker***, 751 F.2d 477, 497–499 (2d Cir. 1984); ***Doali-Miller v. SuperValu***, above.

See also **§ 16–1101** (Applicability of the Rules), and **§ 16–901 (**Authenticating or Identifying Evidence), below.

§ 16–104.1 Voir Dire Examination

A party may request an opportunity to conduct voir dire examination of a witness before the witness testifies to determine if testimony or documentary evidence proffered by another party is admissible. The questions on voir dire should be limited to the relevant preliminary or foundational facts. See **1 McCormick on Evidence § 53** (9th ed., Feb. 2025 Update) ("In effect, the voir dire is a mini cross-examination. During the voir dire, the opponent questions the witness solely about the foundational fact which the proponent attempted to establish, not the historical merits.").

Voir dire is often used to examine the qualifications of a proffered expert witness. See ***United States v. Sepulveda***, 15 F.3d 1161, 1184 n. 15 (1st Cir. 1993) ("When uncertainty attends a proffer of opinion evidence, *voir dire* screenings are standard fare") (citations omitted). Such questions may support a motion to exclude proffered expert testimony based on FRE 702. See **§ 16–702** (FRE 702 Testimony by Expert Witnesses).

§ 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

statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

See, for example, ***Baker Hotel of Dallas***, 134 NLRB 524 n. 1 (1961) (where the respondent on cross-examination of a General Counsel witness cited a particular statement in the witness's prehearing affidavit to attack her credibility, the trial examiner properly allowed the GC to introduce the entire affidavit into evidence to show the context in which the statement was made), enfd. 311 F.2d 528 (5th Cir. 1963). See also ***J. G. Braun Co.***, 126 NLRB 368, 369 n. 3 (1960) (holding that where the respondent on cross-examination of a GC witness had read portions of the witness's prehearing affidavit into the record to refresh his recollection, it was error for the judge to reject the GC's offer of the affidavit into evidence).

"The Rule, however, does not require evidence to be excluded simply because it is not available in its complete form." ***Kumho Tires Georgia***, 370 NLRB No. 32, slip op. at 3 (2020) (judge did not abuse his discretion in allowing the General Counsel to introduce an audiotape of a manager's speech, even though it did not include the beginning, as there was no dispute the beginning was not recorded; moreover, the respondent did not call the manager or any other witness to testify about the missing portion or explain how it would demonstrate that the recorded portion was lawful).

See also ***RHCG Safety Corp***., 365 NLRB 852, 852 (2017). There, the respondent contended that the judge erred in receiving a screenshot of a text message containing an alleged interrogation without requiring the General Counsel to move into evidence 10 additional text messages that were exchanged between the employee and the supervisor. The Board rejected the respondent's contention, noting that the text message itself was not incomplete, the GC did not have possession or access to the additional text messages, and the respondent could have questioned the employee about his communications with the supervisor at the hearing.

§ 16–107 FRE 107. Illustrative Aids

> **(a) Permitted Uses**. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.
>
> . . .
>
> (b) **Record.** When practicable, an illustrative aid used at trial must be entered into the record.
>
> (c**) Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

FRE 107 provides standards for the use of "illustrative aids." As explained in the 2024 Advisory Committee Notes, an illustrative aid is any presentation (e.g., a drawing, photo, diagram, video depiction, chart, graph, or computer simulation) offered for the narrow purpose of assisting the trier of fact in understanding evidence or argument, rather than as substantive evidence or to demonstrate how an event occurred. The rule also distinguishes summaries used as an illustrative aid from summaries offered to prove the contents of voluminous admissible evidence, which continue to be governed by FRE 1006. See **§ 16–1006**, below.

§ 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 as "official" or "administrative" notice) at any stage of the proceedings, with or without a request by one of the parties. If the facts are subject to reasonable dispute, judicial notice is improper. See, e.g., ***Longshoremen ILWU (SSA Terminals),*** 372 NLRB No. 66, slip op. at 1 n. 1 (2023) (denying the charging party union's request to take administrative notice of a Pacific Maritime Association report because the report involved adjudicative facts that were subject to reasonable dispute); ***Wyman Gordon Pennsylvania***, LLC, 4–CA–182126, unpub. Board order issued Jan. 11, 2019 (2019 WL 656326) (declining to take judicial notice of two letters to and from the Regional Director that were not offered or admitted into evidence at the hearing "because the facts asserted therein are facts in dispute").

The following are examples where an ALJ or the Board took judicial notice.

The NLRB's own proceedings. *See* ***Starbucks***, 373 NLRB No. 135, slip op. at 30 n. 7 (2024) (Regional Director's Decision and Direction of Election in related representation proceeding); ***Longshoremen ILWU,*** 372 NLRB No. 66, slip op. at 1 n. 1 (2023) (prior Board decisions and public case documents that were official records of the Board); ***National Assoc. of Broadcast Employees and Technicians***, 371 NLRB No. 15, slip op. at 3 (2021) (an evidence-preservation letter sent by General Counsel to charging party); ***Registry of Interpreters for the Deaf, Inc***., 370 NLRB No. 18, slip op. at 4 & n. 11 (2020) (Regional Director's initial letter dismissing the underlying charge); ***Shamrock Foods Co***., 366 NLRB No. 117, slip op. at 3 n. 14 (2018) (settlement agreement between the discriminatee and the respondent in another case that was pending on exceptions before the Board), enfd. per curiam 779 F. Appx. 752 (D.C. Cir. July 12, 2019). See also ***Securitas Security Services, USA***, 01–RD–293620, unpub. Board order issued Feb. 1, 2024 (2024 WL 448905), at 1 n. 1 (taking administrative notice that the Agency's internal records indicated that an e-filing outage notification was not posted until the day after the petitioner contended the notification caused him to delay e-filing the decertification petition). Click or tap here to enter text.

But see ***Hilton Hawaiian Village***, 372 NLRB No. 61, slip op. at 7 (2023) (refusing to take administrative notice of a position statement that the employer submitted to the Regional Office in advance of the hearing but was not entered into evidence at hearing); ***Longshoremen ILWU Local 12 (Southport Lumber Co.)***, 367 NLRB No. 16, slip op. at 1 n. 1 (2018) (denying the union's request to take administrative notice of a Division of Advice Memo as such memos "have no precedential value or dispositive effect before the Board"); ***Wyman Gordon Pennsylvania***, above.

Federal and state agency and court materials. See ***Starbucks***, 373 NLRB No. 135, slip op. at 29 n. 3 (respondent's annual report Form 10-K, with exhibits, filed with Securities and Exchange Commission); ***Longmont United Hospital***, 373 NLRB No. 97, slip op. at 10 n. 3 (2024) (respondent's federal court filing contesting the validity of charging party union's certification); ***Red Rock Casino Resort Spa***, 373 NLRB No. 67, slip op. at 74 (2024) (10(j) injunction requiring respondent to recognize and bargain with charging party union); ***Technocap LLC***, 372 NLRB No. 136, slip op. at 8 n. 33 (2023) (OSHA finding that long shifts are associated with increased risk of injury); ***Nissan North America***, 372 NLRB No. 48, slip op. at 11 n. 53 (2023) (BLS website statement that tool and die makers and machinists are typically trained on the job); (***New York Presbyterian Hudson Valley Hospital***, 372 NLRB No. 15, slip op. at 6 n. 18 (2022) (state agency letter that issued after the hearing), enfd. 22-6582, 23-6036, 2023 WL 8715731 (2d Cir. Dec. 18, 2023); ***Pacific Green Trucking Inc***., 368 NLRB No. 14, slip op. at 9 n. 25 (2019) (state agency website materials regarding unemployment compensation claims); ***Lucky Cab Co***., 366 NLRB No. 56 (2018) (BLS unemployment rate data and various IRS publications and reports), enfd. 818 F. Appx. 638 (9th Cir. 2020); ***Atelier Condominium***, 361 NLRB 966, 967 n. 12 (2014) (subsequent developments in a related state lawsuit based on a website operated by the state court system), enfd. 653 F. Appx. 62 (2d Cir. 2016); ***San Manuel Indian Bingo and Casino***, 341 NLRB 1055, 1055 n. 3 (2004) (casino's location on the tribal reservation based on two federal agency publications and a court decision), enfd. 475 F.3d 1306 (D.C. Cir. 2007). See also ***Drummond Coal Co.***, 277 NLRB 1618, 1618 n. 1 (1986) (an arbitral award issued after close of hearing, despite party's objection).

Federal and state statutes and regulations. ALJs and the Board have also routinely taken judicial notice of relevant federal and state statutes and regulations. See, e.g., ***Taylor Mfg. Co., Inc***., 83 NLRB 142 n. 5 (1949) (affirming the ALJ's taking judicial notice of applicable statutes and regulations issued by the Veterans Administration); ***Yellow Cab Co.***, 229 NLRB 1329 n. 2 (1977) (granting the charging party's request to take judicial notice of certain new Chicago regulations affecting the taxicab industry). The courts have as well. See, e.g., ***Martinez v. Welk Group, Inc***., No. 09 CV 2883, 2011 WL 90313, *2 (S.D. Cal. Jan. 11, 2011) ("Courts routinely take judicial notice of state or federal statutes and regulations.") (citations omitted).

However, it may be unnecessary to take judicial notice of such materials. See ***St. Vincent Medical Center***, 338 NLRB 888 (2003), where the Board ruled that it was "not necessary" to take judicial notice of California State statutory authority, as the Respondent's citation to that authority in its brief in opposition to the General Counsel's exceptions "was sufficient to draw it to [the Board's] attention." See also ***Romero v. Bestcare, Inc***., No. 15-CV-7397, 2017 WL 1180518, *3 n. 5 (E.D.N.Y. Mar. 29, 2017) (noting that it is unclear if judicial notice of the contents of the Federal Register, the Code of Federal Regulations or administrative agency guidance is required as the facts contained therein are legislative rather than adjudicative facts covered by FRE 201).

It may depend on what the statute or regulation is being used for. See ***Toth v. Grand Trunk Railroad***, 306 F.3d 335, 349 (6th Cir. 2002) ("[W]hether a fact is adjudicative or legislative depends upon the manner in which it is used. A legal rule may be a proper fact for judicial notice if it is offered to establish the factual context of the case, as opposed to stating the governing

law.") (citation omitted). See also ***Robinson v. Liberty Mutual Insurance Co***., 958 F.3d 1137, 1142 (11th Cir. 2020) ("Dictionary definitions are legislative facts when used to answer a question of law, such as how to interpret contractual terms").

For a full discussion of the difference between adjudicative facts and legislative or "background" facts that are not subject to the requirements of FRE 201, as well as other considerations, including the applicability of the hearsay rules, see **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 201** (Apr. 2026 Update); **Wright & Miller et al., 21B Fed. Prac. & Proc. Evid**. **§§ 5103.2 and 5104** (2d ed. Apr. 2026 Update). See also **ABA Formal Op. 478** (Dec. 8, 2017) (Independent Factual Research by Judges Via the Internet), available at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-478.pdf; ***Commodity Futures Trading Commission v. McDonnell***, 287 F.Supp. 3d 213, 230 (E.D.N.Y. 2018) (discussing the ABA rule).

Other information on the internet. See ***MCPc, Inc***., 367 NLRB No. 137, slip op. at 1 n. 5 (2019) (contents of a web page available through the Wayback Machine); ***Postal Service***, 365 NLRB 557, 558 n. 5 (2017) (the Postal Service's administrative structure as set forth on its website); ***Laborers Local 872 (Westgate Las Vegas Resort & Casino)***, 363 NLRB 1633, 1635 n. 9 (2016) (the width of a driveway entrance to the facility based on Google map and satellite images of the location); ***Bud Antle, Inc***., 359 NLRB 1257 n. 3 (2013), reaffd. 361 NLRB 873 (2014) (distances between cities based on Google Maps).

Courts have also taken judicial notice of publicly available social media posts, news articles, and other writings on websites when the parties do not dispute the authenticity of the documents. See, e.g., ***McKenna v. Nassau County***, No. 2:23-CV-4286, 2023 WL 8455670, *6 (E.D.N.Y. Dec. 6, 2023) (granting defendant's request and taking judicial notice that plaintiff made certain statements on Facebook), ***Zambrano v. Strategic Delivery Solutions, LLC***, No. 15 Civ. 8410, 2022 WL 3369597, at *1, n. 3 (S.D.N.Y. Aug. 16, 2022) (granting plaintiffs' request, in FLSA misclassification action, to take judicial notice that defendant company's public website referred to its delivery drivers as "independent contractors"); ***Ho v. Marathon Patent Group, Inc.***, No. EDCV 21-339, 2022 WL 1600048, *7 (C.D. Cal. Feb. 11, 2022) ("Pursuant to [FRE] 201(b), courts may take judicial notice of news articles to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.") (quotations and case citations omitted), and cases cited there. Cf. ***Int'l Assoc. of Machinists and Aerospace Workers, District Lodge No. 160***, 373 NLRB No. 39, slip op. at 1 n. 2 (2024) (refusing to take judicial notice of, and rejecting as uncorroborated hearsay, a news report about collective-bargaining negotiations offered for the truth of the facts reported).

§ 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

Evidence outside or extrinsic to an agreement is inadmissible to vary or contradict its clear and unambiguous terms. ***Orchids Paper Products Co***., 367 NLRB No. 33, slip op. at 22 (2018); ***Church Square Supermarket***, 356 NLRB 1357, 1359 (2011). See also ***Xerox Corp. v. Local 14A, Workers United***, 128 F.4th 93, 102 (2d Cir. 2025) (CBA "is not ambiguous unless, after applying established rules of interpretation, it remains reasonably susceptible to at least two reasonable but conflicting meanings"); ***NLRB v. Electrical Workers Local 11***, 772 F.2d 571, 575 (9th Cir. 1985) ("Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant."), enfg. 270 NLRB 424 (1984).

However, extrinsic evidence is admissible to show the meaning of an ambiguous contract. ***Doubletree Guest Suites Santa Monica***, 347 NLRB 783, 784 n. 7 (2006); ***Commonwealth Communications v. NLRB***, 312 F.3d 465, 468 (D.C. Cir. 2002). See also ***Longshoremen ILA Local 1422***, 372 NLRB No. 36, slip op. at 24 (2022), citing ***General Teamsters, Local 982 (J.K. Barker Trucking Co.)***, 181 NLRB 515, 517 (1970) (if a clause challenged under Sec. 8(e) of the Act is ambiguous, the Board will consider extrinsic evidence to determine whether it was intended to be administered in a lawful or unlawful manner), enfd sub. nom. ***Joint Council of Teamsters No. 42 v. NLRB***, 450 F.2d 1322 (D.C. Cir. 1971)).

Parol evidence is also admissible to show that no agreement was reached in the first place. ***Dex YP***, 371 NLRB No. 23, slip op. at 1 n. 2 (2021), petition for review denied sub nom. ***Commercial Workers District 4 v. NLRB***, 59 F.4th 1302 (D.C. Cir. 2023). See also ***Apache Powder Co***., 223 NLRB 191 (1976) (a unilateral mistake may 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***, above, and cases cited there.

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 Enterprizes, Inc.***, 353 NLRB 803 (2009) (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), reaffd. 355 NLRB 478 (2010), enfd. 431 F. Appx. 488 (7th Cir. 2011). See also ***Horizon Group of New England***, 347 NLRB 795 (2006) (same).

§ 16–402.2 Evidence of Animus and Unlawful Motive

Unalleged statements. Evidence of an employer's coercive statements may properly be received and considered to establish union animus even if they are not alleged in the complaint. See, e.g., ***DH Long Point Mgt. LLC***, 369 NLRB No. 18, slip op. at 13 n. 37 (2020) (relying on testimony regarding a manager's coercive statement as evidence of the employer's union animus even though the testimony was elicited by the charging party and the manager's statement was not alleged in the General Counsel's complaint), enfd. per curiam 858 F. Appx. 366 (D.C. Cir. 2021).

The Board has also historically relied on unalleged noncoercive statements of opposition to unions or unionization as evidence of animus and an unlawful motive. However, in ***United Site Services of California, Inc.***, 369 NLRB No. 137 (2020), the Board overruled such decisions and agreed with those reviewing courts that have rejected reliance on such noncoercive statements. The Board held that Section 8(c) of the Act (often called the Act's "free speech" provision) "precludes reliance on statements of opinion that neither threaten nor promise as evidence in support of any unfair labor practice finding." See slip op. at 14 n. 68. See also ***Truck Drivers Local 100 (Beta Productions LLC),*** 370 NLRB No. 36, slip op. at 2–3 (2020).

Events over 6 months before the alleged unlawful conduct (background evidence). 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 Section 10(b) limitations period. See, e.g., ***Compañia Cervecera de Puerto Rico***, 373 NLRB No. 47, slip op. at 12–13 (2024), enfd.150 F.4th 601, 612 (D.C. Cir. 2025); ***CSC Holdings, LLC***, 365 NLRB 665, 678–679 (2017); ***Wilmington Fabricators***, 332 NLRB 57 n. 6 (2000);***Douglas Aircraft Co***., 307 NLRB 536 n. 2 (1992), enfd. 66 F.3d 336 (9th Cir. 1995). See also **§ 3–620**, above, regarding admission of evidence concerning events outside the 10(b) period.

Events after the alleged unlawful conduct. Events occurring after the alleged discriminatory conduct may be relevant to whether that conduct was motivated by animus. See ***Con-Way Freight, Inc***., 366 NLRB No. 183, slip op. at 3 n. 10 (2018) (employer's post-discharge violations were relevant to whether the discharge was motivated by animus); ***Dresser-Rand Co***., 362 NLRB 1100, 1100–1101 (2015) (employer's post-lockout violations were relevant to whether the lockout was unlawfully motivated), enf. denied in relevant part 838 F.3d 512 (5th Cir. 2016).

Circumstantial evidence. Animus or discriminatory motive may be inferred from circumstantial evidence. See ***Intertape Polymer Corp.,*** 372 NLRB No. 133, slip op. at 6–7 (2023), and cases cited there. See also ***East End Bus Lines, Inc***., 366 NLRB No. 180, slip op. at 1 n. 7 (2018), citing ***Laro Maintenance Corp. v. NLRB***, 56 F.3d 224, 229 (D.C. Cir. 1995) ("In most cases only circumstantial evidence of motive is likely to be available."); ***CC1 Limited Partnership v. NLRB***, 898 F.3d 26, 32–33 (D.C. Cir. 2018). "In determining whether circumstantial evidence supports a reasonable inference of discriminatory motive, the Board does not follow a rote formula and has relied on many different combinations of factors." ***Intertape Polymer***, above, slip op. at 7 n. 27. For example, the Board has "routinely inferred animus and a causal connection from, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; disparate treatment of the employee; and reliance on pretextual reasons for the action." Id. at 13.

Treatment of other employees. Parties frequently offer evidence of whether an employer treated other employees differently or the same. The most common situation is where the General Counsel offers evidence of disparate treatment of union supporters—for example, that the employer issued lesser or no discipline to non-union supporters who committed similar or worse offenses. Respondents, on the other hand, may offer evidence that non-union supporters were treated the same as union supporters, or evidence that no adverse actions were taken against other union supporters, as circumstantial evidence that there was no unlawful motive. The parties may also offer evidence of different or similar conduct of others as evidence affecting credibility of witnesses. Each of these situations is addressed below.

Disparate treatment. As indicated above, it is well established that disparate treatment is relevant circumstantial evidence of an unlawful motive. In general, judges should therefore allow disparate treatment evidence into the record. For example, disparate treatment evidence generally should not be excluded solely because it has not been shown that the same individual supervised the comparator employees who were not disciplined or received lesser discipline for similar or worse offenses. See ***Genpak, LLC***, 372 NLRB No. 76, slip op. at 2 (2023) ("The fact that the disciplined employee received discipline from a different official does not, standing alone, distinguish that employee from a non-disciplined comparator."). However, such circumstances, including who supervised the other employees and whether they had wide discretion in issuing discipline for such offenses, may be relevant and considered in evaluating the weight to give the disparate treatment evidence and whether the General Counsel has established an unlawful motive. See, e.g., ***New Otani Hotel & Garden***, 325 NLRB 928, 941 (1998) (finding no unlawful motive in part because the comparators offered by the General Counsel involved different supervisors). See also ***Knox v. Roper Pump Co***., 957 F.3d 1237, 1248 (11th Cir. 2020) (fact that different supervisors were involved in comparators is a meaningful distinction because different supervisors may have different management styles); ***Snipes v. Illinois Dept. of Corrections***, 291 F.3d 460, 463 (7th Cir. 2002) (relevant factors to consider in determining whether comparators are similar include whether the employees dealt with the same supervisor and were subject to the same standards).

Similar treatment. The Board has repeatedly held that an otherwise well-supported showing of a discriminatory motive is not disproved by evidence that the employer did not take similar actions against other union supporters. See, e.g., ***Fresh & Green's of Washington, D.C., LLC***, 361 NLRB 362 n. 1 (2014); ***Igramo Enterprise, Inc***., 351 NLRB 1337, 1339 (2007), rev. denied 310 F. Appx. 452 (2d Cir. 2009); ***Volair Contractors, Inc.***, 341 NLRB 673, 676 n. 17 (2004).

See also ***Temp-Masters, Inc. v. NLRB***, 460 F.3d 684, 690 (6th Cir. 2006) (fact that employer's president was a former union member and that employer has historically hired union workers had "little relevance" to whether employer's transfer of four employees to another jobsite was motivated by antiunion animus), affg. 344 NLRB 1188 (2005); and, with respect to alleged 8(a)(1) statements or threats, ***UNF, West, Inc. v. NLRB***, 844 F.3d 451, 464 (5th Cir. 2016) (ALJ did not abuse his "wide discretion" to exclude irrelevant evidence by refusing to allow the respondent to present testimony from four employees that they had never been threatened by the respondent's agents, as they were not present when the alleged unlawful statements to two other employees were made, and their testimony about their own experience with respondent's labor consultants was not probative of what happened to the other two employees), enfg. 363 NLRB 886 n. 1 (2016).

Note, however, that where the evidence presented was insufficient to establish union animus, the Board has cited the absence of similar actions against other union supporters as

additional support for dismissing discrimination allegations. See ***Electrolux***, 368 NLRB No. 34, slip op. at 5 n. 16 (2019), citing ***Wackenhut Corp***., 290 NLRB 212, 214–215 (1988).

Credibility. "The presence or absence of evidence of similar conduct may be relevant to a judge's credibility determinations," and a judge therefore does "not err in considering it" in "assessing the credibility of particular witnesses' testimony." ***Sutphin Car Wash***, 365 NLRB 1021 n. 1 (2017) (ALJ did not err in discussing absence of evidence that employees other than the General Counsel's two witnesses were subject to the same alleged 8(a)(1) conduct in assessing credibility) (citing cases). See also ***Starbucks Corp***., 372 NLRB No. 159, slip op. at 1 n. 1 & 2–3 (2023) (ALJ did not err by discrediting prounion employee's testimony that the store manager required her to listen to an antiunion presentation, in part because another prounion employee testified that she was not required to do so at her own subsequent meeting with the manager).

Employee's subjective belief or uncertainty. With respect to the ultimate issue of whether a respondent discriminated against an employee based on union or protected concerted activity, it is irrelevant whether the employee personally believes the respondent did so. ***Professional Medical Transport, Inc***., 362 NLRB 144, 152 n. 25 (2015). See also ***Napleton Cadillac of Libertyville***, 367 NLRB No. 6, slip op. at 16 n. 23 (2018) (finding that "nothing is to be gleaned" from the fact that the alleged discriminate/charging party in the unfair labor practice case also filed a parallel charge against the employer alleging disability discrimination), enfd. sub nom. ***Napleton 1050, Inc. v. NLRB***, 976 F.3d 30 (D.C. Cir. 2020); ***Staffing Network Holdings, LLC***, 362 NLRB 67, 73 (2015) (rejecting the employer's argument that the alleged discriminatee/charging party should be discredited because she also filed ancestry and age discrimination charges against the employer over her discharge), enfd. 815 F.3d 296 (7th Cir. 2016).

§ 16–402.3 Evidence of Coercion

The Board applies an objective standard or test in evaluating alleged violations of Section 8(a)(1); specifically, whether the employer's conduct would tend to coerce a reasonable employee. ***Multi-Ad Services***, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Thus, the Board has held that testimony about what an employee understood or subjectively interpreted a supervisor's statement to mean may not be relied on and is normally not admissible. See, e.g., ***Research Medical Center***, 373 NLRB No. 36, slip op. at 2 n. 7 (2024); ***Miami Systems Corp.***, 320 NLRB 71 n. 4 (1995), enfd. in relevant part 111 F.3d 1284 (6th Cir. 1997). See also ***UNF West, Inc. v. NLRB***, 844 F.3d 451, 464 (5th Cir. 2015) ("whether Union support was in fact chilled by a Section 8(a)(1) violation—i.e., whether the problematic conduct in fact coerced anyone or interfered with a campaign—is inconsequential in an 8(a)(1) case, and so cannot serve as a predicate to establish the relevance of evidence.") But see ***FDRLST Media, LLC v. NLRB***, 35 F.4th 108, 124 (3d Cir. 2022) (while employees' subjective impressions are not dispositive, they are not irrelevant, and they are "especially helpful" where the employer claims its statement was made in jest), denying enf. of 370 NLRB No. 49 (2020).

However, it is proper to consider the "surrounding circumstances" to determine whether "objectively reasonable employees *in the position of the [particular employees involved]* would be coerced." ***Russell Reid Waste Hauling & Disposal Service Co.***, 373 NLRB No. 51, slip op. at 3 (2024), enfd. No. 24-1890, 2025 WL 854702 (3d Cir. March 19, 2025) (unpub). See also ***Westwood Health Care Center***, 330 NLRB 935, 940 n. 17 (2000) (it is not improper to consider the "full context" in which the particular incident in question occurred by "taking into account events or statements that occurred before and after [the incident] that may throw light on its significance") .

The Board likewise applies an objective test in evaluating whether an employer's unfair labor practices tainted a decertification petition, i.e., in performing a so-called *Master Slack* analysis. See ***Coserv Electric***, 366 NLRB No. 103, slip op. at 3 n. 10 (2018) (judge did not abuse his discretion by refusing to allow testimony from 23 employees about why they signed a decertification petition, as the test of whether an employer's unfair labor practices tended to undermine the union in the eyes of employees and tainted a decertification petition is an objective one), enfd. in relevant part sub nom. ***Denton County Electrical Cooperative, Inc. v. NLRB***, 962 F.3d 161, 170 (5th Cir. 2020). See also ***Veritas Health Services, Inc. v. NLRB***, 895 F.3d 69, 84 (D.C. Cir. 2018) (the Board's "objective focus of its test . . . makes good sense.")

Similarly, in determining the appropriateness of a *Gissel* bargaining order, the Board does not rely on the subjective reaction of individual bargaining unit members to determine the cause of employee dissatisfaction with the union. See **§ 16–402.5**, Evidence Affecting Remedy.

§ 16–402.4 Evidence of Presettlement Conduct

Under well-established Board law, "in general, evidence involved in a settled case may properly be considered as background evidence in determining the motive or objective of a respondent in activities occurring either before or after the settlement." ***Ambrose Auto***, 361 NLRB 931 n. 2 (2014) (internal quotation marks and citations omitted). See also ***Compañia Cervecera de Puerto Rico v. NLRB***, 150 F.4th 601, 612 (D.C. Cir. 2025) (finding Board properly considered employer's presettlement unilateral schedule change as background evidence of union animus), enforcing 373 NLRB No. 47, slip op. at 12–13 (2024); ***Quickway Transportation, Inc***., 372 NLRB No. 127, slip op. at 8 n. 25 (2023) (citing cases), enfd. 117 F.4th 789 (6th Cir. 2024).

For a case involving alleged violations that occurred before the settlement, see ***Overnite Transportation Co.***, 335 NLRB 372, 376 n. 18 (2001). There, the ALJ refused to allow the General Counsel to present evidence regarding the 8(a)(3) discharge of an employee because it was settled prior to the hearing. The Board reversed and directed the judge to permit the GC to introduce such evidence "to the extent it was relevant" to the other, non-settled allegations regarding the discharge of several other employees.

