NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BENCH BOOK

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BENCH BOOK

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INTRODUCTION

This *BENCH BOOK* has been compiled to assist the National Labor Relations Board's administrative law judges during trials when other resources are unavailable. It does not deal with issues that may arise during decision writing. It is not a digest of substantive law. Nor should it be cited as binding precedent, or be considered a substitute for necessary or issue-specific research. The *BENCH BOOK* has been published in loose-leaf form so that it can be updated by adding or substituting pages.

The basic sources that govern Board trials are the National Labor Relations Act (the Act), the Administrative Procedure Act (APA), the Board's Rules and Regulations (Board's Rules), Statements of Procedure, and decisions, and the Federal Rules of Evidence (Fed.R.Evid.) applicable in U.S. district courts, so far as practicable. Useful information is also available in the NLRB's *Classification Outline and Index*, particularly in Chapter 596 "Procedure in ULP Proceedings," in Chapter 737 "Evidence," and in Chapter 700 "General Legal Principles." Numbered references to the *Classified Outline and Index* appear at appropriate places in the text.

CHAPTER 1. OPENING AND CLOSING TRIAL

§ 1–100 Suggested Form of Opening Statement by Judge

The hearing will be in order. This is a formal trial before the National Labor Relations Board in ___________________, Case __________. [If consolidated with an objections-to-election case, add:] "consolidated with Case__________ for hearing on objections to election."

The administrative law judge presiding is _________________. I am located in the _____________ [Washington, San Francisco, New York, or Atlanta] office of the Division of Judges. Any communications should be addressed to that office, and any requests for extensions of time should be addressed to the ___________ [Chief Judge or Deputy Chief Judge in Washington, or Associate Chief Judge in San Francisco, New York, or Atlanta] in that office.

Will counsel and other representatives of the parties please state their appearances for the record. For the General Counsel . . . [the Charging Party] . . . [the Respondent].

If settlement discussions are desired at any time during the trial, I will be glad to grant a reasonable recess for that purpose. Trial developments sometimes change attitudes and make settlement possible. Accordingly, I am advising you now, before I have heard any of the testimony, that I intend to offer opportunity for settlement discussions at two specific stages of the trial: first, at the conclusion of the General Counsel's case and, second, at the conclusion of the trial. If by inadvertence I overlook the matter, please call it to my attention.

I invite you to bear in mind, as the trial proceeds, that opportunities for discussion of settlement will be available at all times on request.

There will be no smoking in the courtroom.

Mr./Ms. _______________ [the General Counsel's attorney] please introduce the pleadings and other formal papers. I will dispose of any preliminary motions after those are in evidence.

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

§ 1–200 Suggested Form of Closing Statement by Judge

I will prepare and file with the Board my decision in this proceeding. A copy will be served on each of the parties.

You are reminded to refer to the Board's Rules and Regulations for information regarding the filing of briefs and proposed findings for my consideration, and regarding procedures before the Board after the issuance of a judge's decision.

Now that all the evidence is in, you have a better opportunity to assess your chances regarding the outcome of the issues than you had at the outset of the trial. All parties should carefully weigh the risks entailed and decide whether an amicable

settlement of the issues might not offer a more satisfactory solution. Settlement may be arranged now or at any time before I issue my decision.

I will allow until [date no more than 35 days from the close of the trial] for the filing of briefs and any proposed findings and conclusions. Any request for an extension of time for the filing of briefs must be made in writing to the [Chief Judge or Deputy Chief Judge in Washington, or Associate Chief Judge in San Francisco, New York, or Atlanta] and served on the other parties. The positions of the other parties regarding the extension should be obtained and set forth in the request. You should be aware that the Board is concerned over the time it takes from the close of trials to the issuance of decisions and expects the Division of Judges to grant discretionary extensions only when they are clearly justified. The mere fact that the parties have agreed upon an extension will not be a sufficient reason to grant it. We are telling the parties this, so that they will seek fewer extensions and will understand that requests must contain specific reasons and show that the requesting party cannot reasonably meet the current deadline.

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

§ 1–300 Model Separation of Witnesses Order, to Exclude/Sequester Witnesses During Trial

596–7625

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

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

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

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

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

Are there any questions?

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

The above model is set forth in ***Greyhound Lines***, 319 NLRB 554, 554 (1995). For more details on separating, excluding, or sequestering witnesses, see **CHAPTER 10** (“Separation of Witnesses Order”), below.

NOTE. A shortened version of the ***Greyhound*** order is set forth below:

All persons, other than a person designated as essential to the presentation of a party’s case, who expect to be called as witnesses in this proceeding will be required to remain outside the courtroom whenever testimony or other proceedings are taking place. In addition, during the course of the trial, they may not discuss with any other witness or any possible witness the testimony already given or to be given.

An exception to this rule concerns witnesses who are alleged discriminatees in this matter. They may be present in the courtroom at all times, other than when witnesses for the General Counsel or a charging party are giving testimony about the same events about which the alleged discriminatees expect to testify.

Also, counsel for a party may not disclose to any witness the testimony of any other witness. The counsel may, however, inform the counsel’s own witness of the content of testimony given by any opposing party’s witness to prepare to rebut that witness’ testimony.

It is the responsibility of counsel to see that their witnesses comply with this rule separating witness during the trial.

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

§ 1–400 Administration of Oath

596–7637–0100, 737–5650–1100

Examination is under oath. Board’s Rules, Section 102.30. The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively.

An affirmation instead of an oath is acceptable. Fed.R.Civ.P. Rule 43(d). If a witness refuses to swear or affirm on the basis of religious conviction, any formula of words that can reasonably be construed as a promise or undertaking to testify truthfully will suffice. See ***Silver State Disposal Service***, 326 NLRB 84, 98–100 (1998) and ***Union Starch & Refining Co.***, 82 NLRB 495, 496 (1949).

§ 1–410 Witness Oath

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

“Please be seated and give your name and address to the court reporter.”

(If needed for accuracy of transcript:) “How do you spell your name (or your first or last name)?”

For affirmation: “Do you solemnly affirm that you will testify truthfully at this trial?”

§ 1–420 Interpreter's Oath

“Do you solemnly swear that you are fluent in both English and __________ [foreign language] and that you will faithfully and truly, to the best of your skill, knowledge, and ability, translate from English to __________ [foreign language] and from __________ [foreign language] to English when called upon to do so during the trial, so help you God?”

CHAPTER 2. ADMINISTRATIVE LAW JUDGE

§ 2–100 Designation

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

The administrative law judge is designated by the Chief Judge or Deputy Chief Judge in Washington, or by the Associate Chief Judge in San Francisco, New York, or Atlanta, "as the case may be." Board's Rules, Section 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

596–7662–7700

§ 2–210 Basic Prohibition

Once designated, the judge is prohibited from ex parte communication with any of the parties to the proceeding. Board's Rules, Sections 102.126 and 102.128(e). That means any "oral or written communication not on the public record [about] which reasonable prior notice to all parties is not given," Board's Rules, Section 102.127(b), such as written communications when copies "are not contemporaneously served by the communicator on all parties to the proceeding," as well as oral communications "unless advance notice . . . is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present." Board's Rules, Section 102.129.

Significantly, the prohibition continues "until the issues are finally resolved by the Board," Rules, Section 102.128, and extends to indirect, as well as direct, communications. Regarding these communications, "No person shall knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person." Board's Rules, Section 102.131. Thus, when a representative of the General Counsel informed an Associate Chief Judge of the omission of two employees' names from a decision's list of unlawfully laid off employees, and the deciding judge then issued an errata adding those names, the Board pointed out that its "Rules and Regulations do not provide for ex parte communications between parties to a proceeding and the administrative law judge concerning substantive, although inadvertent, errors in the judge's decision." ***Wilco Business Forms***, 280 NLRB 1336, 1336 fn. 2 (1986). Similarly, although the Board ultimately decided not to institute proceedings pursuant to its Rules, Section 102.133(b), the Executive Secretary treated as a prohibited ex parte communication a letter to the judge from the respondent's counsel, requesting deletion of certain language from the judge's decision. See ***Today's Man***, 263 NLRB 332, 333 fn. 3 (1982).

§ 2–220 Exceptions to Basic Prohibition

Obviously, not every off-the-record communication between the judge and the parties is prohibited, because otherwise the judge could not perform some of the duties assigned by Board's Rules, Section 102.35(a), as discussed in **§ 2–300**, "Duties of Administrative Law Judge," below. Section 102.130 lists a number of ex parte communications that are not prohibited. These exceptions include:

Communications of matters that a judge is authorized to handle ex parte. Board's Rules, Section 102.31(a), states, "Applications for subpoena may be made ex parte." Thus, a party may submit an application to a judge outside the presence of other parties and, further, without service on them of a copy of the application. See ***Blake Construction Co.***, 245 NLRB 630, 630 fn. 1 (1979), enfd. in part 663 F.2d 272 (D.C. Cir. 1981).

Communications for information regarding status of case. Board's Rules, Section 102.130(b). For example, calls to a party to ascertain if the trial, in fact, may be as long or short as estimated are permitted. In ***Care Manor of Farmington***, 314 NLRB 248, 248 fn. 2 (1994), the Board held that this and the preceding exemption of Section 102.130(a) precluded from impropriety a judge's call to counsel for the General Counsel to advise the counsel "that [the judge] would be presiding" and to request that counsel notify the respondent's counsel of that fact. The Board did note specifically "the absence of evidence that a prohibited topic was discussed or that some other prohibited conduct occurred" during that call.

Communications to which all parties agree, or on which the judge formally rules, may be made ex parte. Board's Rules, Section 102.130(c). For example, the Board has held that a judge's settlement conversation with counsel for the General Counsel had "occurred with the knowledge of the Respondents and on the heels of a discussion among all of the parties" and did not "in any way involve[ ] the merits of the complaint allegations." ***Sanford Home for Adults***, 253 NLRB 1132, 1132 fn. 1 (1981), enfd. 669 F.2d 35 (2nd Cir. 1981).

Communications proposing settlement or agreement for disposition of any or all issues *may be made ex parte*. Board's Rules, Section 102.130(d). For example, independent of the settlement judge procedure in Board's Rules, Section 102.35(b), discussed in **CHAPTER 9**, "Settlements," below, it is not improper for the judge trying a case to discuss settlement offers with alleged discriminatees, ***Sumo Airlines***, 317 NLRB 383, 383 fn. 1 (1995), nor to inquire about particular remedies that a party would demand or forgo to reach settlement, ***Sanford Home for Adults***, above, as long as there was no discussion about the merits of the complaint's allegations.

Communications between the judge and a colleague concerning procedural matters may be made ex parte. It is not a prohibited ex parte communication for a judge to consult with a colleague concerning procedural matters pertaining to a case pending before the consulting judge. ***Pioneer Hotel, Inc. v. NLRB***, 182 F.3d 939, 943–944 (D.C. Cir. 1999).

§ 2–230 Procedure when Prohibited Communication Received

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

If the communication is written, the judge should place it "on the public record of the proceeding," Board's Rules, Section 102.132(a), with copies to be served "on all other parties to the proceeding and on the attorneys of record for the parties." Section 102.132(b).

In both of those situations, parties have 14 days after mailing of the copies, to file with the judge and serve "on all other parties, a statement setting forth facts or conclusions to rebut

those contained in the prohibited communication," after which the "responses shall be placed in the public record of the proceeding, and provision made for any further action, including reopening of the record which may be required under the circumstances." Board's Rules, Section 102.132(b).

It is not clear what steps should next be taken by the judge. Board Rules, Section 102.133(a), does provide that when "the nature and circumstances of a prohibited communication . . . are such that the interests of justice and statutory policy may require remedial action, the Board, administrative law judge, or Regional Director, as the case may be, may issue to the party making the communication a notice to show cause, returnable before the Board within a stated period of not less than 7 days from the date . . . why the Board should not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication or knowingly causes a prohibited communication to be made should be dismissed, denied, disregarded, or otherwise adversely affected on account of [the] violation." Succeeding subsections of Section 102.113 set forth actions to be taken by the Board, but make no provision for further action by a judge who issues the notice to show cause.

§ 2–300 Duties of Administrative Law Judges

596–7250–8000, 596–7662

The administrative law judge's basic duty is "to inquire fully into the facts . . . whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint." Board's Rules, Section 102.35(a). See ***Hall Industries***, 293 NLRB 785, 785 fn. 1 (1989), enfd. mem. 914 F.2d 244 (3rd Cir. 1990).

Obviously, that is accomplished by "presid[ing] over the [trial]." Statements of Procedure, Section 101.10. In doing so, the judge is responsible (1) for "courtroom administration," ***Liteky v. U.S.***, 510 U.S. 540, 555–556, 114 S.Ct. 1147, 1157 (1994), (2) for "attempting to move the trial along without unnecessary delay," ***U.S. v. Gonzalez-Soberal***, 109 F.3d 64, 73 (1st Cir. 1997)—though not by sacrificing "strict impartiality," ***U.S. v. Saenz***, 134 F.3d 697, 702 (5th Cir. 1998)—and (3) in addition, for "prevent[ing] improprieties during the trial," ***U.S. v. Warner***, 955 F.2d 441, 449 (6th Cir. 1992), cert. denied 505 U.S. 1227 (1992). Regarding courtroom administration, the judge is "the governor of the trial for the purposes of assuring its proper conduct," ***Quercia v. U.S.***, 289 U.S. 466, 469, 53 S.Ct. 698 (1933).

Specific authority conferred upon administrative law judges by the Board is enumerated in Board's Rules, Section 102.35(a)(1)–(a)(13). Only some of that authority needs to be addressed further:

<u>To regulate the course of the trial</u>. Board's Rules, Section 102.34(a)(6). Participation of parties during trials "shall be limited to the extent permitted by the administrative law judge," Board's Rules, Section 102.38. "It is appropriate also for the [judge] to direct the [trial] so that it may be confined to material issues and conducted with all expeditiousness consonant with due process" (footnote omitted). ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950). Toward that end, "[i]n the conducting of a [trial] the question of whether certain lines of inquiry or responses of witnesses should be curtailed rests within the sound discretion of the" judge. The judge's authority to expedite trials, however, must not be exercised to the extent that it "limit[s] either party in the full development of its case." ***American Life Ins. Co.***, 123 NLRB 529, 530 (1959). Thus, a judge may not "cut off lines of inquiry and limit[ ] the response of witnesses to such an extent that the development of the case may have been hampered" (footnote omitted), ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955), and which "precludes a fair determination" of the merits of parties' cases, ***Dayton Power & Light Co.***, 267 NLRB 202, 202 (1983).

If appropriate or necessary, to exclude persons or counsel from the trial for contemptuous conduct. Board's Rules, Section 102.35(a)(6). Thus, although Section 102.38 provides that "Any person shall have the right to appear at [the trial] in person, by counsel, or by other representative," the right of parties and counsel to appear at trials is not unlimited.

As pointed out above, judges are responsible for "courtroom administration," ***Liteky v. U.S.***, above, and one aspect of that responsibility is "prevent[ing] improprieties during the trial." ***U.S. v. Warner***, 955 F.2d 441, 449 (6th Cir. 1992), cert. denied 505 U.S. 1227 (1992). "To ensure a fair trial, the trial judge has a duty to require *all* counsel . . . to abide by the orders she issued and to adhere to the rules of evidence and procedure." ***U.S. v. Logan***, 998 F.2d 1025, 1029 (D.C. Cir. 1993), cert. denied 510 U.S. 1000 (1993). Board's Rules, Section 102.177(a), provides that, "Misconduct at any [trial] before an administrative law judge . . . shall be ground for summary exclusion from the [trial]." In taking this step, however, the judge should carefully explicate the reasons for exclusion. See ***Great Lakes Screw Corp. v. NLRB***, 409 F.2d 375, 378–381 (7th Cir. 1969). See also **§ 7–510**, "Exclusion of Counsel," below.

To make and file decisions. "After [trial] for the purpose of taking evidence upon a complaint, the administrative law judge shall prepare a decision." Board's Rules, Section 102.45(a). See also Statements of Procedure, Section 101.11(a). Thus, although all parties can agree to stipulate the facts to the Board for decision, waiving trial before an administrative law judge, a judge cannot grant only one party's motion to transfer a case directly to the Board for decision. See ***Machinists Lodge 1129 (Sunbeam Appliance Co.)***, 216 NLRB 630, 630 (1975).

Board's Rules, Section 102.45(a), requires that decisions "contain findings of fact, conclusions, and the reasons or basis [for them], upon all material issues of fact, law, or discretion presented on the record, and shall contain recommendations [on] what disposition of the case should be made." See also Statements of Procedure, Section 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, 312 (1984).

In decisions, judges must "apply established Board precedent which the Supreme Court has not reversed" (citation omitted), leaving "for the Board, not the judge, to determine whether that precedent should be varied." ***Waco, Inc.***, 273 NLRB 746, 749 fn. 14 (1984).

After a decision issues, the judge may issue an errata. ***Daniel Construction Co.***, 239 NLRB 1335, 1335 fn. 2 (1979), enfd. mem. 634 F.2d 621 (4th Cir. 1980), cert. denied 450 U.S. 918 (1981). But, an errata may not be used as a means for making substantive changes in a decision. "Under [Board's Rules] Secs. 102.35 and 102.45 . . . [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, 1336 fn. 2 (1986). As pointed out in that footnote, in addition to typographical errors, an errata may 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 errata 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."

To call, examine, and cross-examine witnesses and to introduce documentary and other evidence. Board's Rules, Section 102.35(a)(11). This section corresponds to Fed.R.Evid. Rule 614. As held:

1. A judge’s decision to question witnesses, or even to call witnesses, is not improper. ***Hall Industries***, 293 NLRB 785, 785 fn. 1 (1989), enfd. mem. 914 F.2d 244 (3rd Cir. 1990).

2. “Judges may do so repeatedly and aggressively to clear up confusion and manage trials,” or when “testimony is inarticulately or reluctantly given” (citation omitted), ***U.S. v. Tilghman***, 134 F.3d 414, 416 (D.C. Cir. 1998), quoting from ***U.S. v. Norris***, 873 F.2d 1519, 1525–1526 (D.C. Cir. 1989), cert. denied 493 U.S. 835 (1989).

3. To “clarify testimony or develop the record” (citations omitted). ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994), enfd. mem. 57 F.3d 1073 (7th Cir. 1995).

4. For “clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings.” ***U.S. v. Filani***, 74 F.3d 378, 386 (2nd Cir. 1996).

Even so, discretion to examine witnesses and to introduce evidence is not unlimited. See ***U.S. v. Gonzalez-Soberal***, 109 F.3d 64, 72 (1st Cir. 1997). The judge “must refrain from impeaching or from examining witnesses to the extent that he takes out of the hands of either party the development of its case” (footnote omitted), ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950), from “appearing to assume the role of an advocate in attempting to impeach [witnesses’] prior testimony” (footnote omitted), ***Better Monkey Grip***, 113 NLRB 938, 939 (1955), and in general from slanting, as opposed to clarifying, the record. See ***NLRB v. Honaker Mills***, 789 F.2d 262, 265 (4th Cir. 1986).

Judges are not required to withhold their questioning until the parties have finished examining witnesses. Rather, judges may “interrupt questioning . . . to clarify testimony or . . . develop a complete and integrated record.” ***Teamsters Local 722 (Kasper Trucking)***, above.

§ 2–400 Trials

596–7600

“Any party shall have the right to appear at [the trial] in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence,” Board’s Rules, Section 102.38. See also Statements of Procedure, Section 101.10(a).

Public trials. “Except in extraordinary situations the [trial] is open to the public.” Statements of Procedure, Section 101.10(a).

Unrepresented parties. The Act provides “no authority to provide counsel for litigants before the Board.” ***Golden Hours Convalescent Hospitals***, 200 NLRB 279, 280 fn. 5 (1972). Moreover, 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 [trial].” ***Air Transport Equipment***, 190 NLRB 377, 377 fn. 2 (1971), enfd. mem. 486 F.2d 1394 (2nd Cir. 1972). An unrepresented party must “comply with relevant rules of procedural and substantive law,” ***Faretta v. California***, 422 U.S. 806, 834 fn. 46, 95 S.Ct. 2525, 2540 fn. 46 (1975), and has no “constitutional right to receive personal instruction from the trial judge on courtroom procedure.” ***McKaskle v. Wiggins***, 465 U.S. 168, 183–184, 104 S.Ct. 944, 954 (1984).

Intervention at Trial. A person seeking to intervene “shall file a motion in writing or, if made at the [trial], may move orally on the record, stating the grounds upon which [the] person claims an interest,” and may be permitted to intervene “in person or by counsel or other representative to [the] extent and upon such terms as [the Regional Director or administrative law judge, depending on whether the motion was made before or during trial] may deem proper.” Board’s Rules, Section 102.29. See **§ 7–400**, “Intervention at Trial,” below.

Rules of evidence. “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 under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, U.S. Code [section 2072 of title 28].” Section 10(b) of the Act. That provision is essentially restated in Board’s Rules, Section 102.39, and in Statements of Procedure, Section 101.10(a). This is an area covered in greater depth in **CHAPTER 13**, “Evidence,” below.

NOTE. Board’s Rules, Section 102.39, states that “documentary evidence shall be submitted in duplicate.”

Oral arguments and briefs. “Any party shall be entitled, upon request, to a reasonable period at the close of the [trial] for oral argument,” but it is within “the discretion of the . . . judge” to allow briefs “or proposed findings and conclusions, or both” to be filed. Board’s Rules, Section 102.42. “They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge.” Statements of Procedure, Section 101.10(a). Under Board’s Rules, Section 102.42, however, “In any case in which the . . . judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, he or she shall notify the parties at the opening of the [trial] or as soon thereafter as practicable that he or she may wish to hear oral argument in lieu of briefs.” Under that section, the judge has discretion to “fix a reasonable time for briefs” to be filed, “but not [more than] 35 days from the close of the [trial].” See **§ 12–200**, **§ 12–500**, and **§ 12–601**,” below.

§ 2–500 Disqualification

§ 2–510 Grounds Asserted for Disqualification

596–7250–5000

“The functions of all administrative law judges . . . are conducted in an impartial manner,” Statements of Procedure, Section 101.10(b). The most commonly advanced ground for disqualification is the judge’s personal bias. The Fourth Circuit held In ***Eldeco, Inc. v. NLRB***, 132 F.3d 1007, 1010 (4th Cir. 1997), however, a contention that “approximately 89%” of an administrative law judge’s “decisions in the last 20 years were in favor of the Union, thereby indicating a bias in favor of labor unions,” is irrelevant in determining bias. It cited its earlier decision, ***Fieldcrest Cannon, Inc. v. NLRB***, 97 F.3d 65, 69 (4th Cir. 1996), which held “this type of statistical argument is irrelevant” because in reality it “tells us little or nothing.”

The terms “bias” and “prejudice” can also be applied when a judge’s conduct, for whatever reason, “precludes a fair determination” of the merits, ***Dayton Power & Light Co.***, 267 NLRB 202, 203 (1983), prejudicing not only the party affected, but also the basic objective of “inquir[ing] fully into the facts,” ***Hall Industries***, 293 NLRB 785, 785 fn. 1 (1989), enfd. mem. 914 F.2d 244 (3rd Cir. 1990). Beyond that, “proceedings should be free from any *appearance* [emphasis added] of partiality or bias.” ***Engineers Beneficial Assn. District 1 (Crest Tankers)***, 274 NLRB 1481, 1482 fn. 5 (1985).

In general, the terms bias and prejudice “connote a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate,* either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree.” ***Liteky v. U.S.***, 510 U.S. 540, 550, 114 S.Ct. 1147, 1155 (1994). Thus, as the Court explained, those terms are not confined to opinions reached on the basis of extrajudicial sources, 510 U.S. at 554, 114 S.Ct. at 1157, but can be based upon “favorable or unfavorable predisposition” which “even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment,” 510 U.S. at

551, 114 S.Ct. at 1155. In reaching a determination in those areas, a series of factors have been scrutinized:

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, 800 fn. 1 (1982), enfd. in part 724 F.2d 282 (2nd Cir. 1983). Nor, for that matter, is past representation of another party, at least if that representation was relatively remote in time. ***Centeno Super Markets***, 220 NLRB 1151, 1151 fn. 1 (1975), enfd. 555 F.2d 442 (5th Cir. 1977), cert. denied 434 U.S. 1064 (1978) (8 or 9 years had passed by time of trial). And, somewhat related, it is not grounds for disqualification that the administrative law judge is "employed by the Board which . . . also employs the staff of the General Counsel prosecuting the case." ***Money Radio***, 297 NLRB 705, 705–706 (1990).

Criticisms of counsel or parties. Although "judicial 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," 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 v. U.S.***, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). For example, no prejudice is shown by comments "rebuk[ing] counsel for improper behavior" (citation omitted), ***U.S. v. Logan***, 998 F.2d 1025, 1029 (D.C. Cir. 1993), cert. denied 510 U.S. 1000 (1993), nor even necessarily for "remarks and behavior [that] could well be interpreted as disparaging the General Counsel and the Union." ***Weather Shield Mfg.***, 292 NLRB 1, 1 fn. 3 (1988), enf. denied 890 F.2d 52 (7th Cir. 1989). For that matter, bias was not shown by certain remarks made by the judge in an unrelated prior proceeding during which the judge had questioned counsel's "professional integrity." ***Merillat Industries***, 307 NLRB 1301, 1301–1302 (1992).

On the other hand, the Board concluded that disqualification for bias was warranted by comments that "impugned the good faith of [a party] and questioned whether the General Counsel and the Charging Party were abusing the Board's processes," ***New York Times Co.***, 265 NLRB 353, 353 (1982), as well as by "serious accusations and hostile tone" directed to one counsel, including the accusation that counsel would be "suborning perjury" if he asked certain questions. ***Reading Anthracite Co.***, 273 NLRB 1502, 1502 (1985).

Comments about the merits and about evidence presented. A judge's opinion 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 v. U.S.***, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). Thus, although 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), it has not concluded that opinions expressed by judges about a particular defense, after all evidence has been received, to be improper, ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1018 (1994) , enfd. mem. 57 F.3d 1073 (7th Cir. 1995), nor opinions "regarding the ultimate merits of the case . . . in the context of suggesting the possibility of settlement," ***Roto Rooter***, 288 NLRB 1025, 1025 fn. 2 (1988).

For that matter, the Board concluded there was no bias shown by comments concerning testimony "which was evasive, unresponsive, and circumlocutory," although it pointed out that the "comments would have better been left unsaid," ***American Life Ins. Co.***, 123 NLRB 529, 530 (1959). "A judge's remarks that constitute mere expressions of a point of law are not sufficient to show personal bias or prejudice." ***NLRB v. Honaker Mills***, 789 F.2d 262, 265 (4th

Cir. 1986).

On the other hand, bias was shown when the judge expressed his view that some "allegations . . . did not constitute unfair labor practices" and, accordingly, intended to preclude introduction of "any evidence to support [the] allegations." ***Center for United Labor Action***, 209 NLRB 814, 814–815 (1974). See also ***Dayton Power & Light Co.***, 267 NLRB 202, 202–203 (1983). Bias was also shown by a judge's "statements throughout the [trial]" creating "the impression that he had prejudged the ultimate issue in the case." ***Reading Anthracite Co.***, 273 NLRB 1502, 1502 (1985).

Rulings. "First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." ***Liteky v. U.S.***, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). For example, no bias was shown when, before making evidentiary rulings, the judge sometimes asked how a party's case would be prejudiced if its objection was overruled, and the judge told the parties "that a fair application of the rules of evidence may at times turn on whether . . . the case of the party opposing introduction of evidence would be prejudiced were the evidence received." ***Blake Construction Co.***, 245 NLRB 630, 630 fn. 1 (1979), enfd. in part 663 F.2d 272 (D.C. Cir. 1981).

Participation in questioning witnesses. As set forth in **§ 2–300**, "Duties of Administrative Law Judge," above, administrative law judges possess authority to examine and cross-examine, as well as call, witnesses. As also pointed out, there are limits to that authority, and prejudice will be found when those limits are exceeded.

Suggestions to counsel regarding how to proceed. It was held improper for a judge to suggest that counsel "maintain a reasonably militant posture [regarding] the relevancy of this material." ***Reading Anthracite Co.***, 273 NLRB 1502, 1502 (1985). Even so, the Board has not found bias when the judge suggested to counsel "a line of questioning" that "the judge might have accomplished . . . through his own questioning," ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994), nor when the judge's suggestion "related to a technical rule of cross-examination procedure" involving "general background evidence."

Gratuitous and off-the-record remarks. A judge's making such remarks, of itself, does not necessarily establish prejudice. Because of the potential for an appearance of partiality and accusations of bias, however, the Board has cautioned against gratuitous remarks, ***Better Monkey Grip Co.***, 113 NLRB 938, 940 (1955) and ***Teamsters Local 777 (Crown Metal)***, 145 NLRB 197, 198 fn. 4 (1963), enfd. 340 F.2d 905 (7th Cir. 1964), and against off-the-record remarks, ***Aerosonic Instrument Corp.***, 116 NLRB 1502, 1503 (1956) ("unnecessary remarks or comments to the parties [off the record] concerning the merits of their cases" and ***Thermoid Co.***, 90 NLRB 614, 614 fn. 2 (1950) (during a recess offering suggestions in trial tactics to counsel).

Efforts to expedite trial. A "judge's efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune" from accusations of prejudice. ***Liteky v. U.S.***, 510 U.S. 540, 555–556, 114 S.Ct. 1147, 1157 (1994). Even so, the efforts cannot be so extreme that they limit "either party in the full development of its case." ***Indianapolis Glove Co.***, 88 NLRB 986, 987 (1950). For example, although "certain lines of inquiry or responses of witnesses [can] be curtailed," ***American Life Ins. Co.***, 123 NLRB 529, 530 (1959), in "attempting to move the trial along without unnecessary delay," ***U.S. v. Gonzalez-Soberal***, 109 F.3d 64, 73 (1st Cir. 1997), judges may not in the process preclude parties from presenting evidence that will allow a "fair determination" of the issues. ***Dayton***

Power & Light Co., 267 NLRB 202, 202 (1983) and ***Center for United Labor Action***, 209 NLRB 814, 814–815 (1974). Doing so may not lead to disqualification, but it surely will result in remand for further trial.

§ 2–520 Disqualification Procedure

596–7250–4500

"An administrative law judge may withdraw from a proceeding whenever he deems himself disqualified," and parties can request that a judge withdraw "at any time following his designation and before filing of his decision," Board's Rules, Section 102.37. See also Statements of Procedure, Section 101.10(b). That means that if the asserted disqualifying facts are discovered after trial, but before issuance of the judge's decision, the motion must be made to the judge. ***Al Bryant, Inc.***, 260 NLRB 128, 128 fn. 1 (1982), enfd. 711 F.2d 543 (3rd Cir. 1983), cert. denied 464 U.S. 1039 (1984).

To move for disqualification, a party must file with the judge "promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification." Board's Rules, Section 102.37. If a party fails to file an affidavit 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, 1025 fn. 2 (1988), ***Central Mack Sales***, 273 NLRB 1268, 1268 fn. 2 (1984), and ***Sanford Home for Adults***, 253 NLRB 1132, 1132 fn. 1 (1981), affd. in relevant part 669 F.2d 35 (2nd Cir. 1981).

If the motion is timely filed, the judge must rule on the affidavit alleging grounds for disqualification and cannot simply refer it to the Board for disposition. ***Al Bryant, Inc.***, 260 NLRB 128, 128 fn. 1 (1982). Under Board's Rules, Section 102.37, the judge can disqualify himself or herself if the affidavit is regarded as "sufficient on its face." If the judge reaches a contrary conclusion, he or she "shall so rule on the record, stating the grounds for his ruling, and proceed with the [trial] or, if the [trial] has closed, he shall proceed with issuance of his decision," presumably including a ruling on why disqualification is rejected.

CHAPTER 3. PLEADINGS

§ 3–100 The Charge

596–0800

See Board's Rules, Section 102.9–102.14.

§ 3–110 General Principles

596–0800

A charge may be filed by a labor organization, an employee, an employer or any other entity. See ***Apex Investigation & Security Co.***, 302 NLRB 815, 818 (1991) (charges filed on behalf of, or by, health and welfare fund are valid because anyone may file a charge). A charge must be filed with the appropriate Regional Director or with the General Counsel. Board's Rules, Sections 102.10 and 102.33. The venue of charge filing does not affect the Board's jurisdiction. ***Harris Corp.***, 269 NLRB 733, 734 fn. 1 (1984), citing ***Allied Products Corp.***, 220 NLRB 732, 733 (1975).

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

596–0855

Under Section 10(b) of the Act, a charge must be filed and served within 6 months of the alleged unfair labor practice.

A charge must be *served*, not merely filed, within the 6-month period. ***Dun & Bradstreet Software Services***, 317 NLRB 84, 84–85 (1995), affd. 79 F.3d 1238 (1st Cir. 1996) (a charge served one day late, based in part on erroneous advice from Regional Office, is untimely). It does not, however, have to be *received* by the charged party within the 6-month period. ***NLRB v. Imperial House Condominium***, 831 F.2d 999, 1003 (11th Cir. 1987) and ***NLRB v. Laborers Local 264***, 529 F.2d 778, 781–785 (8th Cir. 1976). The charge must be signed. Board's Rules, Section 102.11. But an unsigned copy served on the charged party is adequate if the original filed with the Regional Office is signed. ***Freightway Corp.***, 299 NLRB 531, 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 __ F.3d __ (DC Cir. April 13, 2001).

Section 10(b) of the Act is discussed more fully at **§ 3–600**, "Section 10(b) Affirmative Defense," below.

§ 3–130 Sufficiency of the Charge

596–0844

A charge is required before the Board can act. ***NLRB v. Kohler Co.***, 220 F.2d 3, 7 (7th Cir. 1955). But a charge is not a pleading and does not require the specificity of a pleading. It merely serves to initiate a Board investigation to determine whether a complaint should be issued. ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 307, 79 S.Ct. 1179, 1183 (1959). A charge "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the matter." ***NLRB v. Louisiana Mfg. Co.***, 374 F.2d 696, 704–705 (8th Cir. 1967), quoting from ***NLRB v. Raymond Pearson, Inc.***, 243 F.2d 456, 458 (5th Cir. 1957).

§ 3–140 Withdrawal or Dismissal

596–0877–7500, 596–0877–8000

Withdrawal of a charge may be the result of solicitation by the General Counsel. If the charge lacks merit, but withdrawal is refused, the charge will be dismissed. The General Counsel's *NLRB Casehandling Manual* (Part One) Informal Dispositions Section 10120.3. Charges may also be withdrawn as part of a settlement agreement.

Before the trial opens, a charge may be withdrawn only with the consent of the Regional Director. After the trial opens and until the judge's decision issues, it may generally be withdrawn only with the consent of the judge. After the judge's decision issues, it may be withdrawn only with the consent of the Board. Section 101.9 of the Board's Statement of Procedure. The Board has held, however, that even after the opening of trial but before the receipt of evidence, the General Counsel has unreviewable discretion to withdraw the complaint. ***Sheet Metal Workers Local 28 (American Elgen)***, 306 NLRB 981, 981–982 (1992). Not so after evidence has been introduced. ***Sheet Metal Workers Local 162 (Lang's Enterprises)***, 314 NLRB 923, 923 fn. 2 (1994). See also **CHAPTER 9**, "Settlements," below.

The dismissal of a charge by the Regional Director may be appealed to the General Counsel's Office of Appeals in Washington. Until the charge is finally dismissed by the Office of Appeals, it continues to exist during the appeals period. It is not time-barred if it is reinstated during that period by the Regional Director, even though the reinstatement comes more than 6 months after the occurrence of the unfair labor practice. ***Children's National Medical Center,*** 322 NLRB 205, 205 (1996) (reinstatement in these circumstances is consistent with ***Ducane Heating Corp.***, 273 NLRB 1389, 1389–1390 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986)).

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

§ 3–200 Complaint

596–3200, 596–3212

The authority to issue complaints rests solely with the General Counsel. The disposition of charges, and 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, 87 S.Ct. 903, 913 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"). It was error for a judge to conclude that the Regional Director was "without authority" to issue a complaint. See ***Cincinnati Enquirer***, 298 NLRB 275, 275 (1990), review denied 938 F.2d 284 (D.C. Cir. 1991), citing ***NLRB v. Food & Commercial Workers Local 23***, 484 U.S. 112, 118–119, 124–126, 108 S.Ct. 413, 418–419, 421–422 (1987).

§ 3–210 Adequacy of Complaint

596–3225, 596–3237

"The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." ***Curtiss-Wright Corp. v. NLRB***, 347 F.2d 61, 72 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." ***American Newspaper Publishers Assn. v. NLRB***, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100, 73 S.Ct. 552 (1953), quoting from ***NLRB v. Piqua Munising Wood Products Co.***, 109 F.2d 552, 557 (6th Cir. 1940). A complaint is adequate if it alleges "a defined and easily identified class of employees" and others "similarly situated," because the allegation is sufficient to put the respondent on

notice that the complaint is not limited to named individuals. ***Iron Workers Local 433 (Reynolds Electrical)***, 298 NLRB 35, 35–36 (1990), enfd. mem. 931 F.2d 897 (9th Cir. 1991). See also **§ 3–230**, "Bills of Particulars," below.

§ 3–220 Complaint Closely Related to Timely Charge

596–3237, 596–3250

A complaint is not restricted to the precise allegations of the charge. As long as there is a timely charge, the complaint may allege any matter sufficiently related to or growing out of the charged conduct. ***NLRB v. Fant Milling Co.***, 360 U.S. 301, 309, 79 S.Ct. 1179, 1184 (1959).

The test that applies for adding related uncharged allegations is stated in ***Redd-I, Inc.***, 290 NLRB 1115, 1115–1116 (1988), citing ***NLRB v. Dinion Coil***, 201 F.2d 484, 491 (2nd Cir. 1952). Although ***Redd-I*** dealt with allegations in a complaint amendment that were not described in the underlying charge, a similar relatedness test applies to allegations in initial complaints. ***Nickles Bakery of Indiana,*** 296 NLRB 927, 927–928 (1989).

In applying the closely related test set forth in ***Redd-I***, the Board looks at

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

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

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

The Board has clarified ***Redd-I*** to make clear that the untimely allegation need not involve the same section of the Act as the other alleged violations. ***Nickles Bakery of Indiana***, 296 NLRB 927, 928 fn. 5 (1989). Moreover, the Board rejected a claim of different defenses, when the complaint allegations involved the same unlawful object. ***Nickles,*** above at 928 fn. 6. Sufficient nexus exists when the disputed charge and existing charge allegations "all occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union." ***Well-Bred Loaf,*** 303 NLRB 1016, 1016 fn. 1 (1991). See also ***Office Depot, Inc.***, 330 NLRB No. 99, slip op. at 1–3 (2000) and ***Ross Stores***, 329 NLRB No. 59, slip op. at 3 (1999), enf. denied in relevant part 235 F.3d 669, 672–675 (D.C. Cir. 2001) ("closely related" may include acts arising out of the same union campaign).

The boilerplate "other acts" language preprinted on the charge form, however, is not itself sufficient to support a more specific Section 8(a)(1) complaint allegation. See ***Nickles Bakery***, above, and ***Lotus Suites, Inc. v. NLRB***, 32 F.3d 588, 591–592 (D.C. Cir. 1994).

See **§ 3–330**, "Amendments and Section 10(b)," and **§ 3–650**, "Revival of Withdrawn or Dismissed Charge," below, for more detailed discussions of the relatedness test in the context of Section 10(b).

§ 3–230 Bill of Particulars

596–3225, 596–7682

Bills of particulars are normally handled at the pretrial stage by the Chief Judge or Deputy Chief Judge in Washington, or by the Associate Chief Judge in San Francisco, New York, or Atlanta. They may, however, be raised at the beginning of a trial in the same or a somewhat different form. As a general matter, "a bill of particulars is justified only when the complaint is so vague that the party charged is unable to meet the General Counsel's case." ***North American Rockwell Corp. v. NLRB***, 389 F.2d 866, 871 (10th Cir. 1968). A complaint

that alleges interrogation and threats, gives the month of the occurrence, and identifies the official responsible is sufficient to acquaint the respondent with the charges and issues to be considered at the trial. ***Lloyd A. Fry Roofing Co. v. NLRB***, 222 F.2d 938, 940 (1st Cir. 1955).

Also adequate is a complaint that describes the nature of the activity and gives dates and names of the respondent's agents. ***Dal-Tex Optical Co.***, 130 NLRB 1313, 1315 (1961). The names of employees to whom an alleged Section 8(a)(1) violation was directed need not be pleaded, and a respondent is not entitled to disclosure of the names before the trial. See ***Walsh-Lumpkin Wholesale Drug Co.***, 129 NLRB 294, 295 (1960) and ***Storkline Corp.***, 141 NLRB 899, 902–903 (1963), enfd. in part 330 F.2d 14 (5th Cir. 1964). Nor is the General Counsel required to plead evidence or theory of the case in the complaint. ***North American Rockwell***, above, 389 F.2d at 871 and ***Boilermakers Local 363 (Fluor Corp.)***, 123 NLRB 1877, 1913 (1959).

See Board's Rules, Section 102.15, which sets out what is required in a complaint. 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**.

§ 3–300 Amendments to Complaints

596–3262

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

596–3262

After the trial opens, the judge may amend the complaint only on motion by, or with the consent of, the General Counsel. ***GPS Terminal Services***, 331 NLRB No. 121, slip op. 2 (2001). The charging party cannot enlarge upon or change the General Counsel's theory of the case. ***Kimtruss Corp.***, 305 NLRB 710, 711 (1991). Once a complaint has issued, however, the Board and not the General Counsel has authority to grant the appropriate remedy. Thus, the charging party may submit evidence regarding an appropriate remedy different from the remedy sought by the General Counsel. ***Kaumagraph Corp.***, 313 NLRB 624, 624–625 (1993).

§ 3–320 When Amendments Are Allowed

596–3262, 506–3300

Board's Rules, Section 102.17, permits complaint amendments "upon [terms that] may seem just." ***Sheet Metal Workers Local 91 (Schebler Co.)***, 294 NLRB 766, 774–775 (1989), enfd. in part and remanded in part, 905 F.2d 417 (D.C. Cir. 1990) (after the close of trial is too late). Generally, amendments are permitted when they are sufficiently related to existing allegations and no undue prejudice would be visited on the respondent. See ***Payless Drug Stores***, 313 NLRB 1220, 1220–1221 (1994) and ***Pincus Elevator & Electric Co.***, 308 NLRB 684, 684–685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993). Even then, however, the judge may be reluctant to grant amendments that require significant further evidence after the General Counsel has rested or when the case is nearing completion. Particularly in long cases in which there is no Section 10(b) problem, it might be more appropriate to require the filing of a new charge and, if there is merit to the charge, a new complaint. In any event, the judge has considerable discretion in granting motions to amend. If the motion is granted, the judge should be liberal in granting the respondents sufficient time to submit evidence in response to the amendments.

Open-ended motions made at the conclusion of a trial to conform the pleadings to the proof should be viewed with skepticism. Any amendments should be explicit and anything material should be fully litigated. Minor discrepancies that are not material, such as dates, can be handled in the judge's decision.

§ 3–330 Amendments and Section 10(b)

596–0420

In certain circumstances, uncharged allegations may be the subject of amendments to complaint. "If a charge was filed and served within six months after the violations alleged in the complaint, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (1) they are closely related to the violations named in the charge, and (2) occurred within six months before the filing of the charge." ***Redd-I, Inc.***, 290 NLRB 1115, 1115–1116 (1988), citing ***NLRB v. Dinion Coil***, 201 F.2d 484, 491 (2nd Cir. 1952). See also ***Old Dominion Freight Line***, 331 NLRB No. 3, slip op. at 1–2 (2000).

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

596–3282

An unpleaded but fully litigated matter may support an unfair labor practice finding despite a lack of an allegation in the complaint. ***Garage Management Corp.,*** 334 NLRB No. 116, slip op. at 1–2 (2001), ***Hi-Tech Cable Corp.***, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997), ***Meisner Electric, Inc.***, 316 NLRB 597, 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996), and ***Pergament United Sales***, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990). For a discussion of due process when an unpleaded issue has been fully litigated, or when the Board has found a different theory of violation from that argued by the General Counsel, see ***Facet Enterprises v. NLRB***, 907 F.2d 963, 969–975 (10th Cir. 1990).

In ***Facet Enterprises*** the court held that although the alleged refusal to bargain was based on the theory of attempted unit splitting and the Board found a violation on the basis of direct dealing, "quite a different offense" which was not explicitly mentioned in the complaint and which "requires divergent components of proof," the "issue of direct dealing was fully and fairly litigated at trial."

The fully litigated principle applies with particular force when the violation is established from testimonial admissions by the respondent's witness. ***Pergament***, above.

§ 3–400 Consolidation and Severance of Complaints

596–4400

§ 3–410 General Principles

596–4400

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

After issuance of a complaint and before a trial opens, the Chief Judge or Deputy Chief Judge in Washington, or the Associate Chief Judge in San Francisco, New York, or Atlanta, has the authority to consolidate or sever cases on motion of any party. After a trial has opened, consolidation or severance may occur only on motion to the trial judge. Board's Rules, Sections 102.33(d), 102.24, 102.25, and 102.35(a)(8).

Judges have the authority and "discretion to determine when consolidation, or severance, of any complaint is warranted, considering such factors as the risk that matters litigated in [an earlier trial] will have to be relitigated in [a second trial] and the likelihood of delay if consolidation, or severance, is granted." ***Service Employees Local 87 (Cresleigh Management)***, 324 NLRB 774, 775–776 (1997).

In compliance proceedings, see Board's Rules, Section 102.54(b), regarding

consolidation of complaint and related compliance specifications.

§ 3–420 Consolidation

596–4425, 596–4450

Generally, 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) and ***Jefferson Chemical Co., Inc.***, 200 NLRB 992, 992 fn. 3 (1972). But the Board has recognized that ***Peyton Packing*** and ***Jefferson Chemical*** are not absolute. The Board has held that those cases do not give rise to a blanket rule that requires consolidation into one proceeding of all charges filed against the same respondent during the pendency of that proceeding. See ***Maremont Corp.***, 249 NLRB 216, 216–217 (1980) and ***Harrison Steel Castings Co.***, 255 NLRB 1426, 1426–1427 (1981). Thus, it is not appropriate for a judge in a second related case involving the same respondent to dismiss a complaint allegation under ***Peyton Packing***, if the judge in the first case properly refused to allow an amendment to include that allegation in the first proceeding. ***Maremont Corp.,*** above, and ***FES***, 331 NLRB No. 20, slip op. at 6 fn. 13 (2000).

Moreover, the General Counsel may litigate complaint allegations in a subsequent proceeding if the events underlying the new allegations occurred after the close of the trial in the first case. See ***Great Western Produce,*** 299 NLRB 1004, 1004 fn. 1 (1990). See also ***Service Employees Local 87 (Cresleigh Management)***, above, 324 NLRB at 775 (the Board seems reluctant to dismiss a second case under ***Peyton Packing*** and ***Jefferson Chemical*** except in unusual circumstances). See also ***Frontier Hotel & Casino***, 324 NLRB 1225, 1225–1226 (1997) and ***Detroit Newspapers***, 330 NLRB No. 81, slip op. at 3–4 (2000).

§ 3–430 Severance

596–4475

As indicated above, a judge has the authority, after a trial opens, to sever cases previously consolidated by the Regional Director. See ***Quaker Tool & Die, Inc.***, 169 NLRB 1148, 1148 (1968) (reversing the judge on the merits of severance, but not questioning his authority). A good discussion of the issue by a judge who properly utilized his discretion to sever is found in ***Adair Standish Corp.***, 283 NLRB 668, 669–671 (1987), enfd. mem. 875 F.2d 866 (6th Cir. 1989) (a technical 8(a)(5) case had been consolidated by the Regional Director with a basically unrelated unfair labor practice case but, after the trial opened, the judge properly severed the cases and issued separate decisions). See also ***Storer Cable TV of Texas,*** 292 NLRB 140, 140 (1988). There is no ***Jefferson Chemical*** problem with the severance. ***Winchell Co.***, 315 NLRB 526, 532 (1994), enfd. mem. 74 F.3d 1227 (3d Cir. 1995).

§ 3–500 Answer to Complaint

596–4000

Board’s Rules, Section 102.20, sets forth the requirements for an answer. It provides that, if no answer is timely filed in 14 days after service, all allegations of the complaint are deemed to be admitted as true. In most cases in which no answer or an insufficient answer is filed, the General Counsel files a motion for summary judgment directly with the Board pursuant to Board’s Rules, Section 102.24(b). ***Clement-Blythe Cos.***, 168 NLRB 118, 118–119 (1967), enf. denied 415 F.2d 415 F.2d 78 (4th Cir. 1969). Motions for summary judgment must be filed no later than 28 days before the scheduled trial and are filed with the Executive Secretary of the Board and not the Division of Judges.

If for any reason the General Counsel fails to file a motion for summary judgment within the time prescribed by Board’s Rules, Section 102.24(b), issues regarding the absence, timeliness, or adequacy of an answer may be raised before the judge, to whose discretion the

issues are committed. See ***Textile Workers Local 229 (Metzger Co.)***, 120 NLRB 1700, 1700–1701 (1958) (affirming the judge's refusal at the trial to accept an answer retroactively because no adequate excuse was offered for the untimely filing) and ***CCY New Worktech, Inc.***, 329 NLRB No. 24, slip op. at 1 (1999) (respondent failed to file answer and did not appear at the trial).

Under Board's Rules, Section 102.23, a respondent may amend its answer at any time before trial. After the trial opens, the judge has the discretion to permit an amended answer. Motions to amend an answer, particularly when they come early in the trial and there is no prejudice to the General Counsel, should probably be viewed favorably. See Rule 15(b) of the Rules of Civil Procedure and ***Hylton v. John Deere Co.***, 802 F.2d 1011,1015 (8th Cir. 1986). And see ***Baron Honda-Pontiac***, 316 NLRB 611, 611 (1995) (because an allegation in the amended complaint was substantially unchanged from the denied allegation in the initial complaint, the Board did not deem the undenied allegation admitted).

§ 3–600 Section 10(b) Affirmative Defense

596–0420

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 fn. 9, 79 S.Ct. 1179, 1184 fn. 9 (1959). For a complete analysis, see ***Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB,*** 362 U.S. 411, 414–429, 80 S.Ct. 822, 825–833 (1960).

Section 10(b) is not jurisdictional. It is an affirmative defense and, if not timely raised, it is waived. ***Public Service Co.***, 312 NLRB 459, 461 (1993) and ***DTR Industries***, 311 NLRB 833, 833 fn. 1 (1993), enf. denied 39 F.3d 106 (6th Cir. 1994) (waived when not pleaded as an affirmative defense in the answer or litigated at the trial, even though raised in the brief to the judge).

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

596–0420, 596–5000

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

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). The ***Postal Service Marina*** rule, however, is restricted to discriminatory discharge cases. It probably does not apply in refusal to bargain cases. See ***Esmark, Inc. v. NLRB,*** 887 F.2d 739, 746 fn. 6 (7th Cir. 1989). See also ***Leach Corp.***, above, 312 NLRB 990, 991 fn. 7 (the Section 10(b) period for a Section 8(a)(5) charge, involving a plant transfer and withdrawal of recognition, did not begin until a "substantial percentage" of employees had been transferred).

Computing the time, one excludes the day on which the unfair labor practice occurred. ***MacDonald's Industrial Products***, 281 NLRB 577, 577 (1986).

§ 3–620 Not a Rule of Evidence

596–0420, 596–0440

Bryan Mfg., above, 362 U.S. at 414–429, 80 S.Ct. at 825–833 (1960), permits the admission of evidence concerning events outside the 10(b) period, if the evidence is used as background only and not to prove a time-barred unfair labor practice. Thus, evidence of events outside the 6-month period is admissible to shed light on matters within the period as background. See ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997) (admissible to shed light on the respondent's motivation).

When, however, the conduct within the 10(b) period can be found to be an unfair labor practice only through reliance upon an earlier unfair labor practice, evidence of the earlier conduct cannot be used, because "it does not simply lay bare a putative current unfair labor practice," but "serves to cloak with illegality that which was otherwise lawful." ***Bryan Mfg.***, above at 417–418. Thus, evidence of alleged supervisory coercion of employees to designate a union that occurred outside the 10(b) period, was barred by Section 10(b) when offered to prove illegality of contract executed within the 10(b) period. See ***Teamsters Local 27 (Combined Containair Industries)***, 209 NLRB 883, 883–884 (1974).

§ 3–630 Continuing Violations

596–0460

The Board held in ***Control Services***, 305 NLRB 435, 435 fn. 2, 442 (1991), citing ***Alamo Cement Co.***, 277 NLRB 1031, 1036–1037 (1985), that an allegation that an employer maintained an unlawful no-solicitation rule within the 10(b) period was timely even though the respondent promulgated the rule outside the period. Similarly, the Board held in ***A & L Underground***, 302 NLRB 467, 469 (1991), that if the employer simply fails to abide by certain contract provisions, without repudiating the contract, each successive contract breach constitutes a separate unfair labor practice.

On the other hand, the Board also held in ***A & L Underground,*** 302 NLRB at 468–469, that if the respondent meets its burden of showing that the charging party has received clear and unequivocal notice of the total contract repudiation before the 10(b) cutoff date, any alleged contract violations within the 10(b) period is time-barred. Similarly as held in ***Chambersburg County Market***, 293 NLRB 654, 655 (1989), "a charge alleging an unlawful refusal to execute a bargaining contract is cognizable only when filed within 6 months."

§ 3–635 Backpay for Continuing Violations

In ***Vallow Floor Coverings, Inc.***, 335 NLRB No. 7, slip op. at 2 (2001), the union alleged in its June 4, 1997 charge that the employer had refused since March 14, 1991 to apply with their agreement signed on that date to all bargaining unit employees. Finding a continuing violation, the Board agreed with the judge that the employer failed to show that the union, before the 6-month cutoff period, had "clear and unequivocal notice" of the employer's unlawful actions.

The Board ordered the employer to comply with its contracts and make the employees whole from March 14, 1991. Citing ***Pullman Building Co.***, 251 NLRB 1048 (1980), the Board held that "notwithstanding the absence of fraudulent concealment of its [unlawful] conduct":

> There is no logical reason to restrict the remedy to 6 months before the charge was filed where, as in *Burgess* [227 NLRB 765 (1997], the Union did not immediately become aware of unfair labor practices through no fault of its own. Once the 10(b) period has been tolled for the purpose of filing the charge, the case is before us on the same basis as is any other case, and hence the usual make-whole remedy is the appropriate one.