See also ***ExxonMobil Corp., Beaumont Refinery***, 16–CA–276089, unpub. Board order issued April 19, 2023 (2023 WL -----) (citing *Overnite* and holding that the ALJ erred in approving a partial settlement over the General Counsel's objection which contained a "scope of agreement" provision that barred the GC from presenting evidence of the settled conduct in the upcoming hearing on the nonsettled allegations, i.e., it only reserved the GC's right to present such evidence in subsequent cases).

For a case involving the use of presettlement conduct as evidence of alleged unlawful post-settlement conduct, see ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997). There, the Board held that, in determining whether non-Board settlements of alleged discrimination had been breached by the post-settlement suspension and reassignment of two union supporters, the judge could consider evidence of pre-settlement 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 (1992), enfd. in part 11 F.3d 88 (7th Cir. 1993), where it agreed with the judge that the pre-settlement conduct of the respondent in that case evidenced "strong union animus" for the alleged unlawful post-settlement conduct.

Board informal settlements often include so-called "reservation-of-rights" provisions specifically stating that the General Counsel reserves the right to present evidence of the settled allegations as support for other allegations. See, for example, ***CoServ Electric***, 366 NLRB No. 103, slip op. at 1–2 (2018), enf. denied in part on other grounds sub nom. ***Denton County Elec. Coop., Inc. v. NLRB***, 962 F.3d 161 (5th Cir. 2020). There, the informal settlement's "Scope of the Agreement" clause stated:

> The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned cases for any relevant purpose in the litigation of this or any other cases, and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

Based on this language, the Board held that the settled conduct in a prior case could be litigated, found unlawful, and used to establish that the employer thereafter unlawfully withdrew recognition from the union based on a decertification petition that was tainted by the employer's prior unlawful conduct. However, the Board did not order a remedy for the prior unlawful conduct given that it had previously been settled. Compare **§ 9–800**, Setting Aside Settlement Agreements, above.

However, evidence of pre-settlement conduct can be used to establish unlawful post-settlement conduct even if the settlement did not include such reservation-of-rights language. See ***St. Mary's Nursing Home****,* 342 NLRB 979, 979–980 (2004), affd. 240 F. Appx. 8, 12–13 (6th Cir. 2007) (judge erred in precluding the General Counsel from presenting evidence supporting previously settled allegations that employer unlawfully suspended and discharged an employee to support the current complaint's allegations that employer again unlawfully suspended and discharged the employee; GC was entitled to present that evidence both as a matter of law and because the settlement contained a reservation-of-rights clause), citing ***Outdoor Venture Corp.***, 327 NLRB 706, 708–709 (1999) (holding 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). See also ***Monongahela Power Co., Special Mine Services***, above.

§ 16–402.5 Evidence Affecting Remedy

Gissel bargaining orders. The Board applies an objective test in evaluating the appropriateness of a remedial *Gissel* bargaining order based on the union's preelection card majority; specifically, whether the employer's unfair labor practices would "tend to undermine the union's majority and make a fair election an unlikely possibility." ***NLRB v. Gissel Packing Co***., 395 U.S. 575, 579 (1969). The Board considers the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations. The Board does not consider or rely on the subjective responses of the unit employees to the employer's unfair labor practices. See ***RAV Truck & Trailer Repairs, Inc.,*** 369 NLRB No. 36, slip op. at 15 (2020), enfd. in relevant part 997 F.3d 314, 329 (D.C. Cir. 2021). See also ***Altman Camera Co.,*** 207 NLRB 940, 941 (1973) (Board "disavowed" the ALJ's "reliance on subjective considerations to determine why many employees repudiated the Union," and refused to "read the minds of employees in an effort to ascertain whether, as found by the [ALJ], any loss of their support for the Union was attributable to the 'organizing tactics of the union representatives.'"), enfd. 511 F.2d 319 (7th Cir. 1975).

The Board has also traditionally considered the appropriateness of a *Gissel* bargaining order as of the time the employer's unfair labor practices were committed. See ***A.S.V., Inc***., 366

NLRB No. 162, slip op. at 1 n. 1 (2018). Thus, evidence regarding subsequent events, including the passage of time and turnover among unit employees or management officials, is irrelevant.

However, some courts of appeals, including the D.C. Circuit and Second Circuit, have disagreed with the Board and required consideration of such changed circumstances. Accordingly, the Board has sometimes considered such evidence and issued alternative special remedies in recognition that a *Gissel* bargaining order would likely be unenforceable in the courts. See ***Sysco Grand Rapids LLC***, 367 NLRB No. 111, slip op. at 1–3 (2019) (Board found that the passage of 4 years and 30 percent employee turnover since the employer's preelection unfair labor practices likely rendered a *Gissel* bargaining order unenforceable and instead issued various other "special" remedies), enf. denied in relevant part 825 F. Appx. 348, 359–360 (6th Cir. 2020) (denying enforcement of the Board's special notice-reading and union-access remedies); ***Audubon Regional Medical Center***, 331 NLRB 374, 377–378 (2000) (same, where approximately 6 years had passed and there had been 100 percent management turnover since the unfair labor practices began).

Compare ***PCMC/Pacific Crane Maintenance Co***., 32–CA–021925, unpub. Board order issued March 1, 2016 (2016 WL 806825) (rejecting the employer's argument that court decisions requiring consideration of passage of time and turnover in *Gissel* situations also require considering such changed circumstances in withdrawal-of-recognition situations).

Instatement of applicants. In ***FES***, 331 NLRB 9, 12 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), the Board provided "guidance to all parties litigating refusal-to-hire and refusal-to-consider violations by making clear the elements of the violation, the respective burdens of the parties, and the stage at which issues are to be litigated."

Regarding the hearing on the merits, the Board adopted the traditional analysis set forth in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), for evaluating unfair labor practice allegations that turn on employer motivation. Thus, the General Counsel must show that the employer's animus towards union or other protected activity contributed to the refusal to hire or consider for hire. ***FES***, 331 NLRB at 12. But see ***Gross Electric, Inc***., 366 NLRB No. 81, slip op. at 2 (2018) (*Wright Line* analysis does not apply and animus need not be shown where the employer acknowledged that it refused to hire the applicant because of his protected activity).

With respect to refusal-to-hire allegations, the General Counsel must also show that the employer was actually hiring or had concrete plans to hire at the time of the alleged unlawful conduct, i.e., that there were openings for the applicants, and that the applicants met the announced or known requirements for the positions (or that the employer did not uniformly adhere to the announced requirements, or that the requirements were pretextual or pretextually applied). ***FES***, 331 NLRB at 12–13. See also ***Hard Hat Services, LLC***, 366 NLRB No. 106, slip op. at 7–8 (2018) (finding that the General Counsel satisfied this burden); ***Allstate Power Vac, Inc***., 354 NLRB 980, 981–982 (2009) (finding that the General Counsel failed to meet this burden), reaffd. 357 NLRB 344 n. 1 (2011). But see ***Planned Building Services, Inc.***, 347 NLRB 670, 672 (2006) (holding that the General Counsel need not establish these additional facts in cases alleging that an alleged successor discriminatorily refused to hire the predecessor's employees), overruled on other grounds ***Pressroom Cleaners***, 361 NLRB 643 (2014). See also ***W & M Properties of Connecticut, Inc. v. NLRB***, 514 F.3d 1341 (D.C. Cir. 2008), affg. 348 NLRB 162 (2006) (upholding the Board's holding in *Planned Building Services*).

With respect to refusal-to-consider allegations, the General Counsel must show that the employer excluded the applicants from the hiring process. ***FES***, 331 NLRB at 15. See also ***Allstate Power Vac***, 354 NLRB at 982 (finding that the General Counsel failed to satisfy this

burden with respect to the employer's alleged refusal to consider union salts for field technician positions because the GC established neither that the employer was hiring field technicians at the time nor that it had a policy of accepting applications when it was not hiring; furthermore, the employer's receptionist told the only salt who asked to file such an application that he could do so.).

As in ***Wright Line***, once the General Counsel's burden is satisfied, the burden shifts to the employer to show at the merits hearing that it would not have hired or considered the applicants even absent their union or protected activity. ***FES***, 331 NLRB at 12. See also ***Wismettac Asian Foods, Inc.***, 370 NLRB No. 35, slip op. at 1 n. 2 (2020) (employer failed to meet its defense burden where it did not establish it would have refused to consider rehiring employee for using profanity in absence of his union activity), affd. Nos. 20-73768, 21-70142, 2022 WL 313776 (9th Cir. 2022); ***Allstate Power Vac***, 354 NLRB at 982 (finding that the employer met this burden with respect to its alleged refusal to consider union salts for driver positions by showing that it would not have considered the union salts for those positions because none of them possessed CDLs and HAZMAT endorsements).

With respect to the compliance proceeding, the Board held that in refusal-to-hire cases where the "number of applicants exceeds the number of available jobs," the compliance proceeding may be used "to determine which of the applicants would have been hired." 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.

In refusal-to-consider cases where an opening arose after the merits hearing began—or where the General Counsel neither knew nor should have known of an opening that arose before the hearing began— the compliance proceeding is appropriately used to determine "whether the applicant would have been offered that job had he been given nondiscriminatory consideration." Id. at 16.

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 proffered evidence of unconditional offers of reinstatement because the Board must fashion a remedy. ***Kelley Bros. Nurseries***, 145 NLRB 285 n. 2 (1963), enf. denied 341 F.2d 433 (2d Cir. 1965). However, where evidence regarding offers of reinstatement has not been proffered or admitted in the merits hearing, the Board has found no prejudice by deferring the matter to the compliance proceeding. See ***Baker Mfg. Co.***, 269 NLRB 794 n. 2, 813 (1984), enfd. in part 759 F.2d 1219 (5th Cir. 1985). See also ***Charles E. McCauley Assoc., Inc.***, 266 NLRB 649 (1983) (on remand), affd. 760 F.2d 279 (11th Cir. 1985).

For additional cases where the Board deferred reinstatement issues to compliance, see ***Vesta VFO, LLC***, 373 NLRB No. 10, slip op. at 1 n. 2 (2024) (ordering reinstatement and backpay remedy but deferring to compliance respondent's argument that "reinstatement and any other remedial action is impossible" because it was no longer in business); ***Wismettac Asian Foods, Inc.***, above, slip op. at 1 n. 2 (ordering reinstatement and backpay remedy, but deferring to compliance whether respondent was required to rehire these discriminatees directly, as opposed to through a temporary employment agency); ***Solutia, Inc***., 357 NLRB 58, 65 n. 20 (2011) (ordering a reinstatement and backpay remedy, but deferring to compliance whether individual employees who opted to retire after the 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).

With respect to reinstating strikers, see ***Spike Enterprise, Inc***., 373 NLRB No. 41, slip op. at 14 n. 35 (2024) (leaving to compliance the determination of the number and identity of the unfair labor practice strikers covered by the Board's remedial order); ***Napleton Cadillac of Libertyville***, 369 NLRB No. 56, slip op. at 12 (2020) (leaving to compliance whether any of the strikers were entitled to immediate reinstatement as of the date they offered to return, rather than just placement on a preferential hiring list, because the evidence presented at trial "was, at best, sparse" regarding whether the employer hired permanent replacements before or after the date the strike converted from an economic to an unfair labor practice strike).

Restoration. Where a respondent-employer is on notice in the merits proceeding that the General Counsel is seeking a restoration order, it has "the opportunity and responsibility of adducing any relevant evidence [that such an order would be unduly burdensome] that was available to it at the time of the Board hearing." ***Dorsey Trailers, Inc***., 327 NLRB 835 n. 2 (1999), enf. denied in part 233 F.3d 831 (4th Cir. 2000). See also ***Mountaineer Petroleum***, 301 NLRB 801, 801–802, 816 (1991) (finding that an order requiring the employer to reinstitute its unlawfully subcontracted operations would be unduly burdensome based on evidence the employer introduced at the unfair labor practice hearing that it did not have the capital or credit standing to purchase, operate, insure, and maintain the tractors needed to do so). Any such evidence that became available only after the hearing closed may be introduced at the compliance stage. ***San Luis Trucking***, 352 NLRB 211, n. 5 (2008), reaffd. 356 NLRB 168 (2010), enfd. 479 F. Appx. 743 (9th Cir. 2012); ***Dorsey Trailers*****,** above, citing ***Lear Siegler, Inc***., 295 NLRB 857, 861–862 (1989).

Note that reviewing courts may be reluctant to uphold restoration orders in the absence of a record supporting the feasibility of reopening a closed operation, particularly where reopening involves the repurchase of assets and/or the lease of new premises. See, e.g., ***RAV Truck and Trailer Repairs, Inc.***, 997 F.3d 314, 330–331 (D.C. Cir. 2021) (collecting court and Board cases). However, this argument will not prevail where the employer sold or leased its facility after being put on notice that the General Counsel was seeking a restoration remedy. See, e.g., ***Quickway Transporation, Inc. v. NLRB***, 117 F.4th 789, 815–816 (6th Cir. 2024) (upholding Board's restoration order on rationale that employer "should not be able to knowingly benefit from its unlawful conduct").

Discriminatee misconduct/after-acquired evidence. An after-acquired evidence defense limits an employer's liability when the employer discovers evidence of "wrongdoing ... of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." ***McKennon v. Nashville Banner Publ'g Co***., 513 U.S. 352, 362–63 (1995). The Board applies different standards for evaluating after-acquired evidence of discriminatee misconduct depending on whether it involves misconduct before or after the discharge or refusal to hire.

Misconduct before discharge or refusal to hire. If an employer establishes that a discriminatee, before being discharged or denied employment, engaged in unprotected conduct for which the employer would have discharged or refused to hire any employee, reinstatement or instatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. See ***Aerotek, Inc.,*** 368 NLRB No. 94, slip op. at 1 (2019), and cases cited therein.

To invoke the after-acquired evidence doctrine, the employer must demonstrate that it was unaware of the alleged misconduct at the time of the employee's discharge. This is a "heavy burden," and "all ambiguities are resolved against the respondent." ***Starbucks Coffee Co***., 372

NLRB No. 50, slip op. at 30–32 (2023) (rejecting respondent's argument that discriminatees should be denied reinstatement and backpay because they made recordings in the workplace in violation of company policy and state law before their discharge, in part because the evidence showed respondent knew of this before their discharge but did not rely on it), affd. in relevant part, 125 F.4th 78, 93 (3d Cir. 2024). Cf. ***Frontier Telephone of Rochester, Inc***., 344 NLRB 1270, 1277 (2005) (declining to order reinstatement and a full backpay remedy where the employer discovered during the hearing that the discriminatee had forwarded company records that included customers' personal and financial information to his home email account), enfd. 181 F. Appx. 85 (2d Cir. 2006).

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 discharged or refused to hire the employee had respondent known of it earlier. See ***Tel Data Corp.***, 315 NLRB 364, 366–367 (1994) (judge erred in failing to consider whether the discriminatee's falsification of a timecard, which the employer discovered after his discharge, warranted denial of reinstatement and full backpay), enfd. in part 90 F.3d 1195 (6th Cir. 1996). 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 in light of the discriminatee's post-termination criminal record, 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."

But see ***Miller Plastic Products Inc v. NLRB***, 141 F.4th 492 (3d Cir. 2025) (finding that judge did not err by precluding respondent from eliciting after-acquired evidence at merits hearing); ***Tschiggfrie Properties, Ltd***., 365 NLRB 251, 252–253, 264 (2017) (judge recommended, and the Board agreed, that the respondent employer be allowed to establish in a subsequent compliance proceeding that the discharged discriminatee should not be reinstated and/or that his backpay should be tolled based on evidence the employer obtained during its post-discharge investigation of the discriminatee's conduct), enf. denied in part and remanded 896 F.3d 880 (8th Cir. 2018), reaffirmed 368 NLRB No. 120, slip op. at 9 n. 27 (2019); ***San Fernando Valley Advanced Imaging Center***, 31-CA-235878, unpub. Board order issued Jan. 17, 2025 (2025 WL 243150) (denying motion to reopen record to receive evidence of misconduct allegedly committed by discriminatee both before and after discharge; finding issues appropriately addressed during compliance proceeding).

For a case where the misconduct was first discovered in the compliance proceeding, see ***First Transit, Inc.***, 350 NLRB 825 (2007). In that case, the discriminatee admitted during the compliance hearing that she had a prior felony conviction for second degree robbery. The Board found that this warranted denying her reinstatement, as she had failed to disclose the prior felony conviction on her original employment application, and the employer would not have hired her if it had known she was a felon and had lied on the application. Nevertheless, the Board awarded her full backpay because the employer did not discover the misconduct until after the end of the backpay period covered by the compliance specification).

Note, however, that a respondent employer should not be permitted to use the unfair labor practice or compliance hearing as a "fishing expedition" to discover possible misconduct that would support an after-acquired evidence defense. See ***Santa Barbara News-Press***, 357 NLRB 452 n. 3 & 502 (2011), enf. denied on other grounds 702 F.3d 51 (D.C. Cir. 2012). See also ***Barger v. First Data Corp***., No. 1:17-cv-04869, 2018 WL 6591883, *10 (N.D. Ala. Dec. 14, 2018) ("Federal courts are wary of allowing 'fishing expedition discovery' by employers to find evidence of wrongdoing. Instead, they 'must have some preexisting basis to believe that after-acquired

evidence exists before it can take on additional discovery.'") (citations omitted); ***Bahrami v. Maxie Price Chevrolet-Oldsmobile, Inc.***, No. 1:12-cv-01762, 2013 WL 3800336, *4 (N.D. Ga. June 19, 2013) (quashing the employer's subpoenas of plaintiff's pre- and post-termination employment records); ***Perry v. Best Lock Corp***., No. 1:97-cv-01036, 1999 WL 33494858 (S.D. Ind. Jan. 21, 1999) (same), and cases cited there.

Post-discharge misconduct. The Board applies a different, "heightened" standard for after-acquired evidence of post-discharge misconduct. When the arguably disqualifying behavior occurs following the discriminatee's discharge, the Board will evaluate, not whether the employer would have discharged the discriminatee if still employed, but whether the employer proved "misconduct so flagrant as to render [the discriminatee] unfit for further service, or a threat to efficiency in the plant." ***United Parcel Service, Inc.***, 372 NLRB No. 158, slip op. at 23 (2023) (citations omitted). The Board has found that employers met this burden only in 'extraordinary situations,' such as when a discriminatee made death threats, hit a supervisor with a car, or threatened to report a probation violation in order to influence testimony at a Board hearing. Id., citing ***Fund for the Public Interest***, 360 NLRB 877, 877 (2014). The reason for this is because "[e]mployers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims' natural human reactions to the unlawful acts." Id., citing ***Hawaii Tribune Herald***, 356 NLRB 661, 662 (2011), enfd. sub nom. ***Stephens Media, LLC v. NLRB***, 677 F.3d 1241 (D.C. Cir. 2012)).

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 Plastic Compounds Inc. 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 376 (2011), supplemental proceedings 362 NLRB 360 (2015). Note that the ***Hoffman Plastic*** decision has been limited by several courts to preclude backpay awards for work not performed, while not impacting the award of damages, such as pension and welfare benefit fund contributions, for work actually performed. See, e.g., ***N. Atl. Carpenters Cent. Collection Agency v. Bos. Carpentry LLC***, 766 F.Supp. 3d 291, 294 (D. Mass. 2025) (permitting recovery of contested contributions to health and welfare funds for hours of work already performed). See also ***Lucas v. Jerusalem Cafe, LLC***, 721 F.3d 927, 935 (8th Cir. 2013) ("Far from concluding the NLRA did not protect unauthorized aliens for work *actually* performed, the *Hoffman* court—after considering Congress's intervening enactment of the [immigration laws]—reaffirmed its earlier holding ... that the NLRA applies to the *actual* employment of unauthorized aliens.").

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 848 n. 1 (2014); ***Concrete Form Walls***, 346 NLRB 831, 835 (2006), enfd. 225 F. 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); ***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 2006 (2011). In that case, the employer asserted, as an affirmative defense to the compliance specification, that the discriminatees (who had Hispanic surnames) were undocumented aliens, and it served trial subpoenas on each of them seeking various documents relating to that defense. The Board struck the employer's affirmative defense as applied to most of the discriminatees on the ground that, in response to the General Counsel's motion for a bill of particulars, the employer "had articulated no factual support (or reason to believe it could obtain such factual support)" for applying the defense to those individuals. The Board stated that "a reasonable belief that evidentiary support exists and can be obtained through . . . trial subpoenas . . . requires some articulable reason to believe that is the case." Id. at 2010–2011.

See also ***Rivera v. NIBCO, Inc***., 364 F.3d 1057, 1070–1072 (9th Cir. 2004) (rejecting employer's argument that the after-acquired evidence doctrine required the court to approve its request for discovery into the plaintiffs' immigration status, as the employer failed to come forward with any evidence that would justify limiting the plaintiffs' remedies, the requested discovery would therefore be a "fishing expedition," and such discovery could have a substantial chilling effect on bringing civil rights actions), rehearing en banc denied 384 F.3d 822 (2004).

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 compliance proceeding, see ***NLRB v. Domsey Trading Corp.*** in which the Second Circuit held that the employer was entitled to ask discriminatees direct questions in the compliance proceeding about their immigration status and to introduce testimony of its immigration expert. The court cautioned, however, that it is nonetheless appropriate to impose "the usual limits" on cross-examination and require an employer, "before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its [Immigration Reform and Control Act]-required verification of immigration status with regard to a particular claimant now seems questionable, or in error." 636 F.3d 33, 38–39 (2d Cir. 2011).

Identity of impacted employees. The Board in some circumstances has held that the identity of impacted employees can be determined at the compliance stage. See, e.g., ***Tec-Cast, Inc.***, 372 NLRB No. 90, slip op. at 1 n. 2 (2023) (identity of, and amounts owed to, employees impacted by an effects-bargaining violation); ***Spike Enterprise, Inc***., above (number and identity of unfair labor practice strikers covered by the Board's remedial order).

§ 16–402.6 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) (discussing the reasons for the policy and upholding it); ***Air Line Pilots Assn.***, 97 NLRB 929, 933 (1951). See also ***United States v. Janis***, 428 U.S. 433 (1976).

§ 16–402.7 Tape Recordings

General Rule. Tape recording issues most often arise in Board proceedings when an employee has secretly taped remarks of a company manager or supervisor during a meeting. Such recordings are generally admissible even if the taping violated state law. ***Cadillac of***

Naperville, Inc., 368 NLRB No. 3, slip op. at 1 n. 1 (2019), enfd. on point 14 F.4th 703 (D.C. Cir. 2021); ***Times Herald Record***, 334 NLRB 350, 354 (2001), enfd. sub nom. ***NLRB v. Orange County Publications***, 27 F. Appx. 64 (2d Cir. 2001); ***Williamhouse of California, Inc.***, 317 NLRB 699 n. 1, JD n. 2 (1995); ***Wellstream Corp.***, 313 NLRB 698, 711 (1994). See also ***Starbucks Coffee Co****.,* 372 NLRB No. 50, slip op. at 6–7 (2023) (enforcement of such a state law would be preempted if making the workplace recording constituted activity protected by Section 7 of the Act, such as where an employee made the recording to preserve evidence of what was said in a meeting with management for use in future employment-related actions that may arise), reconsideration denied 372 NLRB No. 102 (2023), enfd. in part 125 F.4th 78 (3d Cir. 2024).

However, a different result possibly might obtain if the manner of the recording violated the federal wiretapping statute (18 U.S.C. § 2510 et seq.); for example, if the person who secretly made the recording was not present during the meeting but recorded the remarks by "intercepting" them. See ***Earley v. Smoot***, 846 F.Supp. 451 (D. Md. 1994) (issuing a preliminary injunction barring a union member from using a tape recording in a disciplinary proceeding against a union officer, as the manner of the tape recording arguably violated the federal wiretapping statute, which provides for such injunctive relief). See also ***Earley v. Executive Board of United Transportation Union***, 957 F.Supp. 997 (N.D. Ohio 1996) (issuing permanent injunction).

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). See also ***NLRB v. Maywood Do-Nut Co.,*** 659 F.2d 108, 110 (9th Cir. 1981) (Board acted within its discretion by excluding from evidence the secret tape recordings of bargaining session).

Credibility of Person Making Recording. In ***McAllister Bros.***, 278 NLRB 601 n. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987), the Board expressly disavowed the judge's statement that the Board historically has taken a dim view of workers 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. See also ***Starbucks Coffee Co***., 372 NLRB No. 102, slip op. at 4 (2023) ("recording is not *malum in se*"), citing ***Opreyland Hotel***, 323 NLRB 723, 723 n. 3 (1997); ***Fleming Companies***, 336 NLRB 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' testimony), enfd. in part 349 F.3d 968 (7th Cir. 2003); ***NLRB v. Starbucks Corp***., 125 F.4th 78 (2024) (act of surreptitiously recording to defend against anticipated employer retaliation may constitute Section 7-protected conduct);***Stephens Media, LLC v. NLRB***, 677 F.3d 1241 (D.C. Cir. 2012) (rejecting the employer's argument that secretly recording a meeting is "so fundamentally dishonest and deceitful that it should be deemed categorically unprotected"), enfg. 356 NLRB 661 (2011).

Failure to introduce recording. The unexplained failure of a party to introduce an existing recording of an event into evidence (e.g. the meeting or conversation where a supervisor made an alleged unlawful threat) may support an adverse inference that it would not support the party's version of the event. See ***Gallup, Inc***., 349 NLRB 1213, 1299–1300 (2007) (drawing adverse inference against General Counsel).

Authentication of recordings is discussed in **§ 16–901.2**, below.

§ 16–402.8 State Agency Decisions

The Board receives into evidence and considers relevant decisions by state agencies but does not give the decisions controlling weight on unfair labor practice issues. See ***Cardiovascular Consultants of Nevada***, 323 NLRB 67 n. 2 (1997) (reversing the judge, the Board received a state unemployment compensation decision into evidence because established Board law holds them to be admissible but not controlling); ***Voith Industrial Services, Inc***., 363 NLRB 1020, 1031 n. 11 (2016) (decisions by state workplace standards and unemployment agencies were admitted into evidence but were not found controlling or persuasive because the decisions did not show they were reached after hearings in which the parties had a full and fair opportunity to present evidence, and did not reference the standards of proof applied, the specific evidence relied on, or the nature of any credibility determinations that may have been made); ***Whitesville Mill Service Co.***, 307 NLRB 937, 945 n. 6 (1992) (state agency unemployment decision 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). See also ***Pain Relief Centers, P.A***., 371 NLRB No. 70, slip op. at 2 (2020) (state nursing practice law and regulations did not by themselves determine whether nurse practitioner was a supervisor under Section 2(11) of the NLRA), enfd. Nos. 22-1366, 22-1582, 2023 WL 5380323 (4th Cir. 2023).

§ 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 . . . 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 ***Stroehmann Bros. Co***., 268 NLRB 1360, 1361 n. 10 (1984) (noting that ALJs are authorized to exclude such evidence under FRE 403 and affirming the judge's ruling doing so). See also **Mueller & Kirkpatrick, FEDEV § 4:12** (4th ed. Jul. 2025 Update); **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 403** (Apr. 2026 Update).