§ 3–640 Fraud or Deception

596–0420, 596–5087

Fraudulent concealment of facts of an unfair labor practice from a charging party tolls Section 10(b) unless the charging party is guilty of want of diligence. ***Ladies Garment Workers v. NLRB (McLoughlin Mfg.)***, 463 F.2d 907, 921–923 (D.C. Cir. 1972) (false representation that the employer was going out of business when in fact he was secretly moving plant), citing ***Holmberg v. Armbrecht***, 327 U.S. 392, 397, 66 S.Ct. 582, 585 (1946) ("this equitable doctrine is read into every Federal statute of limitations"). Accord: ***Burgess Construction***, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979) (fraudulent concealment found when the respondent fraudulently assured the union it no longer employed carpenters). For the effects of fraud on the General Counsel, see the next section.

§ 3–650 Revival of Withdrawn or Dismissed Charge

596–0420, 596–6275

As a general rule, a withdrawn or finally dismissed charge may not be revived by the General Counsel after the Section 10(b) period has run. ***Ducane Heating Corp.***, 273 NLRB 1389, 1390–1391 (1985), enfd. 785 F.2d 304 (4th Cir. 1986). See also **§ 3–140**, "Withdrawal or Dismissal," above.

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) (an affidavit submitted to General Counsel and on which General Counsel relied in dismissing a charge, was later discovered to have been perjured). See also ***Brown & Sharpe Mfg. Co.***, 321 NLRB 924, 924–925 (1996), review denied 130 F.3d 1083, 1087 (D.C. Cir. 1997, cert. denied 524 U.S. 926 (1998) (there was no fraudulent concealment from the General Counsel of material facts on alleged bad-faith bargaining, because the General Counsel did not ask for or demand information about certain issues) and ***Benfield Electric Co.***, 331 NLRB No. 77, slip op. at 1–3 (2000) (***Kanakis*** distinguished and no fraudulent concealment found when an attorney's position statement was not forthcoming about his client's true motive, but did not attempt to conceal material facts).

In ***Brown & Sharpe***, above, 321 NLRB at 924, citing ***Holmberg v. Armbrecht***, above, the Board set forth the three elements that are required to establish fraudulent concealment in these circumstances. They are (a) deliberate concealment, (b) of material facts, and (c) the injured party was ignorant of those facts without any fault or want of due diligence on its part. In ***Morgan's Holiday Markets***, 333 NLRB No. 92, slip op. at 4–5 (2001), the Board clarified "material facts" by adopting a "standard of materiality" that the concealed evidence 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 Settlement Agreement. If charges are withdrawn or dismissed as a consequence of a settlement agreement approved by the Agency and the respondent does not complied with the terms of the settlement, Section 10(b) does not bar revival of the charges. Settlements are subject to implicit condition that they will be carried out and that unfair labor practices will not be resumed. See ***Sterling Nursing Home***, 316 NLRB 413, 416 (1995).

3. Closely Related to Current Complaint. If a viable and timely charge exists and the General Counsel seeks to add to the complaint allegations that were contained in a previously withdrawn or dismissed charge, the closely related test applies. See ***Redd-I, Inc.***, above, 290 NLRB 1115, 1115–1116 (1988). See also ***Sonicraft, Inc. v. NLRB***, 905 F.2d 146, 148–149 (7th

Cir. 1990), cert. denied, 498 U.S. 1024 (1991) and ***Pioneer Hotel, Inc. v. NLRB***, 182 F.3d 939, 944–945 (D.C. Cir. 1999), enfg. in part 324 NLRB 918, 918 fn. 1 (1997). And see **§§ 3–220**, "Matters Not Alleged in the Charge" and **5–330**, "Amendments and Section 10(b)," above.

§ 3–700 Other Affirmative Defenses

501–8400

§ 3–710 Misconduct of Charging Party

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

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

Although not a defense to a complaint, union misconduct (violence) may require withholding of bargaining order. See ***Laura Modes Co.***, 144 NLRB 1592, 1596 (1963) and ***Allou Distributors***, 201 NLRB 47, 47–48 (1973). Compare ***Cascade Corp.***, 192 NLRB 533, 533 fn. 2 (1971), enf. denied 466 F.2d 748 (6th Cir. 1972), distinguishing ***Laura Modes*** and ***Maywood Plant of Grede Plastics***, 235 NLRB 363, 365–366 (1978), enfd. as modified 628 F.2d 1 (D.C. Cir. 1980) (provocation must be weighed).

§ 3–720 Laches

762–0100–8000

Apart from the restrictions of Section 10(b) of the Act, the Board generally does not apply the doctrine of laches to itself or the General Counsel. See ***Mid-State Ready Mix***, 316 NLRB 500, 500–501 (1995), citing ***NLRB v. Rutter-Rex Mfg. Co.***, 396 U.S. 258, 264, 90 S.Ct. 417, 420–421 (1969) (inordinate delay by the Board is no defense to a backpay order; the remedy is within the Board's discretion and the rights of innocent employees are involved). Compare, however, ***Garvey Marine, Inc.***, 328 NLRB 991, 995–997 (1999) with ***Wallace International of Puerto Rico***, 328 NLRB 29, 29 (1999) (a ***Gissel*** bargaining order may not be issued in some circumstances because of delay). For an interesting discussion of whether and in what circumstances laches applies to the Government, see ***Martin v. Consultants & Administrators, Inc.***, 966 F.2d 1078, 1090–1091 (7th Cir. 1992).

In any event, laches "curtails litigation only if the defendant suffered prejudice during the delay." ***Reich v. Sea Sprite Boat Co.***, 50 F.3d 413, 418 (7th Cir. 1995). If something like laches is applied to parties in unfair labor practice proceedings, there appears to be a requirement that the respondent was prejudiced by a lack of diligence by the charging party. See ***Stanford Realty Associates***, 306 NLRB 1061, 1065 (1992) (no prejudice found from lack of due diligence by the charging party).

§ 3–730 Inadequacy of Investigation

596–2040

The adequacy of General Counsel's investigation may not be litigated in the unfair labor practice trial. Due process claims are tested, not by analysis of the investigation, but by analysis of complaint allegations. ***Redway Carriers**,* 274 NLRB 1359, 1371 (1985).

§ 3–740 Deferral to Grievance Arbitration

530–8006

Deferral to the grievance-and-arbitration machinery of the collective-bargaining agreement pursuant to ***Collyer Insulated Wire***, 192 NLRB 837, 839 (1971)—when "the breadth of the arbitration provision makes clear that the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes"—is an affirmative defense that must be raised in the answer to the complaint or at the trial. The respondent's "interjection of this defense" after the trial closes is "untimely." ***Master Mechanical Insulation,*** 320 NLRB 1134, 1134 fn. 2 (1996). Accord: ***15th Avenue Iron Works,*** 301 NLRB 878, 879 (1991), enfd. 964 F.2d 1336 (2nd Cir. 1992).

§ 3–750 Relitigation of Issues

596–0175, 750–0100, 750–750

In the absence of newly discovered and previously unavailable evidence or special circumstances, the respondent in a Section 8(a)(5) unfair labor practice case may not relitigate issues that were or could have been litigated in a prior representation proceeding. ***Nursing Center at Vineland***, 318 NLRB 901, 903 (1995), enfd. mem. 151 LRRM 2736 (3d Cir. 1995), 1996 WL 199152. Nor may the respondent relitigate in compliance proceedings, matters previously decided in prior unfair labor practice proceedings. ***Task Force Security & Investigations***, 323 NLRB 674, 674 fn. 2 (1997).

For res judicata and collateral estoppel contentions that court or other proceedings bind the Board or the General Counsel, see ***Precision Industries***, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Regarding res judicata, "[t]he Board adheres to 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 [footnote omitted]." Regarding judicial estoppel—the doctrine "that a party who successfully asserted one position in a legal proceeding should not be permitted thereafter to assert a clearly inconsistent position in the same or related proceedings—the Board held that neither the General Counsel nor the charging party filed the EEOC charges, and "certainly they have not taken inconsistent positions."

See also ***NLRB v. Yellow Freight Systems***, 930 F.2d 316, 319–322 (3rd Cir. 1991), cert. denied 502 U.S. 820 (1991), for discussion of "issue preclusion" (referring to res judicata and collateral estoppel) and ***NLRB v. Donna-Lee Sportswear***, 836 F.2d 31, 32–35 (1st Cir. 1987), in which the court, contrary to the Board, found the required "identity of parties" for collateral estoppel, although the earlier district court proceeding was brought by a trustee of the union benefit funds, not by the NLRB.

§ 3–760 Section 8(g) Notice

An allegation that a failure to give notice under Section 8(g) of the Act, rendering otherwise protected conduct unprotected, is an affirmative defense. Raising the issue for the first time in a post-trial brief to the judge is untimely. ***Vencare Ancillary Services***, 334 NLRB No. 119, slip op. at 4–5 (2001).

§ 3–770 Settlement Bar

596–2880–6760

A settlement agreement generally disposes of all issues, with certain exceptions set forth in ***Hollywood Roosevelt Hotel Co.***, 235 NLRB 1397, 1397 (1978). The Board's settlement bar rule is an affirmative defense and must be raised in the pleadings or at the trial; if not it is waived. See ***Richard Mellow Electrical Contractors Corp.***, 327 NLRB 1112, 1112–1113 (1999). See also **§ 9–620**, "Settlement Bar Rule," below.

CHAPTER 4. SERVICE OF DOCUMENTS

§ 4–100 In General

596–1601

Service is a concept distinct from filing. That is, filing refers to receipt "by the Board or the officer or agent designated to receive" a pleading or other document. Board's Rules, Section 102.111(b). Service is "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). See also ***NLRB v. O'Keefe & Merritt Mfg. Co.***, 178 F.2d 445, 447 (9th Cir. 1949) ("a form of notice reasonably calculated to give a defendant knowledge of proceedings and an opportunity to be heard").

§ 4–110 Federal Rules of Civil Procedure

596–1683–8000

The Act (NLRA), the Board's Rules and, to a degree, the Statements of Procedure, specify the requirements for service under the Act. Therefore, "the Federal Rules of Civil Procedure do not govern service of process in Board proceedings." ***Control Services***, 303 NLRB 481, 481–482 (1991).

§ 4–200 Methods of Service

596–1683–6000

Under the Board's Rules, the following methods of service can universally be utilized by Regional Directors and by parties, including counsel for the General Counsel after complaint has issued, except to the extent indicated:

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

Registered or certified mail. Board's Rules, Sections 102.14(a) (for charges), 102.113(a)–(d), and 102.114(a), as above.

Regular mail. Board's Rules, Sections 102.14(a) (for charges); 102.113(d) ("by the Agency" for "documents" other than complaints and amendments, compliance specifications and amendments, subpoenas, and administrative law judges decisions); and 102.114(a) (for "papers by a party on other parties").

Private delivery service. Board's Rules, Sections 102.14(a) (for charges); 102.113(d) ("by the Agency" for "documents" other than complaints and amendments, compliance specifications and amendments, subpoenas, and administrative law judges decisions); and 102.114(a) (for "papers by a party on other parties").

Other methods of service are listed as being appropriate, but not universally so:

Telegraph. Board's Rules, Section 102.113(a)–(d) (for complaints and amendments, compliance specifications and amendments, subpoenas, administrative law judges decisions, and other documents).

CHAPTER 4—SERVICE OF DOCUMENTS

NOTE. There is no provision in Board's Rules, Section 102.114, for "service of documents by a party on other parties." Nor does Section 102.14(a) provide specifically for service of charges by telegraph.

Leaving copy at principal office or place of business of the person required to be served. Board's Rules, Section 102.113(a)–(d) (for complaints and amendments, compliance specifications and amendments, subpoenas, administrative law judges decisions, and other documents).

NOTE. There is no provision in Board's Rules, Section 102.114, for service of "documents by a party on other parties" by leaving a copy at the principal office or place of business.

Other means of service are permitted to parties, including counsel for the General Counsel after complaint has issued (except complaints and amendments, compliance specifications and amendments, and subpoenas), BUT "only with the consent of the party being served." Board's Rules, Section 102.114(a). One means is by fax. Thus, charges, "papers by a party on other parties" and "documents"—other than subpoenas, complaints and backpay specifications, and amendments—"by the Agency" may be served by fax, or faxed, only with permission of the receiving party.

When a document and other papers are filed by fax with the Agency, such as charges, Board's Rules, Section 102.114(f), that party shall serve copies "on all parties in the same way as used to serve the office where filed, or in a more expeditious manner," and faxes "shall be used for this purpose whenever possible." Board's Rules, Section 102.114(h). If a party refuses to accept service by fax, or if a party cannot be served by fax, the "party shall be notified personally or by telephone of the substance of the [faxed] document, and a copy of the document shall be served by personal service or overnight delivery service." Board's Rules, Section 102.114(h).

§ 4–300 Failure of Service

A party's failure to make timely service on other parties is a basis for either "rejection of the document," OR for "[w]ithholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond. Board's Rules, Section 102.114(c). Ordinarily, the Board has been reluctant to reject a document. 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, 236 fn. 1 (1979) (General Counsel's failure to serve timely filed exceptions), and ***Terpening Trucking Co.***, 271 NLRB 96, 96 fn. 1 (1984) (the 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 fn. 5 (1993) (answer to complaint) and ***Acme Building Maintenance***, 307 NLRB 358, 359 fn. 6 (1992).

Nevertheless, the Board has not been reluctant to point out a failure to make proper service on charging parties if answers have not been substantially adequate. See ***Travelodge San Francisco Civic Center***, 242 NLRB 287, 287–288 (1979). More importantly, a self-represented respondent's timely filed answer was rejected for failure to serve the charging party if there had been "repeated efforts by the Region to apprise the Respondent of its obligations under our Rules," but service was never made. ***Active Metal Mfg.***, 316 NLRB 974, 974–975 (1995).

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

§ 4–310 Efforts to Frustrate Service

596–1617, 596–1683–6050

“[T]he Board has long held that a respondent’s failure or refusal to claim certified mail or to provide for receiving appropriate service will not be permitted to defeat the purposes of the Act” (citations omitted). ***SMC Engineering & Contracting***, 324 NLRB 341, 341 (1997) (complaint). Accord: ***Michigan Expediting Service***, 282 NLRB 210, 210 fn. 6 (1986), enfd. mem. 869 F.2d 1492 (6th Cir. 1989) (amended charge) and ***Da Vinci Fashions***, 286 NLRB 809, 814–816 (1987) (compliance specification and amended compliance specification).

§ 4–400 Who Must Be Served

Complaints and amendments, compliance specifications and amendments, and “other documents” of the General Counsel “shall be served upon all parties.” Board’s Rules, Section 102.113(a) and (d). Administrative law judges decisions also “shall be served upon all parties,” Board’s Rules, Section 102.113(b).

“Subpoenas shall be served upon the recipient.” Board’s Rules, Section 102.113(c).

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

NOTE. When a request for special permission to appeal involves a ruling by an administrative law judge, service of the request and appeal, as well as of statements in opposition or other responses, must be served on the administrative law judge. Board’s Rules, Section 102.26.

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

§ 4–500 Determining Date of Service

596–1683–8000

“The date of service,” specified in Board’s Rules, Section 102.112, is

Personal service, the day “delivered in person.”

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

Deposited with private delivery service that makes a “record showing the date the document was tendered to” it.

Fax, “the date on which the fax is received.”

§ 4–600 Proof of Service

"Failure to make proof of service does not affect the validity of service." Board's Rules, Section 102.114(e).

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

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

Personal service, "the verified return by the individual" serving the document. Board's Rules, Section 102.113(e).

Registered or certified mail, "the return [postal service] receipt." Board's Rules, Sections 102.113(e) and 102.114(b).

Telegraph, "telegraph receipt." Board's Rules, Section 102.113(e).

Private delivery service, "the receipt from [the] service showing delivery." Board's Rules, Section 102.114(b).

Delivery to a principal office or place of business, "verified return by the individual" serving the document. Board's Rules, Section 102.113(e).

For methods of service that are not exclusive, "any sufficient proof may be relied upon to establish service." Board's Rules, Sections 102.113(e) (the Agency), and 102.114(b) (parties).

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." Board's Rules, Section 102.114(e). See also ***United States Service Industries***, 324 NLRB 834, 834 (1997). But, 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. ***Control Services***, 303 NLRB 481, 481–482 (1991). For example, in ***G. W. Truck***, 240 NLRB 333, 334–335 (1979), proof of a charge's service was based upon testimony by a Board agent, supported by her "almost contemporaneous with service" written description of what had occurred when she served the charge.

§ 4–700 Special Aspects of Service of Particular Documents

§ 4–710 Charges and Amended Charges

596–1683–2000

Under the proviso of Section 10(b) of the Act, a charge must be both filed *and* served within the six-month limitations period prescribed. Failure to make timely service will raise that bar, even though the charge was timely filed. ***Dun & Bradstreet Software Services***, 317 NLRB 84, 84–86 (1995), affd. 79 F.3d 1238, 1250 (1st Cir. 1996). Accord: ***NLRB v. Laborers Local 264,*** 529 F.2d 778, 782 (8th Cir. 1976).

CHAPTER 4—SERVICE OF DOCUMENTS

The obligation of assuring timely service of a charge is that of the charging party, not the Regional Office. Although the Regional Office will serve a copy of the charge on the charged party, that service is merely a courtesy and does not relieve the charging party of its service obligation. Board's Rules, Section 102.14(a) and (b), and Statements of Procedure, Section 101.4.

NOTE. "[F]ailure 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, 1053 (1990). Furthermore, service has been held sufficient when the charge was served upon the attorney who, at the time, had represented the charged party in the party's dealings with a union. ***Control Services***, 303 NLRB 481, 481 fn. 3 (1991).

Service on but one of multiple charged parties is sufficient if the charged parties are not truly independent entities, but are

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

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

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

Joint bargaining representatives. ***Electrical Workers IUE (Spartus Corp.)***, 271 NLRB 607, 607 (1984).

NOTE. A copy of a charge need not be served upon the labor organization that is asserted in the charge to be a party to an allegedly unlawful collective-bargaining contract, or which is asserted to be unlawfully dominated, assisted or supported, as long as no remedial order is sought against the labor organization. ***Meyers Bros. of Missouri, Inc.,*** 151 NLRB 889, 893 fn. 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).

Under Board's Rules, Sections 102.14(a) and (b), service of a charge may be made by personal service, by registered, certified, or regular mail, by private delivery service, by fax with "the permission of the person receiving the charge," or "by any other agreed upon method."

The requirement of service of a charge is not subject to technicalities. For example, service of an unsigned copy of a charge was held adequate, ***Freightway Corp.***, 299 NLRB 531, 531 (1990), and "when charges have in fact been received, technical defects in the form of service do not affect the validity of the service." ***Control Services***, 303 NLRB 481, 481–482 (1991).

§ 4–720 Complaints and Notice of Hearing

596–1683

Complaints must be "served on all other parties." Board Rules, Section 102.15. In contrast to charges, a copy of the complaint and notice of hearing must be served on the party to a collective-bargaining contract that would be invalidated by the remedial order.

Consolidated Edison Co. of New York v. NLRB, 305 U.S. 197, 218–219, 59 S.Ct. 206, 212 (1938).

§ 4–730 Compliance Specifications

596–4017–3300, 675–4014

"[T]he Regional Director may issue and serve on all parties a compliance specification in the name of the Board." Board's Rules, Section 102.54(a).

Service of a compliance specification upon the respondent's attorney of record is sufficient. ***Star Grocery Co.***, 245 NLRB 196, 197 (1979) and ***Cera International Corp.***, 272 NLRB 1360, 1360 fn. 2 (1984). That is so, even if the attorney no longer represents the respondent, but only as long as notice has not been given to the Regional Director of discontinuance of representation. ***Hopkins Hardware***, 280 NLRB 1296, 1297 (1986).

§ 4–740 Answers to Complaints and to Compliance Specifications

675–4015

Answers to complaints. "Immediately upon the filing of his answer, [the] respondent shall serve a copy . . . on the other parties." Board's Rules, Section 102.21. As set forth in **§ 4–300**, "Failure of Service," above, although the Board is reluctant to reject an answer for failure to make service on other parties, particularly if filed by unrepresented respondents, it will do so if the answer is not substantially adequate or if the respondent has ignored repeated efforts to encourage it to make proper service.

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

§ 4–750 Subpoenas

596–6060–6730

"Subpoenas shall be served upon the recipient either personally or by registered or certified mail, or by telegraph, or by leaving a copy . . . at the principal office or place of business of the person required to be served." Board's Rules, Section 102.113(c). It is not necessary to establish actual receipt of the subpoena by the recipient: "proof that it was mailed is sufficient to prove service." ***Best Western City View Motor Inn***, 327 NLRB 468, 468–469 (1999).

For proof of service of a subpoena, "an attorney's affirmation of service" will suffice, even "without submission of the postal [service] return receipt card." ***Best Western***, above.

CHAPTER 5. PRETRIAL DISCOVERY AND DEPOSITIONS

§ 5–100 Pretrial Discovery

596–5250

Pretrial discovery does not apply in Board proceedings. ***Emhart Industries v. NLRB,*** 907 F.2d 372, 378 (2nd Cir. 1990) and ***David R. Webb Co.,*** 311 NLRB 1135, 1135–1136 (1993) (and cited cases). Neither the Act, the U.S. Constitution, nor the Administrative Procedure Act confers the right to discovery in Federal administrative proceedings. ***NLRB v. Washington Heights,*** 897 F.2d 1238, 1242 (2nd Cir. 1990) and ***Kenrich Petrochemicals, Inc. v. NLRB,*** 893 F.2d 1468, 1483 (3rd Cir. 1990), cert. denied 498 U.S. 981 (1990).

§ 5–200 Depositions

596–5650–3300

A limited "good cause" exception exists to permit the taking of a deposition to preserve the testimony of one's own witness at the discretion of the Regional Director or the judge. Board's Rule, Section 102.30. ***Kenrich Petrochemicals***, above, 893 F.2d at 1483.

CHAPTER 6. TIME AND PLACE OF TRIAL

§ 6–100 Before Trial Opens

596–3600, 596–3675

Board's Rules, Section 102.15, requires that a complaint contain "a notice of hearing" at a fixed date and "a time not less than 14 days after the service of the complaint."

"Except in extraordinary situations the [trial] is . . . usually conducted in the Region where the charge originated." Statements of Procedure, Section 101.10(a).

Generally, before trial, the Regional Director issuing a complaint may extend the date of the trial or may change the place at which it is to be held. Board's Rules, Section 102.16(a). But when a party objects to a postponement and there are less than 21 days before the scheduled trial date, motions to reschedule the trial should be filed with the Division of Judges, which rules only on whether to grant the motion to extend the trial date. The "Regional Director issuing the complaint shall retain the authority to order a new date for [trial] and retains the responsibility to make the necessary arrangements for conducting [the trial], including its location and the transcription of the proceedings." Board's Rules, Section 102.16(b).

§ 6–200 After Trial Opens

596–7612

After a trial opens the administrative law judge, designated to conduct it, possesses authority to "regulate the course of the [trial]." Board's Rules, Section 102.35(a)(6). The judge may continue the trial "from day to day, or adjourn[ ] to a later date or to a different place, by announcement . . . at the [trial] . . . or by other appropriate notice." Board's Rules, Section 102.43. "The granting or refusal of a continuance is within the discretion of the administrative law judge." ***Abrahamson Chrysler-Plymouth***, 225 NLRB 923, 923 fn. 1 (1976), enfd. mem. 559 F.2d 1226 (7th Cir. 1977). See also ***Teamsters Local 777 (Crown Metal)***, 145 NLRB 197, 197 fn. 2 (1963), enfd. 340 F.2d 905 (7th Cir. 1964).

The exercise of that discretion will be reversed only when there is a "showing of abuse." ***Franks Flower Express***, 219 NLRB 149, 149–150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976). Thus, a decision not to transfer the trial to another city was upheld when, in the circumstances, it was "clearly reasonable." ***Flame of Miami, Inc.***, 159 NLRB 1103, 1105 (1966). And a decision to deny a request for a second continuance was upheld because "no prejudice" was shown to the party who made the request. ***Peter Vitalie Co.***, 310 NLRB 865, 865 fn. 1 (1993).

NOTE. The notice of hearing that accompanies all complaints provides that the trial will commence on the date set by the Regional Director and continue "on consecutive days thereafter."

§ 6–300 Requests for Continuance to Obtain Counsel

596–7612–6767–5000, 596–7612–6767–6000, 596–7612–6767–6700

In reality, two situations are presented. First, when an unrepresented party is seeking a continuance to obtain counsel or other representative. Second, when a party is represented, but that counsel or representative is unavailable on the trial date.

To Obtain Counsel. When a party seeks a continuance to obtain counsel, a balance must be struck between the right of parties to be represented at the trial, Board's Rules, Section 102.38 and, on the other hand, the principle that "proceedings must proceed with the utmost dispatch." ***NLRB v. American Potash & Chemical Corp.***, 98 F.2d 488, 492 (9th Cir. 1938), cert. denied 306 U.S. 643 (1938). In striking that balance in particular situations, several areas of scrutiny have been identified:

The length of time since the complaint issued, during which the party had an opportunity to obtain counsel. ***K & L Fire Protection Systems***, 306 NLRB 988, 988 fn. 1 (1992) ("complaint had been outstanding for more than 6 months").

Whether a continuance has already been granted to allow the party to obtain counsel. ***Peter Vitalie Co.***, 310 NLRB 865, 865 fn. 1 (1993) ("the Respondent had already requested and had already been granted a prior postponement in this proceeding from July 22 until August 31") and ***Crusader-Lancer Corp.***, 144 NLRB 1309, 1309 fn. 1 (1963) ("request for a 1-week continuance for the same purpose had previously been granted").

Efforts shown by the moving party to obtain counsel. ***K & L Fire Protection Systems***, above (application to bankruptcy court for authorization to appoint an attorney "made only 3 days before the [trial] and without notice to the counsel for the General Counsel") and ***Peter Vitalie Co.***, 310 NLRB 865, 865 fn. 1 (1993) (after having gotten one continuance to obtain counsel, "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 areas of scrutiny—no one of which is necessarily determinative—have been identified:

Reason for unavailability. ***Mississippi Valley Structural Steel Co. v. NLRB***, 145 F.2d 664, 665–667 (8th Cir. 1944) (unreasonable to deny due to illness of counsel who was the only attorney conversant with case) and ***Hijos de Ricardo Vela, Inc.***, 194 NLRB 377, 377 fn. 1 (1971), enfd. 475 F.2d 58 (1st Cir. 1973) (reasonable to deny when the conflicting commitment was made "long after the notice of hearing" and "indeed only shortly before the scheduled [trial] date").

Length of continuance contemplated. ***Wittek Industries***, 313 NLRB 579, 579 (1993) (not unreasonable to deny when, in part, no alternative trial date proposed) and ***Smith-Weik Machinery Corp. v. Murdock Machine Co.***, 423 F.2d 842, 845 (5th Cir. 1970) (unreasonable to deny when only short continuance sought due to illness of counsel in complicated case).

Complexity of facts and issues. ***Franks Flower Express***, 219 NLRB 149, 149–150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976) (not unreasonable to deny when "neither a complicated nor lengthy proceeding") and ***Smith-Weik Machinery Corp.***, *above* (unreasonable when, among other factors, case was complicated).

Whether a first request, or previously granted requests, for a continuance. ***Franks Flower Express***, above, 219 NLRB at 150 (the "Respondent was granted the original continuance it requested") and ***Glacier Packing Co.***, 204 NLRB 597, 600 (1973), enfd. 507 F.2d 415 (9th Cir. 1974) (one pretrial request granted, two later pretrial requests for further continuance denied).

Availability of substitute counsel. ***Mississippi Valley Structural Steel Co. v. NLRB***, 145 F.2d 664, 665–667 (8th Cir. 1944) (unreasonable to deny when ill counsel was the only attorney conversant with the case); ***Wittek Industries***, 313 NLRB 579, 579 (1993) (not unreasonable to deny when the corporate counsel, who had been involved in the discharge of the alleged discriminatees, was available to try case); ***Franks Flower Express***, 219 NLRB 149, 149–150 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976) (not unreasonable to deny when "represented at the [trial] by a member of [unavailable counsel's] firm, who may be presumed to have knowledge of the issues as framed by the pleadings"); and ***NLRB v. Glacier Packing Co.***, 507 F.2d 415, 416 (9th Cir. 1974) (not unreasonable to deny when the unavailable counsel was a member of a firm with other attorneys capable of litigating the case).

§ 6–301 Length of Continuance to Obtain Counsel or Substitute Counsel

In various circumstances, the following times to obtain counsel or substitute counsel have been held to be reasonable in length: 40 days, ***Peter Vitalie Co.***, 310 NLRB 865, 865 fn. 1 (1993) (to secure counsel); 5 days, ***Franks Flower Express***, above, 219 NLRB 149, 149 (1975) (to secure substitute counsel); 1 day, ***Wittek Industries***, 313 NLRB 579, 579 (1993) (for counsel to be available); and 4 hours, ***NLRB v. Glacier Packing Co.***, above, 507 F.2d at 416 (9th Cir. 1974) (to secure substitute counsel from same firm after pretrial denials of requests for further continuances).

§ 6–302 When Counsel or Party Leaves Trial After Request Is Denied

Inasmuch as "due process preserves [only] the *opportunity* to be heard," ***Broadway Hospital, Inc.***, 244 NLRB 341, 341 fn. 5 (1979), when a continuance has been properly denied, it is not improper to go forward with the trial without the presence of counsel. ***NLRB v. Glacier Packing Co.***, above, 507 F.2d at 416 (9th Cir. 1974) and ***NLRB v. Hijos de Ricardo Vela, Inc.***, 475 F.2d 58, 61 (1st Cir. 1973).

§ 6–400 Motions for Continuance to Prepare a Defense

596–7612–6700

The Board has upheld denials of requests for continuance, made when the General Counsel rests, for a respondent to investigate and prepare its defense. Because of the information supplied to the attorney in the complaint and in the General Counsel's opening statement and because of the recess granted the respondent's attorney after the opening statement to confer with his client, who was alleged to have committed the unfair labor practices, the attorney was required to go forward with the respondent's proof. ***Spiegel Trucking Co.***, 225 NLRB 178, 179 fn. 8 (1976), enfd. mem. 559 F.2d 188 (D.C. Cir. 1977). See also ***East Bronx Health Center***, 271 NLRB 898, 898 fn. 1 (1984). The following factors have been viewed as important:

Board's Rules, Section 102.15, requires adequacy of the complaint to provide information to which a respondent could look when preparing for trial.

Length of time between issuance of complaint and trial, during which a respondent could prepare its defense.

Nature of arguments advanced in support of motion: "the reasons the Respondent presented in its motion for adjournment fail to explain adequately why the Respondent was unable to go forward with its case or why another postponement was necessary." ***East Bronx Health Center***, above.

§ 6–500 Motions for Continuance Because of Unavailable Witness

596–7612–6767–2500

Obviously there are situations in which a respondent is truly surprised by particular evidence presented during the General Counsel's case and, in consequence, demonstrates a need for a continuance to secure the presence of a particular witness or documents to meet unanticipated evidence. Aside from these situations, however, the following factors have been identified when concluding that denial of the motions was reasonable:

Existence of prior notice of likely involvement of witness, particularly when the witness is named in the complaint. ***Quebecor Group, Inc.***, 258 NLRB 961, 961 fn. 1 (1981) and ***Don't Stop***, 298 NLRB 961, 962 (1990).

Failure to show steps taken to ensure presence of witness. ***Batchelor Electric Co.***, 254 NLRB 1145, 1145 fn. 1 (1981), enfd. mem. 716 F.2d 903 (6th Cir. 1983) and ***Don't Stop***, above.

Failure to show that whereabouts of witness are unknown. ***Quebecor Group, Inc.***, 258 NLRB 961, 961 fn. 1 (1981).

Failure to provide supporting details to explain absence of witness. ***Riverdale Nursing Home***, 317 NLRB 881, 881 (1995) and ***Florida Coca-Cola Bottling Co.***, 321 NLRB 21, 21 fn. 2 (1996).

Showing that the witness simply chose to do something other than attend the trial. ***Greenpark Care Center***, 236 NLRB 683, 683 fn. 3 (1978) (the witness chose to leave the country on vacation despite "ample notice" of the trial date from the notice of hearing issued almost 2 months before the trial date) and ***Don't Stop***, 298 NLRB 961, 962 (1990) ("chose not to be present at the [trial] because it was his considered business judgment that his presence at the [trial] was less important than a meeting with a major customer").

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

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

Failure to take advantage of a suggestion, which was not asserted to be unreasonable, for alternative arrangements to avoid continuance. ***Somerville Cream Co.***, 95 NLRB 1144, 1946 (1951), enfd. 199 F.2d 257 (1st Cir. 1952) (moving trial temporarily to the home of an assertedly incapacitated witness).

CHAPTER 7. APPEARANCES AT TRIAL

§ 7–100 Representation at Trial

596–7612–6767–5000, 596–7682–3349

Section 102.38 of the Board's Rules and Regulations gives any party the right to appear in person, or by any other representative. There is no requirement that the representative be a lawyer.

§ 7–105 Respondent Not Represented by Counsel

596–7691–2500

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, 1126 fn. 2, 1129 fn. 1 (1977), enfd. mem. 624 F.2d 192 (9th Cir. 1980), cert. denied 450 U.S. 996 (1981). And when a losing respondent was represented by an attorney at the trial, the respondent cannot overturn an adverse decision on any claim of a constitutional or statutory right to the effective assistance of counsel. ***Father & Sons Lumber v. NLRB***, 931 F.2d 1093, 1096–1097 (6th Cir. 1991), enfg. 297 NLRB 437, 437 (1989).

It is sufficient that the self-represented respondent is accorded "a full and fair opportunity to present the Respondent's case and cross-examine witnesses." ***American Cleaning Co***., 291 NLRB 399, 399 fn. 1 (1988) (the respondent's nonlawyer president was served as respondent's representative). As long as the judge remains impartial, he or she may go somewhat beyond according fundamental fairness and due process. ***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).

§ 7–110 Former Board Employee

596–0194

Board's Rules, Section 102.119 (as amended October 28, 1997), provides in part:

> Former officers and employees of the Agency who were attached to any of its Regional Offices or the Washington staff are subject to the applicable post-employment restrictions imposed by 18 U.S.C. § 207.

This provision is less restrictive than the previous Section 102.119 and the repealed Section 102.120.

18 U.S.C. §207(a)(1) would permanently prohibit any former Agency employee, who had participated in a matter while attached to a Regional Office or the Board's Washington staff, from making an appearance in any proceeding on behalf of any person in that same matter.

18 U.S.C. § 207(a)(2) would be a 2-year restriction on any former Agency employee who, in the last year of his or her employment, had known or reasonably should have known that a particular matter was pending under his official responsibility, from making an appearance in any proceeding on behalf of any person in that same matter.

§ 7–115 Attorney as Witness

737–5601–2500

Established Board law has been that it would not police the canons of ethics of the various bar associations. When, for example, a party's trial lawyer takes the stand as a witness, any objection that the attorney's testimony should be stricken as a violation of the canons of ethics should be overruled. ***Operating Engineers Local 9 (Fountain Sand Co.)***, 210 NLRB 129, 129 fn. 1 (1974). Accord: ***Royal Motor Sales***, 329 NLRB No. 71, slip op. at 60–61 (1999), enfd. — F.3d — (2001 WL 59043 (D.C. Cir.)) (although the judge follows Board law, he urges the Board to reconsider under the circumstances, but not addressed by the Board), and ***Wells Fargo Armored Service Corp.***, 290 NLRB 872, 873 fn. 3 (1988).

This probably remains the Board's policy even after January 13, 1997, the effective date of a codification at 29 CFR § 102.177, to be printed as Board's Rules, Section 102.177. See the Board's discussion of the purpose of the rule at 61 Fed.Reg. 65,323 (Dec. 12, 1996). See also the discussions in **§ 7–500,** "Misconduct by Attorney or Representative" and **§ 13–602**, "Attorney for Party," below.

§ 7–120 Representation at Postelection Proceedings

595–7600, 596–7682–3313, 596–7682–3398

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

§ 7–200 Failure of Party to Appear at Trial

§ 7–220 Absence of Respondent's Attorney

596–7612–6767–5000, 596–7612–6767–6700, 596–7682–3349

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

§ 7–300 Rights of Charging Parties and Discriminatees

596–7682–3300, 596–7682–6700

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

Although discriminatees can be separated (see **§ 10–400**, "Who Should and Should Not Be Separated," below), the charging party can designate a discriminatee as its representative, who may be permitted to remain at the trial throughout, if the judge believes it is appropriate. ***Impact Industries***, 285 NLRB 5, 8–9 (1987), remanded 847 F.2d 379 (7th Cir. 1988).

A charging party discriminatee is an adverse party under Fed.R.Civ.P. Rule 611(c)

(formerly 43(b)) and can be called as an adverse witness by the respondent. ***Security Services, Inc.***, 198 NLRB 1166, 1166 (1972) (reversible error for the judge to preclude the respondent from calling the charging party discriminatee as an adverse witness and to take the position that the respondent should instead call him as its own witness).

Board's Rules, Section 102.38, provides that "Any party [including the charging party] shall have right" to appear at the trial, "to call, examine, and cross-examine witnesses," and to introduce evidence, "except that the participation of any party shall be limited to the extent permitted by the administrative law judge."

The right of the charging party to participate in the trial extends to charging parties who are not represented by counsel. In that regard, the Board has observed that it would be "better practice" for the judge to specifically offer the unrepresented charging party the opportunity to question each witness, although finding that the failure of the judge to do so does not represent a denial of due process. ***Cowin & Co.***, 322 NLRB 1091, 1091 fn. 1 (1997).

The charging party also has the right under Board's Rules, Section 102.118(b)(1), to see the affidavits of witnesses of the respondent in the General Counsel's file for cross-examination. ***Senftner Volkswagen Corp***, 257 NLRB 178, 178 fn. 1, 186–187 (1981). See **§ 13–803** and **§ 13–804**.

Although the charging party may participate in the trial, it cannot amend the complaint. The judge lacks authority to amend the complaint unless "sought or consented to by the General Counsel" or "evidence has been received . . . without objection." ***Winn-Dixie Stores***, 224 NLRB 1418, 1420 (1976), enfd. in part 567 F.2d 1343 (5th Cir. 1978) and ***GTE Automatic Electric***, 196 NLRB 902, 903 (1972) (the judge erred by granting the charging party's motion to allege an additional discriminatee). Also the General Counsel controls the theory of the case, and a judge cannot consider theories for violations argued by the charging party that substantially differ from the General Counsel's. ***Zurn/N.E.P.C.O.***, 329 NLRB No. 52, slip op. at 1 (1999); ***New Breed Leasing Corp.***, 317 NLRB 1011, 1019–20 (1995), 111 F.3d 1460 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997); ***Electrical Workers IUE Local 444 (Paramax Systems)***, 311 NLRB 1031, 1033 fn. 6 (1993), enf. denied 41 F.3d 1532 (D.C. Cir. 1994); and ***Kimtruss Corp.***, 305 NLRB 710, 711 (1991).

After a complaint issues, however, the responsibility for fashioning an appropriate remedy rests with the Board under Section 10(c) of the Act. Thus, it was error for a judge to preclude the charging party from introducing evidence in support of a restoration remedy, even though the General Counsel had not sought the remedy and the charging party had not appealed the Director's refusal to seek the remedy. ***Kaumagraph Corp.***, 313 NLRB 624, 624–625 (1994) and ***Sunland Construction Co.***, 311 NLRB 685, 706 (1993) (the charging party has the right to seek extraordinary remedies not sought by the General Counsel, including a bargaining order). Accord: ***Gourmet Foods,*** 270 NLRB 578, 579 (1984). It must be noted, however, that the charging party has no right to seek remedies that are inconsistent with the complaint or the General Counsel's theory of the case. ***ATS Acquisition Corp.,*** 321 NLRB 712, 712 fn. 3 (1996) (error for a judge to award backpay pursuant to a request of the charging party, because complaint did not allege unlawful unilateral changes).

In a compliance proceeding, the charging party has somewhat greater rights, because the General Counsel does not have final authority under Section 3(d) of the Act, as it does regarding complaints. ***Ace Beverage Co.***, 250 NLRB 646, 647 (1980). Thus, in compliance matters, the General Counsel does not act on his own initiative, but as agent of the Board in effectuating the remedy. Therefore, the charging party is entitled to appeal to the Board a

Regional Director's decision regarding the cut-off date for reinstatement. ***Ace Beverage,*** above (the procedure followed was a motion to the Board for clarification of its prior Order). This does not mean, however, that the charging party is entitled to raise and litigate issues before the judge, contrary to the backpay specification. The charging party should make its appeal directly to the Board from the Regional Director's decision regarding the specification. ***John Cuneo, Inc.***, 276 NLRB 75, 77 (1985), remanded 792 F.2d 1182 (D.C. Cir. 1986) and ***Page Litho, Inc.***, 325 NLRB 338, 338–339 (1998). See Board's Rules, Section 102.53(c), providing for review by the Board of the General Counsel's decision concerning compliance determinations.

§ 7–400 Intervention at Trial

596–4800

Board's Rules, Section 102.29, permits "any person" to file a motion with the judge to intervene in the trial, and the judge shall rule on the motion and "may permit intervention . . . to [the] extent and upon such terms as he may deem proper." The issue of intervention is subject to the discretion of the judge and will not be disturbed absent abuse or prejudice. ***Auto Workers v. NLRB***, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968) and ***Biles-Coleman Lumber Co.***, 4 NLRB 679, 682 (1937).

Intervention has been permitted by judges when employees or groups of employees sought intervention to litigate the union's majority status or its solicitation of authorization cards. ***Taylor Bros., Inc.,*** 230 NLRB 861, 861 fn. 1 (1977), ***J. P. Stevens & Co.***, 179 NLRB 254, 255 (1969), enfd. 441 F.2d 514 (5th Cir. 1971, cert. denied 404 U.S. 830 (1971) and ***Spruce Pine Mfg.***, 153 NLRB 309, 309 fn. 1 (1965), enfd. in part 365 F.2d 898 (D.C. Cir. 1966).

The Board in ***Camay Drilling Co.***, 239 NLRB 997, 998–998 (1978), reversed a judge's denial of a motion to intervene filed by trustees of a jointly operated pension fund. The judge had concluded that the trustees would have no interest in the trial until a backpay proceeding was held. The Board disagreed, finding that because of the fiduciary obligations imposed on the trustees by ERISA, they are "interested parties" under the Administrative Procedure Act 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 (8th Cir. 1976), in which the judge permitted trustees of trust funds to appear in an 8(b)(4)(ii)(B) and 8(e) case that involved a clause prohibiting subcontracting to employers who were delinquent in payments to the funds.

§ 7–500 Misconduct by Attorney or Representative

596–7662–8400, 596–7682–3375, 596–7690

Although the judge has no authority to hold attorneys in contempt for misconduct during the trial, the Board's Rules and precedents do provide the judge various methods to control or punish the conduct.

Thus, when an attorney or other representatives engages in such misconduct during the trial 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 was intended to unreasonably delay the trial, the judge should first point out to the offending party that the conduct is improper and will not be tolerated. If the conduct persists, despite the warnings, the judge has various options.

Effective January 13, 1997, the Board added Section 102.177 to its Rules and Regulations. The new section is titled, "Misconduct by Attorneys or Party Representatives." Helpful background discussion by the Board is contained in the Board's "Summary" at 61 Fed.Reg. beginning at 65,323 (Dec. 12, 1996). In his memo of December 23, 1996 to all the

judges concerning the new rule, Chief Judge Giannasi provided a six-point thumbnail sketch of some of the more significant aspects of the new rule. These six points are:

1. The rule covers misconduct at any and all stages of a Board proceeding, not just the trial.

2. The standard for misconduct remains the same, but useful explanatory material is provided [in a copy of the pertinent pages from the Federal Register attached to the memo].

3. A new procedure is implemented in which the General Counsel has final, unreviewable authority to initiate disciplinary proceedings against an attorney or other representative. If the General Counsel decides to initiate such an action, the case will be tried before an administrative law judge, as under the present practice. The participation of complainants in any such case is, however, limited.

4. Allegations of misconduct may be made by any person, but the rules contemplate that judges may continue the present practice of recommending disciplinary action in their decisions by asking the Board to refer the matter to the General Counsel. See footnote 12 of the explanatory material.

5. Notwithstanding the new procedure, judges and the Board itself retain the authority to "admonish or reprimand, after due notice, any person who engages in misconduct at [the trial]." Section 102.177(b). It is beyond question that a judge may continue as at present, verbally or informally, to reprove a difficult attorney or representative during a trial. But if the judge intends in his or her decision to issue a reprimand, which is defined in ***Sargent Karch***, 314 NLRB 482, 486 fn. 10 (1994) as a "formal admonition," some kind of "due notice" would seem to be required. Any problem with the a "due notice" provision could be obviated by simply recommending in the decision that the lawyer or representative be admonished or reprimanded by the Board.

6. In addition, Section 102.21 has been revised to make its provisions concerning the filing of answers applicable to nonlawyers as well as lawyers.

§ 7–510 Exclusion of Counsel

Board's Rules, Section 102.177(b), provides that "misconduct by any person . . . shall be grounds for summary exclusion from the [trial]." 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), in which the court reversed the Board's affirmance of a judge's decision to exclude counsel. The court criticizes both the judge and the Board for not providing detailed and specific references to the attorney's conduct that allegedly warranted exclusion.

The court concluded that to justify exclusion, the attorney must have engaged in contemptuous conduct, and there must be a clear showing that the conduct amounted to an obstruction of justice. It also found that the judge "mistook counsel's overzealous approach for contumacious behavior" and found that prejudicial error was committed by the exclusion of counsel. The Board had argued that the attorney had shouted at witnesses, questioned their intelligence, disparaged their language weaknesses, belittled the legal ability of the General Counsel, and made meaningless and superficial objections. The court disagreed, and found that although "counsel's conduct was far from being the paragon of comportment, it did fall short of

constituting contemptuous behavior.”

If the judge decides to exercise this exclusion option, it is essential that he or she provides the offending party with several warnings, specifying the conduct that the judge considers inappropriate. The judge should make a clear statement on the record that he or she will exclude the party if the conduct continues. If the person being excluded represents the respondent, it is appropriate, if not essential, 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, 149 fn. 2 (1967), revd. and remanded 409 F.2d 375 (7th Cir. 1969).

This procedure has been followed, even though the counsel involved had co-counsel in the room at the time. Compare ***Advance Waste System***, 306 NLRB 1020, 1032–1033 (1992) and ***State Bank of India***, 283 NLRB 266, 277–278 (1987), in which the judge excluded counsel and representatives of the charging party for misconduct, but completed the trial even in the absence of these individuals. Although due process claims are not so significant for the charging party, because the General Counsel continues to represent its interests, the charging party is also entitled to be represented by an attorney of its choice. Thus, 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. ***Great Lakes Screw***, above.

A possible middle ground, which could avoid the postponement problem, is available when the offending party has co-counsel. Thus in ***Baddour, Inc.***, 281 NLRB 546, 546 fn. 2 (1986), enfd. mem. 848 F.2d 193 (6th Cir. 1988), cert. denied 488 U.S. 944 (1988), the Board affirms 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.

§ 7–520 Authority to Admonish or Reprimand Counsel

Boards Rules, Section 102.177(b), also provides the Board with the authority to “admonish or reprimand, after due notice, any person who engages in misconduct at a [trial].” The Board points out that “formal admonition or reprimand declares conduct improper and cautions the offender that repetition of offense will result in more severe discipline.” ***Sargent Karch***, 314 NLRB 482, 486 fn. 14 (1994).

Although the rule requires *due notice* before the imposition of this action, the notice requirement from the judge’s perspective would probably be satisfied by a recommendation in his or her decision. Nonetheless, the judge should specifically warn the offender that continued misconduct would or might result in a recommendation for a formal admonition. It is essential, however, as is the case of an exclusion decision, for the judge to clearly state on the record the misconduct the individual has committed, with a clear and specific warning that repetition of the conduct will not be tolerated and will result in stronger action. Note that 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. ***Advance Waste System***, 306 NLRB 1020, 1032–1033 (1992), and ***State Bank of India***, 283 NLRB 266, 277–278 (1987), above.

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***, above; inappropriate or unprofessional comments about the

judge, ***Maietta Contracting***, 265 NLRB 1279, 1279–1280 (1982), enfd. mem. 729 F.2d 1484 (3rd Cir. 1984); profanity directed towards counsel and the judge and refusal to obey the judge's instructions, accusing the judge of "taking money," ***State Bank of India***, above; violating a separation of witnesses order of the judge, ***Seattle Seahawks***, 292 NLRB 899, 908 (1989), enfd. mem. 888 F.2d 125 (2nd Cir. 1989); and willfully taking frivolous position at the trial to delay and abuse the Board's processes, ***Nursing Center at Vineland***, 318 NLRB 337, 344 (1995).

The Board, however, has on occasion reversed the judge on exclusion rulings or recommendations for reprimand. In ***Operating Engineers District 1 (Crest Tankers)***, 274 NLRB 1481, 1482 (1985), the judge excluded counsel because the judge believed that counsel had misrepresented his ruling in filing a special appeal and had refused the judge's directive to "correct" the appeal. The Board majority concludes that the counsel's actions were not a deliberate attempt to obstruct the trial and did not warrant exclusion. The Board also granted the charging party's motion to recuse the judge, because his conduct in excluding the counsel demonstrated an "appearance of partiality or bias."

In ***Patterson-Stevens, Inc.***, 325 NLRB 1072, 1073 (1998), the judge had found that conduct of the attorney throughout the investigation stage and trial was "a blatant premeditated attempt to obstruct and delay the Board's process . . . and deserving of Board reprimand." The conduct involved the withholding of relevant payroll records during the investigation and instructing employees of the respondent not to assist the General Counsel in interpreting limited financial information that was provided. The Board agreed with the judge that the uncooperative attitude of the respondent's attorney warranted a finding that the backpay formula proposed by the General Counsel was appropriate. Although the Board agreed that the attorney had been uncooperative and not forthcoming or straightforward, however, it concluded that his behavior was not "sufficiently egregious to a warrant a reprimand on this occasion, as recommended by the judge."

The Board has not indicated what misconduct warrants a warning, reprimand, or censure. It issued warnings for misconduct in ***Government Employees (IBPO)***, 327 NLRB 676, 676 (1999); in ***Nursing Center at Vineland***, above, 318 NLRB 337, 338 fn. 7, 343–344 (1995) (for "willfully taking a frivolous position, both for delay [causing a 5-week adjournment in the trial] and to abuse the Board's processes"); and in ***Advance Waste Systems***, above, 306 NLRB 1020, 1020 fn. 2, 1033 (1992). The Board issued reprimands in ***Patterson-Stevens, Inc.***, 325 NLRB 1072, 1073, 1079 (1998) and ***Maietta Contracting***, above, 265 NLRB 1279, 1279–1280, 1286–1287 fn. 15 (1982). It gave censures in ***State Bank of India***, above, 283 NLRB 266, 277–278 (1987) and ***Alan Short Center****,* 267 NLRB 886, 886 fn. 1 (1983).

Board's Rules do not specifically provide for a "censure." The Board apparently considers censure to be a separate and more severe penalty, particularly for use if there is evidence of prior misconduct.

Board's Rules, Section 102.21, which provided for disciplinary action against an attorney for filing an answer that is without good grounds to support it and which is interposed for delay, has now been revised to apply to answers filed by nonattorney representatives as well. This section has frequently been cited by the Board in cautioning and warning attorneys against engaging in misconduct. ***Graham-Windham Services****,* 312 NLRB 1199, 1199 fn. 2 (1993); ***Worldwide Detective Bureau***, 296 NLRB 148, 148 fn. 2 (1989); and ***M. J. Santulli Mail Services***, 281 NLRB 1288, 1288 fn. 1 (1986). 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.

§ 7–530 Suspension of Counsel

The final and most severe remedy for misconduct is set forth in Section 102.177(d) of the Board's revised Rules, which states that misconduct "of an aggravated character, shall be grounds for suspension and/or disbarment from practice before the Board." This section, which had previously been incorporated in Section 102.44, now sets forth a detailed procedure for implementation, including disciplining attorneys or representatives for misconduct at any stage of any Agency proceeding, including but not limited to the trial.

Board's Rules, Section 102.177(d), states:

> (d) Misconduct of an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

Section 102.177(e)(1)–(12) provides that *all* allegations of misconduct shall be handled in accordance with the stated procedure. Footnote 12 of the explanatory notes makes clear that the judge may still recommend in his or her decision that the Board refer the matter to the General Counsel. Thus, the judge may recommend in his or her decision that the misconduct, which may reach the level of "aggravated misconduct," be referred to the General Counsel for investigation and determination whether the respondent should be served with a complaint for litigation under Section 102.177(d) and (e) of the Board's Rules and Regulations. See ***Bethlehem Temple Learning Center***, 330 NLRB No. 166, slip op. at 1 fn. 3 (2000).

Board's Rules do not define the term "aggravated" misconduct. It is therefore necessary to examine case precedent to determine its meaning. That is not always easy to do, because the Board itself has observed that "the Board does not now have any rules concerning attorney misconduct at [trials] that would place an attorney on notice concerning the extent of disciplinary action for inappropriate conduct." ***Matter of an Attorney***, 307 NLRB 913, 913 (1992). Nonetheless, it is possible to detect some factors that the Board deems significant in assessing this issue. The most important factor appears to be the presence of prior disciplinary offenses. Thus, the Board in ***Sargent Karch***, above, 314 NLRB 482, 486 fn. 10 (1994), notes that American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards), section 6.23, states that prior disciplinary offenses constitutes an "aggravating" factor justifying increased discipline.

The Board did make clear in ***Sargent Karch***, however, that it does 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***, above, 307 NLRB 913, 913 (1992), in which it approved a settlement calling for a 6-month suspension of an attorney for using profanity and verbally addressing opposing counsel in a rude, vulgar, and profane manner, even in the absence of prior disciplinary proceedings against him. The Board majority relied on the absence of prior discipline to justify the unusual action of redacting the name of the attorney. One Member dissented, stating that the rule is not conditioned on a prior violation, and it "does not permit a free bite of the apple."

The Board has imposed suspension or disbarment for first time offenses. See ***Kings***

Harbor Health Care, 239 NLRB 679, 680 (1978) (an attorney was disbarred from practice before the Board for suborning perjury at the trial).