For additional Board cases upholding the judge's exclusion of evidence under FRE 403, see, e.g., ***Dupont Specialty Products USA, LLC***, 369 NLRB No. 117, slip op. at 1 n. 1 (2020) (judge did not abuse his discretion by rejecting the respondent's request to admit a document under seal and to seal the hearing room during its admission, as the probative value of the document was slight and the judge reasonably determined that its marginal relevance was outweighed by the administrative burden associated with a seal), enfd. Nos. 20-3179, 20-3480, 2021 WL 3579384 (3d Cir. Aug. 13, 2021); ***Dickens, Inc.***, 355 NLRB 255, 257 (2010) (judge properly exercised his discretion in terminating the unrepresented respondent's cross-examination of the alleged discriminatee, directing him to present his own testimony at that time, and subsequently cutting off his narrative testimony after several hours); ***J.S. Troup Electric, Inc.***, 344 NLRB 1009, 1010 (2005) (citing both FRE 403 and FRE 608(b) in upholding the judge's exclusion of primary and secondary evidence of the alleged discriminatee's false claim for unemployment or workers compensation benefits, notwithstanding that the judge broadly credited the discriminatee); ***University Medical Center***, 335 NLRB 1318 n. 1, 1342–1343 (2001)

(upholding judge's imposition of time limits on the presentation of the 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), enfd. by consent order sub nom. ***Teamsters Local Union No. 122 v. NLRB***, No. 01-1513, 2003 WL 880990 (D.C. Cir. 2003); ***NLRB v. Champa Linen Service***, 324 F.2d 28, 30 (10th Cir. 1963) (pre-FRE case endorsing the judge's refusal to permit cross-examination of the truth of a statement, which was alleged to be an 8(a)(1) violation, that a union official "stole a million dollars").

Note, there is authority that evidence should not be excluded in a bench trial based solely on "unfair prejudice" under FRE 403. See ***Gulf States Utilities Co. v. Ecodyne Corp***., 635 F.2d 517, 519 (5th Cir. 1981) (the weighing of probative and prejudicial value through Rule 403 "has no logical application to bench trials" insofar as trial judges are "able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity . . . [and] exclude those improper inferences from [consideration] in reaching a decision."). See also ***Schultz v. Butcher***, 24 F.3d 626, 632 (4th Cir. 1994) ("[I]n the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial."); ***United States v. Labona***, 689 F. Appx. 835, 838–39 (6th Cir. 2017) ("[C]ourts worry less about prejudicial effects in bench trials."); ***United States v. Ziska***, 267 F. Appx. 717, 719 (9th Cir. 2008) (bench trials before experienced judges "lessen[ ] the risk of potential unfair prejudice, if any"). See also **§§ 2–300 (**Duties of Trial Judge); **16–102** (FRE 102), above.

With respect to the use of "illustrative aids" to help the trier of fact understand the evidence or argument, see FRE 107, discussed in **§ 16–107**, above. With respect to the use of summaries to prove the content of voluminous materials, see FRE 1006, discussed in **§ 16–1006**, below.

§ 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' character may be admitted under Rules 607, 608, and 609.
> **(b) Other Crimes, Wrongs, or Acts.**
> **(1) Prohibited Uses.** Evidence of any other crime, wrong, or 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. . . .

Compare ***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 Rule 404(b) as their prior conduct was not "a material issue in the case"); and ***T.K. Productions Inc.***, 332 NLRB 110, 112 n. 3 (2000) (Rule 404 prohibited the GC from using respondent's prior settled conduct as evidence that respondent was likely to behave in the same manner in the current cases); with ***Overnite Transportation***

Co., 336 NLRB 387, 387–388 (2001) (judge did not violate FRE 404 by considering respondent's prior unfair labor practices as the judge did so only in the course of rejecting respondent's arguments that its witnesses would never collude to testify falsely and that it trained its supervisors not to become involved in decertification efforts); ***Kenworth Trucks of Philadelphia***, 236 NLRB 1299 n. 2 (1978) (Rule 404 does not bar use of prior unfair labor practice violations as "background evidence showing [employer's] strong and continuing union animus"), enfd. mem. 595 F.2d 1213 (3d Cir. 1979). See also **§§ 16–607**, **608**, **609**, below.

Note that there is conflicting authority whether Rule 404 is limited to natural, as opposed to corporate, "persons." See **Wright & Miller, 22B Fed. Prac. & Proc. Evid. § 5234** (2d ed. Apr. 2026 Update) (comparing cases and concluding that "the proper method of handling issues of corporate character remains an open question"). See also ***ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union***, No. 3:12-cv-1058, 2019 WL 1651038, at *17 (D. Or. Apr. 17, 2019). There, the court rejected the employer's motion in a § 301 contract enforcement action to exclude, as improper "character" evidence under FRE 404, evidence that it had disputes and exercised poor management style with others in order to show that it had similar disputes and poor management style with union members. The court therefore evaluated the evidence only under Rules 402 and 403.

§ 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, e.g., ***Ponderosa Granite Co***., 267 NLRB 212 n. 1 (1983) (judge in 8(a)(3) discharge case erred in admitting testimony by an employee of another store that the alleged discriminatee had written a bad check for supplies and then returned the supplies for cash, 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.

To qualify as evidence of a person's "habit," the evidence must show a regular semi-automatic practice of meeting a specific situation with specific conduct. See, e.g., ***Zubulake v. UBS Warburg LLC***, 382 F.Supp. 2d 536, 541–542 (S.D.N.Y. 2005). In that case, the defendant-employer asserted that the plaintiff was terminated for insubordination rather than for discriminatory reasons in violation of Title VII as she alleged. In support, the employer sought to introduce evidence that she had been insubordinate at her previous employment. The employer argued that the evidence was admissible under FRE 406 to show that she had a habit of acting

insubordinately. The court rejected the employer's argument, both because the prior instance did not involve the same specific circumstances and because it was insufficient to establish the type of frequent semi-automatic conduct envisioned under the rule.

To qualify as evidence of an organization's "routine practice," the evidence must show "that the organization acted with 'regularity over substantially all occasions or with substantially all other parties with whom the [organization] has had similar business transactions.'" ***SEC v. Lyon,*** 605 F.Supp. 2d 531, 543 (S.D.N.Y. 2009), quoting ***Mobil Exploration & Producing U.S., Inc. v. Cajun Const. Services, Inc***., 45 F.3d 96, 100 (5th Cir. 1995).

FRE 406 is often used when a witness has no present recollection of a particular event or action but can testify about the habit or routine practice. The rule allows the testimony as affirmative evidence of what actually occurred. See, e.g., ***Johnson v. Cook, Inc.***, 587 F.Supp. 2d 1020, 1026 (N.D. Ill. 2008) (HR generalist who reviewed applications for the employer, but did not specifically recall reviewing plaintiff's application, was properly allowed to testify that his rejection of the application was in conformity with his usual habit or practice of rejecting overqualified candidates for the START training program), affd. 327 F. Appx. 661, 664 (7th Cir. 2009).

§ 16–407 FRE 407. Subsequent Remedial Measures

FRE 407 states:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.
>
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

As indicated in the Advisory Committee Notes to FRE 407, subsequent remedial measures may include, not only repairs, but also rule or policy changes and disciplinary actions against employees. See also **Wright & Miller et al., 23 Fed. Prac. & Proc. Evid. § 5283** (2d ed. Apr. 2026 Update); and additional court cases cited in ***DH Long Point Mgt., LLC*****,** 369 NLRB No. 18, slip op. at 14 n. 40 (2020), enfd. per curiam 858 F. Appx. 366 (D.C. Cir. 2021). Courts have applied FRE 407 in cases involving alleged employment discrimination or disparate treatment. See, e.g., ***Estate of Hamilton v. City of New York***, 627 F.3d 50, 53 (2d Cir. 2010) (plaintiffs who alleged that they were discriminatorily denied promotions because of their national origin were properly barred under FRE 407 from presenting a supervisor's statement indicating that management subsequently decided to involve more individuals in the promotion process to prevent unsuccessful candidates from feeling that they were unfairly passed over); ***Stahl v. Board of Commissioners of Wyandotte County***, 244 F.Supp. 2d 1181 (D. Kan. 2003) (gender-discrimination plaintiff who was denied a promotion because she failed a physical fitness test was barred by FRE 407 from presenting evidence, as proof of her claim that the test was used as a pretext for discrimination, that defendant subsequently suspended its use of the test), affd. 101 F. Appx. 316, 321–322 (10th Cir. 2004).

However, FRE 407 does not bar evidence of a respondent's inconsistent discipline or actions as evidence of a discriminatory motive. See ***Grewcock v. Yale-New Haven Health Servs. Corp.***, No. 3:16-cv-00452, 2018 WL 1156224, *3 (D. Conn. March 4, 2018) ("Importantly,

the rule does not purport to bar a plaintiff from introducing any evidence at all about a defendant's inconsistent positions or conduct after it has engaged in the action that forms the basis for a plaintiff's lawsuit."). See also ***Smith v. City of Mesa***, No. CV-21-01012, 2023 WL 8368605, *6 (D. Ariz. 2023) (rejecting employer's Rule 407 objection and allowing, in a workplace religious-accommodation case, evidence of employer's subsequent measures to make religious discrimination less likely in the workplace, as the evidence was "probative of the [employer's] knowledge and conduct to provide religious accommodations."). Indeed, as previously discussed in **§ 16–402.2,** such disparate treatment evidence is routinely admitted and considered in evaluating whether a respondent discriminated against an employee because of union or other protected concerted activity.

With respect to the impeachment exception, it should be read narrowly and applied only when the subsequent remedial measure directly contradicts a witness's testimony. See ***Minter v. Prime Equipment Co***., 451 F.3d 1196, 1212–1213 (10th Cir. 2006), and cases cited there. See also **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 407** (Apr. 2026 Update).

§ 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 settlement offers or other statements during settlement discussions as evidence regarding the merits of the underlying claim that is the subject of the settlement. ***Shamrock Foods, Inc***., 369 NLRB No. 5, slip op. at 3 n. 15 (2020). For example, in ***St. George Warehouse, Inc.***, 349 NLRB 870, 874 (2007), the General Counsel sought to prove that the employer had engaged in unlawful surface bargaining during its first-contract negotiations with the newly certified union by, among other things, presenting evidence that the employer had made certain statements indicative of surface bargaining at a particular mediation session. Although the purpose of the mediation session was both to continue negotiating the first contract and to settle the pending surface bargaining allegations, the Board held that FRE 408 barred the GC from presenting the statements as evidence of surface bargaining because they were made while attempting to settle the surface bargaining allegations.

Rule 408 does not apply to a statement relevant to claims other than those being settled in the discussions. See ***Lenox Hill Hospital***, 327 NLRB 1065, 1067 n. 4 (1999) (Rule 408 did not bar grievance settlement discussions from being introduced in 8(a)(5) refusal-to-provide-information case as the discussions were not offered to show that respondent had violated the contract as alleged in the grievance, but to show that union's information request was relevant to the grievance). See also ***Westwide Winery, Inc. v. SMT Acquisitions, LLC***, 511 F.Supp. 3d 256, 265–267 (E.D.N.Y. 2021) (in action for breach of settlement agreement, Rule 408 did not bar evidence of the existence of the settlement agreement). However, FRE 408 may bar evidence of unlawful conduct committed during settlement discussions if the conduct is "so closely intertwined with the unfair labor

practices under discussion that they cannot be separated therefrom." ***Contee Sand & Gravel Co***., 274 NLRB 574 n. 1 (1985) (FRE 408 barred evidence that the respondent unlawfully refused to execute new collective-bargaining agreements with the union as they were negotiated while attempting to settle allegations that the respondent had unlawfully failed to abide by the existing contract).

FRE 408 also does not bar introduction of settlement discussions or proposals for purposes other than proving or disproving a disputed allegation or to impeach. See, e.g., ***El Super***, 367 NLRB No. 34, slip op. at 1 n. 1 (2018) (judge did not err by including in the hearing record his prehearing decision denying the respondent's motion for approval of a consent order, together with the motion and exhibits, as the judge did so to facilitate potential Board and court review of his decision and did not rely on the proposed consent order for any purpose prohibited by FRE 408).

Nor does FRE 408 bar evidence of independent unfair labor practices committed during settlement discussions, such as threats of retaliation for filing a charge or testifying in support of it. See ***Miami Systems Corp.***, 320 NLRB 71 n. 2 (1995) (FRE 408 did not bar evidence that the respondent's managers made unlawful threats during informal grievance settlement discussions that the company would terminate the third shift if the union pursued the grievance), enfd. in relevant part sub nom., ***Uforma/Shelby Business Forms v. NLRB***, 111 F.3d 1284, 1293–1294 (6th Cir. 1997). See also ***Shamrock Foods, Inc***., above (FRE 408 did not bar evidence that the respondent unlawfully offered the alleged discriminatee over four times his accrued backpay in return for waiving reinstatement); ***Cirker's Moving & Storage Co***., 313 NLRB 1318, 1326 (1994) (FRE 408 did not bar evidence that the respondent had unlawfully insisted during grievance settlement discussions that the discharged employee resign from his position as shop steward as a condition of reinstatement).

Note that, like other rules of evidence, FRE 408 is a rule of admissibility rather than discoverability. Thus, many if not most courts have held that it does not prevent a party from subpoenaing evidence relating to communications made during settlement negotiations and have refused to recognize a settlement privilege protecting such materials from discovery. See ***Manzo v. County of Santa Clara***, No. 5:17-cv-00221, 2019 WL 2866047, *3 (N.D. Cal. July 3, 2019); ***In re Subpoena to Commodity Futures Trading Comm***., 370 F.Supp. 2d 201, 211 (D.D.C. 2005), affd. in part on other grounds 439 F.3d 740 (D.C. Cir. 2006), and cases cited therein. But see ***Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc***., 332 F.3d 976, 979–982 (6th Cir. 2003) (communications made in furtherance of settlement negotiations are privileged and protected from third party discovery).

However, as with other subpoenaed materials, the party subpoenaing such communications must demonstrate that they are "relevant to [the] party's claim or defense and proportional to the needs of the case" under FRCP 26(b)(1). See **§§ 8–310** and **8–330**, above**.** And some courts have considered the policies underlying FRE 408 in declining to compel production of such communications under that Rule. See, e.g., ***Garner v. Ranka***, No. 1:18-cv-00860, 2020 WL 601898 (D.N.M. Feb. 7, 2020) (denying defendant's motion to compel production of settlement communications between the plaintiff and other defendants because the sole reason for seeking the documents was to use them as evidence of liability, which Rule 408 prohibits, and therefore they were not relevant to its defense); ***Washtenaw County Employees' Retirement System v. Walgreen Co.***, No. 15 C 3187, 2019 WL 6108220 (N.D. Ill. Nov. 15, 2019) (denying plaintiffs' motion to compel production of settlement communications between the defendant and the SEC because, although the documents [which the court reviewed in camera] were "loaded with assertions that [bore] upon the factual and legal issues" in the case and were therefore relevant, "their compelled production [was] not so important to the needs of the case as

to override the burden [on the policy goals underlying Rule 408] associated with such production under a Rule 26(b)(1) proportionality analysis" as the documents "were sourced from the factual discovery already being made available to [p]laintiffs.").

§ 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 1350 n. 3 (2007); **§ 8–475** (State Confidentiality Rules), above.

For a more detailed discussion of privileges, including the attorney-client privilege, the work-product doctrine, protections for Board agent testimony and files, and the mediator's and reporter's privileges, see **§ 8–400** et seq., above, dealing with subpoenas. The same principles apply where parties attempt to submit testimony or evidence involving such privileges during the hearing.

Protective orders may also be appropriate when testimony or evidence is offered that may include confidential information. For a more detailed discussion of protective orders, see **§ 8–600**, above.

§ 16–501.1 Fifth Amendment Claims

No requirement to stay proceeding. There is no requirement that civil or administrative proceedings be stayed pending the outcome of criminal proceedings. The judge may therefore properly deny a motion to stay based on a consideration and balancing of the particular circumstances and competing interests involved, including the extent to which the defendant's Fifth Amendment rights are implicated; the interests in going forward expeditiously with the civil litigation and the prejudice to plaintiffs of a delay; the burden that the civil proceeding would impose on the defendant; the convenience and efficient use of judicial resources of the civil court or agency; the interests of nonparties to the civil litigation; and the interests of the public in the pending civil and criminal litigation. See ***Keating v. Office of Thrift Supervision***, 45 F.3d 322, 325–326 (9th Cir. 1995) (ALJ did not abuse his discretion in deciding that the balance of factors favored going forward with the hearing despite the potential implication of Keating's Fifth Amendment rights). See also ***SEC v. Dresser Industries, Inc***., 628 F.2d 1368 (D.C. Cir. 1980); ***Diebold v. Civil Service Commission of St. Louis County***, 611 F.2d 697, 700–701 (8th Cir. 1979); ***United States v. White***, 589 F.2d 1283, 1286 (5th Cir. 1979); ***Luman v. Tanzler***, 411 F.2d 164, 167 (5th Cir. 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 advise or warn charged parties of their constitutional rights. ***F. J. Buckner Corp. v. NLRB***, 401 F.2d 910, 913–914 (9th Cir. 1968).

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 ***Holmes v. Postal Service***, 987 F.3d 1042, 1049 (Fed. Cir. 2021) ("while an employee is permitted to invoke [the] Fifth Amendment right to remain silent, 'an agency may still take into consideration and make an adverse inference from the failure of the employee to respond'") (citations omitted). See also ***Doe ex rel. Rudy-Glanzer v. Glanzer***, 232 F.3d 1258, 1264 (9th Cir. 2000); ***LaSalle Bank Lake View v. Seguban***, 54 F.3d 387, 389–391 (7th Cir. 1995).

For a Board case illustrating this principle, see ***Sunshine Piping, Inc.***, 351 NLRB 1371, 1378 n. 28 (2007) (finding that inference of respondent's unlawful motive for disciplining and terminating employee was supported by, among other things, supervisor's initial invocation of the Fifth Amendment, which showed 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:

> If the Administrative Law Judge deems the request appropriate, the Judge will recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board will take such action on the Administrative Law Judge's recommendation as it deems appropriate. Until the Board has issued the requested order, no individual who claims the privilege against self-incrimination will 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 the 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, at https://www.justice.gov/jm/jm-9-23000-witness-immunity#9-23.130.

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). There, the respondent union in an 8(b)(1)(A) violence case requested a 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 2222 n. 1, 2230 (2011).

As indicated in Section 102.31(c), absent a Board order, a witness asserting the privilege should not be required 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.

Subdivision (a) addresses when the intentional disclosure of certain privileged or protected communications in a federal proceeding may result in subject matter waiver with respect to other related and undisclosed communications. The Advisory Committee notes indicate that subject matter waiver under this subdivision is limited to "those unusual situations" where a party intentionally offers privileged or protected testimony or documents into evidence in a federal proceeding in a "selective, misleading and unfair manner," i.e., to gain a tactical advantage, such that "fairness requires" further disclosure of related, privileged or protected information. See also **Rice et al., 2 Attorney-Client Privilege in the U.S. § 9:30** (Dec. 2025 Update) ("Courts will not allow the attorney-client privilege to be used as both a sword and shield.").

Subdivision (b) addresses "inadvertent" disclosures, stating that such disclosures in a federal proceeding or to a federal officer or agency will not operate as a waiver if "reasonable steps" were taken to prevent disclosure and to rectify the error. The Advisory Committee Notes indicate that several factors may be considered in applying this rule, including the number of documents to be reviewed and the time constraints for production.

For a Board case applying subdivision (b), see ***Church Square Supermarket***, 356 NLRB 1357, 1369 n. 40 (2011) (rejecting the employer's contention that a document it had previously disclosed to the General Counsel in response to a subpoena was inadmissible under FRE 502, as the disclosure was not "inadvertent" and/or the employer had failed to take reasonable steps to prevent disclosure).

With respect to subdivision (d), a primary purpose of such orders is to expedite discovery and relieve the subpoenaed party from conducting a lengthy and costly privilege review. See ***Arconic Inc. v. Novelis Inc.,*** Civ. No. 17-1434, 2019 WL 911417, *3 (W.D. Pa. Feb. 25, 2019); Advisory Committee Notes to FRE 502(d) and attached Statement of Congressional Intent. For examples of such orders, see ***Swank v. DePuy Synthes Sales, Inc.***, No. 20-cv-01373, 2021 WL

5140262 (W.D. Wash. Nov. 4, 2021); ***United States v. AT&T Inc***., No. 17-cv-02511, 2017 WL 6329012 (D.D.C. Dec. 8, 2017); ***Bond v. Antero Resources Corp****.,* No. 17-cv-00014, 2017 WL 6397753 (S.D. Ohio Dec. 14, 2017). See also *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 Sedona Conf. J. 1, 150–51 (2018); *Model Draft of a Rule 502(d) Order*, 81 Fordham L. Rev. 1587, 1588 (2013). Note, however, that it is unclear whether administrative law judges have the authority to issue such orders. Neither the Board nor any circuit court appears to have addressed the issue since FRE 502 was enacted in 2008.

For a discussion regarding waiver of the attorney client privilege and work product protection generally, see **§§ 8–415** and **8–435**, 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 shall apply to Board proceedings "so far as practicable." 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 per curiam 65 F.3d 169 (6th Cir. 1995); ***Operating Engineers Local 9 (Fountain Sand)***, 210 NLRB 129 n. 1 (1974). See also **§ 6–210**, 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), enfd. 2011 WL 7645787 (6th Cir. 2011).

§ 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.

A witness' personal knowledge may include inferences and opinions, provided they are grounded in personal observation and experience. ***United States v. Flores-Rivera***, 787 F.3d 1, 22 (1st Cir. 2015); ***United States v. Whittemore,*** 776 F.3d 1074, 1082 (9th Cir. 2015). See, for example, ***Comet Fast Freight, Inc***., 262 NLRB 430, 432 n. 11 (1982). In that case, the Board held that a witness had the requisite personal knowledge under FRE 602 to testify that "other drivers did not mind driving the red truck like I did." The Board found that the record established sufficient factual predicates for the witness's testimony; specifically, that the witness was employed as a driver at the same terminal as the other drivers, the truck was driven by other drivers, and none of them ever complained that it was unsafe. See also **§ 16–701**, Opinion Testimony by Lay Witnesses, below.

Where a witness lacks sufficient memory or recall of an event to establish personal knowledge, the testimony may properly be excluded. See, for example, ***Warren -Higgins v. Indiana University Health, Inc.***, No. 21-1351, 2021 WL 4691609, *1 (7th Cir. Oct. 7, 2021) (district court properly excluded plaintiff-employee's testimony that supervisor made disparaging remarks about her, as she was unable to distinguish which comments she heard from the supervisor and which she heard secondhand from coworkers, and thus she failed to establish personal knowledge under FRE 602 sufficient to determine if her testimony was admissible nonhearsay or inadmissible hearsay).

However, a witness' lack of absolute certainty about the accuracy of the witness' observations (e.g., "I believe so" or "I think so") does not require exclusion of the testimony for lack of personal knowledge under FRE 602. See **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 602** (Apr. 2026 Update), citing ***M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.***, 681 F.2d 930, 933 (4th Cir. 1982). See also ***Sunbelt Rentals, Inc.***, 370 NLRB No. 102, slip op. at 2 n.6 (2021) (ALJ properly denied respondent's motion to strike union bargaining team member's testimony about bargaining meetings, notwithstanding that his memory was refreshed during the hearing using a prehearing affidavit that he prepared after consulting the notes of another bargaining team member and that was not placed in evidence, as he had personal knowledge of what happened at the bargaining meetings).

Nevertheless, lack of certainty may be considered in evaluating how much weight to give the testimony. See, e.g., ***Kroger Ltd. Partnership I Mid-Atlantic***, 368 NLRB No. 64, slip op. at 12 n. 23 (2019), enfd. sub nom. ***Food and Commercial Workers Union Local 400 v. NLRB***, 989 F.3d 1034 n. 1 (D.C. Cir. 2021). But see ***Double D Construction Group, Inc***., 339 NLRB 303, 304 (2003) (ALJ erred by giving no weight to a union official's testimony that he "believed" the company president saw him and the alleged discriminatee sitting together at the NLRB office following the election, while giving weight to the president's uncertain testimony that the discriminatee "could have been" at the NLRB office but that he did "not recall" him being there).

§ 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.

With respect to the practice of "affirming," the Advisory Committee's Note to Rule 603 states:

> The rule is designed to afford the flexibility required in dealing with religious adults…. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath," includes affirmation, 1 U.S.C. Sec. 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. Secs. 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. Sec. 1621.

See **§ 1–400**, Witness Oath, above, for a discussion of witness oaths in Board hearings. See also **§ 16–610**, Religious Beliefs or Opinions, below, for a discussion of the consideration of a witness's religious beliefs in making credibility determinations.

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 a sample interpreter's oath.

Interpreters are normally used to translate the testimony of a witness who is unable to understand or communicate sufficiently well in spoken English. See **Wright & Miller et al., 27 Fed. Prac. & Proc. Evid. § 6054 (2d ed. Apr. 2026 Update); Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 604** (Apr. 2026). This may include situations where a witness is able to understand and speak English but has such a heavy accent that the witness' English testimony would likely be unintelligible and result in significant errors or gaps in the record. See, e.g., ***Morgan v. Protuondo***, Nos. 98–CV–0064, 00–MISC–0066, 2003 WL 21817596, *7 (E.D.N.Y. 2003); ***Spavento v. United States,*** 939 F.Supp. 233 n. 1 (S.D.N.Y. 1996), affd. 162 F.3d 1148 (2d Cir. 1998).

Individuals certified by the Director of the Administrative Office of the United States Courts to serve as interpreters in federal court proceedings are typically considered qualified to interpret in Board proceedings. Where, however, a language features multiple dialects, interpreters certified for that language may not be sufficiently fluent in a witness's specific dialect. See generally **Wright & Miller et al.,** above, citing cases.

The hearing record should reflect that appointed interpreters are qualified (i.e., have the requisite ability to interpret for the witness). This is usually accomplished by having them state their training and experience interpreting in various venues, after which the parties may challenge those qualifications via cross-examination and/or extrinsic evidence from other sources. A party's failure to timely object may waive its objection to that individual's qualifications. Id.

§ 16–604.1 Simultaneous or Consecutive Interpretation

The Court Interpreters Act, 28 U.S.C. §§ 1827(k), states as follows with respect to interpretation in federal court proceedings:

> The interpretation provided by certified or otherwise qualified interpreters pursuant to this section shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States and in the consecutive mode for witnesses, except that the presiding judicial officer, sua sponte or on the motion of a party, may authorize a simultaneous, or consecutive interpretation when such officer determines after a hearing on the record that such interpretation will aid in the efficient administration of justice.

See also ***United States v. Heyer***, 740 F.3d 284, 290–291 (4th Cir. 2014).

The Board has not passed on whether simultaneous or consecutive interpretation is preferred or presumptively appropriate in unfair labor practice proceedings. Like other issues relating to the method or manner of presenting testimony and other evidence, this is an issue left to the sound discretion of the judge. See, e.g., ***Dickens, Inc***., 355 NLRB 255, 256–257 (2010) (judge acted within his discretion and in a commonsense manner to expedite the trial by ordering that tape recordings of alleged incidents be played in open court with simultaneous translation).

§ 16–604.2 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), reaffd. 355 NLRB 705 (2010) (judge advised that the interpreter's translation would constitute the transcribed record but allowed the 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 ***UNF, West, Inc***., 363 NLRB 886 n. 1 (2015), enfd. 844 F.3d 451 (5th Cir. 2016); ***Yaohan U.S.A. Corp.***, 319 NLRB 424 n. 2 (1995), enfd. mem. 121 F.3d 720 (9th Cir. 1997) (finding in both cases that the trial judge did not abuse his discretion in restricting the use of interpreters for witnesses who demonstrated some ability to converse in English).

Where interpretation is necessary, the judge should carefully monitor the translation process to ensure that both the interpreter and the witness understood the questions asked and that the witness's answers were accurately interpreted. See ***NLRB v. Del Rey Tortilleria, Inc.***, 787 F.2d 1118, 1121–1122 (7th Cir. 1986), enfg. 272 NLRB 1106, 1115 n. 21 (1984).

§ 16–604.3 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 affidavits certified at the bottom that the Board agent who translated them 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 Board affirmed the judge's rulings on exceptions. The judge's ruling was also 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.

§ 16–604.4 Assisting Hearing-Impaired Witness

In ***Manno Electric***, 321 NLRB 278 (1996), affd. per curiam 127 F.3d 34 (5th Cir. 1997), 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. The Board noted that, although respondents' counsel informed the judge of the problem, counsel made no request for such equipment; the president wore a hearing aid on each ear; 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 Americans with Disabilities Act, the Rehabilitation Act of 1973, nor the Board's Rules, require an unsolicited offer to provide such equipment. Id. at 278, n. 7.