In ***H. P. Townsend Mfg. Co.***, 317 NLRB 1169, 1169 (1995), enf. denied on other grounds 101 F.3d 292 (2nd Cir. 1996), in which an attorney suborned perjury during a deposition in response to an investigative subpoena, the Board found that a strong prima facie case of aggravated misconduct had been established. Because, however, the Board's Rules at the time applied only to conduct at the trial, the Board concluded that the conduct fell outside the reach of the Board's Rules. Therefore, it decided to transmit a copy of the record to the State bar association for each State in which the attorney was admitted to practice, with a request by the Board for appropriate disciplinary action.

It appears that the most common types of misconduct encountered by judges are interruptions, refusals to obey judge's instructions or rulings, delaying tactics, and derogatory, abusive, or profane comments to opposing counsel or even to the judge.

The Board found aggravated misconduct in ***Sargent Karch***, above, 314 NLRB 482, 485–488 (1994). In that case, the Board suspended an attorney from practice for 6 months for violating the separation of witnesses order of the judge, because the attorney had engaged in identical misconduct in a prior case and had been "formally admonished" for it, even though the prior misconduct had been found by the judge to be negligent, as opposed to a knowing or intentional misconduct.

In ***Stuart Bochner***, 322 NLRB 1096, 1096 (1997), the Board suspended an attorney from practice for 2½ years for aggravated misconduct under former Board's Rules, Section 102.44, as well as violations of Section 102.21. The attorney had lied to the judge in one proceeding and purposely delayed other proceedings by engaging in frivolous delaying tactics, including the failure to produce subpoenaed documents without filing a motion to revoke in three separate proceedings. The attorney violated Board's Rules, Section 102.21, by 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***, above, 306 NLRB 1020, 1032–1033 (1992), for interrupting counsel, witnesses, and the judge and for failing to follow the judge's instructions.

In ***Joel I. Keiler***, 316 NLRB 763, 766–770 (1995), the Board suspended an attorney from practice for 1 year for aggravated misconduct, based on two prior warnings for "unprofessional remarks" and "inappropriate and unprofessional behavior," which required the judge to constantly reprimand him and which unnecessarily prolonged the case. The attorney committed aggravated misconduct at the trial by making unfair and derogatory comments about the General Counsel, accusing him of being a "liar," and by also committing a "fraud on the court." The Board concluded that this conduct, which was repeated even after chastisement by the judge, was "an intentional and calculated effort to intimidate counsel." The Board also found that the attorney engaged in aggravated misconduct by refusing to supply or verify subpoenaed documents, viewing the refusal as being motivated by "nothing more than a desire to obstruct and delay" the trial.

It must be noted, however, that the Board's decision in ***Keiler***, above, was reversed by a district court judge in an unpublished opinion on February 3, 1998. The district court concluded that the Board's disciplinary standard of "misconduct of an aggravated character" was "unconstitutionally vague." The judge, citing ***U.S. v. Wunsch***, 84 F.3d 1110 (9th Cir. 1996), which invalidated a rule requiring lawyers to "abstain from all offensive personality," concluded that the Board's Rules like the rule in ***Wunsch*** "lacks definable substance" and did not put Keiler *on notice* of what conduct would be condemned by the Board. The judge further found

that "it was unwilling to let this rule stand in light of its potential chilling effect on zealous advocacy. Lawyers cannot second-guess their strategic moves for fear of being disciplined under a rule that can be invoked at the judge's whim."

The Board chose not to appeal this unfavorable decision, perhaps because its misconduct rule required revision. Now in Board's Rules, Section 102.177(a), revised after ***Keiler***, the Board states that attorneys and representatives "shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by these standards in interpreting and applying the provisions of this section." In Supplementary Information published in the Federal Register, the Board further clarified this provision by stating that the Board will be guided by standards, "including ABA Model Rules of Professional Conduct, other ABA standards adopted in the future, applicable State Bar rules, and court decisions applying [the] rules."

The incorporation of these new provisions, coupled with the explanatory notes, might be sufficient to overcome the "unconstitutionally vague" conclusion made by the district court judge. to the Board's prior rule. See ***U.S. v. Hearst***, 638 F.2d 1190, 1197 (9th Cir. 1980), cert. denied 451 U.S. 938 (1981) (the court finds "conduct unbecoming a member of the bar" not to be unconstitutionally vague, referring to the legal profession's code of behavior of which all attorneys are charged with knowledge).

The judge is, of course, bound by the Board's current rules and precedent and must continue to attempt to apply and interpret them. It would be useful for the judge to give clear, distinct, and frequent warnings to any attorney or representative that he or she believes has engaged in aggravated misconduct. As in situations described above, when the judge intends to recommend an admonishment or exclusion, the attorney will then have been presented with clear notice of what conduct is being condemned, and what conduct could subject him to discipline if it is repeated.

CHAPTER 8. SUBPOENAS

§ 8–100 In General

596–6001

§ 8–140 Application for Subpoena

596–6040

Board's Rules, Section 102.31, requires a written application for issuance of a subpoena. If the application is filed before trial, it should be filed with the Regional Director. If filed during the trial, it should be filed with the judge. Applications for subpoenas may be made ex parte. A judge must issue a subpoena and await a petition to revoke, even if the subpoena on its face seeks the production of unobtainable information. See ***Canova v. NLRB**,* 708 F.2d 1498, 1503 (9th Cir. 1983). After the trial opens, if the judge is unavailable, as over a weekend, the Regional Director may issue a requested subpoena because the issuance is "virtually a ministerial act and involves no exercise of discretion." ***Free-Flow Packaging Corp.***, 219 NLRB 925, 926 (1975), enfd. in part 566 F.2d 1124 (9th Cir. 1978).

§ 8–160 Service of Subpoena

596–6060–6730

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph, or by leaving a copy at the principal office or place of business of the person required to be served. Board's Rules, Section 102.113(c). Any sufficient proof may be relied upon to establish that service was made. Section 102.113(e). ***Best Western City View Motor Inn***, 327 NLRB 468, 468–469 (1999) (the attorney's affirmation of service is sufficient). The date of service is the day when the subpoena is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date it was tendered to the delivery service, or is delivered in person. Board's Rules, Section 102.112. See ***National Automatic Sprinklers**,* 307 NLRB 481, 481 fn. 1 (1992).

§ 8–170 Geographic Reach of Subpoena

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

§ 8–180 Fees and Mileage Required to be Paid

596–6040–8000

Witnesses summoned by subpoena to a trial shall be paid the same fees and mileage that is paid witnesses in the Federal courts, by the party who issued the subpoena. Board's Rules, Section 102.32; ***Zurn/N.E.P.C.O.***, 329 NLRB No. 52, slip op. at 4 (1999). Failure to pay the witness fee and mileage may constitute a violation of the Act. ***Howard Mfg. Co.***, 231 NLRB 731, 732 (1977). To the same effect, see the General Counsel's *NLRB Casehandling Manual* (Part One) Subpoenas Section 11780. Tender of fees [for the first day] must accompany service of the subpoena. ***Zurn,*** above. ***O.K. Machine & Tool Corp.***, 279 NLRB 474, 479 fn. 3 (1986). Normally, a Federal agency need not advance the standard fees to accompany service. The distance to be traveled, however, may require that travel expenses be included with service of the subpoena, even by the Government. ***Zurn***, above (an "undue burden" to require disinterested witness to advance his own costs for 550 mile round trip).

CHAPTER 8—SUBPOENAS

§ 8–185 Expert Witnesses, Required Fees and Mileage

Regarding expert witnesses, the standard fee for witnesses does not constitute payment of the fee charged by an expert, and a subpoena may be quashed when the appropriate expert witness fee has not been included with service of the subpoena. ***Zurn/N.E.P.C.O.,*** 329 NLRB No. 52, slip op. at 4 (1999).

§ 8–200 Revocation of Subpoenas

596–6060

§ 8–205 Petition to Revoke

Board's Rules, Section 102.31(b), provides that petitions to revoke should be in writing. To avoid unnecessary delay, however, a party may be ordered to argue orally against a subpoena. ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995).

§ 8–210 Grounds for Revoking Subpoena

596–6060–6700

A subpoena may be revoked if the evidence requested does not relate to any matter under investigation, the subpoena does not describe with sufficient particularity the evidence required, or the subpoena is invalid for any other reason sufficient in law. Board's Rules, Section 102.31 (b). See also ***Brink's, Inc.***, 281 NLRB 468, 468 (1986).

§ 8–215 "Within 5 Days"—Petition to Revoke

596–6060–3350

Section 11 of the Act, as well as Board's Rules, Section 102.31(b), provides that any party served with a subpoena has 5 days in which to petition for revocation of the subpoena. A March 1997 amendment of the rule provides that "the date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received." Because the period of time allowed to file a petition is less than 7 days, intermediate Saturdays, Sundays, and holidays are not included in the computation. Board's Rules, Section 102.111(a). The date of service is also excluded. To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995).

CAUTION. The 5-day rule may not be strictly applied if the subpoenaed material is subject to a privilege. See ***M. J. Mechanical Services,*** 324 NLRB 812, 832 (1997) ("reporter's privilege"). In ***Detroit Newspapers***, 326 NLRB 700, 751 fn. 25 (1998), enf. denied on other grounds 216 F.3d 109 (D.C. Cir. 2000), a judge refused to apply the 5-day rule, even though the petition to revoke was filed "many weeks" after service of the subpoena. The judge held that the attorney-client privilege prevailed and revoked the subpoena on that basis. Ruling on an interlocutory appeal, however, a panel majority of the Board held in an unpublished order that the judge "abused his discretion . . . because the Respondent did not file a proper motion or petition to revoke within 5 days." Dissenting, one Member would not have granted the special appeal, but would have permitted the issues to be raised "in the exceptions process."

Courts have also rejected application of a 5-day rule when subpoenaed documents are protected by a privilege. ***EEOC v. Lutheran Social Services,*** 186 F.3d 959, 960 (D.C. Cir. 1999) (an EEOC document protected by the attorney-client privilege) and ***NLRB v. Midland Daily News***, 151 F.3d 472, 474–475 (6th Cir. 1998) (a Board's subpoena that "constituted a constitutional infringement of [the respondent newspaper's] right to exercise commercial free speech").

§ 8–300 Scope of Subpoenas

596–6060–6735

§ 8–310 Material Must Be “Reasonably Relevant”

Subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board’s Rules, Section 102.31(b) and ***Perdue Farms***, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998) (the information needs to be only “reasonably relevant”).

§ 8–320 Preserving Related Material

A party served with a subpoena in an unfair labor practice case can be ordered to preserve and maintain documents that are related to the allegations in the complaint, for use at the compliance stage of the proceedings. ***Dauman Pallet, Inc.***, 314 NLRB 185, 213 (1994).

§ 8–330 Protecting Integrity of Material

If a served party considers any items irrelevant, privileged, or otherwise exempt from production, the judge may want to consider the matter after an in camera inspection. Any subsequent ruling may include a protective order that conditions or limits use of the relevant material.

NOTE. Sometimes the General Counsel or other party may want to remove files and documents produced under subpoena to a separate room or even keep them overnight. (The problem is enhanced if the request applies to personnel files and payroll records of current employees.) Before the judge permits this (even if there is no objection), he or she must consider the possibility that a contention can be made later, when the General Counsel seeks a stipulation of authenticity, that some of the affected documents have been tampered with (for example, a contention that the presence of yellow (or other color) highlighting was not present when the files were turned over to the General Counsel) and that the party served cannot now stipulate to authenticity. Even worse, a contention could be made that the files had contained critical documents that have been removed, and not returned, and that now the served party will have to offer secondary evidence of their (purported) contents.

§ 8–400 Privileged Material

596–6060–6750

§ 8–410 Attorney-Client Privilege

737–8433–1750

The Board, in ruling on an asserted attorney-client privilege, generally tracks the Supreme Court’s decision in ***Upjohn Corp. v. U.S.***, 449 U.S. 383, 389–390, 101 S.Ct. 677, 682–683 (1981). When a party argues that the information sought by a subpoena is protected by the attorney-client privilege, the relevant inquiry is whether the subpoenaed material discloses a communication made in confidence to an attorney by a client for the purpose of seeking legal advice. The privilege protects not only the giving of legal advice to one who can act on it, but also the giving of information to the attorney to enable him to give informed advice. ***Patrick Cudahy, Inc*,** 288 NLRB 968, 969–971 (1988).

When the legal advice relates to collective bargaining, the Board will not readily and broadly compel disclosure of confidential communications between attorney and client because the communications are intermixed with business and economic considerations. The notes of

exchanges in a bargaining session with other parties are not protected, however, unless they are intermingled with privileged communications. Also, nonprivileged documents, e.g., ordinary corporate records such as payroll or personnel records, cannot be swept within the privilege simply by being transmitted from the client to the attorney. ***Patrick Cudahy***, above, 288 NLRB at 971 fn. 13. See also ***Taylor Lumber & Treating, Inc.***, 326 NLRB 1298, 1298 fn. 2 (1998).

In ***Patrick Cudahy*** the Board also held, 288 NLRB at 972–974, that counseling an unfair labor practice does not come within the tort or crime exception to the attorney-client privilege.

The Board has not spoken definitively on the attorney work-product privilege, but in ***Upjohn Corp.***, above, 449 U.S. at 391, 397–398, 101 U.S. at 683, 686–687 (1981), the Supreme Court reaffirmed ***Hickman v. Taylor***, 329 U.S. 495, 511, 67 S.Ct. 385, 393–394 (1947), the case that established the privilege. ***Upjohn***, 449 U.S. at 401–402, 101 S.Ct. at 688–689, applied ***Hickman*** to an Internal Revenue Service summons and barred the IRS from seeking the company attorney's memoranda of oral interviews of company employees. The Court also held that the "substantial need" exception found in Fed.R.Civ.P. Rule 26(b)(3) usually is unlikely to overcome the privilege, for "work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship."

See also the discussion of these issues in **§ 13–270**, "Attorney-Client," below.

§ 8–420 Testimony by Board Agents and Privileged Files

596–6001–5083

Except as provided by the Board under Freedom of Information Act (FOIA) regulations and Board's Rules, Section 102.117(a)–(c), the Board requires in Section 102.118(a) that 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—without the written consent of the Board or Board Chairman if the documents are in Washington, D.C., or the written consent of the General Counsel if the documents are in a Regional Office or in Washington, D.C. under the control of the General Counsel.

To avoid the appearance of partiality, the Board has a strong and longstanding policy against Board agents and employees appearing as witnesses in a legal proceeding. ***Laidlaw Transit, Inc.***, 327 NLRB 315, 316 (1998). Special application must be made to the General Counsel for the Board agent to take the witness stand. Board's Rules, Section 102.118(a)(1).

§ 8–430 Federal Mediator Not Subject to Subpoena

737–5601–5800

Similarly, the Board has appropriately revoked a subpoena seeking the testimony of a Federal mediator, who would be able to provide information crucial to resolving a credibility issue, to preserve the mediator's effectiveness. ***NLRB v. Joseph Macaluso, Inc.***, 618 F.2d 51, 56 (9th Cir. 1980). See also **§ 13–280**, "Federal Mediator," below.

§ 8–440 State Confidentiality Rules Regarding Subpoenas Honored

Canova v. NLRB, 708 F.2d 1498, 1501 (9th Cir. 1983) (the Board appropriately revoked a subpoena seeking records of a State unemployment insurance agency, which had a regulation prohibiting the use of its records as evidence in any action or special proceeding other than one arising under its jurisdiction).

§ 8–500 Jencks Statements

596–6060–6725

A Jencks "statement" or affidavit given to the General Counsel by a witness is not subject to production by subpoena. Neither will the Board require the production of a Jencks affidavit simply because the affiant gave a copy of it to the charging party union. ***H. B. Zachry Co.***, 310 NLRB 1037, 1037–1038 (1993). Regarding origin of Jencks rule, see **§ 13–800**, "Witness Statements (Jencks Rule)," below.

Board's Rules, Section 102.118(b)(1), authorizes, upon the motion of the respondent, the production of any Jencks statement in the possession of the General Counsel, *after the witness has testified*, if the entire contents relates to the subject matter about which the witness testified. In ***Albertson's, Inc.***, Case 27–CA–13390, the Board issued an unpublished interim order, dated January 29, 1999, ruling that the evidentiary limitation imposed by Board's Rules, Section 102.118(b)(1), obligated the General Counsel to *search* its files [before, it is implied, the witness is giving testimony] for Jencks statements in cases involving charges filed by the charging party union against the respondent during the period covered by the pending charges. (The Board's order, on special appeal during an adjournment of the trial, reversed the portion of the judge's order directing a search of files in cases involving charges against other employers, and also denied the General Counsel's request to restrict the search to the same Regional Office where the pending charges were filed.)

When the General Counsel asserts that the Jencks statement requested to be produced contains information that does not relate to the subject matter about which the witness testified, the General Counsel should deliver the statement(s) to the judge for in camera inspection. After reviewing the statement(s), the judge should excise any portion that do not relate to the subject matter of the testimony of the witness. The judge also has the discretion to decline to excise portions which, although unrelated to the witness' testimony, relate to other matters raised by the pleadings. ***Caterpillar, Inc.***, 313 NLRB 626, 627 (1994).

Board's Rules, Section 102.118(d), defines a Jencks "statement" to mean any written statement by the witness that is signed or otherwise adopted or approved by him, as well as a tape recording or transcription that is a substantially verbatim recital of an oral statement made by the witness to the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement. 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 Board's Rules, Section 118(b)(1). ***Caterpillar***, above, 313 NLRB at 627 fn. 4. They may also be protected from disclosure by the attorney work-product doctrine. In addition, tape recordings and transcripts of conversations between a supervisor and employee are not Jencks statements. They are obtainable by subpoena. See ***Leisure Knoll Assn.***, 327 NLRB 470, 470 fn. 1 (1999). Similarly, contemporaneous remarks captured on an audio or video tape, taken when applicants apply for work in an employer's office, are not a Jencks "statement" because "not a description of a past event" and may be subpoenaed. ***Delta Mechanical, Inc.***, 323 NLRB 76, 77 (1997).

See **§ 13–218**, "Tape Recording Obtained by Subpoena" and also **§ 13–800** through **§ 13–815**, below.

One issue that has arisen following ***Leisure Knoll*** and ***Delta Mechanical***, above, is whether a subpoena served on a Government witness to produce any audio or video tape recordings pertaining to the case, will reach the tapes after the witness, before being served with the subpoena, has turned the tapes over to the Regional Office. The Board's answer is "No." By its March 1, 2000 order (as supplemented by its May 31, 2000 order denying a motion

for reconsideration) granting counsel for the General Counsel's special appeal in ***Gallup***, Case 16–CA–19898, a majority of a Board panel, reversing the judge, ruled that the respondent must first request the General Counsel's consent to produce under Board's Rules, Section 102.118.

The judge should then (fn. 4) “decide any issues flowing from the General Counsel's response." (One Member dissented on the basis that, in his view, counsel for the General Counsel should have been aware that the subpoenas had been served on the witnesses, alleged discriminatees, and she therefore should have alerted the respondent that the tapes had been given to her before the subpoenas were served so that the respondent could have made a request under 102.118 before the trial).

A second question is whether the trial must be delayed while the respondent either makes a written request that the General Counsel (in Washington, D.C.) grant permission under Board's Rules, Section 102.118(a)(1), for production, or (perhaps “and”) serve a new subpoena on the Regional Director or the Government's trial attorney. This probably should depend on the specific circumstances of each case. The judge should utilize his or her discretion.

See also **§ 13–218**, “Tape Recording Obtained by Subpoena” and **§ 13–811**, “Time of Production.”

§ 8–600 Refusal to Honor Subpoena

§ 8–610 Failure of Witness to Appear

The failure of a witness to appear and testify in compliance with a subpoena on behalf of an adverse party, for whom the witness would be expected to give favorable testimony, may appropriately give rise to an inference that the witness’ testimony would favor the adverse party. ***Carpenters Local 405***, 328 NLRB 788, 788 fn. 1 (1999). See also **§ 13–235**, “Adverse Inferences,” below.

§ 8–620 Failure to Produce Documents

Several choices are available to a judge in dealing with a party who refuses to comply with subpoena. The appropriate choice, if any, is within the discretion of the judge, who may choose any or all of them, depending on the circumstances. The judge may

1. Draw an adverse inference. ***Teamsters Local 776 (Pennsy Supply)***, 313 NLRB 1148, 1154 (1994).

2. Bar a noncomplying party from asking questions on direct or cross-examination about the subject matter sought by the subpoena. ***Perdue Farms***, above, 323 NLRB at 348, affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998) and ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995).

3. Permit the introduction of secondary evidence by the party who has been disadvantaged. ***Bannon Mills***, 146 NLRB 611, 614 fn. 4, 633–634 (1964) and ***American Art Industries***, 166 NLRB 943, 951–953 (1967), affd. in pertinent part 415 F.2d 1223, 1229–1230 (5th Cir. 1969). This may be followed by an order precluding the offending party from cross-examining witnesses who offer the secondary evidence. ***NLRB v. C. H. Sprague & Son***, 428 F.2d 938, 942 (1st Cir. 1970).

The failure of a party to produce documents that are lost, have inadvertently been misplaced, or no longer exist, does not necessarily warrant an adverse inference. ***CPS Chemical Co.***, 324 NLRB 1018, 1019 (1997), enfd. 160 F.3d 150 (3rd Cir. 1998) and ***Hansen Bros. Enterprises***, 313 NLRB 599, 608 (1993).

See also **§ 13–235**, "Adverse Inferences," below.

§ 8–630 Interference with Subpoena Compliance

It is a violation of the Act to state or imply that compliance with a subpoena is optional. ***Bobs Motors, Inc.***, 241 NLRB 1236, 1236 (1979). Attempting to dissuade an employee from speaking to a Board agent or appearing at a Board trial also violates the Act. ***Alterman Transport Lines, Inc.***, 127 NLRB 803, 804 (1960) and ***Certain-Teed Products Corp.***, 147 NLRB 1517, 1520 (1964). See also ***U.S. Precision Lens***, 288 NLRB 505, 505 fn. 3 (1988) (treating a witness' attendance at a Board trial as absences counting against her employer's "excellent attendance" program violates Section 8(a)(4)).

A judge who learns that witnesses are being subjected to retaliation for testifying should take steps to prevent retaliation by at least warning against it.

§ 8–700 Enforcement of Subpoenas

596–6080

Upon a party's failure to comply with a subpoena, the General Counsel will, in the name of the Board, on request of the party seeking enforcement of the subpoena, institute (but will not prosecute) 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. ***Best Western City View Motor Inn***, 325 NLRB 1186, 1186 (1998).

§ 8–710 When Enforcement Refused

The Board has ruled it unnecessary to enforce a subpoena if the party seeking the documents is unable to show undue hardship in obtaining substantial equivalent materials by other means. ***Marian Manor for the Aged & Infirm***, 333 NLRB No. 133, slip op. at 1, 1 (2001).

CHAPTER 9. SETTLEMENTS

§ 9–100 In General

596–2801

“[T]he Board has from the very beginning encouraged compromises and settlements [footnote omitted]. The purpose of 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, 65 S.Ct. 238, 240–241 (1944).

“It is the policy of the Board and the office of the General Counsel to provide full opportunity to the parties to reach a mutually satisfactory resolution of issues as an alternative to litigation. Settlement of a meritorious case is the most effective means to improved relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action.” General Counsel’s *NLRB Casehandling Manual* (Part One) Settlements Section 10124.1.

§ 9–200 Promoting Settlement

§ 9–220 Initial Contact with the Parties

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

While emphasizing the importance of pursuing settlement, the judge should ensure that the parties have communicated about settlement and are fully apprised of the positions of the other parties on settlement. The General Counsel should be asked if a complete settlement package has been given to the respondent including, when appropriate, a complete calculation of all monetary obligations. If it appears possibly fruitful, the parties should be allowed and encouraged to discuss settlement terms during the conference call, with the degree of judicial participation the parties and the judge find appropriate.

It is often helpful if the parties are willing to freely discuss the merits of the case, including both the facts and theories on which they intend to rely, enabling them to know before the trial the strengths and weaknesses on each side and to discuss a settlement, based on this understanding.

The parties should be encouraged, if there is any possible likelihood of settlement, to continue their settlement discussion after the conference call. The judge may suggest that a specific meeting take place or that the parties exchange phone calls at particular times. The judge may also schedule follow-up conference calls to further discuss the merits of the case or to stimulate consideration of a particular settlement. 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

There will always be a natural tension between the granting of time to pursue chances of settlement that are possible, but not likely, and the need to get on with the trial to bring the matter to a conclusion. The determination of (1) when, and for how long, to delay the litigation to pursue settlement, (2) when to abandon that process and turn to the litigation, and (3) when to return to the settlement negotiation process mid-trial, are setting-specific and a function of the personality of the judge and the litigants. Some factors that could be mentioned to the parties include:

Costs of litigation. (1) The time involved in issuing a judge's decision, Board decision, and circuit court decision. (2) The initial stress of trial and the lingering worries of outcome regarding both the ultimate outcome and the outcome of individual credibility contests involving questions of honesty and believability. (3) The renewal or maintenance of hostility at the facility or among the employees whose different memories of events are brought into open conflict. (4) The time of witness preparation as well as the participation of employees, managers, and support staff for the trial.

Benefits of Settlement. (1) Resolution of litigation. (2) Certainty of outcome. (3) Demonstration of the willingness of the parties to compromise.

§ 9–240 After the Trial

A judge may, but normally does not, renew settlement efforts after the record is closed and the decision is in preparation. If the parties require more than the 35-day limit on the time the judge is authorized to grant for the filing of briefs and are engaged in settlement efforts, they may of course seek an extension of time from the Chief Judge or Deputy Chief Judge in Washington, or from the Associate Chief Judge in San Francisco, New York, or Atlanta for filing their briefs. After the judge's decision has issued, the matter is transferred to the Board and the judge is no longer the individual to whom the parties should direct settlement or settlement issues.

§ 9–300 Settlements Approved

§ 9–320 Settlements Before Record Opens and Testimony Taken

596–2840–4050

The judge assigned to a case has an obligation to assist the parties, when appropriate, in deciding to settle a case and in suggesting ways and means of reaching a settlement. Unless and until the record formally opens, however, neither the judge nor the Board has any role in approving an unfair labor practice settlement. Consideration and approval or rejection of a settlement are the sole province of the General Counsel and his agents, as is the review procedures provided to parties adversely affected by the rulings. ***NLRB v. Food & Commercial Workers Local 23***, 484 U.S. 112, 124–126, 108 S.Ct. 413, 421–422 (1987). Board's Rules, Sections 101.7 and 101.9 (a)–(c), deal with the General Counsel's consideration of settlement issues and applicable procedures.

In ***Sheet Metal Workers Local 28 (American Elgen),*** 306 NLRB 981, 981–982 (1992), the Board held that as long as no evidence has been introduced in a trial and no contention has been made that a legal issue was ripe for adjudication on the parties' pleadings alone, the General Counsel retains his pretrial rights under Board's Rules, Section 102.18, to withdraw the complaint on his own motion for purposes of approving a settlement.

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

596–2840–4075

Consideration of proposed settlements and the formal approval or rejection of settlements after the trial opens and testimony is taken but before a decision issues, are the exclusive province of the trial judge, with slightly differing procedures for review depending on the type of settlement. (Consolidated R and C cases present special circumstances.) Board's Rules, Section 101.9, provides

> (d)(1) If the settlement occurs after the opening of the [trial] and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give [the] party an opportunity to state on the record or in writing its reasons for opposing the settlement.
>
> (2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by [the] ruling may ask for leave to appeal to the Board as provided in Board's Rules, Section 102.26.