In the federal courts, it is the policy of the Judicial Conference that a court must provide sign language interpreters or other auxiliary aids and services to participants who are deaf, hearing impaired, or have communication disabilities, and may provide these services to spectators when the court deems appropriate. The court should honor a participant's choice of auxiliary aid or service, unless it can show that: (1) another equally effective means of communication is available, or (2) use of the means chosen would result in a fundamental change in the nature of the judicial proceeding, or an undue financial or administrative burden. See Court Interpreting Guidance, Guide to Judiciary Policy, Vol. 5, § 255, at https://www.uscourts.gov/rules-policies/judiciary-policies/court-interpreting-guidance. See also ***Patrick v. Postal Service***, No. CV-10-0650, 2010 WL 4879161, *4 (D. Ariz. Nov. 23, 2010) (court found that it was required to provide an ASL language interpreter for hearing-impaired plaintiff in wrongful discharge action under Rehabilitation Act of 1973). But see ***United States v. Crandall***, 748 F.3d 476 (2d Cir. 2014) (failure of judge in criminal trial to appoint a sign language interpreter for defendant with hearing loss was not reversible error where defendant did not notify the judge of a continuous inability to hear the proceedings, there was considerable evidence that defendant's hearing was adequate, and the judge made accommodations when defendant at times had some difficulty

hearing, such as instructing witnesses to speak louder, moving defendant closer to the bench, and instructing defense counsel to notify the court if the defendant was having difficulty hearing any of the proceedings).

§ 16–604.5 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 GC "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 GC 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, 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* now in the majority) found that the judge properly exercised his discretion under the circumstances. See also ***Ji Shiang, Inc.***, 357 NLRB 1292, 1293 n. 4 (2011) (likewise rejecting the respondent's assertion that the General Counsel was required to pay for interpretation of its witnesses in the 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

There are several ways to impeach a witness, including (1) attacking the witness's personal knowledge or ability to perceive or recall the event; (2) contradicting the witness's testimony by eliciting or presenting inconsistent or contrary testimony or documents; (3) showing that the witness is biased or interested in the outcome; (4) attacking the witness's character for truthfulness; and (5) showing that the witness made prior inconsistent statements about the event. See ***Goode & Wellborn,*** **Courtroom Handbook Fed. Evid. Rule 607** (Apr. 2026 Update); **Graham, 4 Handbook of Fed. Evid. § 607:1** (10th ed. Nov. 2025 Update); **Wright & Miller et al., 28 Fed. Prac. & Proc. Evid. § 6101 et seq.** (2d ed. Apr. 2026 Update)**.**
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Specific limitations on (4) and (5) are set forth in FRE 608–610 and 613. See **§§ 16-608** (character for untruthfulness), **16-609** (evidence of criminal conviction), **16-610** (religious beliefs),

16–613 (prior inconsistent statements), below. See also **§ 16-607. 2**, below, about protecting the identities of prounion employees.

In general, a judge has discretion to also limit cross-examination of a witness "when it degenerates into a fishing expedition, when it becomes coercive, when there is no development of material or relevant evidence or of contradictions, where there is no reason to believe there are inconsistent declaration[s] or matters that would impeach the witnesses credibility, and where no foundation is laid that further inquiry would reasonably disclose some relevant new evidence." ***Bethlehem Temple Learning Center, Inc***., 330 NLRB 1177, 1184 (2000). See also ***United States v. Martínez-Vives***, 475 F.3d 48, 53–54 (1st Cir. 2007) ("The court may limit cross-examination if the defendant is unable to lay a proper evidentiary foundation. Where the theory of bias is inherently speculative, the court may prohibit cross-examiners from mounting fishing expeditions.").

However, 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 the respondent company's offer of proof that the General Counsel's main witness was biased against it and favored the alleged discriminatee because of the witness's "intimate relationship" with the company's former employee relations director who was hostile toward the company. The company argued that the former director was using the GC's main witness to give false testimony to show 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). See also ***United States v. Sanabria***, 645 F.3d 505, 514–15 (1st Cir. 2011) (distinguishing *United States v. Martínez-Vives*, above, and reversing the district court where it did not give the defendant a chance to lay any evidentiary foundation and the proposed cross-examination "was not, on its face, a speculation-fueled 'fishing expedition'" as defendant's counsel represented to the court personal knowledge of statements by the witness indicating potential bias or coercion).

§ 16–607.2 Limits on Impeachment: Names of Prounion 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 **§ 8–455**, 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 may disallow impeachment of a witness on a collateral matter that is not probative of the witness' propensity to testify untruthfully concerning a material issue. See ***Erickson's Inc***., 366 NLRB No. 171, slip op. at 1 n. 2, and 5 (2018) (judge precluded respondent's counsel from questioning a discriminatee about being terminated from a prior job as a police officer), enfd. 929 F.3d 393 (6th Cir. 2019); ***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); ***Operating Engineers Local 17 (Hertz Equipment Rental),*** 335 NLRB 578, 583 n. 11 (2001) (judge precluded respondent from cross-examining witness about whether she had ever been accused of stealing from the company); ***Ponderosa Granite Co***., 267 NLRB 212 n. 1 (1983) (judge should have excluded testimony by a deputy sheriff that eight bad check warrants had been issued against the alleged discriminatee, as it was not evidence of a criminal conviction and involved a mere collateral matter). See also ***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 substantially 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 848 n. 1 (2014), discussed in **§ 16–402.5,** 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 alleged 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 (id. at 305 n. 14) that the judge "arguably" could have refused to admit the evidence under FRE 608, citing ***Plumbers (AFL-CIO) Local 332 (Enterprise Industrial Piping Co.)***, 117 NLRB 995 n. 2 (1957) (trial examiner did not abuse his discretion in refusing to permit cross-examination concerning an employee's false statements on an unemployment insurance claim), enfd. sub nom. ***JJ White Inc. v. NLRB***, 252 F.2d 807 (3d Cir.1958).

For a court case discussing this issue, see ***United States v. Almeida-Perez***, 549 F.3d 1162, 1174–1175 (8th Cir. 2008). The court 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 violations of immigration laws were considered admissible because relevant to truthfulness (***United States v. Cardales***, 168 F.3d 548, 557 (1st Cir. 1999); ***United States v. Cambindo Valencia***, 609 F.2d 603, 633 (2d Cir. 1979)). 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); ***Rengifo v. Erevos Enterprises, Inc***., No. 06 Civ. 4266, 2007 WL 894376 (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).

Note also that, as with subpoenas seeking after-acquired evidence of misconduct (see **§ 16–402.5**, above), courts generally will not permit a party to engage in a "fishing expedition" to discover evidence of collateral matters relevant to impeachment. See ***Taylor v. City of New York***, No. 1:16-cv-07854, 2020 WL 6559412, *5 (S.D.N.Y. Nov. 9, 2020); ***Alvarado v. GC Dealer Services Inc.,*** No. 2:17-cv-01762, 2018 WL 6322188, *4 (E.D.N.Y. Dec. 3, 2018) ("Courts have required parties to establish good cause where discovery is sought solely to unearth potential impeachment material, and have not found such cause where the request is speculative.") (internal quotations and citations omitted).

§ 16–608.2 Use of extrinsic evidence

Even if testimony on a collateral matter is allowed, the use of extrinsic evidence to prove it in order to attack or support the witness's character for truthfulness is generally prohibited (unless it involves a criminal conviction, see **§16–609**, below). Thus, admission of extrinsic evidence of specific acts to attack a witness' response to questions about a collateral matter is not permitted, unless it tends to show bias or motive to testify untruthfully. See ***Sunshine Piping; Ponderosa Granite***; ***J.S. Troup Electric***, above.

An exception may be made, however, where a witness on direct is found to have "opened the door" for such evidence by making a broad disclaimer of misconduct. Relying on the concept of "impeachment by contradiction" (see **§ 16–607.1**, above), a judge may admit extrinsic, specific-instance evidence that would be otherwise inadmissible under Rules 404 and 608(b). See, e.g., ***United States v. Antonakeas***, 255 F.3d 714, 724 (9th Cir. 2001) (trial judge properly allowed testimony by a witness that the defendant had sold him cocaine, where the defendant on direct had made sweeping affirmative disavowals of having any involvement in drugs). "This approach has been justified on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral-fact doctrine." **Wright & Miller, 28 Fed. Prac. & Proc. Evid. § 6119** (2d ed. Apr. 2026 Update) (citing cases).

§ 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***, 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) (*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"), pet. for rev. denied 196 F. Appx. 59 (3d Cir. 2006).

§ 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' 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' 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), a witness may be impeached by reference to prior criminal convictions (not merely arrests) within the past 10 years if: (1) they are 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. Although FRE 609(a)(1) states that such convictions "must" be admitted in civil cases, this is expressly "subject to Rule 403," which states that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, undue delay, or wasting time. See **§ 16–403** above. In weighing the probative value against the prejudicial effect of admitting evidence of convictions, courts typically consider factors such as the kind of crime involved, when the conviction occurred, the importance of the witness' testimony to the case, the importance of the credibility of the defendant or the witness, and the impeachment value of the prior crime. See ***United States v. Young-Bey***, No. 21-661, 2024 WL 249181, *2 (D.D.C. Jan. 23, 2024) (citations omitted).

For a Board case applying FRE 609(a)(1) and (2), see ***Erickson's Inc***., 366 NLRB No. 171, slip op. at 1 n. 2 & 5 (2018) (precluding respondent's counsel from introducing evidence of a discriminatee's prior felony conviction within the last 10 years both because exclusion was proper under FRE 403 and because the conviction was not for a crime entailing any element of dishonesty of falsification), enfd. 929 F.3d 393 (6th Cir. 2019).

Under FRE 609(b) if more than 10 years have passed since the witness' 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 written notice" of the intent to use it. For a Board case applying FRE 609(b), see ***Pessoa Construction Co***., 361 NLRB 1174 n. 1 & 1177 n. 6 (2014) (judge in the 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), enfd. 632 F. Appx. 760, 768 (4th Cir. 2015).

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 witness's felony conviction within the last 10 years for carrying a concealed weapon, but nevertheless credited the witness's substantially corroborated testimony), 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) (court properly admitted testimony that two witnesses were members of a church in which defendant was the pastor for the purpose of showing that the witnesses may have been biased in favor of the defendant through their religious affiliation with him). See also, with respect to bias based on membership or affiliation with an organization generally, ***United States v. Abel***, 469 U.S. 45, 52 (1984) ("A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias.").

For a discussion of whether the judge should exclude evidence that a witness is a full or part-time minister, see ***United States 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), cert. denied 577 U.S. 847 (2015). For a discussion of witnesses "affirming" versus swearing an oath, see **§ 16–603,** above.

§ 16–611 FRE 611. Mode and Order of 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 Mode and Order of Examination

Pursuant to FRE 611(a), trial judges retain broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence. See ***Geders v. United States***, 425 U.S. 80 (1976); ***United States v. Baptista-Rodriguez***, 17 F.3d 1354 (11th Cir. 1994) (neither confrontation clause nor due process clause restricts trial judge's broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence). See also **Graham, 5 Handbook of Fed. Evid**. **§ 611:4** (10th ed. Nov. 2025 Update) ("the entire matter of order of presentation of evidence and mode of witness examination rests largely in the discretion of the trial judge").

Controlling the mode and order of examining witnesses and presenting evidence may include imposing reasonable time limits on the proceedings and limiting the number of witnesses who may testify about a particular fact to avoid cumulative, repetitive, or irrelevant testimony. See ***United States v. Quattrone*****,** 441 F.3d 153, 183 (2d Cir. 2006)**;** ***Lutz v. Glendale Union High School*****,** 403 F.3d 1061 (9th Cir. 2005). See also **§ 2–300**, above, regarding the ALJ's authority and duty to regulate the course of the hearing under Section 102.35(a)(6) of the Board's Rules. It may also include refusing to allow the recall of a witness who has already testified. See, e.g., ***New York Party Shuttle v. NLRB***, 18 F.4th 753, 769 (5th Cir. 2021) (ALJ in compliance proceeding did not abuse discretion by refusing to allow respondent to recall the Agency's compliance officer to testify about issues that respondent had already fully cross-examined her about). But see ***United States v. Edelin***, 128 F.Supp. 2d 23, 47 (D.D.C. 2001) (permitting government to present case in chronological order by recalling witnesses).

For a further discussion of these and other common issues arising under FRE 611(a) and the discretion of courts to deal with them—including common testimonial or evidentiary objections, presenting or examining witnesses out of turn, and restricting or placing limits on the number of witnesses or the amount of time to examine them—see **Graham**, above**; Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 611** (April 2024 Update); **Wright & Miller et al., 28 Fed. Prac. & Proc. Evid**. **§ 6164** (Apr. 2026 Update)**.**

§ 16–611.2 Cross-Examination Beyond the Scope

The first sentence of FRE 611(b) states that cross-examination should not go beyond the subject matter of direct or matters affecting the witness' credibility. However, the courts have generally defined "subject matter" broadly or liberally to include "reasonably related" matters. See **Wright & Miller**, above, **§ 6165; Goode & Wellborn**, above, citing ***United States v. Bozovich***, 782 F.3d 814, 816 (7th Cir. 2015). See also **Graham**, above, **§ 611:11,** citing ***United States v. Arnott***, 704 F.2d 322, 324 (6th Cir. 1983); ***United States v. Miranda-Uriarte***, 649 F.2d 1345, 1353 (9th Cir.1981); ***United States v. Green***, 648 F.2d 587, 594 (9th Cir.1981).

Further, the second sentence gives judges discretion to "allow inquiry into additional matters as if on direct examination." See, e.g., ***United States v. Wolford***, 614 F.2d 516, 519 (5th Cir. 1980) (finding no abuse of discretion where judge did so, notwithstanding that "it may have been more appropriate to require the government to recall [the defendant's witness] if it wished to question him about [matters not covered on direct].")

§ 16–611.3 Redirect, Recross, Rebuttal, and Surrebuttal Testimony

FRE 611 does not address redirect and recross examination or rebuttal and surrebuttal testimony. Judges therefore have broad discretion. See **Wright & Miller**, above, **§ 6164.** For Board cases addressing the matter, 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); ***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 ***United States 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 the party had an opportunity to introduce the evidence at an earlier point); ***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 counsel for the GC had 9 days' notice that he might desire the testimony but did not have the witness available at the time he sought to introduce it).

However, if the judge allows a new, significant matter to be raised on redirect or rebuttal, then recross or surrebuttal should also be permitted. See **Goode & Wellborn**, above; and **Wright & Miller et al.**, above.

§ 16–611.4 Leading Questions/Hostile Witnesses

FRE 611(c)(2) states that leading questions should not be permitted on direct examination except when necessary to develop the witness' testimony, or when questioning a hostile or adverse witness or a witness identified with an adverse party.

For examples where leading questions have been allowed to develop testimony, see ***W & M Properties of Connecticut, Inc.***, 348 NLRB 162 (2006) (judge did not err in permitting the 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); ***United States v. Torres***, 894 F.3d 305, 317 (D.C. Cir. 2018) (district court did not abuse its discretion in allowing leading questions where the witness was unusually hesitant and more open-ended questions had yielded lengthy delays and fragmentary responses).

The most common, clear-cut, and uncontested example of a witness who is hostile or adverse or identified with an adverse party in Board proceedings is a current manager or supervisor of a respondent employer who is called by the General Counsel under FRE 611(c) to testify about facts relevant to the employer's alleged unlawful conduct. Whether a *former* manager or supervisor qualifies may be less clear, however. It may depend on various factors, including the reasons the manager or supervisor separated from the employer, whether the

manager or supervisor was involved in the employer's alleged unlawful conduct or had an ongoing relationship with the employer's key witnesses, and whether the manager or supervisor exhibited hostility while testifying. See ***Doe by Watson v. Russell County School Board***, No. 1:16CV00045, 2018 WL 1089277 (W.D. Va. Feb. 28, 2018); ***Gibbons v. Village of Sauk Village***, No. 15 CV 4950, 2017 WL 4882334, *4 (N.D. Ill. Oct. 30, 2017); ***SEC v. Goldstone***, 317 F.R.D. 147, 167–169 (D.N.M. 2016); ***Robinson v. R.J. Reynolds Tobacco Co***., 86 F. Appx. 73, 76 (6th Cir. Jan. 8, 2004); ***Stahl v. Sun Microsystems, Inc***., 775 F.Supp. 1397, 1398 (D. Colo. 1991), and cases cited there.

A charging party discriminatee is also an adverse witness when called by the respondent. ***Security Services, Inc.***, 198 NLRB 1166 (1972) (pre-FRE determination that 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).

Other common examples where the courts have allowed leading questions on direct are where the questions relate to undisputed preliminary matters or where a witness' memory is exhausted. **Wright & Miller et al., 28 Fed. Prac. & Proc. Evid**. **§ 6168** (2d ed. Apr. 2026 Update); **Graham, 5 Handbook of Fed. Evid. § 611:8** (10th ed. Nov. 2025 Update) **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 611** (Apr. 2024 Update).

Whether a question is leading usually depends on its phrasing and context. Typically, a leading question suggests or hints at the answer the witness should give. For example, a question that begins with "Isn't it true that . . ." is clearly leading. Questions may also be leading where they may invoke a false memory or induce the witness to testify only about certain details that the examining party views as favorable rather than everything the witness remembers about an event. See the treatises cited above.

If counsel improperly uses leading questions, the judge should caution counsel against doing so, either on objection from opposing counsel or on the judge's own motion. ***Liberty Coach Co.***, 128 NLRB 160, 162 n. 7 (1960). Where a witness has already answered an improper leading question, the answer is admissible but entitled to "minimal weight." ***ODS Chauffeured Transportation***, 367 NLRB No. 87, slip op. at 1 n. 1 (2019), citing ***H.C. Thomson***, 230 NLRB 808 (1977).

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 FRE 611(c), the nonadverse party may be prohibited from asking leading questions on cross-examination except as necessary to focus the witness' attention on the subject matter and further develop the witness's prior testimony on direct. For example, it is improper for the nonadverse party who seeks to explain the witness' previous testimony on direct to incorporate the explanation in the question. See **Graham**, above, **§§ 611:8, 611:10**, and **611:12.** The judge, however, retains discretion to allow leading questions under FRE 611(a). See ***Alpha Display Paging, Inc. v. Motorola Communications***, 867 F.2d 1168, 1171 (8th Cir. 1989); ***Stahl v. Sun Microsystems***, above, 775 F.Supp. at 1398–1399; ***Pendleton v. Bob Frensley Chrysler Jeep Dodge Ram, Inc***., No. 3:14 C 02325, 2016 WL 10703740, *3 (M.D. Tenn. Aug. 17, 2016); and cases cited there.

§ 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 without explanation to call a witness reasonably assumed to be favorably disposed toward it. See ***Ready Mixed Concrete Co. v. NLRB***, 81 F.3d 1546, 1552 (10th Cir. 1996) (Board properly drew adverse inference of employer knowledge of union activity where employer failed to present any reason why it did not call company operations manager as witness).

"[T]he decision to draw an adverse inference lies within the discretion of the factfinder." ***JAM Productions, Ltd.***, 371 NLRB No. 26, slip op. at 16 n. 53 (2021), citing ***Tom Rice Buick***, 334 NLRB 785, 786 (2001). Further, the judge is not required to advise the party that an adverse inference is being considered before drawing the adverse inference. ***Northeast Center for Rehabilitation and Brain Injury***, 372 NLRB No. 35, slip op. at 1 n. 3 (2022), enfd. 94 F.4th 67 (D.C. Cir. 2024).

Current managers, supervisor, officers, or agents. The so-called "missing witness" rule is most often applied to a party's current managers, supervisors, officers, or agents. With respect to employers, see, e.g., ***Starbucks Corp.***, 374 NLRB No. 8, slip op. at 5, 9 (2024) (drawing adverse inference against the employer for failing to call its current manager to testify); ***United Parcel Service, Inc.,*** 372 NLRB No. 158, slip op. at 16, n. 68 (2023) (finding that judge appropriately drew adverse inference against respondent about testimony current supervisor would have provided); ***Sparks Restaurant***, 366 NLRB No. 97, slip op. at 9–10 (2018) (drawing adverse inference against the employer for failing to call its manager to testify), enfd. sub nom. ***Michael Cetta, Inc. v. NLRB***, 805 F. Appx. 2 (D.C. Cir. 2019); ***Martin Luther King, Sr. Nursing Center***, 231 NLRB 15 n. 1 (1977) (same, where the employer failed without explanation to call its supervisors to testify); ***Dayton Newspapers, Inc***., 339 NLRB 650, 664 (2003) (same, where employer failed to call a dispatcher who attended meetings between operations director and employees), enfd. in part 402 F.3d 651, 661–662 (6th Cir. 2005). Compare ***Quicken Loans, Inc***., 367 NLRB No. 112, slip op. at 3 n. 9 (2019) (judge erred in finding that a missing witness was an agent of the respondent employer simply because he was a current employee within the employer's control).

With respect to unions, see ***Government Employees (IBPO),*** 327 NLRB 676, 699 (1999) (drawing an adverse inference against the respondent union where it failed to call its president to testify), enfd. mem. 205 F.3d 1324 (2d Cir. 1999); and ***Vigo Industrial, LLC***, 363 NLRB 631, 635 (2015) (drawing an adverse inference from the failure of the General Counsel or charging party union to call the individual who served as the union co-chair of the particular labor-management committee meeting at issue), and cases cited there. See also ***Global Contact Services, Inc***., 29–RC–134071, unpub. Board order issued April 28, 2015 (2015 WL 1939736), at n. 1 (union's business agent may reasonably be presumed to be favorably disposed to union).

Other persons who would favor the party. The rule has also been applied to other witnesses who would reasonably be expected to favor a party. See, e.g., ***Equinox Holding, Inc***., 364 NLRB 1519 n. 1 (2016) (adverse inference was warranted where employer failed to corroborate manager's hearsay testimony by calling the employees who allegedly reported the objectionable preelection conduct to him); ***Desert Springs Hospital***, 363 NLRB 1824, 1829 (2016) (employer's failure to call an employee warranted an adverse inference where the employee's purported complaint to management was one of the reasons the alleged discriminatee was terminated), and cases cited there. Compare ***Quicken Loans, Inc***., above, 367 NLRB No. 112, slip op. at 3 (judge abused his discretion by drawing an adverse inference against the respondent employer for failing to call an employee to testify, as the employee was an

alleged discriminatee in the case and "as such would be reasonably disposed to testify *against* the Respondent and favorably to the General Counsel.").

Failure to question favorable witnesses. The judge may also draw an adverse inference where a party calls a favorable witness but fails to question that witness regarding a factual issue about which the witness would likely have knowledge. See ***Flexsteel Industries***, 316 NLRB 745, 757–758 (1995) (drawing adverse inference where respondent failed to ask the alleged discriminatee's direct supervisor, who it called to testify about other topics, why he issued the alleged unlawful negative evaluation to the alleged discriminatee, but instead called a manager to defend the evaluation, who offered only conclusory testimony), affd. mem. 83 F.3d 419 (5th Cir. 1996).

An adverse inference is inappropriate, however, in the following circumstances.

Former managers or supervisors. No adverse inference is drawn from the failure of a respondent to call a former manager or supervisor who is no longer under its control and cannot reasonably be assumed to be favorably disposed toward it. See ***Heart and Weight Institute***, 366 NLRB No. 53, slip op. at 1 n. 1 (2018), enfd. 827 F. Appx. 724 (9th Cir. 2020); ***Reno Hilton Resorts***, 326 NLRB 1421 n. 1 (1998), affd. 196 F.3d 1275, 1284 (D.C. Cir. 1999); ***Goldsmith Motors Corp.***, 310 NLRB 1279 n. 1 (1993) (declining to draw an adverse inference from the respondent employer's failure to call a former manager or supervisor), and cases cited there. The same is true with respect to a respondent's former agent. See ***Food & Commercial Workers Local 1439 (Rosauer's Supermarket)***, 275 NLRB 30, 35 n. 10 (1985) (declining to draw an adverse inference from the respondent union's failure to call its former representative).

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. ***JAM Productions, Ltd.,*** above; ***Pacific Green Trucking, Inc.***, 368 NLRB No. 14, slip op. at 4 (2019); ***Daikichi Corp.***, 335 NLRB 622 n. 4 (2001), enfd. per curiam 56 F. Appx. 516 (D.C. Cir. 2003); ***Torbitt & Castleman, Inc.***, 320 NLRB 907, 910 n. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997). But cf. ***Spurlino Materials***, 357 NLRB 1510, 1521 (2011) (fellow strikers were not mere bystander employees), enfd. 805 F.3d 1131 (D.C. Cir. 2015).

However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the GC 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).

Board agents. As discussed in **§ 8–440**, 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 the General Counsel's failure to call a Board agent to testify. ***Independent Stations Co.***, 284 NLRB 394 n. 1, 412, 415 (1987).

Unnecessary witnesses. An adverse inference is improper if the missing witness's testimony was unnecessary. See ***Laborers Local 242,*** 372 NLRB No. 111, slip op. at 1 n. 1 (2023) (judge properly declined to draw adverse inference from respondent's failure to call additional managers where testifying managers made their testimony unnecessary and cumulative); ***Michigan Bell Telephone Co.***,371 NLRB No. 63, slip op. at 2–3 (2022) (judge erred in drawing an adverse inference from respondent's failure to call a manager, as respondent had offered another manager whose credible testimony resolved the disputed factual issue). See also ***One Stop Kosher Supermarket***, 355 NLRB 1237, 1238 n. 3 (2010) (finding that no adverse

inference was warranted from the failure of the General Counsel or the charging party to call a rebuttal witness); ***Riley Stoker Corp***., 223 NLRB 1146, 1146–1147 (1976) (finding that no adverse inference was warranted from a discriminatee's failure to appear and testify), enfd. mem. 559 F.2d 1209 (3d Cir. 1977).

For other circumstances where an adverse inference is improper, see ***Auto Workers v. NLRB,*** 459 F.2d 1329, 1338 (D.C. Cir. 1972) (noting that an adverse inference for failing to present evidence is unwarranted if the party has good reason to believe the opponent has failed to meet the burden of proof or the opponent or the judge played a role in suppressing the evidence); ***JAM Productions, Ltd.***, above, slip op. at 13 n. 40 (denying employer's request for adverse inference against union-petitioner in representation case for failing to present evidence on particular issue where employer had the burden of proof on issue in question); ***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 F. Appx. 29 (D.C. Cir. 2002); ***Riverdale Nursing Home***, 317 NLRB 881, 882 (1995) (it is improper for the judge to rely on an adverse inference to fill an evidentiary gap in the General Counsel's case). Compare also ***Advocate South Suburban Hospital v. NLRB***, 468 F.3d 1038, 1048 n. 8 (7th Cir. 2006) (an adverse inference is warranted only when the missing witness was peculiarly in the power of the other party to produce)***.***

Effect or scope of adverse inference. An adverse inference that a nontestifying witness would not have corroborated a party's witness(es) does not necessarily warrant an inference that the nontestifying witness would have corroborated 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***, above (General Counsel's failure to call fellow strikers who witnessed the striker's conversation with a supervisor warranted an adverse inference that their testimony would not have supported the 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). See also ***Terracon, Inc***., 339 NLRB 221 n. 2, 246 (2003) (discrediting the General Counsel's employee witness notwithstanding the respondent's failure to corroborate the manager's contrary testimony by calling another manager who attended the subject meeting), affd. 361 F.3d 395 (7th Cir. 2004).

§ 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.** Unless 18 U.S.C. § 3500 [the Jencks Act] provides otherwise in a criminal case, an 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. . . .