§ 9–340 Settlement After Judge's Decision Issues

596–2840–4090

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 and returned. The moving parties should be directed to take appropriate matters to the Executive Secretary of the Board.

§ 9–400 Standards for Approving or Rejecting Settlements

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

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

A third type of settlement, a non-Board settlement, involves an adjustment strictly between the respondent(s) and the other non-Board parties (i.e., not with the General Counsel) in CA, CB, CC, and CE cases. Special rules govern the adjustment of CD cases, see Section 10(k) of the statute and Board's Rules, Section 102.90.

Formal settlements require Board approval. Because of the statutory division of authority between the Board and the General Counsel, differing rules apply for jurisdiction over acceptance or rejection of informal settlements, depending on the state of litigation at which the settlement occurs. Informal settlements require approval of the Regional Director or the General Counsel. A non-Board settlement requires a withdrawal of the charge, and the judge may permit the withdrawal over the objection of the General Counsel.

CHAPTER 9—SETTLEMENTS

§ 9–413 Formal Settlements

596–2820

The General Counsel's *NLRB Casehandling Manual* (Part One) Settlements Section 10164.1 provides:

> *Generally*: A formal settlement is a written stipulation calling for remedial action in adjustment of unfair labor practices and 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.

The Board and the General Counsel have evolved an elaborate procedure for transferring formal settlements to the General Counsel's Washington, D.C. office and the Board, with a significant body of sample language appropriate for formal settlements. See the General Counsel's *NLRB Casehandling Manual* (Part One) Settlements Sections 10164–10174. Normally formal settlement agreements are drafted by the Regional Offices, using the procedural and technical language in the manuals, to meet the requirements for submitting the agreements 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.

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

§ 9–415 Informal and Non-Board Settlements

596–2840

In the lead case on settlements, ***Independent Stave Co.,*** 287 NLRB 740, 743 (1987), the Board set out considerations for approving non-Board settlements. The Board will not "reject the parties' non-Board settlement simply because it does not mirror a full remedy," but

> will 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.

The Board in ***Woodworkers Local 3–433 (Kimtruss Corp.)***, 304 NLRB 1, 2 (1991) approved the judge's application of ***Independent Stave*** to an informal settlement agreement opposed by the charging party. In ***American Pacific Pipe Co.***, 290 NLRB 623, 623–624 (1988), the Board applied the ***Independent Stave*** ruling to a non-Board settlement of a backpay claim. In ***Longshoremen ILA Local 1814 (Amstar Sugar),*** 301 NLRB 764, 764–765 (1991), the Board applied ***Independent Stave*** to a non-Board settlement reached by the parties, over the opposition of the General Counsel, after the judge issued his decision. See also ***Flint Iceland Arenas***, 325 NLRB 318, 318–319 (1998), in which a non-Board settlement, opposed by the General Counsel, did not "sufficiently satisfy the standards" of ***Independent Stave***, as

discussed in **§ 9–500**, “Procedure for Considering, Accepting, or Rejecting Settlement,” below.

§ 9–420 Settlement by Consent Order

596–2860

After a trial has opened, in very limited circumstances, the judge may approve a settlement by “consent order” (that is, a settlement offered by the respondent and opposed by both the General Counsel and the charging party, but approved by the judge). See ***National Telephone Services,*** 301 NLRB 1, 1 fn. 2 (1991). The key to Board acceptance appears to be whether the proffered settlement remedies all the unfair labor practices alleged in the complaint. ***Iron Workers Local 27 (Morrison-Knudson)***, 313 NLRB 215, 217 (1993), enfd. mem. 70 F.3d 119 (9th Cir. 1995) (all alleged violations were not remedied and the settlement offer was rejected) and ***National Telephone***, above (with all violations remedied, the offer was accepted). Compare ***Communications Workers Local 9403 (Pacific Bell),*** 322 NLRB 142, 142–143 (1996), review denied 113 F.3d 1288 (D.C. Cir. 1997), cert. denied 522 U.S. 995 (1997) (Board affirms judge’s approval of “unilateral settlement agreements between General Counsel and Respondent,” but the judge and Board rule on the merits of any allegations not settled).

In another case in which all complaint allegations were not remedied (yet the judge approved a consent order proposed by the respondent as a settlement), the Board revoked the judge's approval. In that case, ***Copper State Rubber***, 301 NLRB 138, 138 (1991), the Board reversed the judge’s approval of a settlement proffered by the respondent, but rejected by the General Counsel and the charging party. The Board relied on the rejection by two of the parties, an overbroad waiver clause involving an employee, the failure to address all allegations of the complaint, and the failure to protect against future misconduct.

In an unpublished order in ***Brandt Construction Co.***, 33–CA–12420 (1999), a Board panel rejected a consent order as a settlement, reversing the judge who had approved it. The panel emphasized again that the Board will not approve a proposed consent order unless it provides a “full remedy.”

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

When the parties have reached an oral settlement or an agreement in principle to settle the case, the trial judge is often faced with issues of how to handle subsequent events. As noted above, if the trial has not opened, the matter remains before the General Counsel and the judge has no formal role in dealing with the settlement.

After the trial begins, if a proposed settlement is reached, either orally or in principle, and the proposal is offered to the trial judge for approval, the judge must determine whether to adjourn the trial to provide time to prepare the settlement, or to proceed with the trial. In reaching this decision, the judge must consider the parties’ positions as well as the likelihood that a settlement will in fact be reached, as well as the practical questions of remaining on site during preparation of the settlement as opposed to adjourning the trial.

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. An informal settlement may be secured on Form NLRB 5378, “Settlement Agreement Approved by an Administrative Law Judge.” The forms should be 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.

The positions of all parties on the settlement should be put on the record. When a party objects to the approval of a formal settlement, the party must be given a reasonable opportunity on the record to state its position and argument opposing the settlement. See 101.9(d)(1) of Statements of Procedure.

In settlements involving discriminatees, their position regarding approval of the settlement should also be put on the record, either directly or indirectly through the General Counsel or the charging party's representation of their position. In ***Flint Iceland Arenas***, above, 325 NLRB 318, 320 (1998), a Board majority rejected a settlement. The Board majority held, among other things, that although it is not necessary that all discriminatees be notified and that they all agree to be bound to render a settlement approvable, the views of named and otherwise identifiable discriminatees should be taken into account and, if those individuals have not been informed of the settlement or have not been given opportunity to express their views of the settlement, their lack of a record position is a factor to be considered in approving the settlement.

After having heard and considered the positions of the parties and whatever argument the judge finds appropriate, the judge's decision and reasoning in approving or rejecting the settlement should be stated on the record and the settlement itself placed in evidence.

If the settlement is rejected, the parties should be informed of the rights of review available under Statements of Procedure, Section 101.9(d)(2), which provides that "If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by [the] ruling may ask for leave to appeal to the Board as provided in Board's Rules, Section 102.26." The trial should then be resumed.

If the settlement agreement is approved, any opposing party should again be apprised of the review rights of Board's Rules, Section 101.9(d)(2), quoted above.

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

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

If the judge approves a formal settlement, as indicated in **§ 9–413**, "Formal Settlements," above, it should be approved in writing and be left with to the Regional Office so that the procedure in the General Counsel's *NLRB Casehandling Manual* (Part One) Settlements Section 10164.6 for obtaining approval of the Board can be implemented.

A separate order may be issued to resolve some settlement matters. When a party objects to the settlement and the issues are somewhat complex, it may be appropriate to entertain briefs on the advisability of approving a settlement. After consideration of the briefs, the judge may issue an order approving or rejecting the settlement. An order is also appropriate when the settlement occurs after the close of trial or during a hiatus in the case.

CHAPTER 9—SETTLEMENTS

§ 9–600 Various Provisions of Settlement Agreements

596–2801–7500

§ 9–610 Nonadmission Clauses

596–2860–8000

Inclusion of a clause, to the effect that the respondent does not admit commission of unfair labor practices, is not a valid basis for objecting to a proposed settlement. ***Concrete Materials of Georgia v. NLRB***, 440 F.2d 61, 68 (5th Cir. 1971); ***Mine Workers (James Bros. Coal),*** 191 NLRB 209, 209–210 (1971*); **NLRB v. Oil Workers (Catalytic Maintenance),*** 476 F.2d 1031, 1037 (1st Cir. 1973) (formal settlement agreement with consent decrees, but objections by the charging parties); ***Garment Workers ILGWU Local 415–475 (Arosa Knitting) v. NLRB***, 501 F.2d 823, 826, 832–833 (D.C. Cir. 1974) (informal settlement; but objections by the charging party*);* and ***Containair Systems Corp. v. NLRB***, 521 F.2d 1166, 1172 (2nd Cir. 1975) (Board's refusal to delete a nonadmission clause was affirmed).

Nonadmission clauses, however, may not be included in the Board's Notice to Employees regarding settlement agreements. ***Pottsville Bleaching Co.,*** 301 NLRB 1095, 1095–1096 (1991). "The Board's notice, in most cases, is the principal means by which the Board communicates to those affected by a respondent's unfair labor practices. . . .Thus, the notice should be a strong and affirmative statement of a respondent's promise not to engage in unlawful conduct . . . . [T]he inclusion of a nonadmissions clause . . . .could be confusing to those reading the notice and could undermine its effectiveness."

§ 9–620 Settlement Bar Rule

A prior 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. ***Park-Ohio Industries,*** 283 NLRB 571, 572 (1987), reaffirming the settlement bar rule in ***Hollywood Roosevelt Hotel Co.,*** 235 NLRB 1397, 1397 (1978). As in ***Park-Ohio***, the judge may have to determine the scope and meaning of a settlement agreement. See ***Ratliff Trucking Corp.***, 310 NLRB 1224, 1224 (1993), for a case in which the issue was not specifically reserved and thus the new complaint was dismissed.

Non-Board Settlement. A prior non-Board settlement, however, does not preclude the General Counsel from re-alleging settled matters in subsequent unfair labor practices. The settlements are not approved by the Regional Director, even though withdrawal of a charge may have been approved. ***Auto Bus, Inc.,*** 293 NLRB 855, 855–856 (1989), in which the Board quoted as squarely controlling the following statement by the judge in ***Quinn Co.***, 273 NLRB 795, 799 (1984):

> In the absence of a Regional Director signing or approving a settlement agreement, any such agreement between a charging party and a respondent which resulted in the withdrawal of the charge is viewed by the Board as a private arrangement which does not estop the Regional Director from proceeding on any new charge alleging the same conduct as the withdrawn charges.

Fed.R.Evid. Rule 408. This rule makes inadmissible settlement discussions to prove or disprove liability. The rule does not, however, establish a privilege and therefore does not bar the introduction of the evidence if relevant to an issue other than the liability discussed in the offer to compromise. Thus, the General Counsel is entitled to prove, regardless of the legitimacy of the grievance that was the subject of compromise negotiations, that the respondent threatened to retaliate for pursuing it*.* ***Uforma/Shelby Business Forms v. NLRB***, 111 F.3d

1284, 1293–1294 (6th Cir. 1997).

§ 9–630 Joint and Several Liability

A settlement proposal limited to one of a number of (potential) jointly and severally liable respondents does not extinguish the liability of the nonsettling respondents, unless that is the intention of the parties. See ***Zenith Radio v. Hazeltine Research***, 401 U.S. 321, 342–348, 91 S.Ct. 795, 808–811 (1971) (an antitrust case). The Board has adopted this rule. See ***Urban Laboratories***, 305 NLRB 987, 987–988 (1991).

§ 9–640 Releases

Release and discharge of the respondent from all claims by an employee is permissible as part of a settlement, unless it prohibits the filing of unfair labor practice charges in the future. ***First National Supermarkets***, 302 NLRB 727, 727–728 (1991).

§ 9–650 Taxability

Money settlements for backpay under Title VII do not redress tort-like personal injuries; thus, they are taxable as gross income to the employee. ***U.S. v. Burke***, 504 U.S. 229, 242, 112 S.Ct. 1867, 1874 (1992). See also ***IRS v. Schleier***, 515 U.S. 323, 115 S.Ct. 2159 (1995), an ADEA case. Compare ***Banks v. U.S.***, 81 F.3d 874, 876 (9th Cir. 1996) (settlement for union's breach of duty of fair representation "was of a tort-like cause of action" and therefore not taxable). The Board's backpay settlements are probably also taxable, although the Board did not resolve the issue in ***Frontier Foundries, Inc.***, 312 NLRB 73, 73–74 (1993), in which the Board rejected the judge's approval of the non-Board settlement that provided for only about 6 percent of full backpay and "does not provide for any notices and does not contain assurances against future misconduct."

§ 9–700 Settlement Agreement in Context of Deferral

In ***Postal Service***, 300 NLRB 196, 196–199 (1990), a suspended employee filed both a grievance and an unfair labor practice charge. The Regional Director deferred processing the charge pending disposition of the grievance. In the grievance procedure, the union and employer entered in a settlement that was opposed by the grievant. The Board found it appropriate to defer to the settlement agreement in accordance with ***Alpha Beta Co.***, 273 NLRB 1546 (1985), review denied 808 F.2d 1342, 1345–1346 (9th Cir. 1987), the court applying the principles of ***Spielberg Mfg. Co.***, 112 NLRB 1080, 1082 (1955) and ***Olin Corp.***, 268 NLRB 573, 573–575 (1984), to determine the validity of settlement agreements reached during grievance and arbitration proceedings.

§ 9–800 Setting Aside Settlement Agreements

596–2880)

The Board's Statements of Procedure, Section 101.9(e)(2), 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. The Regional Director's action in setting aside the settlement and reactivating the case is reviewable by the judge and the Board in the new complaint trial.

As held in ***YMCA of the Pikes Peak Region, Inc. v. NLRB***, 914 F.2d 1442, 1449–1450 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991), enfg. 291 NLRB 998, 1010, 1012 (1988):

> A settlement agreement is binding on all parties to it, but it "will be set aside if its provisions are breached or if postsettlement unfair labor practices are committed" [citing ***Lawyers Publishing Co.***, 273 NLRB 129,129, 135 (1984), revd. in part and remanded 793 F.2d 1062 (9th Cir. 1986) and ***Soule Glass & Glazing Co. v. NLRB***, 652 F.2d 1055, 1109 (1st Cir. 1981)]. If the settlement agreement is set aside, the employer's presettlement conduct may be assessed for unfair labor practices. Moreover . . . to determine whether postsettlement conduct constitutes an unfair labor practice, "presettlement conduct may be considered as background evidence in determining the motive or object underlying a respondent's postsettlement conduct" [citing ***Lawyers Publishing***, above, 273 NLRB at 130 fn. 4, and other cases].

A Regional Director has the authority to reinstate a charge following noncompliance with a non-Board settlement agreement, notwithstanding Section 10(b) of the Act, provided the original charge was timely filed. See ***Norris Concrete Materials***, 282 NLRB 289, 291 (1986) and ***Sterling Nursing Home***, 316 NLRB 413, 416 (1995).

§ 9–900 Role of Settlement Judge

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

> Upon the request of any party or the judge assigned to hear a case, or on his or her own motion, the [Chief Judge or Deputy Chief Judge in Washington, or the Associate Chief Judge in San Francisco, New York, or Atlanta] may assign a judge, who shall be other than the trial judge, to conduct settlement negotiations. In exercising his or her discretion, the [Chief Judge, Deputy Chief Judge, or Associate Chief Judge] making the assignment will consider, among other factors, whether there is reason to believe that resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. Provided, however, That no . . . assignment shall be made absent the agreement of all parties to the use of this procedure.
>
> (1) The settlement judge shall convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the [Chief Judge, Deputy Chief Judge, or Associate Chief Judge] the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. [If feasible], settlement conferences shall be held in person.
>
> (2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.
>
> (3) Participation of the settlement judge shall terminate upon the order of the [Chief Judge, Deputy Chief, or Associate Chief Judge] issued after consultation with the settlement judge. The conduct of settlement negotiations shall not unduly delay the [trial].
>
> (4) All discussions between the parties and the settlement judge shall be confidential. The settlement judge shall not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge shall be

admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.

(5) No decision of [the Chief Judge, Deputy Chief Judge, or Associate Chief Judge] concerning the assignment of a settlement judge or the termination of a settlement judge's assignment shall be appealable to the Board.

(6) Any settlement reached under the auspices of a settlement judge shall be subject to approval in accordance with the provisions of Section 101.9 of the Board's Statements of Procedure.

CHAPTER 10. SEPARATION OF WITNESSES ORDER

§ 10–100 In General

596–7625

"Except in extraordinary situations the [trial] is open to the public." Statements of Procedure, Section 101.10(a). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury" (citations omitted). ***Waller v. Georgia***, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215 (1984). "In our view, the educational benefits accruing to *all participants* in Board proceedings serve to stabilize labor-management relations by cultivating an appreciation of conflicting policy considerations and of the decision-making process." ***Unga Painting Corp.***, 237 NLRB 1306, 1308 (1978).

Even so, "[t]he efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion" (citation omitted). Fed.R.Evid. Rule 615 Advisory Committee's Note on Exclusion of Witnesses ("to preclude fact witnesses from shaping their testimony based on other witnesses' testimony"). "The less a witness hears of another's testimony, the more likely he is to declare his own unbiased knowledge, even though the witnesses have talked among themselves before the [trial] and have discussed their testimony with counsel." ***Unga Painting Corp.***, 237 NLRB 1306, 1306 (1978). See also ***Opus 3 Ltd. v. Heritage Park, Inc.***, 91 F.3d 625, 628–629 (4th Cir. 1996).

Fed.R.Evid. Rule 615, "Exclusion of Witnesses," provides as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

§ 10–200 Scope of Order

A model separation of witnesses order is set forth in ***Greyhound Lines****,* 319 NLRB 554, 554 (1995). See **§ 1–300** ("Model Separation of Witnesses Order, to Exclude/Sequester Witnesses During Trial"), above.

The "heartland" of Fed.R.Evid. Rule 615 is the exclusion of potential witnesses from the courtroom "so that they cannot hear the testimony of other witnesses." ***U.S. v. Sepulveda***, 15 F.3d 1161, 1175–1176 (1st Cir. 1993), cert. denied 512 U.S. 1223 (1994). "Apart from the 'heartland' of courtroom sequestration ["Exclusion of Witnesses"] mandated by Rule 615, the court retains discretion to add other restrictions or not, as it[s] judges [find] appropriate." ***U.S. v. Magana***, 127 F.3d 1, 5 (1st Cir. 1997). Consequently, a "judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony." ***Geders v. U.S.***, 425 U.S. 80, 87, 96 S.Ct. 1330, 1335 (1976). The "determination whether witnesses should be excluded from the [trial] after testimony has been heard is a matter within the discretion of the administrative law judge." ***Alpert's, Inc.***, 267 NLRB 159, 159 fn. 1 (1983).

Witness Conferring with Counsel. As held in ***U.S. v. Magana***, 127 F.3d 1, 5 (1st Cir. 1997), the judge has the discretion to prohibit counsel "from conferring with a witness during the witness' testimony, including during any recesses in the trial."

Considering that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying," it is no denial of the right to assistance of counsel to prohibit a defendant from consulting with counsel during a short recess between direct and cross-examinations, because "the judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." ***Perry v. Leeke***, 488 U.S. 272, 283–284, 109 S.Ct. 594, 600, 601 (1989). BUT that holding does not allow prohibition of "the normal consultation between attorney and client that occurs during an overnight recess [which] would encompass matters that go beyond the content of the defendant's own testimony." ***Perry v. Leeke***, 488 U.S. at 284, 109 S.Ct. at 602). For example, during a 10-minute recess while the General Counsel was examining an adverse-party witness, it was not error for an administrative law judge to allow that witness to speak with counsel to "be prepared for questioning by [that] counsel," but not about "what he testified and how to change it." ***United Chrome Products***, 288 NLRB 1176, 1176 fn. 1 (1988).

Informing prospective witnesses of prior testimony, including by showing transcripts to them, is prohibited "without express permission of the administrative law judge," EXCEPT "that counsel for a party may inform counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side . . . to prepare for rebuttal of [the] testimony." ***Greyhound Lines,*** 319 NLRB at 554, 554 (1995). NOTE that ***Greyhound*** modifies the Board's prior seemingly absolute prohibition on showing separated witnesses the transcripts of other witnesses' testimony." See ***El Mundo Corp.***, 301 NLRB 351, 351 (1991). BUT that modification appears confined to a showing by counsel and, further, to one limited to only so much of the transcript as is needed for possible rebuttal of testimony recited in the transcript, as opposed to making the entire transcript available to open-ended perusal by a prospective witness.

§ 10–300 Requests to Separate Witnesses

Although Fed.R.Evid. Rule 615, "Exclusion of Witnesses," provides that judges possess authority to "order witnesses excluded" even if not requested, "attorneys should specifically note the rule and ask the trial judge to formally invoke it. Without taking these minimal steps, it will be the rare case indeed when we could conclude that a 'sequestration order' has been violated." ***U.S. v. Williams***, 136 F.3d 1166, 1168–1169 (7th Cir. 1998) (parties informed the judge that they had agreed to sequestration, but there was "no formal request for entry of an order," and "no sequestration order was ever entered").

If a request is made, Fed.R.Evid. Rule 615 mandates that the court "shall" order witnesses excluded, leaving no discretion to the judge. Fed.R.Evid. Rule 615 Advisory Committee's Note on Exclusion of Witnesses (excluding witnesses is not a "matter committed to [the judge's] discretion," but is "one of right"). The Board follows that position. ***Unga Painting Corp.***, 237 NLRB 1306, 1307 (1978) ("upon request of a party we shall continue to exclude from the [courtroom] all witnesses"). See also ***Greyhound Lines,*** above.

NOTE. Extraordinary circumstances have been held in one case to justify denying a request to separate witnesses. In ***Curlee Clothing Co.***, 240 NLRB 355, 355 fn. 1 (1979), enfd. 607 F.2d 1213 (8th Cir. 1979), the Board upheld the denial of a request to separate witnesses when there was a "large number of witnesses" and "severe spatial limitations" rendered

separation of the witnesses an “impossibility.”

Timing of request. “No time is specified for making the request” to separate witnesses. Fed.R.Evid. Rule 615 Advisory Committee’s Note on Exclusion of Witnesses.

§ 10–400 Who Should and Should Not Be Separated

596–7625–6700

All potential witnesses should be excluded from the trial. ***Unga Painting Corp.***, 237 NLRB 1306, 1307 (1978) (“we shall continue to exclude from the [courtroom] all witnesses”) and ***Greyhound Lines**,* above (“all persons who are going to testify . . . may only be present in the [courtroom] when they are giving testimony”). Both Fed.R.Evid. Rule 615 and the Board, however, have enumerated exceptions.

Party who is a natural person is exempted by Rule 615(1) (“a party who is a natural person”) and by ***Greyhound***, above (“natural persons who are parties”).

Officer or employee of a party which is not a natural person is exempted if “designated as its representative designated as its representative by its attorney,” Rule 615(2), and “representatives of nonnatural parties,” ***Greyhound Lines**,* above. BUT, “As we read Rule 615, exemption 2 could limit a corporate respondent to its attorney and one other representative.” ***Unga Painting Corp.***, 237 NLRB 1306, 1308 fn. 16 (1978). BEYOND THAT, as held in ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d 625, 630 (4th Cir. 1996), “We cannot agree that a corporation’s mere designation of a person to act on its behalf at trial converts the person into its employee. Moreover, to allow a corporate party to ‘employ’ a person solely as its trial representative would render Rule 615 meaningless.”

Person essential to a party’s presentation is exempted from exclusion by Fed.R.Evid. Rule 615(3) (“a person whose presence is shown by a party to be essential to the presentation of his cause”) and by ***Greyhound***, above (“a person who is shown by a party to be essential to the presentation of the party’s cause”). The Advisory Committee’s Note to Rule 615 explains that this “category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.” It must be shown that the presence is “’essential,’ rather than simply desirable.” ***U.S. v. Jackson***, 60 F.3d 128, 135 (2nd Cir. 1995), cert. denied 516 U.S. 980, 1130, 1165 (1995 and 1996). And “section (3) exempts any person whose presence is found by the district court to be essential to the presentation of the party’s cause [footnote omitted].” ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d 625, 628 (4th Cir. 1996).

Alleged discriminatees—whether charging parties or persons named in the complaint based only on someone else’s charge—are exempted from exclusion, EXCEPT “during that portion of the [trial] 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, unless, in the judgment of the administrative law judge, there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying” (footnotes omitted). ***Unga Painting Corp.***, 237 NLRB 1306, 1307 (1978). See also ***Greyhound Lines***, 319 NLRB 554, 554 (1995).

§ 10–500 Violation of Separation of Witnesses Order

596–7625–8700

When a witness has violated a separation of witnesses order, the Board’s preferred course appears to be “stricter scrutiny of the tainted testimony,” ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1149 (1994), enfd. 72 F.3d 780 (10th Cir. 1995), without striking the testimony

of that witness. Still, violating a separation of witnesses order "may warrant striking the tainted testimony if it can be demonstrated that a party was prejudiced by the violation of the rule." ***Suburban Trails***, 326 NLRB 1250, 1250 fn. 1 (1998). Under Fed.R.Evid. Rule 615, if disregard of an "Exclusion of Witnesses" order is revealed "before" a witness is called to testify, that witness may be barred from testifying. ***U.S. v. Wilson***, 103 F.3d 1402, 1406 (8th Cir. 1997) ("In addition, the trial court clearly acted within its discretion in concluding that Jones could not be called to testify at the last minute after sitting in the courtroom and listening to much of the case").

CHAPTER 11. MISCELLANEOUS PROCEDURAL MATTERS

§ 11–100 Use of Audio and Video Equipment

§ 11–101 Auditory Equipment Use, Whether Required

596–7682–3363)

Respondents were not denied due process when the judge failed to provide or offer special auditory enhancement devices to assist the company president who was hearing impaired. Although the respondent counsel informed the judge of the problem, the counsel made no request for the equipment. The judge on several occasions instructed witnesses to speak louder and there were no contemporaneous complaints that those instructions were not sufficient to reasonably accommodate the president's hearing problems. The Board also noted that neither the Act nor its Rules require an unsolicited offer to provide this equipment. ***Manno Electric***, 321 NLRB 278, 278 fn. 7 (1996)

§ 11–102 Tape Recorders in Trial, Whether Allowed

596–7682–0100

The use of a tape recorder by parties to record trial proceedings is within the discretion of the judge. See ***Red & White Supermarkets,*** 172 NLRB 1841, 1846 (1968), in which its use was permitted, and ***Marriott Corp.***, 172 NLRB 1891, 1892 fn. 1 (1968), enfd. in part 417 F.2d 176 (4th Cir. 1969), in which permission was denied. The Fourth Circuit held the denial to be arbitrary and capricious, but not prejudicial. The court indicated, 417 F.2d at 178, that use of the recorder should be permitted to the extent that it does not interfere with or slow down the trial. Obviously, a tape recording of testimony would be subject to the restrictions imposed by a separation of witnesses order. When the use of a recording device is allowed, the judge and the parties are bound by the transcript as reported by the official court reporter. ***Daisy's Originals, Inc.***, 187 NLRB 251, 251 fn. 1 (1970).

§ 11–103 Television Cameras, Not Permitted in Courtroom

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

§ 11–200 Bankruptcy, Jurisdiction of Board

596–6867–9700

The Board has jurisdiction over a bankrupt employer and the authority to process an unfair labor practice case to its final disposition. ***Olympic Fruit & Produce Co.***, 261 NLRB 322, 323 (1982). Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. ***Phoenix Co.***, 274 NLRB 995, 995 (1985) and ***NLRB v. Evans Plumbing Co.***, 639 F.2d 291, 293 (5th Cir. 1981).