Refreshing memory during testimony. 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 a document or some other item if appropriate and not improperly suggestive. The document or item may be used to refresh recollection even if it could not be introduced as evidence by the refreshing party. See **Wright & Miller et al., 28 Fed. Prac. & Proc. Evid. § 6184** (2d ed. Apr. 2026 Update); **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 612** (Apr. 2026 Update). See also ***Sunbelt Rentals, Inc***., 370 NLRB No. 102, slip op. at 2 n. 6 & 12 n. 26 (2021) (ALJ properly denied respondent's motion to strike union bargaining team member's testimony about bargaining meetings, notwithstanding that his memory was refreshed during the hearing using a prehearing affidavit that he prepared after consulting the notes of another bargaining team member and that was not placed in evidence, as he had personal knowledge of what happened at the bargaining meetings).

However, a judge has discretion to disallow using a document to refresh recollection where the circumstances indicate that the document might engender a false memory or be impermissibly suggestive. See treatises cited above. See also ***Drukker Communications***, 277 NLRB 418, 420 n. 18 (1985) (ALJ did not abuse discretion by refusing to permit respondent to use its lawyer's prehearing position statement to the regional director to refresh a witness's recollection).

As indicated in FRE 612(a)(1) and (b), when a writing has been used at the hearing to refresh a witness' memory, an adverse party is entitled to inspect it, cross-examine the witness about it, and to introduce the relevant portions into evidence. For a Board case addressing this issue, see ***J.G. Braun Co.***, 126 NLRB 368, 369 n. 3 (1960) (holding that where the respondent on cross-examination of a General Counsel witness had read portions of the witness' prehearing affidavit into the record to refresh his recollection, it was error for the judge to reject the GC's offer of the affidavit into evidence). See also FRE 106, Remainder of or Related Writings or Recorded Statements, above. But see discussion of Jencks statements, below.

Memory refreshed before testifying. As indicated in FRE 612(a)(2), if examination reveals that a witness's recollection was refreshed before testifying, the adverse party is afforded the same rights or options only if the judge determines that "justice requires" it. In evaluating what justice requires, courts balance the interests of the adverse party against the burden imposed on the witness, the other parties, and the court itself, considering various factors, including the importance of the witness's testimony, the extent to which the witness relied on the writings to refresh memory, whether there is evidence of a calculated plan to influence the testimony of the witness, whether production of the writings would delay or prolong the hearing because of their large number or unavailability, whether the writings are privileged attorney-client communications or protected work product, and whether the witness's credibility could be tested in a less burdensome way. See **Wright & Miller et al.,** above**, § 6185.**

See also ****CNN America, Inc.***, 352 NLRB 265 (2008) (holding that the ALJ erred in requiring the respondent to produce any documents reviewed by any witness within 6 months prior to the hearing, without first requiring the General Counsel to establish that the documents refreshed the witness's memory for the purpose of testifying and evaluating whether production of the documents is necessary in the interests of justice), supplemental proceedings 352 NLRB 448 (2008), 352 NLRB 675 (2008), and 353 NLRB 891 (2009), final decision and order issued 361 NLRB 439 (2014), reconsideration denied 362 NLRB 293 (2015), rev. granted in part and denied in part 865 F.3d 740 (D.C. Cir. 2017).

In Camera inspection and redaction. In camera review may assist the judge in determining whether "justice requires" production where the writings were reviewed to refresh memory before testifying. In addition, as indicated in FRE 612(b), it may be necessary for the judge to review the writings in camera to determine if unrelated matter should be redacted before being produced to the adverse party. See, e.g., ***Computer Sciences Corp***., 258 NLRB 641, 645 n. 9 (1981).

Waiver of attorney-client privilege and work-product protection. Courts differ on whether the attorney-client privilege or work-product protection is waived when a witness has reviewed the subject document during or before the hearing to refresh the witness's memory. Some hold that the privilege or protection is always waived. Others, however, reject such an automatic waiver, citing the Advisory Committee Notes to Rule 612 ("The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory. House Report No. 93-650."), and the fact that Rule 612 distinguishes between documents reviewed during and before trial. Consistent with that distinction, these courts usually find waiver in the former situation but apply a balancing test in the latter. See **Graham, 5 Handbook of Fed. Evid. § 612:2** (10th ed. Nov. 2025 update); **Wright & Miller et al.,** above, **§ 6188.**

Jencks statements. Rule 612(b) expressly limits a party's right to a writing used to refresh recollection where the writing is subject to the Jencks Act, which prohibits disclosure in a criminal proceeding of affidavits or other statements in the government's possession that were made or adopted by a government witness until after the witness has testified on direct. As discussed in **§ 16–613.1**, below**,** the Board has applied the Jencks rule to prehearing affidavits and statements in the General Counsel's possession.

For a court case addressing the Jencks exception, see ***United States v. Jimenez***, 613 F.2d 1373, 1377 (5th Cir. 1980) (where government surveillance agent had refreshed memory by report, Jencks Act meant disclosure could be delayed until direct testimony was done, but it "also mandates disclosure at that time" on defense request). For additional discussion of the exception, including disagreement among commentators over its effect, see **Wright & Miller, et al**., above, **§ 6186.**

§ 16–613 FRE 613. Witness' 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.** Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after 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. 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 using 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 on request, but not to the witness.

However, unless the judge orders otherwise, subsection (b) requires that the witness be given an opportunity to explain or deny the statement, and that the opposing party be afforded an opportunity to examine the witness about it, before extrinsic evidence of the inconsistent statement is admitted into evidence. As indicated in the Advisory Committee Notes to the 2024 rule amendments, the judge has discretion to delay the opportunity to explain or deny, or even dispense with the requirement altogether. Examples include where the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or where a prior opportunity was impossible because the statement was not discovered until after the witness testified.

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) ("[W]here 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 **§ 16–604.3**, 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 ***Circus Circus Casinos, Inc. v. NLRB***, 961 F.3d 469, 485 (D.C. Cir. 2020), denying enf. and remanding 366 NLRB No. 110 (2018); ***Sutter East Bay Hospitals v. NLRB***, 687 F.3d 424, 437–438 (D.C. Cir. 2012), remanding 357 NLRB 259 (2011).

§ 16–613.1 Jencks Statements

The following rules apply to disclosure of prior statements given to the General Counsel, which are subject to 18 U.S.C. § 3500, known as the Jencks Act, and Section 102.118 of the Board's Rules and Regulations.

Disclosure required only on request after witness testifies. As discussed in **§ 8–445**, above, 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(a) and (e) of the Board's Rules, pretrial statements given by a GC witness need not be released or produced unless and until disclosure has been requested after the witness has testified, and then only for the purpose of cross examination. Courts addressing the issue have found that this regulation provides necessary protection to witnesses testifying against the entity that controls their livelihood, and that it does not violate the employer's right to due process. See, e.g., ***NLRB v. Champion Laboratories, Inc.***, 99 F.3d 223, 226 (7th Cir. 1996), citing ***P.S.C. Resources, Inc. v. NLRB***, 576 F.2d 380, 387 (1st Cir.1978).

The proper time for a disclosure request is at the close of the direct examination; it is premature to demand production earlier. ***United States v. Martinez*****,** 151 F.3d 384, 390–391 (5th Cir. 1998). See also ***Edwards Trucking Co***., 129 NLRB 385, 386 n. 1 (1960).

Similarly, the judge may properly deny a request for production after the witness has completed testifying and been excused. ***Walsh Lumpkin Wholesale Drug Co.***, 129 NLRB 294, 296 (1960) (upholding judge's denial of the 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 the close of trial after the last witness had been excused), enfd. sub nom. ***Sara Lee Bakery Group v. NLRB***, 296 F.3d 292 (4th Cir. 2002); ***SBC California***, 344 NLRB 243 n. 3 (2005) (request for affidavit was untimely when made at the close of respondent's case).

The Board has also upheld the judge's discretion to deny a belated request for production even where the witness has not yet been excused. See ***Raymond Engineering***, 286 NLRB 1210, 1214 n. 7 (1987) (judge declined to order production of a witness's affidavit after the General Counsel finished questioning the witness on redirect examination), cited with approval in ***SBC California***, above. See also ***I-O Services***, 218 NLRB 566 n. 1 (1975), where 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 the respondent had failed to show prejudice, as the witness's testimony was "in many respects merely cumulative and fully corroborated by other witnesses, including witnesses presented by the Respondent."

Disclosure limited to Jencks "statements." Section 102.118(g) defines a Jencks "statement" to mean:

> (1) A written statement made by the witness and signed or otherwise adopted or approved by the witness; or
>
> (2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement.

See also ***Rosenberg v. United States***, 360 U.S. 367, 371–372 (1959) (a signed letter constitutes a producible "statement").

Must be signed or adopted. 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(e). ***Caterpillar, Inc.***, 313 NLRB 626 n. 2, 627 n. 4 (1993); ***Coca-Cola Bottling Co.***, 250 NLRB 1341, 1342 (1980). See also ***National Specialties Installations, Inc.***, 344 NLRB 191 (2005) (a written notice from a 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).

Must be a description or account of past events. As discussed in **§ 8–510** above, the Board has held that contemporaneous remarks captured on an audio or video tape are not a Jencks "statement" subject to Section 102.118(e) 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); ***Dickens, Inc***., 355 NLRB 255 n. 7 (2010).

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. Section

102.118(e)(2) of the Board's rules sets forth the procedure to be followed where the statement arguably contains unrelated matter, stating:

> If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Administrative Law Judge will order the General Counsel to deliver the statement for the inspection of the Administrative Law Judge *in camera*.

It further provides that, upon receipt of such a statement, the judge "will excise the portions of such statement which do not relate to the subject matter of the testimony of the witness," although the judge "has discretion to decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings." Id.

For cases applying this rule, see ***Caterpillar, Inc***., 313 NLRB 626, 627 (1993) (judge erred in directing production of witness statements without regard to the specific issues or cases involved and regardless of whether the witness had testified in connection with those cases or issues); ***Tejas Electrical Services, Inc.***, 338 NLRB 416 n. 2 (2002) (judge erred in summarily denying the 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).

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). In that case, the respondent requested all notes that a witness had passed to the General Counsel during the trial. The GC 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.

Limitations apply to copies in possession of others. No waiver results from the General Counsel's witnesses giving copies of their confidential Board 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 GC, even if the charging party union also has a copy of them. ***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 given to the General Counsel by individuals who were not called to testify).

A respondent likewise may not subpoena the affidavits from the witnesses themselves; indeed, the Board has held that an employer violates Section 8(a)(1) of the Act by serving employees with subpoenas seeking the affidavits and other related communications and documents they gave to the General Counsel. The Board considers such requests to be inherently coercive and unlawful. See ***Starbucks Corp.,*** 373 NLRB No. 101, slip op. at 6–7 (2024), vacated and remanded, 173 F.4th 230 (5th Cir. 2026); ***Tracy Toyota***, 372 NLRB No. 101, slip op. at 6 (2023), citing ***U.S. Cosmetics Corp***., 368 NLRB No. 21, slip op. at 1, 29 (2019); ***Santa Barbara News-Press***, 358 NLRB 1539, 1541–1542 (2012), reaffd. 361 NLRB 903 (2014), enfd. per curiam sub nom. ***Ampersand Publishing, LLC v. NLRB***, No. 15–1074, 2017 WL 1314946 (D.C. Cir. March 3, 2017).

Respondent not entitled to statements never in the General Counsel's possession. The Jencks rule does not compel disclosure of a pretrial witness statement that was given to the charging party and was never in the possession of the General Counsel. See ***Tidelands Marine Service, Inc***., 140 NLRB 288, 289 n. 4 (1962), enfd. 338 F.2d 44 (5th Cir. 1964).

Respondent not entitled to statements of its own witness. A respondent is not entitled to Jencks statements of its own witness, i.e., a witness the respondent called to testify. ***Clear Channel Outdoor, Inc.***, 346 NLRB 696 n. 1 (2006). Accord ***Lion Elastomers LLC***, 369 NLRB No. 88, slip op. at 1 n. 2 & 8 n. 9 (2020). 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 a Jencks statement given by the charging party, as the charging party was called by respondent as an adverse witness). See also ***NLRB v. Duquesne Electric Co.***, 518 F.2d 701, 705 (3d Cir. 1975). The court there upheld the ALJ's application of *Kenrich Petrochemicals* where the respondent called a discriminatee to testify, noting that FRCP 43(b) [now FRE 611(c)] only authorizes leading questions, not cross-examination. However, the court 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.

Board law is unclear regarding whether a respondent is entitled to Jencks statements of its own manager, supervisor, officer, or agent after being called by the General Counsel as an adverse witness under FRE 611(c). It may depend on whether the witness gave testimony adverse or damaging to the respondent. See generally ***Sherwin v. United States***, 320 F.2d 137, 156 n. 12 (9th Cir. 1963) ("The production required by the [Jencks] Act is restricted to production for impeachment purposes. *Palermo v. United States*, 360 U.S. 343, 349, 79 S. Ct. 1217, 3 L.Ed.2d 1287."); ***United States v. Bradford***, No. 2:17-CR-101, 2017 WL 4699261, *2 (N.D. Ind. Oct. 19, 2017) ("Jencks production is intended to allow a defendant the opportunity to impeach an adverse witness with her own earlier, potentially contradictory, statements. *See* ***United States v. Allen,*** 798 F.2d 985, 998 (7th Cir. 1986).

Charging party entitled to statements given by respondent 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 a witness 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) (judge did not err in granting the charging party union's request, after the respondent's general manager had been called and examined by the respondent and cross-examined by the General Counsel, to review a pretrial statement the general manager had given to the Regional Office during its investigation of the charge).

The same is true if a witness was called and examined as an adverse witness by the General Counsel. See ***Parts Depot***, 332 NLRB 670 (2000) (applying the rationale of *Senftner* to require the General Counsel to provide the charging party, for purposes of cross-examination and impeachment, with the pretrial affidavit of a company supervisor after she had been called and examined by the GC as an adverse witness under FRE 611(c)), enfd. 24 F. Appx. 1 (D.C. Cir. 2001).

Board law is unclear whether a charging party may demand a copy of a witness's Jencks statement before or after the charging party itself calls the witness as an adverse or hostile witness under FRE 611(c). However, based on the holdings in ***Kenrich Petrochemicals*** and ***Duquesne Electric***, above, it appears likely that the Board and the courts would uphold a judge's ruling or order declining to require disclosure of the statement.

Duty to search for statements. In ***Albertson's, Inc.***, Case 27–CA–13390, unpub. Board order issued Jan. 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 GC's request to restrict the search to the same Regional Office where the pending charges were filed. However, it ruled that the GC 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 1), 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 (1961).

With respect to retaining the statement, in ***Wal-Mart Stores, Inc***., 339 NLRB 64 (2003), the Board held that a Jencks statement may not be retained after the close of the hearing. After the witness has testified, the exception to the general prohibition against using Board files under Section 102.118 of the Board's Rules no longer applies and the prohibition of the rule is restored.

With respect to retaining a Jencks statement *during* the hearing, even after the witness has been cross-examined, see ***Cadillac of Naperville, Inc***., 368 NLRB No. 3, slip op. at 1 n. 1 (2019), enfd. 14 F.4th 703 (D.C. Cir. 2021). There, the Board held that the judge did not abuse his discretion in denying the respondent employer's request to do so. The Board stated that the judge's ruling was "consistent with Board precedent and neither unreasonable nor an interference with the Respondent's case." In support, it quoted the Board's statement in ***Wal-Mart Stores***, above, that "the plain meaning of Sec. 102.118(b) [now 102.118(e)] of the Board's Rules and Regulations limits the purpose of disclosure [of witness statements] to cross-examination."

There may, however, be circumstances where a respondent may appropriately be allowed to retain a statement throughout the trial. See NLRB Casehandling Manual (Part 1), Sec. 10394.9 (providing that, on request, the respondent may be permitted to retain the copies throughout the trial for legitimate trial purposes, returning them at the close of the trial unless 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, and **§ 2–410**, Grounds Asserted for Disqualification, above.

§ 16–615 FRE 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

FRE 615 states:

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) one officer or employee of a party that is not a natural person, if that officer or employee has been designated as the party's representative by its attorney;

(3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

See **Chapter 11,** Sequestration of Witnesses, for a discussion of FRE 615 and the Board's application of it. See also **§ 1–300,** setting forth a 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.

A lay witness' opinion must be based on personal knowledge or observations. See, e.g., ***UCSF Stanford Health Care***, 335 NLRB 488, 532 (2001) (testimony of the respondent's witnesses did not qualify as lay opinion testimony under FRE 701 because the testimony was not based on first-hand knowledge or observations), enfd. 325 F.3d 334 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004); ***Scafidi v. B. Braun Medical, Inc.***, No. 8:22-cv-2772, 2024 WL 382397, *5 (M.D. Fla. Feb. 1, 2024) (Title VII plaintiff precluded from adducing lay opinion testimony by her former coworkers about the company's motive for terminating her where they had no personal knowledge of company's termination decision).

In general, lay witnesses are not qualified to make legal conclusions. ***In re Dickson***, 655 F.3d 585, 592 n.4 (6th Cir. 2011). For a further discussion of witness testimony on ultimate and legal issues, see **§ 16–704**, below.

§ 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 the proponent demonstrates to the court that it is more likely than not that:
> **(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's opinion reflects a reliable application of the principles and methods to the facts of the case.

Pursuant to FRE 104(a), opposing counsel may voir dire a proffered expert witness before the witness is permitted to offer an opinion. See **§ 16–104.1**, above. Such questions may support a motion to exclude evidence for failure to satisfy the requirements of FRE 702.

The Board accords judges significant discretion in determining whether to allow expert testimony. See ***Dupont Specialty Products USA, LLC***, 369 NLRB No. 117, slip op. at 1 n. 1 (2020) (holding that the judge did not abuse his discretion by refusing to permit the respondent company to introduce expert testimony regarding workplace safety regulations, hazards, and mitigation efforts at the plant, as the record clearly established, and it was undisputed, that there were significant hazards at the plant and the expert testimony would have been largely cumulative of testimony by the company's chief of emergency services), enfd. Nos. 20-3179, 20-3480, 2021 WL 3579384 (3d Cir. Aug. 13, 2021). See also ***California Gas Transport***, 355 NLRB 465 n. 1 (2010) (judge in backpay proceeding did not err in refusing to hear respondent's proffered expert testimony that the Board's methodology for determining the interim earnings of self-employed discriminatees was flawed).

For other case examples, see ***Chemical Solvents, Inc***., 362 NLRB 1469, 1491 (2015) (rejecting the respondent's proffered expert witness testimony, in an 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); ***National Extrusion & Mfg. Co.***, 357 NLRB 127, 154–155, n. 29 (2011) (rejecting, in a case alleging an 8(a)(5) refusal to provide health insurance-information, the General Counsel's proffered expert witness testimony 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), enfd. 700 F.3d 551 (D.C. Cir. 2012), rehearing en banc denied Dec. 19, 2014; ***UCSF Stanford Health Care***, 335 NLRB at 531–532 (rejecting the respondent's proffered expert witness testimony regarding the effect of union or employee solicitation and distribution on patients and their families, as respondent had not shown that the testimony was based on more than subjective belief or was reliable).

See also ***Cedars-Sinai Medical Center***, 31–CA–143038, unpub. Board order issued Dec. 1, 2015 (2015 WL 7769416). The complaint in that case alleged that the respondent's mandatory arbitration provision violated 8(a)(1) because it would reasonably be construed by employees to

preclude the filing of NLRB charges. Respondent sought to call two witnesses: 1) its recruitment manager to testify that the company's employees are proficient in English and have completed high school; and 2) a linguistics expert to testify that a reasonable employee having these characteristics would not interpret the respondent's mandatory arbitration provision to preclude the filing of NLRB charges. The Board held that the ALJ did not abuse his discretion in barring the testimony of both witnesses as irrelevant.

§ 16–702.1 Polygraph Evidence

A majority of federal courts leave admission of polygraph evidence to the discretion of the trial court. However, "[p]olygraph evidence has faced sharp criticism, largely because of serious doubts about its scientific or probative value." ***United States v. Resnick***, 823 F.3d 888, 896 (7th Cir. 2016). For this reason, such evidence is often excluded on the basis of *Daubert*/Rule 702 or Rule 403 or both. See, e.g., ***United States v. Henderson***, 409 F.3d 1293, 1303 (9th Cir. 2005); ***United States v. Lea***, 249 F.3d 632, 638–639 (7th Cir. 2001). See **§ 16–403**, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons and **§ 16–702**, Testimony by Expert Witnesses.

For Board cases addressing polygraph evidence, see ***J.C. Penney Co.***, 172 NLRB 1279 (1968), enfd. in relevant part 416 F.2d 702, 705 (7th Cir. 1969); ***Ackerman Mfg. Co***., 241 NLRB 621, 622 n. 1 (1979).

§ 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,*** 357 NLRB 127, 155, n. 29 (2011) (rejecting the General Counsel's proffered expert witness testimony in part because of failure to give advance notice to the respondent), enfd. 700 F.3d 551 (D.C. Cir. 2012), rehearing en banc denied Dec. 19, 2014. See also **§§ 16–102** and **16-403**, above.

However, there is no requirement to create and produce an expert's report in the manner required by FRCP 26(a)(2)(B) in the context of federal civil discovery. ***McDonald's USA, LLC,*** 2–CA–093893, unpub. Board order issued Jan. 16, 2018 (2018 WL 447422) (holding that "there is no demonstrated need for an expert report that cannot be met by alternative measures such as granting a continuance, if appropriate, after the . . . expert has testified, despite the inherent delay that would result").

§ 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 expert's analysis and conclusions are flawed. See ***Raley's***, 348 NLRB 382, 562–563 (2006) (handwriting expert's testimony about signatures on a petition was based on flawed premises); ***H. B. Zachry Co.***, 319 NLRB 967, 979–980 (1995) (basis for management professor's opinion about the 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 the 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 n. 6 (2006) (judge in the 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), enfd. 260 F. Appx. 607 (4th Cir. 2008).

The foregoing rulings are consistent with the Supreme Court's expression in ***General Electric Co. v. Joiner***, 522 U.S. 136, 146 (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 701 (lay witness) or Rule 702 (expert witness), as well as Rule 403.

Thus, 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 126 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.

In the employment discrimination context, federal courts distinguish between permissible opinions about an employer's discriminatory motive and impermissible legal conclusions such as directly opining that a defendant "violated anti-discrimination laws." See ***Houston v. Smith***, No. 24-cv-00934, 2025 WL 2662960, slip op. at *7 (D. Colo. Sept. 17, 2025) (citing cases). See also ***Torres v. County of Oakland***, 758 F.2d 147, 151 (6th Cir. 1985) (trial court erred in allowing defendant to ask its director whether she believed plaintiff had been "discriminated against" because of her national origin, as the question called for an improper legal conclusion, noting that director instead could have been asked whether she believed plaintiff's national origin had "motivated" the hiring decision)

Rule 704 does not override Rule 702's gatekeeping requirements, and ultimate-issue testimony that does not otherwise satisfy Rule 702 requirements for expert testimony remains excludable. ***Houston v. Smith***, above, slip op. at *6. See, e.g., ***Huey v. United Parcel Service, Inc.***, 165 F.3d 1084, 1087 (7th Cir.1999) (district court correctly excluded expert witness testimony, in absence of statistical or other scientific analysis, that plaintiff was discharged in retaliation for filing race discrimination claim). See also **Graham, 6 Handbook of Fed. Evid. § 704:1** (10th ed. Nov. 2025 Update); **Wright & Miller et al., 29 Fed. Prac. & Proc. Evid. § 6284** (Apr. 2026 Update).

§ 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); ***H & M International Transportation, Inc***., 22-CA-089596, unpub. Board order issued May 23, 2014 (2014 WL 2194514) (upholding the 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).

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

§ 16–801.1 Purpose of Evidence: Truth of the Matter Asserted

As indicated in FRE 801(c)(2), an out-of-court statement is hearsay only if it is offered "to prove the truth of the matter asserted in the statement." The following are examples of statements that are nonhearsay because they are not offered for that purpose.

Statement offered only to show it was made. See, e.g., ***West Texas Hotels, Inc***., 324 NLRB 1141, 1141 n. 1 (1997) (testimony that employees voiced concerns about management was admissible nonhearsay evidence under 801(c) to show that the statements were made and the alleged discriminatee's related actions were therefore concerted).

Statement offered only to show the effect the statement had on the hearer. See, e.g., ***Salem Hospital Corp***., 363 NLRB 515 n. 1 (2015) (allowing union official's testimony that hospital's nurses told a union organizer that the hospital was planning to close certain units, as the testimony was offered only to show the effect it had on the union organizer, specifically her decision to request information and bargaining regarding the closure). A common example of such statements are reports or complaints about an employee's conduct when they are offered, not to prove that the conduct occurred, but because the employer claimed to rely on them in taking adverse action against the employee. See, e.g., ***Khungar v. Access Community Health Network***, 985 F.3d 565, 576 (7th Cir. 2021) (staff and patient complaints about discharged physician); ***Kitchen v. BASF***, 952 F.3d 247, 255 (5th Cir. 2020) (physician's report to manager that discharged employee had tested positive for alcohol); ***Zamora v. Board of Education for Las Cruces***, 553 Fed. Appx. 786, 790 (10th Cir. 2014) (report detailing employee's violation of employer's sexual harassment and compensatory time policies).

Statement offered to show knowledge and disparate treatment. See, e.g., ***McDaniel v. Loyola Univ. Medical Center***, 606 F.Supp. 3d 776, 791–792 (N.D. Ill. 2022) (admitting over hearsay objection crude and vulgar work emails demonstrating unprofessional conduct by plaintiff's former coworkers who, unlike plaintiff, were not disciplined for unprofessional conduct); ***Eschert v. City of Charlotte***, No. 3:16-cv-295, 2017 WL 3633275, *7 (W.D.N.C. Aug. 23, 2017) (admitting screenshots of Facebook posts by plaintiff's former coworkers to show that allegedly similarly situated individuals posted public statements akin to plaintiff's Facebook posts with little or no disciplinary action).

Statement by witness offered to impeach or rehabilitate that witness's credibility. As such statements are not offered for the truth of the matter asserted, the requirements in Rule 801(d) for admitting sworn inconsistent testimony or prior consistent statements for the truth of the matter asserted need not be met. See **30B Wright & Miller, Federal Practice and Procedure, § 6728** (2d ed. Apr. 2026 Update), and **§ 16–801.2**, below.

Statements that have independent significance ("verbal acts"). If an out-of-court statement actually affects the legal rights of the parties, or legal consequences flow from the fact that the words were said, the statement itself is not hearsay. Common examples are words or documents associated with the formation of an agreement or contract, and statements that give notice or constitute threats. See **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 801** (Apr. 2026 Update); **Wright & Miller**, above. See also ***Carpenters Local 257 (DAT Construction)***, 290 NLRB 538 n. 2 (1988) (job applicant's testimony that employer's president told him to "go to work Monday with your tools" was admissible nonhearsay evidence that manager was offering him a job); ***West Texas Hotels,*** above (complaints by other employees showed that alleged discriminatee's related actions were "concerted" within the meaning of the Act).

Statements indicating what was in the public realm (news articles). See ***Ho v. Marathon Patent Group, Inc.***, No. EDCV 21-339, 2022 WL 1600048, *7 (C.D. Cal. Feb. 11, 2022) ("Pursuant to [FRE] 201(b), courts may take judicial notice of news articles to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.") (quotations and case citations omitted). Note also that, under FRE 803(16), a newspaper article

published before 1998 is admissible as an exception to the rule against hearsay. See **§ 16–803**, below; ***SEC v. Collector's Coffee, Inc.***, No. 19 Civ. 4355, 2023 WL 3575428, *2 (S.D.N.Y. May 22, 2023) (admitting 1948 news article as FRE 803(16) "ancient document"), report and recommendation adopted 2023 WL 3862662 (S.D.N.Y. Jun. 7, 2023).

§ 16–801.2 Prior Statements

As discussed above, prior statements that are not offered for the truth of the matter asserted are nonhearsay under 801(c). Prior statements may also be admitted as nonhearsay evidence for the truth of the matter asserted provided that the circumstances listed in 801(d) are met.