§ 11–300 Binding Precedent, Judge Required to Follow

596–8001–5000

The judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. ***Los Angeles New Hospital***, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981) and ***Iowa Beef Packers***, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964).

CHAPTER 11—MISCELLANEOUS PROCEDURAL MATTERS

§ 11–301 Judges Decisions, When Not Binding Precedent

596–8433–5033

When the Board has adopted a portion of a judge's decision to which no exceptions have been filed, that portion of the decision is not binding precedent for any other case. ***Watsonville Register-Pajaronian***, 327 NLRB 957, 959 fn. 4 (1999) and ***Colgate-Palmolive Co.***, 323 NLRB 515, 515 fn. 1 (1997).

§ 11–302 Motions to Dismiss

Sometimes a respondent will move to dismiss a complaint, or portions of a complaint, at the conclusion of the General Counsel's case. In exercising the authority to rule on such a motion under Board's Rules, Section 102.35(a)(8), the judge should follow the same standard the Board uses in ruling on motions to dismiss.

"In ruling on a motion to dismiss" under Board's Rules, Section 102.24, "the Board construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." ***Detroit Newspapers***, 330 NLRB No. 81, slip op. at 2 fn. 7 (2000).

§ 11–400 Correction of Transcript, With Approval of Parties

596–8500

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

§ 11–500 Interlocutory Appeals from Judges Rulings

596–7665

A judge need not feel obligated to grant recesses to parties wishing to take interlocutory appeals and may continue with and close the trial without waiting for the Board to rule on the appeal. If the judge has a genuine doubt about the ruling, any recess should allow adequate time for the Board to rule. It is suggested that the judge set a date by which the request for leave to appeal should be filed and set a resumption date no less than one week later. Board's Rules, Section 102.26, requires service of the request and any responses on the judge.

§ 11–600 Opening a Trial by Telephone or Mail

596–7601

There are circumstances under which, in the interests of saving time and expenses for all concerned, a judge may open a trial by telephone or by mail. It is typically done in a situation in which a charging party or the General Counsel is unwilling to join in a proposed settlement. One of the parties to the settlement makes a motion to open the trial by mail, to receive the formal papers, and consider the proposed settlement agreement. The judge issues a show cause order, giving the parties a date by which to show cause why the motion should not be granted and inviting them to submit any statements they desire to make regarding whether the settlement should be approved. Upon receipt of the statements, if the judge decides the settlement should be approved, he or she issues an order granting the motion to open the record, discusses the objections, approves the settlement, and adjourns the trial indefinitely, pending full compliance with the agreement. If the parties are willing, this can be accomplished even faster by considering the motion, the settlement agreement, and any objections in a telephone conference call, with a court reporter recording the proceedings.

A similar procedure has also been used in the case of a lengthy trial at a distant location involving the production of voluminous subpoenaed documents. The trial was opened by a telephone conference call, the judge ruled on questions raised in a petition to revoke the subpoena, and set the ground rules for producing the documents. He then traveled to the trial site when the parties were ready to resume the trial.

§ 11–601 Testimony by Telephone

596–7601

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

§ 11–700 Remands, Limited Issues

596–8001–7500

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

§ 11–800 Stipulations, Use of

596–7662–4900, 737–7078

A stipulation of fact is ordinarily conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the judge accepts the stipulation, see ***Kroger Co.***, 211 NLRB 363, 364 (1974), except on a showing of honest mistake or newly discovered evidence. The General Counsel may make appropriate stipulations with adverse parties concerning relevant facts, subject to the right of a charging party who does not join in a stipulation to introduce contrary evidence or additional material facts. ***Borg-Warner Corp.***, 113 NLRB 152, 154 (1955), review denied 231 F.2d 237 (7th Cir. 1956), cert. denied 352 U.S. 905 (1956). A record may be stipulated directly to the Board for decision, provided all parties consent and waive a trial and the issuance of a decision by the judge.

The parties may also agree to waive a trial and stipulate facts to the judge for issuance of a judge's decision. When a case is stipulated to a judge, he or she should make sure that the stipulation is complete enough to support a decision on all relevant issues.

§ 11–900 Motion to Reopen Record

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

The Board's standards for ruling on such a motion, when addressed to the Board under Board's Rules, Section 102.48(d)(1), are well established.

First, the movant must demonstrate that the evidence is truly "newly discovered." As held in ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46, 46 fn. 1 (1998), "Newly discovered evidence is evidence which was in existence" at the time of the trial, and the movant was

"excusably ignorant" of it. "A motion seeking to introduce evidence as newly discovered must also show facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence." By contrast, as held in ***Allis-Chalmers Corp.***, 286 NLRB 219, 219 fn. 1 (1987), evidence that did not exist at the time of the trial because it relates to events that occurred after the close of the trial is not "newly discovered."

Second, in a case before the Board, the movant must "demonstrate that the introduction of the [evidence in question] would require a different result than that reached by the judge." ***Fitel/Lucent Technologies***, above.

§ 11–1000 Compliance Proceeding

596–6867–9500, 675–6000

Many procedural rules for backpay cases are established in the reported cases, and this is particularly true regarding allocation of the burden of proof on various issues. For a case that collects 10 of these burden-of-proof rules into a single list, see ***Minette Mills, Inc.,*** 316 NLRB 1009, 1010–1011 (1995).

CHAPTER 12. ORAL ARGUMENT, BRIEFS, JUDGES DECISIONS

§ 12–100 Pretrial or Trial Briefs

596–8467

Although the Board's Rules make no provision for pretrial or trial briefs, the 3d Edition of the Administrative Conference's *Manual for Administrative Law Judges* states at 47:

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

Board's Rules, Section 102.35(a), does provide, in part, that judges have authority,

> (12) To request the parties at any time during the [trial] to state their respective positions concerning any issue in the case or theory in support [of it].

This provision tends to support the judge's right to solicit trial briefs. Presumably like post-trial briefs, however, the Board does not allow the judge either to require the submission of briefs or to draw any type of adverse inference from the nonsubmission of briefs.

§ 12–200 Post-Trial Oral Argument

Whether or not parties are permitted to file post-trial briefs, Board's Rules, Section 102.42, specifically provides:

> Any party shall be entitled, upon request, to a reasonable period at the close of the [trial] for oral argument, which may include presentation of proposed findings and conclusions, and shall be included in the stenographic report of the [trial].

§ 12–300 Post-Trial Briefs

596–7693, 596–8467–6000

In most cases, judges will provide for the filing of briefs. Under Board's Rules, Section 102.42, the briefs must be filed within 35 days of the close of trial. The parties should be informed that the Board and its presiding judges will not lightly grant postponements for the submission of briefs and that motions for extension of time to file post-trial briefs should, on their face, explain the reason for the request and should further indicate whether the other parties object to the proposed extension.

See **§ 1–200**, "Suggested Form of Closing Statement," above. But see **§ 12–500**, "Expedited Decision Without Briefs, in Lieu of Bench Decision" and **§ 12–600**, "Bench Decision," below.

<u>Where Briefs Are to Be Filed</u>. Because the identity of the presiding judge in any given case depends on the location of the office to which the judge is assigned, the judge should specifically inform the parties at the beginning of the trial that briefs should be filed in that office, for example, the Atlanta office. Motions for extension of time should be directed to that office as well, for example, to the Associate Chief Judge of the Atlanta office.

Service of Briefs. Board's Rules, Section 102.42, requires that briefs be submitted in triplicate with simultaneous service on the other parties. Section 102.112 addresses service requirements:

> *Date of service; date of filing.*—The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. [If] service is made by [fax], the date of service shall be the date on which [the fax] is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by Section 102.111.

Reply Briefs. As there is no provision in the Board's Rules for the filing of reply briefs to the administrative law judge, they are a matter within the judge's discretion. See Judge Linton's discussion in ***Fruehauf Corp.***, 274 NLRB 403, 403 JD fn. 2 (1985).

§ 12–400 Decision After Filing of Briefs

In most cases, as indicated, judges will provide for the filing of briefs.

Although Board's Rules, Section 102.42, now leaves it to the judge's discretion whether to grant a party's request "made before the close of the [trial]" to "file a brief or proposed findings and conclusions, or both," parties customarily expect to be granted the privilege of filing briefs, and judges often find briefs to be quite helpful during the preparation of their decisions.

§ 12–500 Expedited Decision Without Briefs, in Lieu of Bench Decision

The Board now authorizes the issuance of an expedited decision, by leaving the filing of briefs to the discretion of the judge. Board's Rules, Section 102.42, provides:

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

After giving the required notice to the parties and after hearing the oral arguments in lieu of briefs, the judge may then return to his or her office, read the transcript, exhibits, and applicable authorities, and prepare a written expedited decision in the usual manner.

An expedited decision may be preferred as an alternative to a bench decision, discussed below in **§ 12–600**. It avoids the sometimes hurried approach and potential pitfalls of a bench decision, which must be delivered orally at the close of the trial.

§ 12–600 Bench Decision

§ 12–610 In General

Board's Rules, Section 102.35(a)(10), provides, in part, that administrative law judges shall have authority

(10) 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.

The Board's bench decision procedures were approved by the Court of Appeals for the First Circuit in ***NLRB v. Beverly Manor Nursing Home***, 174 F.3d 13, 35 (1st Cir. 1999), enfg. 325 NLRB 598 (1998). The court held:

> The Board's Notice of Proposed Rulemaking explicitly stated that "[t]he Board has not tried to spell out, in the proposed rules, the circumstances in which these procedures should be utilized." 59 Fed.Reg. 46,376. Instead, the Board stated that it would monitor the implementation of the regulation and "refine the circumstances for which the procedures are best suited." [Thus, although] the regulation sets forth "example[s]" of situations in which [judges] might opt to issue bench decisions without briefing, it does not require that such a practice must, or that it may not, be followed in any particular set of circumstances. The regulation explicitly leaves [judges] with discretion in deciding whether written briefs should be permitted or dispensed with, and whether a bench decision should be issued in any case.

§ 12–620 Deciding to Issue Bench Decision

The determination whether to issue a bench decision is within the informed discretion of the trial judge. The cases in which bench decisions are rendered should be only those that "turn on a very straightforward credibility issue; cases involving one day [trials]; cases involving a well settled legal issue when there is no dispute [over] the facts; short single issue cases; or cases in which a party defaults by not appearing at the [trials]. . . . [I]n more complex cases, including cases with lengthy records, [bench decisions] would likely not be appropriate." Proposed Board Guidelines on Bench Decisions, 59 Fed.Reg. 65,942–65,943 (Dec. 22, 1994), adopted as a final rule, 61 Fed.Reg. 6941 (1996), codified as 29 CFR § 102.35.

The judge should put the parties on notice as soon as practicable that a bench decision is contemplated and that oral argument instead of post-trial briefs will be required. Thus, if possible, the judge should notify the parties at the opening of the trial, or even before at the pretrial telephone conference, that a bench decision will be rendered. The First Circuit in ***Beverly Manor***, above, 174 F.3d at 36, however, approved the mid-trial determination of a judge that he would issue a bench decision. The decision and announcement to the parties had been made as soon as practicable as the case evolved.

§ 12–630 Procedures for Issuance of Bench Decisions

Under the Board's Rules and Regulations, the judge's bench decision is delivered orally on the record. Under Section 102.35(a)(10), the decision must issue within 72 hours of the conclusion of oral argument. This time limit must be strictly complied with. See ***E-Z Recycling***, 331 NLRB No. 116, slip op. at 1 fn. 1 (2000).

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. Although the Board's Rules allow for delivery of a bench decision up to 72 hours after oral argument, 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. Board's Rules, Section 102.45, provides, in part:

> If the administrative law judge delivers a bench decision, promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and cause a copy . . . to be served on each of the parties. Upon the filing of the decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of [the] transfer, on all the parties. Service of the administrative law judge's decision and of the order transferring the case to the Board shall be complete upon mailing.

The Board's language, "promptly upon receiving the transcript the judge shall certify the accuracy of the pages of the transcript containing the decision," compels the judge to be very attentive to the time restrictions of these provisions and to comply with them.

The certification may also include corrections of the transcript and some correction or clarification of the oral decision if necessary, although the judge should avoid wholesale rewriting of the decision. 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 Board's Rules, Section 102.46, 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.

§ 12–640 Contents of Bench Decision

The bench decision itself 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, 1170 (1998).

CHAPTER 13. EVIDENCE

§ 13–100 Applicable Rules of Evidence, in General

737–0100

"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." Section 10(b) of the Act, 29 U.S.C. § 160(b) and Board's Rules, Section 102.39.

§ 13–101 So Far as Practicable

737–0150–5000

The Board's position is that it is not required to apply the Federal Rules of Evidence strictly. ***International Business Systems***, 258 NLRB 181, 181 fn. 5 (1981), enfd. mem. 659 F.2d 1069 (3rd Cir. 1983). In general the courts agree. ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479 (7th Cir. 1992) (dictum, but cases cited). But not always. See ***NLRB v. United Sanitation Service,*** 737 F.2d 936, 940–941 (11th Cir. 1984) (finding error in the receipt of a Board affidavit of alleged discriminatee who had died before trial).

§ 13–102 Taut Record

See Fed.R.Evid. Rule 403, "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time." The rule reads, in part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Ideally the judge will receive evidence which is competent, relevant, and material, and exclude that which is not, resulting in a "taut" record. Authorities can be cited permitting leeway in admitting evidence, or stressing that records should be kept as short as reasonably possible. The tension that exists in these competing concerns means that the judge usually will have to exercise his or her best judgment in the circumstances of each case.

See also **§ 2–300**, "Duties of Administrative Law Judges," above, for basic duty to "inquire fully into the facts."

§ 13–103 Trials Open to Public

Unfair labor practice trials ordinarily should be open to the public (see Fed.R.Civ.P. Rule 43(a)) unless, as provided in Board's Rules, Section 102.34, "otherwise ordered by the Board or the administrative law judge."

§ 13–104 Background Evidence

§ 13–105 Admissible to Show Motive

737–8467–3300

Grimmway Farms, 314 NLRB 73, 73–74 (1994), enfd. in part mem. 85 F.3d 637 (9th Cir. 1996) (walkout over 6 months earlier considered . . . to give meaning to statement made within 6 months). See also **§ 3–620**, "Not a Rule of Evidence," above, regarding admission of evidence concerning events outside the Section 10(b) period.

§ 13–106 Presettlement Conduct

737–7024–3350

Under well-established Board law, as held in ***Host International***, 290 NLRB 442, 442 (1988):

> Even though we are not setting aside the settlement agreement in the earlier case, we agree with the judge that the Respondent's presettlement conduct may properly be considered as background evidence to establish the motive for the Respondent's postsettlement conduct in this case [citing cases].

In ***Monongahela Power Co.***, 324 NLRB 214, 214–215 (1997), the Board held that, in determining whether settlements of alleged discrimination had been breached by the postsettlement suspension and reassignment of two union supporters, the judge could consider evidence of presettlement statements by the respondent reflecting union animus, as "shedding light" on the respondent's motivation.

The Board cited its decision in ***Special Mine Services***, 308 NLRB 711, 711, 720–721 (1992), enfd. in part 11 F.3d 88 (7th Cir. 1993), in which it agreed with the judge that the respondent's presettlement conduct evidenced "strong union animus" for the allegedly unlawful subcontracting.

If the settlement agreement specifically reserves, in a "Scope of the Agreement" clause, the General Counsel's right to use the evidence obtained in the investigation and prosecution of the settled case, for any purpose in the litigation of any other case (or in a similar clause), the respondent is bound by the terms to which it agreed in the settlement agreement. Thus, in ***Outdoor Venture Corp.***, 327 NLRB 706, 708–709 (1999), the Board held that the settlement agreement in a prior case did not bar litigation of the complaint allegation that a strike was converted to an unfair labor practice strike.

See also **§ 9–620**, "Settlement Bar Rule," and **§ 9–800**, "Setting Aside Settlement Agreements," above.

§ 13–107 Section 8(c) and Union Animus

737–8401–1150

To show animus, the General Counsel may offer unalleged statements (made either beyond or within the 6-month limitation period) of opposition to unionization. Thus, the Board relies on Section 8(c) statements of union opposition to show union animus, on the issue of motivation. ***Lampi LLC***, 327 NLRB 222, 222 (1998), enf. denied 166 LRRM 2321 (11th Cir. 2001) and ***Stoody Co.***, 312 NLRB 1175, 1176–1177, 1182 (1993).

Certain circuit courts, however, have ruled that Section 8(c) statements cannot be used to show union animus. ***Medeco Security Locks v. NLRB***, 142 F.3d 733, 744 (4th Cir. 1998) (the company's antiunion propaganda campaign "cannot be used by the General Counsel to prove antiunion animus" and ***BE & K Construction Co. v. NLRB***, 133 F.3d 1372, 1375–1377 (11th Cir. 1997) ("antiunion animus" cannot be inferred from the company's expression of its desire "to keep its workplace union-free" under its "merit shop policy"). Our judges, of course, are bound to apply established Board law. ***Waco, Inc.***, 273 NLRB 746, 749 fn. 14 (1984).

§ 13–108 Official Notice of Certain Documents

737–1400

Regarding official notice of documents, ***American Stores Co. v. C.I.R.***, 170 F.3d 1267, 1270 (10th Cir. 1999), cert. denied 528 U.S. 875 (1999) (no official notice taken of various IRS documents) and ***Johnson v. Morgenthau***, 160 F.3d 897, 898 (2nd Cir. 1998) (official notice taken of a party's death when a copy of the death certificate is furnished to the court).

See Fed.R.Evid. Rule 201.

§ 13–109 NLRB Decisions

737–1450–0900

The Board may rely on findings and evidence in an earlier case as background in a subsequent case against the same respondent. ***Stark Electric, Inc.***, 327 NLRB 518, 518 fn. 1 (1999).

§ 13–110 State Unemployment Decisions

737–1450–4800

The Board receives and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight on unfair labor practice issues. See ***Whitesville Mill Service Co.***, 307 NLRB 937, 945 fn. 6 (1992). See also **§ 13–402**, "Findings of State Agencies," below.

§ 13–111 Offers of Proof

737–7054

§ 13–112 In General

737–7054–0100

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. Fed.R.Evid. Rule 103(a)(2). Normally the offer is made in narrative form by the counsel's stating what the witness would testify to if permitted to answer. See ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479–1480 (7th Cir. 1992).

The judge may direct that the offer be made by questions and answers. Fed.R.Evid. Rule 103(b). The Q and A procedure can be useful if the judge is doubtful about his or her ruling. Sometimes the Qs and As will suggest that a different ruling should be made.

On the request of a party, documents offered as part of a rejected offer of proof should be placed in the rejected exhibits file. ***Crown Corrugated Container,*** 123 NLRB 318, 320 (1959).

§ 13–113 During Cross-Examination of Adverse Witness

If the offer of proof is made on cross-examination or examination of an adverse witness, it is suggested that the judge inquire of the counsel (usually outside the presence of the witness) regarding the basis for anticipating a particular answer. The judge will then be in a position to determine whether an offer of proof is genuine or a mere "fishing expedition."

§ 13–114 Narrative or Q and A Offers of Proof

Even when a judge is not fully confident of the ruling sustaining an objection to questions, he or she normally denies requests to be permitted to examine the witness on a Q and A offer of proof. If the judge's doubt is substantial, and the requests are granted, a positive result is that the judge may reverse his ruling after hearing the Q and A offer, or if the judge is later reversed, the witness will not have had all the time before a remand appearance to think about answers to the questions. The negatives, however, are rather heavy. The first is that time is lost and the record may be unnecessarily expanded. Second, the parties are likely to be encouraged to litigate a "shadow" record through a series of offers of proof. The opponent (sometimes one, sometimes the other party) will then seek to make offers rebutting the other party's offers of proof, arguing that the judge should allow the rebuttal offers so that the Board can see that there is no merit to the offers of the proponent.

§ 13–115 Waiver of Objection to Offer of Proof

If a charging party, in the absence of an objection from the General Counsel, later enters the area described in the respondents' offer of proof, the proffered matter may be considered as evidence because the objection to it has been waived. ***Goski Trucking Corp.***, 325 NLRB 1032, 1032 (1998).

§ 13–200 Hearsay

737–7042

§ 13–201 In General

737–7042–0100

See Fed.R.Evid. Rules 801 to 807 and the "so far as practicable" provision in Section 10(b) of the Act, quoted in **§ 13–100**, "Applicable Rules of Evidence, in General," above.

In ***Midland Hilton & Towers***, 324 NLRB 1141, 1141 fn. 1 (1997), the Board pointed out that the judge did not rely on the testimony for the truth, but that even if the testimony were hearsay, "administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies," citing ***Alvin J. Bart & Co.***, 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2nd Cir. 1979). The Board held that hearsay evidence would be admitted "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence," citing ***RJR Communications, Inc.***, 248 NLRB 920, 921 (1980).

Contrary to the Board's holding in ***First Termite Control Co.***, 247 NLRB 684, 684–685 (1980), enf. denied 646 F.2d 424 (9th Cir. 1981), the court ruled that evidence supporting legal jurisdiction was hearsay and remanded the case to the Board. After remand the Board ruled, 265 NLRB 1558, 1558–1559 (1982), that additional evidence showed jurisdiction.

§ 13–202 May Be Excluded

737–7042–0160

T.L.C. St. Petersburg, 307 NLRB 605, 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993) (the judge properly accorded no weight to twice-removed hearsay). In ***Auto Workers Local 651 (General Motors)***, 331 NLRB No. 59, slip op. at 3 (2000), the Board held that an employee's uncorroborated testimony that a second employee told her that he heard a supervisor called her a "voodoo sister" was unreliable hearsay and that it did not support a finding that the supervisor was in fact hostile to her. Compare ***Kamtech, Inc.***, 333 NLRB No. 33, slip op. at 1 fn. 4 (2001) (purported "double hearsay").

§ 13–203 Admissible if Corroborated

737–7042–0180–5000

Dauman Pallet, Inc., 314 NLRB 185, 186 (1994) (the Board overturns the judge's exclusion of corroborated hearsay and accords it weight). See also ***Teamsters Local 705 (Pennsylvania Truck Lines)***, 314 NLRB 95, 98 fn. 4 (1994).

§ 13–204 Exceptions to Hearsay Rules

737–7042–0190

Hearsay is also admissible under familiar exceptions. See Fed.R.Evid. Rules 803 to 804 and related notes.

NOTE. "The Board does not require adherence to the requirement of Fed.R.Evid. Rule 803, exception 24, 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 fn. 2 (1997). The judge, of course, may exercise his or her discretion to impose a notice requirement in circumstances indicating that a lack of some notice will prejudice the adverse party or prolong the trial.

§ 13–205 Caution

The judge should exercise informed caution before receiving hearsay unless it has the appearance of being reliable, probative evidence or is corroborated by other evidence. Admissibility, therefore, ought to be governed generally by the same basic considerations as evidence in general: On balance, what is the necessity of the evidence and its probative value, as compared with the possibilities of prejudice, inconvenience, and error resulting from its admission? This will usually be a matter of individual judgment in light of the particular circumstances.

§ 13–206 Affidavits

737–7012

§ 13–207 In General

737–7012–0100

Aside from their use to establish admissions of a party or to impeach, see **§§ 13–242** and **13–243** (admissions in affidavits) and **§ 13–250** (admissions in formal papers), below, affidavits generally are received substantively only if the declarant is deceased or unavailable, or the taking of testimony poses a threat to the health of the witness, because there is no opportunity for the opponent to cross-examine or the judge to observe demeanor. ***Weco Cleaning Specialists***, 308 NLRB 310, 311 fn. 7, 314–315 (1992) and ***Colonna's Shipyard***, 293 NLRB 136, 143 fn. 2 (1989), enfd. mem. 900 F.2d 250 (4th Cir. 1990). See also **§ 13–214**, "Dead Man's statutes," below, regarding the Board's ruling admissible (contrary to the "Dead Man's" statutes of some States) statements attributed to deceased persons or those too ill to testify. ***West Texas Utilities***, 94 NLRB 1638, 1639 fn. 3 (1951), enfd. 195 F.2d 519 (5th Cir. 1954).

§ 13–208 Of Nontestifying Witnesses

737–7012–2500

Marine Engineers District 1 (Dutra Construction), 312 NLRB 55, 55 (1993) (the judge properly struck the non-Board affidavit of a nonappearing witness, offered in support of an affirmative defense; the proponent did not allege that the affiant was unavailable to testify).

See also Classified Index code numbers 737–8401–8400, “Affidavit of decedent,” and 737–8401–8500, “Affidavit of unavailable or hostile witness.”

Weco Cleaning Specialists, 308 NLRB 310, 311 fn. 7, 314–315 (1992) (the Board affirms the judge's receipt in evidence of an affidavit of a deceased company agent—taken by the union's attorney, a former Board lawyer—because the affidavit is corroborated by other evidence, but the Board attaches less weight than did the judge).

§ 13–209 Of Available Witness

See Fed.R.Evid. Rule 804 regarding examples of unavailability.

In ***Three Sisters Sportswear Co.***, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (9th Cir. 1995), cert. denied 516 U.S. 1093 (1996), 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 Fed.R.Evid. Rule 803(5).

§ 13–210 Of Recanting Witness

737–7012–7500

In ***Southdown Care Center***, 313 NLRB 1114, 1114–1115, 1118 (1994), based on a recanting affidavit of a major witness indicating that most of her testimony in the first trial was false, the Board remanded that portion of case. On remand the judge, disbelieving the recanting version, reaffirmed his original findings, which the Board adopted.

§ 13–211 Bargaining Notes

737–7024–1750

Generally, bargaining notes are admissible if made at or soon after bargaining sessions and authenticated by the sponsoring witness. ***NLRB v. Tex-Tan, Inc.***, 318 F.2d 472, 483 (5th Cir. 1963); ***Pacific Coast Metal Trades Council (Lockheed Shipbuilding***), 282 NLRB 239, 239 fn. 2 (1986); and ***Allis-Chalmers Mfg. Co.***, 179 NLRB 1, 2 fn. 9 (1969). 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).

§ 13–212 Newspaper/Television Reports

737–7093

Newspaper articles and job advertisements are self-authenticating. Fed.R.Evid. Rule 902(6). Self-authenticating documents, however, are not necessarily admissible because (as the rule points out) “Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility” for the items in the publication.

Avoiding a hearsay problem of an article quoting one of the principals in a labor dispute, the Board in ***B. N. Beard Co.***, 248 NLRB 198, 199 fn. 9 (1980), disregarded a newspaper article quoting the company president. The Board instead considered only the newspaper reporter’s credited testimony describing the quote.

Normally our cases do not involve the exception, Fed.R.Evid. Rule 803(16), for “ancient” documents.

Aside from the hearsay problem of interview remarks quoted in a newspaper article, a similar problem exists with news articles reporting on the economy or some new trend in the

affected industry. In ***Dorothy Shamrock Coal Co.***, 279 NLRB 1298, 1298 fn. 1 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987), the judge excluded a newspaper article about increased reliance on leased drivers in the financially troubled trucking industry. The Board affirmed because the article was published after the employer laid off its drivers and, therefore, the article played no part in the employer's layoff decision.