Inconsistent prior statements (801(d)(1)(A)). Where an employee witness gives testimony inconsistent from the witness's 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). There, the Board remanded for consideration of the posthearing affidavit of a major witness indicating that most of her testimony at the hearing was false. On remand the judge, disbelieving the recanting affidavit, reaffirmed his original findings, which the Board adopted.

Prior consistent statements (801(d)(1)(B)). The first clause (i) of FRE 801(d)(1)(B) permits the introduction of a declarant's prior consistent statements to rebut an express or implied charge of recent fabrication or improper influence or motive. To be admissible under this clause, the prior consistent statement must have been made before the charged fabrication, influence, or motive came into being. ***Tome v. United States***, 513 U.S. 150, 167 (1995).

For a Board case applying this rule, see ***Pagerly Detective and Security Agency, Inc.***, 273 NLRB 494 n. 1 (1984), affd. 784 F.2d 1132 (D.C. Cir. 1986). There, the judge excluded, as inadmissible hearsay, testimony offered by the General Counsel that, shortly after meeting with the employer's president, the discharged employee told another employee the same thing he testified to at the hearing about what the employer's president said to him during the meeting. The Board held that the judge should have permitted the testimony of the prior consistent statement under FRE 801(d)(1)(B) because the respondent had "vigorously attacked the veracity" of the discharged employee's testimony about what the president said to him.

Not all impeachment may be sufficient to trigger the applicability of Rule 801(d)(1)(B)(i). See **Mueller & Kirkpatrick, FEDEV § 8:39** (4th ed. Aug. 2023 Update) ("[A]ttacks by prior inconsistent statements[ ] do not *themselves* amount to charges of fabrication, influence, or motive . . .Ordinarily, attacks suggesting untruthful disposition (bad character for truth and veracity), or some lack or defect in sensory or mental capacity, do *not* usually suggest fabrication, improper influence or motive . . . [T]he meaning or direction of the impeaching attack is critical. If there is doubt on that score, the judge may ask the attacking party to describe [the] purpose . . .").

The second clause (ii) of FRE 801(d)(1)(B), which was subsequently added in 2014, also allows use of prior consistent statements to rehabilitate the declarant's credibility as a witness when attacked on another ground. This clause allows use of prior consistent statements to "rebut other attacks on a witness—such as charges of inconsistency or faulty memory." Advisory Committee Note to 2014 Amendment. For a case applying this rule, see ***United States v. Flores***, 945 F.3d 687, 705 (2d Cir. 2019) (permitting government to introduce prior consistent statements contained in its primary witness's notes and reports in light of the defendant's opening arguments challenging that witness's memory).

§ 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). See, e.g., ***Ferguson Enterprises, Inc***., 355 NLRB 1121 n. 2 (2010) (supervisor's statements to an employee were nonhearsay admissions under FRE 801(d)(2)), enfd. No. 11–1086, 2011 WL 7645787 (6th Cir. 2011); ***Times Union***, 356 NLRB 1339 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).

Courts do not require that the agent have been specifically authorized to make a statement on the particular subject in question but rather have been broadly authorized to speak concerning the matter. See ***Young v. James Green Management., Inc.,*** 327 F.3d 616, 622 n. 2 (7th Cir. 2003), citing ***Wilkinson v. Carnival Cruise Lines, Inc.***, 920 F.2d 1560, 1566 (11th Cir. 1991). A purported agent's classification as an independent contractor, as opposed to an employee, is not controlling; rather, ordinary agency principles apply. See, e.g., ***Cruz v. Farmers Insurance Exchange***, 42 F.4th 1205, 1211–1212 (10th Cir. 2022) (finding manager's racist comment about terminated salesman to be a party-opponent admission and direct evidence of discrimination by the company, despite company's classification of manager as an independent contractor, as the evidence showed manager acted at the direction and on behalf of the company).

Affidavits 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 statement 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), enfd. 182 F.3d 622 (8th Cir. 1999); ***Hogan Masonry***, 314 NLRB 332, 333 n. 1 (1994); ***United Technologies Corp.***, 310 NLRB 1126, 1127 n. 1 (1993), enfd. mem. sub. nom. **NLRB v. Pratt & Whitney**, 29 F.3d 621 (2d Cir. 1994); ***Massillon Community Hospital***, 282 NLRB 675 n. 5 (1987). See also ***MCPC v. NLRB***, 813 F.3d 475, 493 n. 13 (3d Cir. 2016). Indeed, the Board has held that it is reversible error for the judge to refuse to admit a position statement into evidence. ***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 n. 5 (2005); ***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), enfd. 531 F.3d 321 (4th Cir. 2008). 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***, 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, 1024–1026 (2001), enfd. 309 F.3d 452 (7th Cir. 2002). 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 1510 n. 1, 1514 n. 18, 1516 n. 20 (2011), enfd. 805 F.3d 1131 (D.C. Cir. 2015). The Board has also held that a lawyer's position statement can be used to impeach the lawyer's conflicting testimony at the trial. ***Harowe Servo Controls, Inc.***, 250 NLRB 958, 1033 (1980).

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 statement); ***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) (statement in the lawyer's brief to the judge), enfd. 791 F.2d 619 (7th Cir. 1986); ***Riverwoods Chappaqua Corp. v. Marine Midland Bank***, 30 F.3d 339, 343 (2d Cir. 1994) (representation in counsel's opening statement).

Statements in pleadings. Generally, documents contained in General Counsel's Exhibit 1 are limited to the so-called "formal papers" (charges, pleadings, motions, orders, and other similar documents), and are therefore offered and received as merely procedural documents. ***Colorado Symphony Assoc***., 366 NLRB No. 60, slip op. at 4 n. 5 (2018). See also ***Operating Engineers Local 627***, 368 NLRB No. 39, JD. at 3 n. 2 (2019) (compliance proceeding). Thus, they generally do not constitute substantive evidence unless they contain an admission.

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); ***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); ***Boydston Electric, Inc.***, 331 NLRB 1450, 1451 (2000) (holding that the judge erred in finding, based on the evidence at trial, that the alleged discriminatee was not discharged, in light of the respondent's previous admission to the discharge in its answer).

With respect to admissions in withdrawn or superseded answers, see ***D. A. Collins Refractories***, 272 NLRB 931, 932 (1984) (admission loses its binding effect when an amended pleading is filed; judge erred by not, despite amended pleading, allowing party to explain and/or rebut admission). See also **Graham, 6 Handbook of Fed. Evid. § 801:26** (10th ed. Nov. 2025 Update) (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,*** above.

Opening statements and briefs. Like statements in a position statement and an answer, statements by counsel in an opening statement or a brief may be used against the party as admissions. See ***Tracy Toyota***, 372 NLRB No. 101, slip op. at 4–5 (2023); ***Performance Friction Corp.***, 335 NLRB 1117, 1149 (2001); ***McGaw of Puerto Rico, Inc.***, 322 NLRB 438, 448 (1996), enfd. 135 F.3d 1 (1st Cir. 1997); ***Molon Motor and Coil Corp.***, 302 NLRB 138, 139 n. 7 (1991), enfd. on other grounds 965 F.2d 523 (7th Cir. 1992). Even a statement by counsel in a legal brief in a related case may be found admissible against a party. ***Purgess v. Sharrock***, 33 F.3d 134, 143–144 (2d Cir. 1994) (court properly admitted statement by defense counsel in a memorandum of law filed in support of defendants' motion to dismiss the complaint in an earlier related case).

Statements in form of opinion or legal conclusion. See ***Casino Pauma***, 362 NLRB 421, 423 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 the casino's argument that the Board lacked jurisdiction).

Statements by alleged discriminatees. An alleged discriminatee who has not filed a charge in the proceeding is not a party-opponent under FRE 801(d)(2). Thus, affidavits or statements of noncharging-party discriminatees are generally not admissible as substantive evidence. See the ALJ's ruling in ***Vencor Hospital Los Angeles***, 324 NLRB 234, 235 n. 5 (1997), which was subsequently cited and followed in ***Performance Friction Corp.***, 335 NLRB at 1120–1121, 1141. But see **§ 16–801.2**, Affidavit of Recanting Witness, above.

It appears uncertain, however, whether an alleged discriminatee who is also a charging party constitutes a party opponent within the meaning of FRE 801(d)(2). In ***UNITE HERE (Sams Town Hotel)***, 357 NLRB 38, 39 (2011), the ALJ discredited the chargingparty/discriminatee based on both her demeanor and another witness's testimony about a prior inconsistent statement she made, which the ALJ found was admissible as nonhearsay under FRE 801(d)(2) because she was a party opponent under that rule. However, on exceptions, the Board specifically noted that it relied solely on the ALJ's demeanor-based findings in adopting his credibility findings. See also ***Unga Painting Corp.***, 237 NLRB 1306, 1307 (1978), discussed in **Chapter 11** on sequestration of witnesses, above (applying a partial exclusion policy to alleged discriminatees even if they are also charging parties excepted from exclusion under FRE 615(a)). And compare, in the context of EEOC actions, ***EEOC v. Placer ARC***, No. 2:13-cv-0577, 2016 WL 74032 (E.D. Cal. Jan. 7, 2016) (holding that statements made by the individual charging party in the EEOC action were admissible as statements of an opposing party under Rule 801(d)(2)); ***EEOC v. Triangle Catering, LLC***, No. 5:15-CV-00016, 2017 WL 818261, *3 (E.D.N.C. March 1, 2017) (same); ***EEOC v. Rent-A-Center East, Inc***., 303 F.Supp. 3d 739, 742–744 (C.D. Ill. 2018) (disagreeing with *Placer* and *Triangle Catering* and ruling to the contrary).

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(1) (present sense impression) and/or 803(6) (records of regularly conducted activity: business records), discussed more fully below in **§§ 16–803.1 and 16–803.6.**

Establishing that declarant was an agent of a party. The party asserting that a statement is admissible nonhearsay under FRE 801(d)(2)(D) bears the burden of establishing that the statement was made by a party's agent or employee on a matter within the scope and during the time of that relationship. See, e.g., ***United States v. Aetna, Inc***., No. 1:16-cv-1494, 2016 WL 8738426, *2 (D.D.C. Nov. 30, 2016), citing ***Gilmore v. Palestinian Interim Self-Gov't Authority***, 53 F.Supp. 3d 191, 205–206 (D.D.C. 2014), affd. 843 F.3d 958 (D.C. Cir. 2016). This is consistent with the general rule that the burden of proving an agency relationship is on the party asserting its existence. See ***Tyson Fresh Meats, Inc***., 343 NLRB 1335, 1336 (2004) (employer established that union stewards who talked with employees waiting in line to vote had actual and apparent authority to represent union); ***Pan-Oston Co***., 336 NLRB 305, 306 (2001) (General Counsel failed to prove a group leader who committed allegedly unlawful conduct was an agent of the employer based on actual or apparent authority merely because of his title and because he attended supervisory meetings).

As indicated in FRE 801(d)(2), the declarant's own statement may be considered but is insufficient by itself to establish that the declarant was acting as an agent of a party. Thus, there must be independent direct or circumstantial evidence that an agency relationship existed and that the statement was made within the scope of the agency relationship. See, e.g., ***Gomez v. Rivera Rodriguez***, 344 F.3d 103, 116 (1st Cir. 2003); ***United States v. Portsmouth Paving Corp***., 694 F.2d 312, 321 (4th Cir. 1982); ***Jones v. Discount Auto Parts, LLC***, No. 6:16-cv-138, 2017 WL 1396477, *5 (M.D. Fla. April 19, 2017); ***Ungerbuehler v. FDIC***, No. 5:08–CV–20, 2010 WL 3732205, *7 (E.D. Ky. Sept. 20, 2010), and cases cited therein.

For Board cases addressing whether a sufficient independent showing was made, see, e.g., ***U.S. Ecology Corp***., 331 NLRB 223, 225 n. 12 (2000) (individual's statement to employee was inadmissible hearsay as the employee's description of the individual as a "supervisor" was insufficient by itself to find that he was an agent of the employer), enfd. 26 F. Appx. 435 (6th Cir. 2001); ***Laborers Local 270***, 285 NLRB 1026, 1028 (1987) (statements by business manager's wife were inadmissible hearsay as the evidence failed to establish that she was an agent of the respondent union based on either actual or apparent authority or ratification). See also ***Delchamps, Inc.***, 330 NLRB 1310, 1318 (2000) (supervisor's statement to employee on supervisor's last day employment was admissible nonhearsay as the evidence showed the supervisor was still on the premises and made the statement during his normal working hours, and the employer failed to establish that he was told to leave early).

Statements by party's predecessor-in-interest. The final sentence in 801(d)(2) provides that, if a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party. As indicated in the Advisory Committee Notes to the 2024 rule amendments, this means that when a party stands in the shoes of a declarant or the declarant's principal— such as a successor whose potential liability is derived from the predecessor—hearsay statements made by the declarant or principal are admissible against the party.

§ 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). Thus, ALJs are not precluded from admitting hearsay and affording it the weight they believe to be appropriate based upon other record evidence. ***Conley Trucking***, 349 NLRB 308, 310–312 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). See also ***NLRB v. St. George Warehouse***, 645 F.3d 666, 674–675 (3d Cir. 2011) (finding Board properly admitted hearsay testimony regarding discriminatee's search for work), enfg. 355 NLRB No. 81 (2010).

§ 16–802.1 Corroborated hearsay

Hearsay evidence is admissible in Board proceedings "if it is 'rationally probative in force and . . . corroborated by something more than the slightest amount of other evidence.'" ***CEMEX Construction Materials Pacific, LLC***, 372 NLRB No. 130, slip op. at 4 n. 24 (2023), citing ***Meyers Transport of New York, Inc.***, 338 NLRB 958, 969 (2003). See also ***Rome Electrical Systems***, 356 NLRB 170 n. 4 (2010) (Board "may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable"); ***Midland Hilton,*** above (affirming the judge's ruling admitting "highly probative" hearsay testimony corroborated by a number of witnesses); ***RC Aluminum Industries, Inc***., 343 NLRB 939, 940 (2004) (affirming the judge's ruling admitting corroborated hearsay); ***Dauman Pallet, Inc.***, 314 NLRB 185, 186 (1994) (overturning the judge's exclusion of corroborated hearsay and according it weight). Cf. ***W. D. Manor Mechanical Contractors, Inc***., 357 NLRB 1526 (2011) (uncorroborated hearsay is entitled to "little weight"); ***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 requirements for admission under the Federal Rules or Board decisions. 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); ***T.L.C. St. Petersburg***, 307 NLRB 605 (1992) (judge properly accorded no weight, on the issue of the 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), affd. mem. 985 F.2d 579 (11th Cir. 1993). See also ***IATSI Local 8 (Elliott Lewis Convention Services)***, 369 NLRB No. 67, slip op. at 1 n.1 (2020), enfd. Nos. 20-1980, 20-2199, 2022 WL 186039 (3d Cir. 2022). Cf. ***Starbucks Corp***., 373 NLRB No. 105, slip op. at 1 n. 4 (2024) (purported "double hearsay" statements were actually a party admission not barred by the hearsay rule); ***Kamtech, Inc.***, 333 NLRB 242 n. 4 (2001) (same), enfd. 314 F.3d 800 (6th Cir. 2002). See also FRE 805, set forth in **§ 16–805**, below.

The double hearsay issue may also arise with respect to documents. For example, a meeting notes offered for the truth of the statements recorded therein may constitute double hearsay if the notes do not fall within the business record exception in FRE 803(6) or some other exception and the recorded statements also do not fall within an exception. See, e.g., ***Volvo Group North America, LLC***, 370 NLRB No. 52, slip op. at 4 (2020) (to extent meeting notes described another meeting attendee's statement and were offered for the truth of the attendee's statement, they were inadmissible as double hearsay). Cf. ***A.S.V., Inc. a/k/a Terex***, 366 NLRB No.

162, slip op. at 1 n. 4 (2018) (manager's report containing statement by unidentified employee(s) was admissible because it was a business record under FRE 803(6), and the employee statements were corroborated by other evidence and otherwise sufficiently trustworthy considering the circumstances to fall within the residual exception in FRE 807).

Direct messages and posts on social media may also constitute double hearsay where the third-party messages or posts include statements by others and neither are admissible under the Federal Rules and Board decisions. See, e.g., ***United States v. Wallace,*** No. 3:21-cr-00091, 2023 WL 2563230, *2 (S.D. Miss. Mar. 17, 2023) (rejecting as double hearsay Facebook posts and Messenger chats where, in making the posts, the account holder was not acting in the regular course of business); ***United States v. Barker***, No. 4:21-cr-00134, 2023 WL 2663241, *8 (E.D. Okla. Mar. 28, 2023) (rejecting Facebook content reflecting direct messages sent via Facebook platform where Facebook was not shown to have adequately verified or otherwise assured the accuracy of the information provided by the third-party).

For a further discussion of the FRE 803(6) and (7) exceptions, see **§§ 16–803.6** and **16–807**, 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' 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 was prepared before January 1, 1998, 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.]

Under FRE 803, certain out-of-court statements are admissible as substantive evidence to prove the truth of the matter asserted therein, regardless of whether the person who made the statement is available to testify, because the statements "possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." Advisory Comm. Notes to 1972 Proposed Rules.

Whether any of the FRE 803 hearsay exceptions apply is often academic in NLRB proceedings because, as discussed above in **§ 16–802.1**, the Board allows hearsay testimony if it is corroborated by more than the slightest amount of other evidence. See, e.g., ***RC Aluminum Industries, Inc***., 343 NLRB 939, 940 (2004) (finding it unnecessary to decide whether a photocopied paycheck from the alleged discriminatee's personnel file, which contained the notation "Terminated 11/16/00," was admissible as a business record under FRE 803(6) to prove she was terminated rather than quit, because the notation was corroborated by her nonhearsay testimony that the supervisor told her that she was being fired). However, where corroborative evidence of the proffered hearsay statement is absent or slight, it may be necessary to address the issue.

Note that, as previously discussed in **§ 16–104** (FRE 104), the hearsay rule is also inapplicable where offered to address a preliminary question such as whether other evidence is admissible.

§ 16–803.1 Present Sense Impression

Under the FRE 803(1) "present sense impression" hearsay exception, an individual's out-of-court statement regarding an event or condition is admissible as substantive proof of the event or condition if the individual 1) personally "perceived" the event or condition, such as by seeing or hearing it, 2) made the statement "while or immediately after" perceiving it, and 3) "describ[ed] or explain[ed]" what was perceived. See **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 803(1)** (Apr. 2026 Update); **Graham, 7 Handbook of Fed. Evid. § 803:1** (10th ed. Nov. 2025 Update); **Mueller & Kirkpatrick, FEDEV § 8:67** (4th ed. Aug. 2023 Update).

The theory underlying this hearsay exception is that "substantial contemporaneity of event and statement"—either "precise contemporaneity" or a "slight lapse" thereafter—"negate the likelihood of deliberate or conscious misrepresentation." Advisory Comm. Notes to 1972 Proposed Rules. "'The idea of immediacy lies at the heart of the exception,' thus, the time requirement underlying the exception 'is strict because it is *the* factor that assures trustworthiness.'" ***United States v. Green***, 556 F.3d 151, 155 (3d Cir. 2009), citing **Mueller & Kirkpatrick**, above.

There is no bright-line rule regarding what constitutes only a "slight lapse," but as little as 10 or 15 minutes may be too long depending on the circumstances. See ***Cumberland Farms Dairy of N.Y., Inc.,*** 258 NLRB 900 n. 1 (1981). In that case, the employer presented testimony from its plant foreman that the plant manager told him that he fired the charging party employee (Giles) because Giles called him an "asshole." The ALJ ruled that the plant manager's statement was admissible under FRE 803(1). However, the Board reversed on the ground that the manager did not make the statement to the foreman until 10 minutes after the event, by which time, according to the foreman, the manager had become worried about it.

See also ***United States v. Penney***, 576 F.3d 297, 313–314 (6th Cir. 2009) (arrested shooting suspect's statement to police officer that he thought he was being robbed was not admissible under FRE 803(1) because it was made 10–15 minutes after the incident); ***Hilyer v. Howat Concrete Co***., 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978) (statement made "at least 15 minutes and possibly up to 45 minutes" after the event "hardly qualifies as 'immediately' after the [event] as that term is used in Rule 803(1)."). But see ***United States v. Wade***, No. 3:22-CR-3, 2024 WL 397546, *1–3 (N.D. Ind. 2024) (alleged assault victim's report to 911 operator made 5 minutes following incident and under a threat of additional action by an armed assailant was sufficiently contemporaneous).

As indicated in the treatises cited above, substantial contemporaneity and the other foundational requirements under FRE 803(1) may be established by the statement itself and the surrounding circumstances. A common example is a 911 call where the caller's statements indicate that the event was just observed or is being observed. However, if the statement itself and the surrounding circumstances are unclear, the foundational requirements must be established by other evidence. See, e.g., ***Healthbridge Mgt. LLC. v. NLRB***, 672 F. Appx. 1 (D.C. Cir. Sept. 30, 2016) (administrator's reports to a manager about an incident involving the alleged discriminatee and a group of other employees was not admissible under FRE 803(1) because the record was unclear how much time elapsed between the incident and the statements and it was possible up to an hour had elapsed); ***Miller v. Greenleaf Orthopedic Associates, S.C.***, 827 F.3d 569, 573 (7th Cir. 2016) (employee's diary entries were not admissible under FRE 803(1) in her ADA discrimination action against employer because she offered no evidence that the entries were made while she was perceiving the events or immediately thereafter without calculated narration). Courts also sometimes require corroborative evidence where the identity of the declarant is not identified, as an unidentified declarant's capacity to personally perceive the event cannot be substantiated or attacked. As such, the hearsay statement of an unidentified declarant cannot serve as its own foundation for personal knowledge. See ***Miller v. Keating***, 754 F.2d 507, 511 (3d Cir. 1985) (even where "the substance of a statement itself—such as 'I saw that blue truck run down the lady on the corner'—might contain words explicitly revealing perception…the trial judge must be "satisfied by a preponderance that the declarant spoke from personal perception" based on the particular circumstances").

For cases applying FRE 803(1) to personnel records and bargaining notes, see ***Caudill v. Kennebec County***, No. 1:18-cv-00164, 2019 WL 1270921 *4 n. 6 (D. Me. March 19, 2019) (daily field training sheets assessing employee's work skills were admissible under both 803(1) and 803(6)); ***Mack Trucks***, 277 NLRB 711, 725 (1985) (employer's bargaining notes were admissible under both 803(1) and 803(6)).

For cases applying Rule 803(1) to emails, see, e.g., ***United States v. Figueroa***, No. 7:23-CR-161, 2023 WL 8373566, *4 (S.D.N.Y. Dec. 4, 2023) (emails by personal assistants to attorney conveying approximately contemporaneous phone messages received on his behalf, appointment reminders, and administrative notes about work-related matters constituted present sense impressions); ***United States v. Ferber***, 966 F.Supp. 90, 98–99 (D. Mass. 1997) *(*email by an employee to his supervisor recounting a phone conversation with the defendant shortly after it occurred was admissible under the present sense impression exception).

§ 16–803.2 Excited Utterance

Under FRE 803(2), an out-of-court statement "relating to" a "startling event or condition", made "while the declarant was under the stress of excitement" caused by the event or condition is admissible as substantive evidence to prove the truth of the matter asserted. The rationale underlying the exception is that "excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that utterance will be influenced by self-interest and therefore rendered unreliable." ***United States v. Medina***, 155 F.4th 11, 18 (1st Cir. 2025).

Thus, for the exception to apply, it must be shown that the declarant was so excited or distraught by the startling event or condition when the declarant made the statement regarding it that the declarant did not reflect on it beforehand. The standard is subjective; whether the speaker was in fact excited at the time, regardless of whether another might not have been. As

with 803(1) statements, this may be shown by the statement itself and the surrounding circumstances, at least where the declarant is identified. See **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 803(2)** (Apr. 2026 Update); **Graham, 7 Handbook of Fed. Evid. § 803:2** (10th ed. Nov. 2025 Update); **Mueller & Kirkpatrick, FEDEV § 8:68** (4th ed. Aug. 2023 Update).

For a Board case finding an out-of-court statement admissible under FRE 803(2), see ***Lauderdale Lakes General Hospital***, 227 NLRB 1412, 1418 n. 6 (1977), enfd. in relevant part 576 F.2d 666 (5th Cir. 1978). In that case, the General Counsel offered evidence that as the alleged discriminatee, a nurse, was leaving a conversation with the hospital administrator, she encountered another employee and said, "That son-of-a-bitch just threatened to place narcotics in my car." The nurse's statement to the employee was found admissible under the 803(2) hearsay exception because it was "a spontaneous utterance which was the result of an exciting or shocking outward occurrence and was made before enough time had elapsed for [the nurse] to have devised anything in her own interest."

Compare ***Honeycomb Plastics Corp***., 288 NLRB 413, 419 (1988) (an employee's statements to other employees that a manager had questioned her earlier that day about the identity of union organizers were not admissible excited utterances under FRE 803(2) to prove the alleged unlawful interrogation because the statements were not made contemporaneous with the event); ***Barberton Manor***, 252 NLRB 380, 389 (1980) (evidence of a deceased patient's prior statements that the alleged discriminatee, a nurse's aide, had abused her were not entitled to substantive effect under the 803(2) hearsay exception as she was not in a state of excitement at the time of her statements and they were not sufficiently reliable given that she was 97 years old, was receiving radiation therapy and medication, was at times confused and demanding, and could not identify the alleged discriminatee until a nurse mentioned her name)

Historically, courts have tended not to find writings 803(2) "excited utterances" as the act of writing "inherently involves reflection, deliberation, and conscious thought." **4 Jones on Evidence § 28:19** (7th ed. Nov. 2025 Update). For example, in ***United States v. Ferber***, above, the court found that, although the employee's email about his phone conversation with the defendant was admissible under the 803(1) exception for present sense impressions, it was not admissible as an 803(2) excited utterance. Although the email ended with, "my mind is mush," the court noted that it was several paragraphs long, detailed, and indicated that the employee had consulted a coworker concerning the phone conversation. 966 F.Supp. at 98–100. But see ***Lorraine v. Markel American Insurance Co.,*** 241 F.R.D. 534, 569 (D. Md. 2007) ("The prevalence of electronic communication devices, and the fact that many are portable and small, means that people always seem to have their laptops, PDA's, and cell phones with them, and available for use to send e-mails or text messages describing events as they are happening. Further, it is a common experience these days to talk to someone on the phone and hear them typing notes of the conversation on a computer as you are talking to them. For these reasons, Rules 803(1) and (2) may provide hearsay exceptions for electronically stored communications containing either present sense impressions or excited utterances.")

§ 16–803.3 State of Mind: Motive

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.

For cases applying this hearsay exception, see ***Global Recruiters of Winfield***, 363 NLRB 589, 594 n. 10 (2015) (prior emails from the respondent company's owner to corporate staff about how to work with the alleged discriminatee, which were offered into evidence by the respondent itself, were not excluded by the hearsay rules as they were offered for the purpose of establishing the owner's state of mind when he wrote the emails and his motivation for the various actions that he subsequently took regarding the discriminatee); ***International Business Systems***, 258 NLRB 181 n. 6 (1981) (prior statements attributed to strikers, which articulated their fears, grievances, and intent to strike, constituted statements of then-existing state of mind or emotion, and thus were admissible under FRE 803(3) to establish that the strike was an unfair labor practice strike), 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); ***Garcia v. Green Fleet Systems, LLC***, No. CV 14-6220, 2014 WL 5343814 (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 interim injunction against the employer under Section 10(j) of the Act is therefore just and proper).

Of course, even if testimony is admissible under the FRE 803(3) "state of mind" exception, it should nevertheless be excluded if state of mind is irrelevant. See ***Delaware County Memorial Hosp.***, 366 NLRB No. 28, slip op. at 4 n. 5 (2018), enf. denied in part and remanded on other grounds 976 F.3d 276 (3d Cir. 2020). See also **§ 16–402,** above.

§ 16–803.5 Recorded Recollection

Under FRE 803(5), the contents of a memorandum or record written, signed, or adopted by a witness regarding a matter when it was fresh in the witness' memory, but of which the witness has insufficient present recollection, are admissible as substantive proof of the events. See, e.g., ***A.A. Superior Ambulance Service***, 263 NLRB 499, 500–501 (1982) (employee witness who was unable to recall certain conversations that occurred 10 months before the hearing was permitted under FRE 803(5) to read into the record a written statement he had given to the union shortly after the conversations occurred), enfd. mem. 720 F.2d 683 (9th Cir. 1983).

Normally, a foundation must be laid, through testimony of the witness, that the witness currently has an insufficient recollection and the prior statement was made at a time when the events were fresh in the witness' mind and the witness made or adopted the recorded statement believing it to be true. See ***Tarochione v. Roberts Pipeline, Inc.***, 62 F.Supp. 3d 821, 828 (N.D. Ill. 2014) (although in affidavit form, witness' written statement was admissible in discrimination case as a recorded recollection where witness repeatedly denied recalling the events about which he attested in the affidavit, and testified that he had reviewed the affidavit before signing it and that his memory was fresher at that time). See also ***J. C. Penney Co. v. NLRB***, 384 F.2d 479, 484 (10th Cir. 1967) (distinguishing between writings admitted as past recollection recorded, i.e., as a substitute for the witness's memory, and writings used to stimulate memory [present recollection revived] or to determine truthfulness [prior inconsistent statements]). But cf.***Three Sisters Sportswear Co.***, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (9th Cir. 1995), 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).

Note, however, that contemporaneousness is not required to find that the matter was fresh in the witness' mind at the time of the prior recorded statement. See ***United States v. Smith***, 197 F.3d 225, 231 (6th Cir. 1999) (affirming district court's admission of a prosecution witness's prior statement to a detective 15 months after one of the alleged unlawful incidents occurred), and cases cited there. But see ***Garrison v. Sam's East, Inc.,*** 787 F. Appx. 627 (11th Cir. 2019) (district court's exclusion of plaintiff's statement to her insurance claims adjuster 5 months after her alleged slip and fall was not manifestly erroneous).

As indicated in FRE 803(5), if admissible under this exception, the contents of the memorandum or record may be read into evidence by the party offering it; however, only the adverse party may submit the memorandum or record as an exhibit.

§ 16–803.6 Regularly Conducted Activity: Business Records

A party seeking to admit a business record of an act, event, condition, or opinion as proof thereof under FRE 803(6) must show—through the custodian or other witness familiar with the business' or organization's mode of operation (or by a proper certification with reasonable written notice)—that the record was made "at or near the time" by someone with personal knowledge or from information furnished by someone with personal knowledge, the persons furnishing and recording the information had a "regular practice" of doing so, and the record was kept "in the course of a regularly conducted activity", i.e., it was a routine record. These foundational requirements may be met by "a custodian or another qualified witness"; thus, the witness is only required to be familiar with the record and understand the system used to prepare it; they do not need to be the person who created or maintained the record. See, e.g., ***Metzinger v. United States***, 178 Fed. Cl. 781, 787 (2025).

If these foundational requirements are met, the record is admissible unless the opposing party shows that "the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness"; for example, that the record was prepared in anticipation of litigation. **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 803(6)** (Apr. 2026 Update); **Graham, 7 Handbook of Fed. Evid. § 803:6** (10th ed. Nov. 2025 Update); **McCormick on Evidence § 288** (9th ed. Feb. 2025).

Personnel documents. Memoranda 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 foregoing conditions are met. See, e.g., ***Caudill v. Kennebec County***, No. 1:18-cv-00164, 2019 WL 1270921, *4 n. 6 (D. Me. Mar.19, 2019) (daily field training sheets assessing employee's work skills were admissible under FRE 803(6) as well as 803(1) and 801(d)(2)). A supervisor's ad hoc "desk notes" regarding an employee may fail to qualify as business records, particularly where they were not created with the kind of regularity or routine which gives business records their inherent reliability. See, e.g., ***Murphy v. Caterpillar Inc.***, 140 F.4th 900 (7th Cir. 2025) (supervisor's personal "desk notes" inadmissible where they were unaccompanied by testimony from supervisor that they were drafted in the ordinary course of business, there was no evidence that supervisor regularly took similar notes on other employees, that the notes were relied upon by anyone else or that he was under a duty to record the notes accurately). The timing of a personnel document's preparation may also disqualify it as a business record, particularly where circumstances indicate that it may have been prepared with an eye toward potential litigation. See ***Affinity Medical Center***, 362 NLRB 654, 660 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 event, "indicat[ing] a lack of trustworthiness"); ***Avondale Industries***, 329 NLRB 1064, 1237 (1999) (undated post-discharge form prepared for submission to state labor department in anticipation

of litigation not admissible under 803(6) to show that the employee was discharged for insubordination, as "[a] discharge is not a routine event for any employer, and it is hardly a "regularly conducted activity" within the meaning of 803(6)).

Bargaining notes. Bargaining notes have also been admitted as substantive evidence under FRE 803(6). ***Pacific Coast Metal Trades Council (Lockheed Shipbuilding***), 282 NLRB 239, JD at n. 2 (1986) (employer's records concerning attendance and discussions at bargaining sessions were admissible under 803(6)), ***Mack Trucks***, 277 NLRB 711, 725 (1985) (company negotiator's bargaining notes were admissible under 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).

Electronically stored information. "For the purposes of Rule 803(6), 'it is immaterial that the business record is maintained in a computer rather than in company books'"; the Rule "allows for the admission of a 'data compilation, in any form,' so long as the compilation meets the requirements of the rule." ***Sea-Land Service, Inc., v. Lozen Intern., LLC***, 285 F.3d 808, 819 (9th Cir. 2002) (quoting ***United States v. Catabran***, 836 F.2d 453, 457 (9th Cir.1988)). See also FRE 101(b)(4) (defining a "record" to include "a memorandum, report, or data compilation"), and (b)(6) ("a reference to any kind of written material or any other medium includes electronically stored information"); ***United States v. Conde***, 134 F.4th 82 (2025) (finding electronically stored data qualifies as a "record" under Rules 101(b)(4) and 803(6) even where there are no "conventional words or figures written on paper"). Under the business records exception, in the context of electronically stored data, "the 'business record' is the datum itself, not the format in which it is printed or displayed." ***United States v. Mhana***, No. 24-4488, 2026 WL 1291534 (4th Cir. May 12, 2026). Thus, exempt 803(6) business records may include data stored electronically on computers and later printed out for presentation in court, so long as the original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice. See, e.g., ***Anthony v. GE Capital Retail Bank***, 321 F.Supp. 3d 469, 476 (S.D.N.Y. 2017); ***Branch v. Government Employees Insurance Company***, 286 F.Supp. 3d 771 (E.D. Va. 2017). See also ***Metzinger v. United States***, above at 788 (admitting under 803(6) payroll compilation records regularly made by employer submitted with a declaration by a payroll supervisor).

However, as indicated above, records that are otherwise admissible under FRE 803(6) may be excluded as untrustworthy if they were prepared in anticipation of litigation. While accurate and unaltered data retrieved from a computer system does not become inadmissible as a business record merely because it was retrieved in anticipation of litigation, if the retrieval process amounts to a purposeful selection that cannot be independently reviewed by the opposing party, then the retrieved material may be challenged as being prepared in anticipation of litigation. Id.; see also ***Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.***, 38 F.3d 627, 633 (2d Cir. 1994) (computer generated report was properly excluded where proponent did not show it was compiled in accordance with regular business practice and where its preparation required significant selection and interpretation of data, as opposed to a downloading of information previously computerized in the regular course of business).

Emails and text messages. Like other electronically stored information, an email or a text message may be admitted for the truth of the matter asserted under the 803(6) business record hearsay exception provided it meets the requirements of the Rule. **Wright & Miller et al., 30B Fed. Prac. & Proc. Evid. § 6864** (Apr. 2026 Update). While properly authenticated emails may be admitted into evidence under the business record exception, there is no categorical rule that all emails housed on an employer's server are business records. ***United States v. Cone***, 714

F.3d 197, 220 (4th Cir. 2013); ***In re Oil Spill***, No. 2179, 2012 WL 85447 at *3 (E.D. La. 2012). The foundational requirements for an email or text message to survive a hearsay challenge are as follows:

First, the message must have been made at or near the time of the event recorded by, or from information transmitted by, someone with knowledge of the event documented in the message. See, e.g., ***Nair v. Columbus State Community College***, No. 2:02–cv–595, 2008 WL 3822341, *23–24 (S.D. Ohio Aug. 2, 2008) (email to department chairman from colleague of Title VII plaintiff regarding incident between plaintiff and a student did not qualify as an 803(6) business record as it was sent months after reported incident occurred); ***Rogers v. Oregon Trail Electric Consumers Coop, Inc.***, No. 3:10–CV–1337, 2012 WL 1635127, *8–10 (D. Ore. May 8, 2012) (emails describing events employer claimed justified issuing disciplinary warnings to ADA/FMLA plaintiff did not qualify as 803(6) business records as employer failed to establish that individuals who sent the emails had personal knowledge of the events described therein).

Second, the message must have been sent or received in the course of a regular business activity. This requires more than just a showing that the message was sent between two company employees or that employees regularly conduct business through emails or text messages generally; it must be shown that the particular message in question was made by an employee who had a business duty to make and maintain such emails and regularly or routinely did so. See, e.g., ***United States v. Figueroa,*** No. 7:23-CR-161, 2023 WL 8373566, *3 (S.D.N.Y. Dec. 4, 2023) ("The mere fact that [the company] required its employees to send and receive emails, in general, does not mean that every [company] employee email is [an 803(6) business record]. Put differently, Rule 803(6) speaks not of the medium by which a record is recorded (*e.g.*, email), but rather the content of the record itself."); ***In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico***, No. 2179, 2012 WL 85447, *3 (E.D. La. Jan. 11, 2012) (the business records hearsay exception requires a showing that the company "had a policy or imposed a business duty on its employee to report or record the information within the email" and that it was the "regular practice to send or receive emails that record the type of event(s) documented in the email").

Compare, for example, ***United States v. Daneshvar***, 925 F.3d 766, 777 (6th Cir. 2019) (upholding district court's ruling that branch manager's email to company president was merely "a form of conversation," that is, "a one-time discussion" about a topic, rather than an 803(6) business record), with ***Thomas v. Bronco Oilfield Services.***, 503 F.Supp. 3d 276, 291 & n.11 (W.D. Penn. 2020) (ruling that human resources official's email to human resources director relating a supervisor's thoughts about discharging an employee qualified as an 803(6) business record as firing employees was a regular business activity and nothing suggested that it was not the HR department's regular practice to discuss such matters via email).

Further, if the source of the information related in the message is someone other than the maker of the message, both the maker and the source must be acting in the regular course of the business. Compare ***State of New York v. Microsoft***, No. CIV A. 98–1233, 2002 WL 649951, *4 (D.D.C. Apr. 12, 2002) (rejecting email where no such showing was made), with ***Thomas v. Bronco Oilfield Services***, above.

Third, the message must be kept in the course of a regularly conducted activity of the business or organization. See, e.g., ***Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC,*** No. H-06-1330, 2008 WL 1999234, at *12–13 (S.D. Tex. May 8, 2008) (admitting email summary of telephone conversation based on testimony that it was company's regular practice to keep these records***; DirecTV, Inc. v. Murray,*** 307 F.Supp. 2d 764, 772–73 (D.S.C. 2004) (admitting email sales records when orders were routinely placed via email and

the emails were retained as business records). Compare ***State of New York v. Microsoft***, above, at *2 (refusing to admit emails under 803(6) where there was "a complete lack of information regarding the practice of composition and maintenance" of them). Emails and texts that are automatically stored or archived, as opposed to deliberately maintained for future reliance in business, may not meet this requirement. See, e.g., ***Rogers v. Oregon Trail Electric Consumers Coop, Inc.***, above (rejecting emails as business records where employer failed to provide evidence of a policy that imposed a business duty on employees to send and retain emails); ***United States v. Ferber***, 966 F.Supp. 90, 98 (D. Mass. 1997) (same; finding that "there must be some evidence of a business duty to make and regularly maintain records of this type").

Finally, even if the above requirements are met, the message may nevertheless be inadmissible if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. See, e.g., ***Applebaum v. Target Corp***., 831 F.3d 740, 744 (6th Cir. 2016) (email sent by bicycle manufacturing company's counsel in response to Target's claim for indemnification for plaintiff's bicycle injury was barred because it "lack[ed] the objectivity of a typical business record"); ***Quiles v. United States***, Civ. No. 19-1207, 2021 WL 5549438, *4 (D.P.R. July 22, 2021) (author's statement in email that she was responding to plaintiff's allegations indicated that email was prepared in anticipation of litigation and therefore lacked trustworthiness under Rule 803(6)).

For a discussion of methods available to authenticate emails, text messages, and other electronically stored information, see **§§ 16–901.1** through **16–901.3**, below.

§ 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 cases applying the FRE 804 unavailability requirement, see ***FDRLST Media, LLC,*** 370 NLRB No. 49, slip op. at 1 n. 3 (2020) (judge erred in allowing respondent to enter affidavits of its executive officer and two employees without establishing that they were unavailable to testify), affd. on point but enf. denied on other grounds 35 F.4th 108, 125 n. 8 (3d Cir. 2022); ***Park Maintenance***, 348 NLRB 1373 n. 2 (2006) (judge erred in admitting affidavits in the absence of a showing that the affiants were unavailable to testify); ***Marine Engineers District 1 (Dutra Construction)***, 312 NLRB 55 (1993) (judge properly struck the non-Board affidavit of a nonappearing witness, offered by respondent in support of an affirmative defense, as respondent did not allege that the affiant was unavailable to testify). See also ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1480 (7th Cir. 1992) (respondent's "conclusory" offer of proof that a witness was unavailable was insufficient as it did not explain why the witness was unavailable or show that respondent had attempted to procure his presence), enfg. 298 NLRB 58 n. 1 (1990); ***United States v. Puckett***, 692 F.2d 663, 670 (10th Cir. 1982) (trial judge properly excluded former testimony of absent witnesses whose unavailability was due to attorney's tardiness in attempting to subpoena them).

To establish that a witness is unavailable to testify for medical reasons pursuant to FRE 804(a)(4), there must be "a clear showing that the [witness] is . . . so seriously ill that the taking of oral testimony posed a threat to the witness'[s] health." ***Sparks Restaurant***, 373 NLRB No. 129, slip op. at 1, n. 5 (2024) (internal quotation marks and citation omitted). In that case, the Board found that the ALJ did not abuse his discretion in finding an alleged discriminatee unavailable to testify by videoconference based on an in-camera review of a letter from the discriminatee's physician, despite the respondent's photographic evidence of the witness interacting with patrons

and coworkers in the workplace. The Board found that the physician's letter was sufficient to establish unavailability, citing ***Finizie v. Principi***, 69 Fed. Appx. 571, 573–574 (3d Cir. 2003) (confidential medical affidavit may establish unavailability); ***Bastani v. AFGE, AFL-CIO***, 70 F.4th 563, 569, 570 (D.C. Cir. 2023) (unavailable witness was not required to appear via videoconference). It also found that the photographs did not contradict the letter, as testifying in a hearing involved a "radically different environment," citing, e.g., ***United States v. Mallory***, 902 F.3d 584, 590–591 (6th Cir. 2018) (witness's limited public appearances were "hardly the pressure-filled hours [he] would likely endure in giving trial testimony").

§ 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 has also admitted into evidence other statements by a deceased person where it is the best evidence available. See ***NLRB v. St. George Warehouse***, 645 F.3d 666, 675 (3d Cir. 2011) (ALJ properly admitted in the backpay proceeding the hearsay testimony of the deceased discriminatee's mother regarding her son's post-termination search for alternative work to show that the discriminatee had engaged in a reasonably diligent search for work, "given that it was the best evidence available"), enfg. 355 NLRB 474 (2010). But see ***Custom Coated Products***, 245 NLRB 33 (1979) (ALJ refused to consider the pretrial affidavit that the Regional Office took from the now-deceased charging party, as the affidavit "did not have any circumstantial guarantee of trustworthiness required by Rule 804(5)" [now 807], the residual hearsay exception); ***NLRB v. United Sanitation Service,*** 737 F.2d 936, 940–941 (11th Cir. 1984) (Board incorrectly relied on the residual hearsay exception to admit the affidavit of a deceased alleged discriminatee, as the General Counsel failed to clearly demonstrate the requisite guarantees of trustworthiness).

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 at request of Board to vacate order and dismiss complaint 190 F.2d 82 (5th Cir. 1951).

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).

§ 16–805 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 conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and;
(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

What constitutes a "sufficient guarantee of trustworthiness" for purposes of the rule depends on the circumstances of each case. Compare ***RAV Truck & Trailer Repairs, Inc.***, 369 NLRB No. 36, slip op. at 1 n. 1 & 12 n. 18 (2020) (tax return offered by the respondent employer to show it was operating at a loss was not admissible under FRE 807 as it was not signed), rev. denied in relevant part 997 F.3d 314 (D.C. Cir. 2021); ***Custom Coated Products***, 245 NLRB 33 (1979) (ALJ refused to consider the pretrial affidavit that the Regional Office took from the now-deceased charging party, as the affidavit was not a statement against interest and was not made at a time when he thought he was dying, and therefore "did not have any circumstantial guarantee of trustworthiness required by Rule 804(5)" [now 807]), with ***A.S.V., Inc. a/k/a Terex***, 366 NLRB No. 162, slip op. at 1 n. 4 (2018) (unidentified employees' statements contained in manager's report, while not amounting to a "dispositive admission" regarding respondent's anti-union motive for the layoff/discharge, were sufficiently trustworthy to qualify under the FRE 807 residual exception). See also ***NLRB v. United Sanitation Service,*** 737 F.2d 936, 940–941 (11th Cir. 1984) (Board incorrectly relied on the residual hearsay exception to admit the affidavit of a now-deceased alleged discriminatee, as there was no indication that he knew of his potential liability for perjury and there was no corroboration of several key assertions in the affidavit, and thus the General Counsel had failed to demonstrate the requisite guarantees of trustworthiness).

§ 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). See also ***Metropolitan Transportation Services***, 351 NLRB 657, 703 (2007).

The judge, however, has 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 **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 901** (Apr. 2026 Update); **Graham**, **8 Handbook of Fed. Evid. § 901:4** (10th ed. Nov. 2025 Update).As discussed in the following sections, this is also true with respect to audio and video recordings and other types of electronically stored information (ESI).Click or tap here to enter text.

§ 16–901.2 Audio and Video Recordings

Like other evidence, pursuant to FRE 901(b)(1), tape recordings may be authenticated by presenting testimony of a witness with knowledge that supports a finding that the recording is what the party claims it is. See ***Starbucks Corp***., 373 NLRB No. 90, slip op. at 2 (2024); ***H & M International Transportation, Inc***., 363 NLRB 1273 n. 1 & 1301 n. 48 (2016), enfd. 719 F. Appx. 3 (D.C. Cir. 2018). See also **Mueller & Kirkpatrick, FEDEV § 9:14** (4th ed. Jul. 2025 Update).

Thus, it is not always necessary for the person who made the recording to testify. See ***Sysco Columbia***, above. See also ***United States v. Washington***, No. 16-cr-477, 2017 WL 3642112 (N.D. Ill. Aug. 24, 2017) (YouTube video), affd. 962 F.3d 901 (7th Cir. 2020), and cases cited there. Nor is it always necessary to show chain of custody. See, e.g., ***Sleepy's LLC v. Select Comfort Wholesale Corp***., 779 F.3d 191, 206 (2d Cir. 2015); ***United States v. Carrasco***, 887 F.2d 794, 803–804 (7th Cir. 1989); ***United States v. Sandoval,*** 709 F.2d 1553, 1554–1555 (D.C. Cir. 1983) (holding that the accuracy and authenticity of audiotapes were sufficiently established by the uncontroverted testimony of participants in the conversations, and there was no need to establish chain of custody).

Like other documents or things, recordings may also be authenticated by circumstantial evidence. See ***Sysco Columbia, LLC***, 368 NLRB No. 129, slip op. at 5 (2019), reconsideration denied 2020 WL 1182427 (2020). See also ***United States v. Damrah***, 412 F.3d 618, 628 (6th Cir. 2005) (videotape of defendant offered by the government was authenticated by its own unchallenged characteristics, i.e., by the video and audio it recorded, and no evidence of how it was made and handled prior to its seizure was required). But see ***McHale v. Crown Equipment Corp.***, No. 21-14005, 2022 WL 4350702, *4 (11th Cir. 2022) (trial court in action against forklift manufacturer for damages resulting from a forklift accident did not abuse its discretion in excluding YouTube video of a different forklift accident offered by plaintiff, where there was "no evidence of when the video was originally recorded, what device made the recording, or any witness testimony to the accuracy of the accident or whether the video had been altered"—"[a]ll we know is that the video was pulled from YouTube").

The following are some issues that have arisen with respect to recordings:

Incomplete/partial recording. The incompleteness of a recording will not necessarily render it inadmissible; it is the objecting party's burden to demonstrate that it is prejudiced by the absence of particular evidence in the recording. See ***Starbucks Corp.***, above, slip op. at 2–3 (upholding judge's admission of a recording that included only five minutes of a meeting where the opposing party failed to show that the missing portion contained exculpatory evidence not otherwise admitted through other sources); ***Superior Emerald Park Landfill, LLC***, 340 NLRB 449, 452 (2003) (admitting incomplete recording and transcript of meeting where "no evidence was presented that the transcribed portions of the meeting left out any conversations that would have constituted [an] affirmative defense . . . [or] that any missing portion of the meeting involved statements that would materially affect the result in [the] case").

Defects in Recording. Recordings may be of less than perfect quality, with some words or passages being garbled or inaudible. However, unless the defects are so substantial that they render the entire recording untrustworthy, any defects go to weight not admissibility. See, e.g., ***Thomas v. Touchstone Behavioral Health***, 774 F.Supp. 3d 1179, 1199–1200 (D. Ariz. 2025) (11 instances of "indiscernible" audio contained within 46 pages of transcripts "not so substantial that the audio recordings, or the transcripts, are untrustworthy"); ***Planned Building Services, Inc.***, 347 NLRB 670, 671 n. 5 (2006) (ALJ had a legitimate basis for finding a tape recording sufficiently accurate even though it contained some inaudible portions), overruled on other grounds ***Pressroom Cleaners***, 361 NLRB 643 (2014). See also **Mueller & Kirkpatrick**, above.

Edited recording. Any editing of the recording must be explained by someone with knowledge of the editing. See ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1146 n. 7 (1994) (excluding an edited videotape taken by a guard because the guard did not do the editing and could not describe what was edited), enfd. 72 F.3d 780, 787 (10th Cir. 1995). Compare ***Starbucks Corp***., above, slip op. at 2 (admitting a "cropped" recording of a meeting where witness testified that she cropped it to just the relevant five minutes because the full recording was too large to send by email, and that she later lost access to the full recording when her phone was accidentally damaged).

Transcript of recording. A transcript of the recording may be offered to assist in understanding or identifying relevant portions of the recording. The parties should be encouraged to reach a stipulation regarding the accuracy of the transcript. However, if no stipulation is reached, the party challenging the proffered transcript may present its own version of the disputed portions. The judge may then attempt to resolve the dispute by carefully listening to the recording. See, e.g., ***Local 147, Laborers (Northeast Remsco Construction, Inc.),*** 370 NLRB No. 30, slip op. at 11 (2020); ***Oasis Mechanical, Inc***., 346 NLRB 1011, 1014 (2006). See also **Wright & Miller, et al., 31Fed. Prac. & Proc. Evid. § 7110** (2d ed. Apr. 2026 Update).
Click or tap here to enter text.

For a discussion of other issues regarding the admissibility in NLRB proceedings of recordings, including recordings of collective-bargaining negotiations and recordings made in violation of state law or the Federal Wiretapping Statute, see **§ 16–402.7**, above.

§ 16–901.3 Electronically Stored Information (ESI)

Other types of electronically stored information (ESI), such as email communications, cellular phone text messages, social media posts, and photographs, may likewise be authenticated by circumstantial evidence. See, e.g., ***United States v. Allen***, 159 F.4th 625, 634 (9th Cir. 2025) (content of social media postings authenticated by Facebook profile that contained photograph matching defendant's appearance, as well as his birthday and cell phone number); ***United States v. Midder***, 139 F.4th 649 (8th Cir. 2025) (social media accounts authenticated as defendant's where data extracted from phone had stored autofill information with defendant's name, address and credit card, as well as autofill contact information for defendant's online persona, the Facebook profile of which matched defendant's birth date); ***United States v. Bertram***, 259 F.Supp. 3d 638, 642–43 (E.D. Ky. 2017) (witness with history of email exchanges with defendants could authenticate emails based on distinctive characteristics, even where witness was not a recipient of specific email being admitted); ***Rubin ex rel. NLRB v. Vista Del Sol Health Services, Inc.***, 80 F.Supp. 3d 1058, 1090 (C.D. Cal. 2015) (text message was authenticated by testimony of recipient stating that it was a true and correct copy of message she received, and identifying the recipient's cell phone and sender's cell phone number listed in

message). See also ***United States v. Boykins***, No. 23-1652, 2024 WL 208346, *2 (8th Cir. 2024) (unpublished) (photos and messages on cell phone and posts on Instagram); ***United States v. Lamm***, 5 F.4th 942, 948 (8th Cir. 2021) (social media messages and attached images); ***United States v. Vazquez-Soto***, 939 F.3d 365, 373 (1st Cir. 2019) (photograph from Facebook page); ***United States v. Barber***, 937 F.3d 965, 970 (7th Cir. 2019) (Facebook posts and messages); and ***United States v. Turner***, 934 F.3d 794, 798 (8th Cir. 2019) (text messages and photographs extracted from cellphone); ***United States v. Browne***, 834 F.3d 403, 411–415 (3d Cir. 2016) (Facebook chats).

So-called "strings" of electronic communications, such as emails, texts and direct messages, present special authentication problems. FRE 901(a) requires that, at a minimum, the proponent of such evidence must demonstrate that the proffered string is what it purports to be—a complete and unaltered representation of the exchange. Typically, this is accomplished by an authenticating witness testifying that the emails completely and accurately represent the exchange in question. However, courts will reject message strings that appear on their face to be not "sufficiently complete, sequential, and accurate." Thus, a string with identifiable gaps (e.g., one that opens mid-thought or that forensic analysis shows is missing sequential messages) may fail to satisfy this standard as a representation of a full conversation. See, e.g., ***Arnold v. Huntington Ingalls Inc***., No. 2:22cv384, 2025 WL 1540946, slip op. at *3 (E.D. Va. May 30, 2025) (in employment discrimination case, rejecting text message string that opened with message "I[']m not telling anyone"). Absent such direct evidence of incompleteness, judges may consider incompleteness in message strings merely to go to the weight (i.e., not the authenticity) of the evidence, offering the objecting party the opportunity to invoke FRE 106 (the Rule of Completeness) to require the introduction of any allegedly missing portions. See ***United States v. Avenatti***, 559 F.Supp. 3d 274, 281 (S.D.N.Y. 2021) (distinguishing FRE 106 as a rule of admissibility, not authenticity). See also **§ 16–106 (Remainder of or Related Writings or Recorded Statements)**, above.

For helpful summaries of the various means of authenticating different forms of ESI, see ***Lorraine v. Markel American Insurance Co.***, 241 F.R.D. 534, 546–548 (D. Md. 2007) (describing the various methods or types of evidence that have been found sufficient to authenticate ESI); **Mueller & Kirpatrick, FEDEV § 9:9** (4th ed. Jul. 2025 Update); *Sedona Conference, Commentary on ESI Evidence & Admissibility*, *Second Ed.*, 22 Sedona Conf. J. 83 (2021) at Appendix A (citing numerous cases).

See also **§ 16–902.2,** below, discussing when ESI may be self-authenticating under FRE 902(13) and (14).

§ 16–901.4 Signatures/Union Authorization Cards

There are several alternative ways that union authorization cards and other hand-signed documents may be authenticated. They may be authenticated by the signers themselves; by a witness who observed the signing; or by the person who solicited the signatures and received them back, even if the solicitor did not actually observe the signing. See, with respect to authorization cards, ***Garten Trucking LC***, 373 NLRB No. 94, slip op. at 4 (2024); ***Novelis***, 364 NLRB 1452, 1454 (2016), enf. denied in part on other grounds 885 F.3d 100 (2d Cir. 2018); ***Evergreen America Corp***., 348 NLRB 178, 179 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); ***McEwen Mfg. Co***., 172 NLRB 990, 992 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), and cases cited there. See also ***United Site Services of California,*** 369 NLRB No. 137, slip op. at 4 (2020) (offer and acceptance letters purportedly signed by two of the strike replacements and offered into evidence by the employer were sufficiently authenticated and should have been considered by the ALJ, notwithstanding that the employer did not call the two replacements to testify, as the

HR manager testified that the letters were obtained from their personnel files and that she or the area manager witnessed strike replacements signing their letters, and the area manager testified that he witnessed one of the two subject letters being signed by the replacement).

Hand-signed documents may also be authenticated by comparing handwriting and signatures with authenticated specimens. As indicated in FRE 901(b)(3), either an expert or the judge may perform this task. See ***Traction Wholesale Center Co.***, 328 NLRB 1058, 1059–1060 (1999) (judge properly compared the signature on the authorization card to signatures on the 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). See also ***Novelis***, above; ***Parts Depot, Inc.***, 332 NLRB 670, 674 (2000), enfd. 24 F. Appx. 1 (D.C. Cir. 2001).

Authentication in a given case may be accomplished by a combination of one or more of the above techniques. For example, in ***CEMEX Construction Materials Pacific, LLC***, some of the authorization cards were authenticated by stipulation, some by testimony from employees (who had either signed a card or solicited a coworker's signature and witnessed them sign a card), and some by comparing signatures on the cards with signatures on IRS W-4 forms from the respondent's business records. 372 NLRB No. 130, slip op. at 112 (2023), enfd. sub nom. ***Int'l Brotherhood of Teamsters v. NLRB***, Nos. 23-2081, 23-2302, 23-2377, 2026 WL 1079297 (9th Cir. Apr. 21, 2026).

With respect to the validity of authorization cards offered to establish majority support for a union, see ***Cumberland Shoe Corp.***, 144 NLRB 1268, 1269 (1963) (a card which unambiguously states that the signer authorizes the union to represent the employee for collective bargaining purposes will be counted unless it is proved that the employee was told that the card was solely for the purpose of obtaining an election), enfd. 351 F.2d 917 (6th Cir. 1965). See also ***NLRB v. Gissel Packing Co.***, 395 U.S. 575, 606–608 (1969):

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. . . . [I]n hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

§ 16–901.5 Documents Obtained from Opposing Party

FRE 901(b) makes clear that the 10 listed examples are illustrative only and not exclusive or exhaustive. Courts have also broadly recognized that documents obtained during discovery are self-authenticating as party admissions . See, e.g., ***Jones v. Chapman***, No. 14-2627, 2017 WL 1546432, *3 (D. Md. Apr. 28, 2017) ("Defendants 'cannot have it both ways. They cannot voluntarily produce documents and implicitly represent their authenticity and then contend they

cannot be used by the Plaintiffs because the authenticity is lacking.'") (collecting cases); ***EEOC v. Celadon Trucking Services, Inc***., No. 1:12–cv–00275, 2015 WL 3961180, *3 (S.D. Ind. Jun. 30, 2015); **Wright & Miller et al., 31B Fed. Prac. & Proc. Evid. § 7105** (Apr. 2026 Update) ("Authentication can ... be accomplished through judicial admissions such as ... production of items in response to [a] discovery request."). See also ***Walsh v. Fusion Japanese Steakhouse, Inc.***, 585 F.Supp. 3d 766, 780 (W.D. Pa. 2022) (designating, upon Department of Labor's motion in limine, documents as self-authenticating, to the extent produced by defendant during discovery).The Board appears to apply a similar rebuttable presumption of authenticity to documents the General Counsel has obtained from a respondent employer's personnel files. See ***RC Aluminum Industries, Inc***., 343 NLRB 939, 940 n. 7 (2004) (photocopied paycheck from the employer's personnel files containing a notation that employee was terminated, which the GC offered as evidence that the employee was in fact terminated rather than quit); ***Aero Corp***., 149 NLRB 1283, 1287 (1964) (signed employment applications and W-4 and tax withholding forms, which the GC subpoenaed from the employer and offered as employee handwriting samples to establish that their union authorization cards were genuine), enfd. 363 F.2d 702 (D.C. Cir. 1966). See also ***Overnite Transportation Co***., 334 NLRB 1074, 1090–1091 (2001) (following *Aero*).

§ 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).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

§ 16–902.1 Newspaper/Television Reports

Printed 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) (ALJ excluded a newspaper article's quotation of the CEO 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), where the Board avoided the hearsay problem presented with an article quoting the respondent's president by disregarding the quote and instead considering only the newspaper reporter's credited testimony describing what the president told him. But see **§ 16–801.1**, above, discussing when news articles may be nonhearsay or excepted from the hearsay rule.

For internet news articles, courts consider whether the articles "contain sufficient indicia of authenticity, including distinctive newspaper and website designs, dates of publication, page numbers, and web addresses." ***Ho v. Marathon Patent Group, Inc.***, No. EDCV 21-339, 2022 WL 1600048, *7 (C.D. Cal. Feb. 11, 2022) (admitting online news articles presented by defendant that included distinctive website designs, publication dates, page numbers, and web addresses), citing ***Ciampi v. City of Palo Alto***, 790 F.Supp. 2d 1077, 1091 (N.D. Cal. 2011).

Television interviews may require different treatment as they are not listed in FRE 902 as self-authenticating. But see ***Linde v. Arab Bank, PLC***, 97 F.Supp. 3d 287, 342 n. 28 (E.D.N.Y. 2015) (CNN video was "effectively self-authenticating," as it bore CNN logos, showed no signs of being edited, and "forging such a video would be extremely difficult"), vacated and remanded on other grounds 882 F.3d 314 (2d Cir. 2018).

§ 16–902.2 Electronically Stored Information (ESI)

FRE 902(13) and (14), added in 2017, provide additional tools for authenticating electronically stored information (ESI), including system metadata and files such as an email or an Excel spreadsheet. Like subsections (11) and (12) that precede them, these rules permit the self-authentication of certain ESI only to the extent the party seeking to introduce them into evidence submits a proper certification to their authenticity and provides notice to the opposing party to give it a fair opportunity to challenge the certification.

Certification under FRE 902(13) (records generated by an electronic process or system), may be used to authenticate system metadata (for example, the dates that a file was created, last modified, and last accessed) which itself may be used to authenticate the ESI to which it relates. Certification under FRE 902(14) (data copied from an electronic device) typically involves authenticating a digital copy of ESI by comparing its "hash value" (a unique alphanumeric sequence of characters that an algorithm determines based upon the digital contents of the device) to that of the original document. See generally *Sedona Conference, Commentary on ESI Evidence & Admissibility*, *Second Ed.*, 22 Sedona Conf. J. 83 (2021). For sample certifications under Rules 902(13) and 902(14), see Grimm & Brady, *Recent Changes to Federal Rules of Evidence: Will They Make It Easier to Authenticate ESI?*, 19 Sedona Conf. J. 707, 711–21 (2018).

Sworn certification pursuant to Rule 902(11) by a social media platform's record custodian may satisfy the requirements for self-authentication of online postings as business records of the platform. See, e.g., ***United States v. Spila***, 136 F.4th 1296, 1307**–**1308 (11th Cir. 2025) (upholding admission of Google-certified emails as self-authenticating business records under FRE 902(11)). However, citing the potential for social media accounts to be falsified or accessed by an impostor, courts more often find that a certification from a social media platform alone is

insufficient to establish authenticity, instead requiring that the substantive content of such postings be separately authenticated via circumstantial evidence (under Rule 901(a)) linking a particular person to the social media account at issue. ***United States v. Allen***, 159 F.4th 625, 633–634 (9th Cir. 2025) (Rule 902(11)/803(6) certification self-authenticated only "technical" aspects of defendant's Facebook records; "substantive attributes" of the records separately authenticated through circumstantial evidence). See also ***United States v. Azure***, 164 F.4th 688 (8th Cir. 2026) (district court properly admitted Facebook posts based on circumstantial evidence linking defendant to Facebook account); ***United States v. Perez***, 61 F.4th 623, 626 (8th Cir. 2023) (same, with respect to certified records from online social networking platform MeWe); ***United States v. Barker***, 4:21-cr-00134, 2023 WL 2663241 (D. Okla. Mar. 28, 2023) (rejecting direct messages sent via Facebook's "Messenger" platform despite Facebook's submission of a certification of authenticity that the information was transmitted by a Facebook user, as Facebook did "not indicate that it verifies the identity of the third-party sending or receiving messages" or otherwise indicate that it verified or assured the accuracy of the information). See **§ 16–901.3**, above.

§ 16–903 FRE 903. Subscribing Witness' Testimony

> **FRE 903** states:
> A subscribing witness' 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.

FRE 1002 states the best evidence or "original writing" rule. It applies when the proponent seeks to prove the content of a writing (or recording or photograph). This includes

situations where a party seeks to prove a matter with testimony by a witness with no personal knowledge of it independent of the content of a writing. Under the rule, the party must present the writing itself (the original or a duplicate as permitted under FRE 1003) rather than the testimony or other evidence (unless an exception under FRE 1004 applies). See ***Smithfield Packing Co.***, 344 NLRB 1, 8 (2004) (a party is not allowed to provide secondary evidence when refusing to provide the best evidence), enfd. 447 F.3d 821 (D.C. Cir. 2006).

The rule is not applicable where the party seeks to prove the *meaning* of the contents or facts about the writing other than its contents. It is also generally inapplicable where the party seeks to prove what is *not* contained in the writing. Further, it does not apply when the purpose of the questioning is to test the memory and veracity of the witness. Finally, it does not prevent witnesses with personal knowledge of facts from testifying about them even though the same facts are contained in a writing. See also the exceptions listed in FRE 1004, discussed in **§ 16–1004,** below.

For discussion of these and other points with supporting court cases, see **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 1002** (Apr. 2026 Update); **Wright & Miller et al., 31 Fed. Prac. & Proc. Evid. § 7184** (2d ed. Apr. 2026 Update); **Mueller & Kirkpatrick, FEDEV § 10:19** (4th ed. Jul. 2025 Update). See also ***Mallory Controls Co***., 214 NLRB 616, 618 n. 5 (1974) (best evidence rule did not prevent employer witnesses with knowledge of the results of a survey from testifying about those results even though the same facts were contained in a writing).

§ 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.

In the employment context, FRE 1003 has been applied to a *qui tam* plaintiff's audio recordings of workplace meetings. In ***United States ex rel. Thomas v. Touchstone Behavioral Health***, 774 F.Supp. 3d 1179, 1200 (D. Ariz. 2025), the plaintiff had recorded meetings on his company-issued iPhone and the original recordings were lost when he returned the company device to his employer. The court admitted under FRE 1003 "clippings" of the recordings made by the plaintiff (which had been edited for file size at the beginning and end of each recording), based on the plaintiff's declaration attesting to the recordings' accuracy and the lack of bad faith in the loss of the originals.

§ 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.

A party attempting to introduce secondary evidence to prove the content of an original must meet one of the FRE 1004's exceptions to the "best evidence" rule. Where a party claims that the original was "lost" or "destroyed" under subsection (a) of the rule, proof of loss typically involves testimony that a reasonable effort was undertaken to locate the original. Where a party claims the original was destroyed as part of a regular control program, such destruction (while technically intentional) will satisfy Rule 1004(a), in the absence of convincing evidence of bad faith. **Mueller & Kirkpatrick, FEDEV § 10:27** (4th ed. Jul. 2025 Update).

For additional discussion of the exceptions in subsections (a)–(d) of the rule, see **Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 1004** (Apr. 2026 Update); **Wright & Miller et al., 31 Fed. Prac. & Proc. Evid. §§ 8014–8017** (Apr. 2026 Update). See also **§§ 8–720** and **8–730**, above, regarding the nonproduction or spoliation of subpoenaed documents.

Note that the best evidence rule may also be inapplicable under FRE 104 where testimony regarding a writing is offered to address a preliminary question about whether other evidence is admissible, a witness is qualified, or a privilege exists. See **§ 16–104**, above.
Click or tap here to enter text.

§ 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:

> **(a) Summaries of Voluminous Materials Admissible as Evidence.** The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.
> **(b) Procedures.** The proponent must make the underlying 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.
> **(c) Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Under FRE 1006, summaries of voluminous documents may be admitted as proof of the documents' contents. As indicated in the Advisory Committee Notes to the 2024 amendments to the rule, such summaries are admissible under subsection (a) regardless of whether the underlying documents have or have not been admitted, in whole or in part, into evidence. However, under subsection (b), the underlying documents must be made available to the other parties at a reasonable time and place.

In evaluating its admissibility and/or probative weight of such summaries, the judge should carefully consider the circumstances under which the summary was prepared and whether it reflects the author's partisan subjective view or interpretation of the underlying information. As stated in the Advisory Committee Notes, a summary must "pass the balancing test of Rule 403," and the probative value of a summary that is inaccurate or argumentative "may be substantially outweighed by the risk of unfair prejudice or confusion." See also ***Monfort of Colorado***, 298 NLRB 73, 82 n. 37 (1990), enforced in part 965 F.2d 1538 (10th Cir. 1992).

For a Board case addressing the issue, see ***Dickerson-Chapman, Inc***., 313 NLRB 907 n. 1, 924–925 (1994). In that case, the respondent company sought to introduce "summaries" of payroll records as substantive evidence regarding the supervisory status of its foremen and crew leaders. The judge rejected the summaries for the purpose offered because they did not merely summarize the payroll records but also contained legal conclusions or turned on admittedly inaccurate or controverted testimony by a company vice president who was not shown to have personal knowledge of the facts. However, the judge received the summaries for the purpose of impeaching the vice president's testimony. The company subsequently filed exceptions, but the Board affirmed the judge's rulings.

§ 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.

APPENDIX:

COMMON EVIDENTIARY OBJECTIONS

The following is a list of common evidentiary objections in Board hearings with some basic points or analytical checklists to consider in ruling on them. Citations are to the **NLRB ALJ Bench Book** (BB) chapters and sections above and the additional resources available on Westlaw.

I. Objections to Questions/Testimony

Argumentative/Badgering/Harassing (*The question is argumentative; counsel is badgering or harassing the witness*)

A question on cross-examination is argumentative if it does not seek any additional facts but challenges the witness about an inference from the facts, repeats facts or testimony in order to draw some conclusion from them or suggest it is incredible, or contains an argument and calls for an argument in response. See 2 Federal Evidence Practice Guide § 12.03; Graham, Handbook of Fed. Evid. § 611:20. Argumentative questions that are sarcastic or otherwise phrased to ridicule the witness's testimony are also objectionable on the ground that they constitute badgering or harassing the witness. See Mueller & Kirkpatrick, Federal Evidence § 6:63; Wright & Miller, Fed. Prac. & Proc. Evid. § 6164.

Asked and answered (*The question has already been asked and answered by the witness*)

This objection applies where counsel asks substantially the same question that counsel previously asked and the witness fully answered. It may also apply where a party's counsel asks the same question already asked by counsel for another party sharing the same or similar interests. It does not apply, however, where counsel repeats a question that was previously asked by opposing counsel. See Graham, Handbook of Fed. Evid § 611:17; Larsen, Navigating the Federal Trial § 3:19; Mueller & Kirkpatrick, Federal Evidence § 6:63; Wright & Miller, Fed. Prac. & Proc. Evid. § 6164.

Assumes facts not in evidence (*The question assumes facts that are not in evidence*)

A question on direct examination of a friendly witness that includes facts that have not been established is objectionable because it is suggestive or leading (see below). Such questions are normally not objectionable on cross-examination provided counsel believes in good faith that the assumed fact may be true. See Wright & Miller, Fed. Prac. & Proc. Evid. § 6164.

Beyond the scope of direct (*The question goes beyond the scope of the direct examination*)

Questions on cross-examination are generally limited to the subject matter of the direct examination and matters relevant to the credibility of the witness. However, what constitutes the same subject matter is construed broadly or liberally. Further, judges have discretion to allow a party to exceed the scope of direct examination. See BB § 16–611.2.

Compound (*The question is compound*)

A question that contains more than one question is objectionable because it may confuse the witness and elicit an ambiguous answer. It may also be leading if it includes some alternatives

but not others. The judge may require the questions to be separated or the answer to be clarified. Alternatively, the judge may overrule the objection on the ground that the objecting counsel may clarify the matter on cross or redirect examination. See 2 Federal Evidence Practice Guide § 12.03; Graham, Handbook of Fed. Evid. § 611:16; Wright & Miller, Fed. Prac. & Proc. Evid. § 6164.

Cumulative (The testimony would be unnecessarily cumulative of other evidence)

Relevant testimony may be excluded if its probative value is outweighed by other factors, including that it would cause undue delay, waste time, or be needlessly cumulative of other evidence. See BB § 16–403. Judges generally have wide discretion to exclude cumulative evidence. See Wright & Miller, Fed. Prac. & Proc. Evid. § 5216; Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 403.

Foundation/Personal knowledge (*Counsel has not laid a foundation or established that the witness has the requisite personal knowledge to answer the question*)

A witness may testify about a matter only if the witness has personal knowledge of it. See BB § 16–602. The party offering the testimony has the burden of laying a foundation for the testimony. See Wright & Miller, Fed. Prac. & Proc. Evid. § 6027. If requested, objecting counsel may be permitted to cross-examine or "voir dire" the witness at the time of the objection regarding the foundation for the testimony. See Graham, Handbook of Fed. Evid. § 611:9; Mueller & Kirkpatrick, Federal Evidence § 6:67. If it appears that the witness lacks personal knowledge, the witness's previous testimony about the matter may be stricken. See Graham, Handbook of Fed. Evid. § 602:1.

Hearsay (*The question calls for hearsay*)

See BB §§ 16–801 through 16–807. Checklist:

- Is it hearsay?

  - Does the question seek to establish the truth of the matter asserted by the declarant?

  - Is it a prior statement by the witness under FRE 801(d)(1) (a prior inconsistent statement under oath; a prior consistent statement to rebut a charge of recent fabrication or improper influence or motive or to rehabilitate credibility when attacked on another ground such as inconsistency or faulty memory; or a prior statement that identifies a person)?

  - Was the declarant a supervisor or agent of the party opponent under FRE 801(d)(2)?

- Does a hearsay exception apply under FRE 803 (e.g., present sense impression, state of mind [or, as to documents, recorded recollection, business record]) or FRE 804 (statement against interest by unavailable declarant)?

- Is the hearsay admissible under FRE 104 because it is offered to address a preliminary question about whether other evidence is admissible, a witness is qualified, or a privilege exists?

- Will the hearsay be corroborated by, or itself corroborate, other testimony or evidence?

- Does the hearsay have sufficient guarantees of trustworthiness under FRE 807?

Hypothetical/Speculation *(The question is hypothetical or calls for speculation)*

Asking a lay witness a hypothetical ("what if") question will usually draw an objection that it calls for speculation. To be admissible, a lay person's opinion must be rationally based on personal knowledge and personal experience over a sufficiently long period of time. See Larsen, Navigating the Federal Trial § 11:103; Mueller & Kirkpatrick, Federal Evidence § 7:3.

Leading (*The question is leading; counsel is leading the witness*)

See BB § 16–611.4. Checklist:

- Is the question leading?

- Is this direct or cross examination?

- Is leading on direct appropriate or permitted under the circumstances?

    - Does the question relate to undisputed preliminary or background facts?

    - Has the witness's memory been exhausted?

    - Is this an adverse or hostile witness?

- Is the question to the non-adverse witness phrased to lead as little as necessary?

Legal Conclusion (*The question calls for a legal conclusion*)

Questions that call for a legal conclusion are normally inadmissible. However, if the question uses terms that have the same common and legal meaning, the testimony is admissible. See BB § 16–704.

Misstates prior testimony/evidence (*The question misstates the prior testimony or evidence*)

A question that misstates the prior testimony of the witness or other evidence is improper because it is misleading and creates confusion. The judge may require counsel to restate the question without the objectionable point. See Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 611; Graham, Handbook of Fed. Evid. § 611:22; Mueller & Kirkpatrick, Federal Evidence § 6:63.

Narrative (*The question calls for a narrative*)

Broad or open-ended questions that call for a narrative are objectionable because they are more likely to elicit irrelevant and other objectionable testimony including hearsay and speculation without affording opposing counsel an opportunity to object. However, narrative answers may sometimes be preferable because they are less influenced by counsel, expedite the trial, or assist the search for the truth. It is therefore up to the judge's discretion whether to allow them. See Graham, Handbook of Fed. Evid. § 611:15; Wright & Miller, Fed. Prac. & Proc. Evid. § 6164.

Nonresponsive (*The answer is nonresponsive*)

When a witness's answer is nonresponsive to a question, the questioner may move to strike it. Opposing counsel, however, must show that the answer is inadmissible or objectionable on some other ground to have it stricken. See
Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 611; Graham, Handbook of Fed. Evid. § 611:23; Wright & Miller, Fed. Prac. & Proc. Evid. § 5036.

Privileged (*The question seeks privileged attorney-client communications*)

See BB §§ 8–405 through 8–425 (attorney-client communications), § 16–502 (limitations on waiver of privilege in federal proceedings). Checklist:

- Was it a communication between a client and its outside attorney or in-house counsel acting as such?

- Was it made in confidence for the purpose of seeking and obtaining legal advice?

- Would the substance of the communication be revealed by answering the question?

- Has the privilege been waived?

    - Has the substance of the communication been disclosed to a third person lacking a common legal interest?

    - Has it been disclosed to employees with no need to know and without taking steps to preserve confidentiality?

    - Was it disclosed in a federal proceeding intentionally or inadvertently?

        - If intentionally, does fairness require further disclosure of related privileged information involving the same subject matter?

        - If unintentionally, were reasonable steps taken to prevent disclosure or rectify the error?

- Was the communication in furtherance of a crime or fraud other than an unfair labor practice?

Board law protects from disclosure the identity of employees who engage in union or other protected concerted activity. See BB § 8–455 (identity of union supporters), § 16–607.2 (limitations on impeachment).

Relevance (*The question or testimony is irrelevant*)

See BB §§ 16–401 through 16–403 (relevance), and 16–607 through 16–610 (impeachment). Checklist:

- Is the question relevant to the allegations, defenses, or remedy in the case?

- Is the question relevant to the credibility or bias of the witness?

- Is the relevance marginal and outweighed by other factors (undue delay, wasting time, needlessly cumulative)?

Vague/Ambiguous (*The question is too vague or ambiguous*)

A question is ambiguous or vague if it could be interpreted in different ways or is likely to confuse the witness and elicit a vague or unreliable answer. See Goode & Wellborn, Courtroom Handbook Fed. Evid. Rule 611; Graham, Handbook of Fed. Evid. § 611:19.

II. Objections to Documents or Recordings

Authentication (*The document or recording has not been authenticated*)

See BB §§ 16–901 through 16–903. Checklist:

- Has the document or recording been authenticated by a witness with knowledge?

- Has the authenticity of the document or recording been shown by circumstantial evidence?

- Is the evidence presumptively authentic because it was produced pursuant to a subpoena?

- Is the evidence self-authenticating under FRE 902?

Incomplete (*The document is incomplete*)

If a party introduces an incomplete writing or recording, the opposing party may introduce the remainder or other parts of the writing or recording that in fairness should also be considered. See BB § 16–106.

[See also **Hearsay**, **Privileged**, and **Relevance**, above]

III. Objections to Testimony Regarding Documents

Best evidence (*The document itself is the best evidence*)

See BB §§ 16–1002 and 16–1004. Checklist:

- Does the best evidence rule apply, i.e., is the proponent seeking to prove the contents of a writing (or recording or photograph) or use the contents of the writing to prove a matter?

  - Is the proponent instead seeking to prove the meaning of the contents or facts about the writing other than its contents?

  - Is the proponent instead trying to prove what was not in the writing?

  - Is the proponent instead trying to test the memory of the witness?

  - Does the witness have personal knowledge of the facts independent of the writing?

- Does an exception to the best evidence rule apply?

- Was the writing lost or destroyed by someone other than the proponent acting in bad faith?

- Is the proponent unable to obtain the writing by judicial process?

- Did the opponent have possession of the writing and fail to produce it at the hearing despite notice?

- Is the writing not closely related to a controlling issue in the case?

- Is the testimony about the writing admissible under FRE 104 because it is offered to address a preliminary question about whether other evidence is admissible, a witness is qualified, or a privilege exists?

Impeaching with prior statement (*The prior statement has not been shown to the witness or opposing counsel*)

When attempting to impeach a witness using the witness's prior inconsistent statement, counsel need not show or disclose its contents to the witness but must show it to opposing counsel on request. See BB § 16–613.

Parol evidence (The testimony about the contract violates the parol evidence rule)

Under the parol evidence rule, extrinsic evidence is not admissible to vary or contradict a contract's clear and unambiguous terms. But extrinsic evidence is admissible to show the meaning of an ambiguous contract, to show that no agreement was reached, or to show a past practice inconsistent with an expired contract. See BB § 16–402.1.

Refreshing recollection (*The document has not been produced to opposing counsel*)

When using a document to refresh a witness's memory at the hearing, counsel must produce the document and permit opposing counsel to inspect it, cross-examine the witness about it, and introduce any relevant portion into evidence. This is also true if the document was used to refresh the witness's memory before the hearing if the judge determines that justice requires it. See BB § 16–612

Speaks for itself (*The document speaks for itself*)

This objection is often made where counsel asks a witness to describe the contents of a document that has been or will be offered and received into evidence. The judge has discretion under FRE 611(a) and 701 to allow such testimony where relevant and helpful to clarifying or explaining the contents of the document. See Federal Evidence Practice Guide § 6.33; Mueller & Kirkpatrick, Federal Evidence §10.18.

IV. Objections to Objections

Coaching/Speaking objection (*Counsel is attempting to coach the witness by making speaking objections*)

During cross-examination of a witness (or during direct examination of an adverse witness under FRE 611(c)), it is improper for the opposing counsel who is aligned with the witness to make a narrative or so-called "speaking" objection that goes beyond what is necessary to

inform the judge of the specific ground of the objection in order to coach or suggest to the witness how to answer the question. See Larsen, Navigating the Federal Trial § 3:13.

Frivolous objections (*Counsel is making frivolous or baseless objections and disrupting the examination*)

Disrupting the opposing counsel's examination by repeatedly making frivolous or baseless objections is improper and may warrant sanctions. See BB §§ 6–600 through 6–630.

General objection (*Counsel has failed to state the specific ground for the objection*)

Counsel should state the specific ground for an objection so that opposing counsel and the judge may know how to address it. If counsel fails to do so, under FRE 103 the objection will not be preserved on review or appeal unless the ground was obvious from the context. See BB § 16–103.2. See also 3 Federal Evidence Practice Guide § 16.06; Graham, Handbook of Fed. Evid. § 103:2; Wright & Miller, Fed. Prac. & Proc. Evid. §§ 5036.1 and 5036.7.

Previously overruled objection (*Counsel's objection was previously overruled)*

The judge may grant an objecting party a standing or continuing objection to avoid repeated objections on the same overruled ground(s) to the same line of inquiry. See BB § 16–103.1

Untimely objection (*The objection was made too late, after the testimony or evidence was received*)

An objection (or a motion to strike) should be made as soon as the ground for it becomes apparent. Under FRE 103, the failure to do so may forfeit or waive a claim of error on review or appeal. However, the judge has discretion to sustain an objection even if it is untimely. See BB § 16–103.1.