Television interviews apparently should receive different treatment. TV videotapes are not listed in Fed.R.Evid. Rule 902 as self-authenticating. Questions are more likely to arise over the integrity of a TV news clip (has it been edited?) than whether a page from a newspaper is a forgery. Once a TV videotape has been authenticated, it helps if the parties agree on a transcript of the text of the remarks, by speaker, shown on the TV videotape. Any remarks on the videotape of an absent witness possibly could be admissible under the residual exception. Fed.R.Evid. Rule 804(a)(5).

§ 13–213 Market Quotations, Directories

A specific hearsay exception is provided for “Market quotations, tabulations, lists, directories, or other published compilations that are generally used and relied upon by the public or by persons in particular occupations.” Fed.R.Evid. Rule 803(17). A single article (or even a series of articles) in a general-interest newspaper may not satisfy that rule.

§ 13–214 “Dead Man’s” Statutes

(737–7042–8700)

“We do not regard as controlling [the “Dead Man’s” statute] in the State of Texas which counsel for the Respondent says renders testimony of the type in issue inadmissible in courts of that State. See Section 10(b) of the . . . Act.” ***Quarles Mfg. Co.***, 83 NLRB 697, 699 fn. 8 (1949), remanded 190 F.2d 82 (5th Cir. 1951) (on request of Board for vacating order and dismissing complaint). See also ***West Texas Utilities***, 94 NLRB 1638, 1639 fn. 3 (1951), enfd. 195 F.2d 519 (5th Cir. 1954), in which the Board, citing ***Quarles***, held that it “is not precluded from considering as evidence attributed to deceased persons or those too ill to testify.”

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 Fed.R.Evid. Rule 601. Accordingly, the Board is not bound to apply a State “Dead Man’s” statutes. As held in ***West Texas Utilities***, 94 NLRB at 1639, however, the Board subjects testimony of “statements attributed to deceased persons [as in ***Quarles***] or those too ill to testify [as in ***West Texas Utilities***]” to “the closest scrutiny before deciding what weight to give it.”

See also **§ 13–208** (affidavits of nontestifying witness), above.

§ 13–215 Position Letters

See **§ 13–243** (admissions by attorney), below.

§ 13–216 Recordings

§ 13–217 Tape Recording (Audio/Video) Made Secretly

737–7096,737–8401–550000

The Board has found admissible tapes made without the knowledge or consent of a party to the conversation. ***Williamhouse of California, Inc.***, 317 NLRB 699, 699 fn. 1 and JD fn. 2 (1995). The Board has found the tapes admissible, even when the taping violates State

law. See ***Wellstream Corp.***, 313 NLRB 698, 711 (1994). A different result possibly would obtain if the Federal wiretapping statute were violated: that is, if the recording was secretly made in conjunction with the interception of a telephone conversation between two or more other parties.

The interception of a conversation over a cordless telephone's radio wave has been held not to violate the Federal wiretapping law. ***In re Askin***, 47 F.3d 100, 102–104 (4th Cir. 1995), cert. denied, 516 U.S. 944 (1995). And a supervisor's remarks during a cordless phone conversation, picked up by the discriminatee's "police" scanner and recorded by the discriminatee, provided evidence of animus in ***Scientific Ecology Group***, 317 NLRB 1259, 1259, 1261 (1995).

Tape recording issues frequently arise when an employee has secretly taped remarks of a manager made during a meeting or conference held on the employer's premises. In ***Opryland Hotel***, 323 NLRB 723, 723 fn. 3 (1997), the Board implies that if the employer's preexisting practice had been to prohibit employees from using or possessing tape recorders at work, and to discharge those violating the rule, then no backpay liability would attach from the time the employer discovered the violation. In ***McAllister Bros.***, 278 NLRB 601, 601 fn. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987), the Board expressly disavows a statement by the judge that the Board historically has taken a dim view of personnel who tape-record meetings with their employer. Indeed, citing cases, the Board there reminds us that it "has sometimes found tape recordings of employee meetings to be the best evidence of what was said."

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 (2nd Cir. 1979). Fed.R.Evid. Rule 408 renders inadmissible evidence or conduct of statements "made in compromise negotiations."

Proper authentication of a tape means, in part, that any editing must be explained by someone with knowledge of the editing. In ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1146 fn. 7 (1994) , enfd. 72 F.3d 780, 787 (10th Cir. 1995), the Board affirmed the judge who excluded edited videotape taken by a guard, because the guard did not do the editing and could not describe what was edited.

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

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

§ 13–218 Tape Recording Obtained by Subpoena

Tape recordings (audio/video) are subject to production by subpoena, rather than under the Jencks rule, see **§ 8–500** (subpoena of audio and video recordings in "Jencks Statements"), above. As held in ***Delta Mechanical, Inc.***, 323 NLRB 76, 77 and fn. 3 (1997), "Contemporaneous statements captured on a tape recording [citations omitted] or a videotape [citation omitted] at a substantive event are not a Jencks 'statement' (because not a description of a past event). Instead, they are direct evidence because they are part of the substantive event itself."

See also Classified Index code number 737–7084–5600, “Production of statements of witnesses required.”

§ 13–219 Tape Recorder at Trial

See **§ 11–102**, “Tape Recorder in Trial, Whether Allowed”, above.

§ 13–220 Expert Witness Testimony, In General

737–7030

See Fed.R.Evid. Rules 702 to 706.

Rule 702, Testimony by Experts, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Supreme Court stated in ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579, 585–586, 113 S.Ct. 2786, 2792–2793 (1993): “In the 70 years since its formulation in the ***Frye*** case [***Frye v. United States***, 293 F. 1013, 1014 (D.C. Cir. 1923)], the ‘general acceptance’ test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.” The ***Frye*** test required that for the expert testimony to be admissible in evidence, it must be “deduced from a well-recognized scientific principle or discovery” and that “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

In ***Daubert***, the Supreme Court stated (509 U.S. at 587–589, 113 S.Ct. 2793–2795) that “the ***Frye*** test was superseded by the adoption of the Federal Rules of Evidence,” that Rule 702 (quoted above)” governs expert testimony, and that “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”

The Supreme Court later stated, in ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999):

> In ***Daubert***, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to “ensure that any and all scientific testimony . . . is not only relevant, but reliable” . . . . The initial question before us is whether this basic gatekeeping obligation applies only to “scientific” testimony or to all expert testimony. We . . . believe that it applies to all expert testimony.

Thus, the ***Daubert*** test imposes a special “gatekeeping” obligation upon a trial judge to ensure that all expert testimony is not only relevant, but reliable.

§ 13–221 Flawed Premises

When expert testimony is received, the judge may disregard it if the premises on which the analysis and conclusions rest are flawed. See ***H. B. Zachry Co.***, 319 NLRB 967, 979–980 (1995), modified on different point, 127 F.3d 1300 (11th Cir. 1997) (the judge disregarded a management professor’s analysis, which was shown to be flawed); ***Fluor Daniel, Inc.***, 304 NLRB 970, 971 fn. 10, 975, 978, 980 (1991), enfd. mem. 978 F.2d 744 (11th Cir. 1992) (the

judge, who was affirmed by the Board, disregards the conclusions of a consultant on statistics because he relied on flawed assumptions); and ***Food & Commercial Workers Local 1357***, 301 NLRB 617, 619, 621–622 (1991) (accord: regarding flawed premises of a labor economist in a backpay case).

The foregoing rulings are fully consistent with the Supreme Court's expression in ***General Electric Co. v. Joiner***, 522 U.S. 136, 118 S.Ct. 512, 519 (1997) that a “court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”

§ 13–222 Handwriting

The testimony by handwriting experts is sometimes offered and received for authenticating union authorization cards. The testimony must pass the ***Daubert*** test, imposing a special “gatekeeping” obligation upon a trial judge to ensure that all expert testimony is not only relevant, but reliable.

Under Fed.R.Evid. Rule 901(b)(3) a judge may compare handwriting and signatures with authenticated specimens.

§ 13–223 Union Authorization Cards

An employee’s signature on a union authorization card can be reliably authenticated in the absence of the employee’s testimony. As held in ***Parts Depot, Inc.***, 332 NLRB No. 64, slip op. at 5 (2000), “the Board has long held, consistent with Section 901(b)(3) of the Federal Rules of Evidence, that a judge or a handwriting expert may determine the genuineness of signatures on authorization cards by comparing them to W–4 forms in the employer’s records” or other employment documents. See also ***Traction Whole Center Co. v. NLRB***, 216 F.3d 92, 105 (D.C. Cir. 2000), enfg. 328 NLRB 1058, 1059–1060 (1999).

§ 13–224 Relevance of Expert Testimony

Not all expert opinion would be relevant under Board law. For example, a party may seek to offer an expert opinion on the impact of allegedly objectionable conduct during the critical period before an election, on whether alleged 8(a)(1) statements would have coerced employees, or whether the statements have caused employees to abandon their support of a union. That opinion evidence would not be admissible because it would amount to a legal conclusion that is exclusively within the province of the judge or the Board. See ***Williamhouse of California, Inc.***, 317 NLRB 699, 713 (1995), quoting ***American Freightways Co.***, 124 NLRB 146, 147 (1959) (“The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed but instead on whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere with* the exercise of employee rights under the Act”).

§ 13–225 Expert Testimony on Credibility Not Appropriate

A party conceivably could seek to call an expert in psychology or psychiatry, or of some other discipline or special experience (perhaps an expert in “body language”) to offer an opinion—based on having watched and studied certain witnesses at the trial or on television—that the witnesses did or did not testify truthfully. Most courts, at least in jury trials, look with strong disfavor on expert opinion testimony offered to assess the credibility of witnesses. See, for example, ***U.S. v. Call***, 129 F.3d 1402, 1406 (10th Cir. 1997), cert. denied 524 U.S. 906

(1998) ("The credibility of witnesses is generally not an appropriate subject for expert testimony").

§ 13–226 Prior Notice to Opponent

Among the factors that a judge would consider if a party moves for the introduction of expert testimony is whether the party has given prior notice to the opponent, perhaps supplied copies of any documents or test results, and whether there has been time for the opponent to have obtained opinion testimony by an expert of the opponent's selection. Even if the answer to this initial inquiry is in the affirmative, further lines of inquiry are entailed by Fed.R.Evid. Rule 702 and, even though there is no jury, Fed.R.Evid. Rule 403.

§ 13–230 Polygraphs

737–7088

In recent years, particularly because of the 1988 Federal law, 29 U.S.C. § 2001, restricting polygraph testing by private employers, polygraph testing and test results have not been a frequent issue in unfair labor practice trials. Before the 1988 law, polygraph testing results sometimes were received, and other times not received, under the "general acceptance" standard for scientific evidence first enunciated in the 1923 ***Frye*** case and now superseded by the Federal Rules of Evidence, as discussed above in **§ 13–220**.

Not long before the 1988 law was enacted, in a refusal to bargain case (refusal to furnish information related to polygraph examinations administered to the respondent's employees), the Board wrote, "nor do we pass in any manner on the validity of polygraph testing generally." ***Tritac Corp.***, 286 NLRB 522, 522 (1987).

Although the Fifth Circuit, following the 1923 ***Frye*** test, had banned all polygraph test results, it now directs the trial courts in that circuit to apply the ***Daubert*** gatekeeping analysis. See ***U.S. v. Posado***, 57 F.3d 428, 429 (5th Cir. 1995). The Ninth Circuit followed the Fifth Circuit's lead, ***U.S. v. Cordoba***, 104 F.3d 225, 227–228 (9th Cir. 1997), as did the Tenth Circuit, ***U.S. v. Call***, 129 F.3d 1402, 1404–1405 (10th Cir. 1997), cert. denied 524 U.S. 906 (1998).

At least in jury trials, trial courts frequently find that unilateral or unstipulated polygraph test results (frequently offered in criminal cases by defendants seeking to bolster their credibility) do not clear the Fed.R.Evid. Rule 403 hurdle, because the probative value of the relevant evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Indeed, that is what happened in both ***U.S. v. Call***, above, 129 F.3d at 1405, and ***U.S. v. Sherlin***, 67 F.3d 1208, 1217 (6th Cir. 1995), cert. denied 516 U.S. 1082 (1996) and 517 U.S. 1158 (1996). The ***Cordoba*** court, above, 104 F.3d at 228, observed that three other circuit courts require the district courts to conduct a balancing test under Fed.R.Evid. Rule 403 before admitting polygraph evidence.

NOTE. In ***U.S. v. Scheffer***, 523 U.S. 303, 118 S.Ct. 1261 (1998), the Supreme Court found no constitutional fault with Military Rules of Evidence 707 (which bans polygraph evidence from court-martials). During the course of its split opinion, the Court's language suggests not only that it looks with some disfavor on polygraph evidence, but it also suggests that there would be no constitutional problem if the rules of evidence for civil cases are interpreted to bar polygraph evidence. Presumably, therefore, the Board is free to rule that, even applying the Federal Rules of Evidence, polygraph evidence remains too unreliable to be acceptable in an unfair labor practice trial.

CHAPTER 13—EVIDENCE

CAUTION**.** The Court's opinion in ***Scheffer*** is split three ways (including a dissent by one Justice) with portions of the decision (Parts II,B and II,C), which include additional criticism of polygraph evidence. Just over 2 years after ***Scheffer***, the Fifth Circuit, without citing that case, upheld the admission of polygraph evidence in a bench trial (suit for life insurance proceeds following a murder). The court noted that "Most of the safeguards provided for in ***Daubert*** are not as essential in a case such as this [when] a district judge sits as the trier of fact in place of a jury." ***Gibbs v. Gibbs***, 210 F.3d 491, 500 (5th Cir. 2000). The Fifth Circuit was not unaware of ***Scheffer***, having earlier discussed it in ***Castillo v. Johnson***, 141 F.3d, 218, 222 (5th Cir. 1998), cert. denied 524 U.S. 979 (1998).

§ 13–235 Adverse Inferences

737–4267–2200, 737–4267–3300, 737–4267–4400

The judge may draw an adverse inference when a party fails to produce documents under his control, or to call witnesses reasonably assumed to be favorably disposed toward the party, and the Classified Index reference numbers cite a variety of cases in these respects. Bystander employees, for example, are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling a bystander employee. ***Torbitt & Castleman, Inc.***, 320 NLRB 907, 910 fn. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997).

In ***C & S Distributors***, 321 NLRB 404, 404 fn. 2 (1996), however, the Board, citing ***Queen of the Valley Hospital***, 316 NLRB 721, 721 fn. 1 (1995), held that even when an adverse inference may not be drawn regarding a bystander employee, the judge in making credibility determinations may weigh the party's failure to call the potentially corroborating bystander to corroborate the party's witness.

No adverse inference is drawn from the failure of a respondent to call a former co-owner, manager, or supervisor when not shown it is reasonable to assume that the person is favorably disposed toward the respondent. See ***Goldsmith Motors Corp***., 310 NLRB 1279, 1279 fn. 1 (1993) and ***Christie Electric Corp.***, 284 NLRB 740, 784 fn. 137 (1987) (declining to draw an adverse inference from the failure to call a former supervisor).

Regarding the drawing of an adverse inference because a party fails to honor a subpoena duces tecum and the application of the ***Bannon Mills*** rule, see **§ 8–620**, "Failure to Produce Documents," above, and the cases cited under Classified Index code numbers, 596–7682–3320, 737–4267–2700, and 737–8433–6796.

Infrequently a case may involve evidence destroyed by a party. See ***Akiona v. U.S.***, 938 F.2d 158, 160–161 (9th Cir. 1991), cert. denied 503 U.S. 962 (1992 ("Generally, a trier of fact may draw an adverse inference from the destruction of evidence relevant to a case").

§ 13–240 Admissions

737–7006, 737–7042–2500

See Fed.R.Evid. Rule 801(d)(2).

§ 13–241 Admissions in Affidavit

737–7006–3700

§ 13–242 By Supervisor

Fredericksburg Glass & Mirror, 323 NLRB 165, 175–176 (1997) (admissions in affidavits of supervisors and a manager) and ***Weco Cleaning Specialties***, 308 NLRB 310, 311

fn. 7, 315 (1992) (the Board affirms the judge's receipt of a deceased manager's affidavit, but the Board does not rely on it in finding that the General Counsel established a prima facie case).

§ 13–243 Admissions by Attorney

737–7080, 737–8401–8000

Many cases find attorney statements, both in and out of court, to be admissions. For example, it is well-established Board law that a lawyer's position letter can be received as an admission if it contains a statement or statements conflicting with the party's position. See, for example, ***McKenzie Engineering Co.***, 326 NLRB 473, 485 fn. 6 (1998); ***Hogan Masonry***, 314 NLRB 332, 333 fn. 1 (1994); and ***Massillon Community Hospital***, 282 NLRB 675, 675 fn. 5 (1987). Indeed, a position letter attached to an unsuccessful motion to dismiss the complaint was considered and weighed in ***United Technologies Corp.***, 310 NLRB 1126, 1127 fn. 1 (1993), enfd. mem. ***NLRB v. Pratt & Whitney***, 29 F.3d 621 (2nd Cir. 1994).

Of course, a lawyer's position letter can be used to impeach the lawyer's conflicting testimony at the trial. ***Harowe Servo Controls, Inc.***, 250 NLRB 958, 1033 (1980).

But although admissions in position statements can be received and weighed against the client or party, 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), enf. denied on other grounds 591 F.2d 1 (5th Cir. 1979) (attorney's position letter); ***Trading Corp.***, 310 NLRB 777, 814 fn. 35 (1993), enfd. 16 F.3d 517 (2nd Cir. 1994) (attorney's letter to the judge in the nature of a supplemental brief); ***Auburn Foundry***, 274 NLRB 1317, 317 fn. 2 (1985), enfd. 791 F.2d 619 (7th Cir. 1986) (a statement in lawyer's brief to the judge); and ***Riverwoods Chappaqua Corp. v. Marine Midland Bank***, 30 F.3d 339, 343 (2nd Cir. 1994) (made in the counsel's opening statement).

§ 13–244 Admissions by Employer in Section 8(b)(2) Case

In ***Teamsters Local 705 (Pennsylvania Truck Lines)***, 314 NLRB 95, 98 fn. 4 (1994), the Board strongly suggested that a seemingly hearsay statement of an employer is admissible in a Section 8(b)(2) case to show the basis for a discharge. The statement was not objected to and there was corroborating evidence.

§ 13–245 Settlement Discussions

737–8433–6772

Offers of settlement are not admissions, but may be "offered for another purpose." Fed.R.Evid. Rule 408. Even though evidence of settlement discussions is normally inadmissible to prove liability for the matter being settled, Fed.R.Evid. Rule 408 does not preclude admissibility in a subsequent case of alleged threats made during settlement discussions in the earlier case. ***Miami Systems Corp.***, 320 NLRB 71, 71 fn. 2 (1995), modified but affirmed on point, 111 F.3d 1284, 1293–1294 (6th Cir. 1997).

§ 13–246 Document in Personnel File

737–7015, 737–7021, 737–7042–5000

A document in an employee's personnel file may be received if it constitutes an admission against a 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. Therefore, damaging revelations contained in the memo constitute admissions under Fed.R.Evid. Rule 801(d)(2)(D).

Offers of written warnings (or memos documenting oral warnings), discharge memos, or similar documents from personnel files are frequently offered by one or more of the parties. Normally the documents are offered for the limited purpose of showing the course of events motivating the company's decision to discipline the employee. Usually there is no objection for this limited purpose. Occasionally a party offers the documents for the truth of the matters asserted in the documents. Usually this occurs from a mistaken notion of needing to do so, or sometimes to substitute for testimony from a supervisor no longer with the company. The general offer is based on the theory that the memos and other documents are receivable under the hearsay exception applicable to "business records." Fed.R.Evid. Rule 803(6).

But if the memo or other documents were prepared during the period relevant to the litigation, a judge may reject the offer on the basis that the "source of information, the method or circumstances of preparation" indicates that the document lacks "trustworthiness." As the court wrote in the age discrimination case of ***Pierce v. Atchison Topeka & Santa Fe***, 110 F.3d 431, 444 (7th Cir. 1997), a trial judge is not required to receive a supervisor's memo to an employee's personnel file if the circumstances suggest that the memo may have been prepared because of the "litigation potential" of the events at issue. In that case the trial judge excluded the memo (apparently offered for the truth of its assertions), and the Seventh Circuit wrote, "we will not second-guess its determination."

§ 13–250 Formal Papers—General Counsel Exhibit 1

The issue is whether, or when, items in General Counsel exhibit 1 become "evidence," as distinguished from charges, pleadings, motions, orders, and other matters that are part of the "record" under Board's Rules, Section 102.45(b). That is, aside from referring to one of the documents simply to show a position taken by a party, when may a party, or the judge, cite and rely on something in General Counsel exhibit 1 as substantive evidence? From the cases, it would appear that the answer would be: only when it is an admission.

In ***United Technologies Corp.***, 310 NLRB 1126, 1127 fn. 1 (1993), on the basis that statements in position letter are admissions, the judge denies the respondent's motion to strike from General Counsel's brief all reference to the respondent's precomplaint position letter attached to a motion to dismiss the complaint, which was included as part of the "record," apparently as part of General Counsel exhibit 1. The Board did not disturb the judge's finding.

§ 13–260 Privileges

§ 13–261 General Rule—Fed.R.Evid. Rule 501

As the committee and conference reports on Fed.R.Evid. Rule 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 fn. 8 (1949), citing Section 10(b) of the Act in declining to apply the Texas "Dead Man's" statute, as discussed in **§ 13–214**, "Dead Man's statutes," above. See also ***Woodward Governor v. Curtiss-Wright Flight Systems***, 164 F.3d 123, 126 (2nd Cir. 1999) ("For example, questions about privilege in Federal question cases are resolved by the Federal common law. See Fed.R.Evid. Rule 501").

§ 13–270 Attorney-Client

737–8433–1750, 596–6060–6750

§ 13–271 In General

Taylor Lumber & Treating, Inc., 326 NLRB 1298, 1298 fn. 2 (1998) (the attorney-client privilege was available regarding legal advice under the Board's comprehensive rulings in ***Patrick Cudahy, Inc.***, 288 NLRB 968, 969–974 (1988), in which no claim was made regarding the attorney's testimony about negotiation-related matters). In ***Patrick Cudahy***, 288 NLRB at 971 fn. 12, a bargaining case, the Board stated that in other types of unfair labor practice cases, in which these policy considerations are not involved, the analysis may result in an application that is not as broad. The Board also held, 288 NLRB at 972–974, that counseling an unfair labor practice does not come within the tort or crime exception to the attorney-client privilege.

See discussion of these cases in **§ 8–410** (privileged material of attorney-client), above.

Although the proponent carries the burden of establishing each qualifying element of the privilege, ***In re Lindsey***, 148 F.3d 1100, 1106 (D.C. Cir. 1998), cert. denied 525 U.S. 996 (1998), the Board observed in ***Patrick Cudahy***, above, 288 NLRB at 970, that a matter committed to an attorney is prima facie committed for legal advice on some aspect of the matter and is therefore within the privilege "unless it clearly appears to be lacking in aspects requiring legal advice" (footnote omitted). When the question is close, disclosure probably should not be ordered. See ***U.S. v. Mett***, 178 F.3d 1058, 1065 (9th Cir. 1999).

§ 13–272 Duration

Swidler & Berlin v. U.S., 524 U.S. 399, 118 S.Ct. 2081 (1998) (privilege survives death of client).

§ 13–273 Waiver

The presence of a third person waives the privilege, even if the third person (not part of the client or legal team) is a lawyer, who is present merely as a family counselor rather than to give advice as a lawyer. ***U.S. v. Evans***, 113 F.3d 1457, 1462–1467 (7th Cir. 1997).

Taylor Lumber & Treating, Inc., above, 326 NLRB 1298, 1300 (1998) (no waiver if an attorney gave affidavit during the Regional Office's investigation, because the affidavit did not contain facts about privileged communications).

§ 13–274 Common Interest Rule

U.S. v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997) (the "common interest rule," which applies when two or more parties are aligned, has been described as an extension of the attorney-client privilege). See also ***In re Grand Jury Subpoena Duces Tecum***, 112 F.3d 910, 922 (8th Cir. 1997), cert. denied 521 U.S. 1105 (1997).

NOTE. The "common interest" situation can arise in our unfair labor practice trials, whether it is two charging parties with counsel, separate respondents with counsel, or the General Counsel and a lawyer-represented charging party.

§ 13–275 Attorney Work Product

As compared to an attorney's nonopinion "fact" work product, which may be discoverable on basis of need, an attorney's "opinion" work product "enjoys a nearly absolute immunity." ***In re Allen***, 106 F.3d 582, 607 (4th Cir. 1997), cert. denied 522 U.S. 1047 (1998). The attorney work product doctrine applies to materials prepared in anticipation of litigation. ***In re Grand Jury Subpoena Duces Tecum***, above, 112 F.3d at 924. See also the discussion in **§ 8–410** (privileged material of attorney-client), above.

§ 13–280 Federal Mediator

737–5601–5800

The parties may not compel the attendance and testimony of a Federal mediator, and a subpoena seeking that result must be quashed. ***NLRB v. Lemon Tree***, 618 F.2d 51, 56 (9th Cir. 1980) and ***J. W. Rex Co.***, 308 NLRB 473, 473 fn. 2 (1992), enfd. mem. 998 F.2d 1003 (3rd Cir. 1993) ("Settled public policy clearly prohibits the Board from compelling the testimony of Federal mediators"). Testimony regarding what a Federal mediator told the respondent's agents "in the course of bargaining" is subject to a hearsay objection if offered for the truth but, of course, not if offered for the fact of what was said. See ***Granite Construction Co.***, 330 NLRB No. 19, JD slip op. at 7 fn. 1 (1999).

§ 13–290 Fifth Amendment Claims

737–5601–1600

And see discussion at **§ 13–707**, "Self-Incrimination," below.

§ 13–291 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 5th Amendment. ***Matter of Maurice***, 73 F.3d 124, 126 (7th Cir. 1995); ***LaSalle Bank Lake View v. Seguban***, 54 F.3d 387, 389–391 (7th Cir. 1995) (but more is required to sustain a judgment); and ***F.D.I.C. v. Elio***, 39 F.3d 1239, 1248 (1st Cir. 1994). If an answer is given, as in a deposition, the Government may use it. ***U.S. v. Fraza***, 106 F.3d 1050, 1054 (1st Cir. 1997).

§ 13–292 Grant of Immunity

Under Board's Rules, Section 102.31(c), if any party desires to obtain testimony from a witness who has claimed a privilege under the 5th Amendment, the party may request the judge to recommend that the Board seek approval from the Attorney General for the Board to issue an order requiring the witness to testify (under a grant of immunity). Absent an order, the witness should not be asked or permitted to testify about the subject matter of his 5th Amendment claim.

§ 13–300 Parol Evidence

737–8401–6600

Although evidence outside an agreement is inadmissible to vary or contradict its terms, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining "the correct interpretation of the agreement." ***Don Lee Distributor, Inc.***, 322 NLRB 470, 484–485 (1996), enfd. 145 F.3d 834 (6th Cir. 1998), cert. denied 525 U.S. 1102 (1999) and ***Inter-Lakes Engineering Co.***, 217 NLRB 148, 149 (1975).

CHAPTER 13—EVIDENCE

§ 13–301 Evidence Improperly Obtained

737–8401–5600

It has been Board practice to admit allegedly stolen documents unless it is established that an agent of the Government has been a party to the unlawful seizure. ***Air Line Pilots Assn.***, 97 NLRB 929, 933 (1951). See also ***NLRB v. South Bay Daily Breeze***, 415 F.2d 360, 363–365 (9th Cir. 1969), cert . denied 397 U.S. 915 (1970).

§ 13–400 State of Mind

§ 13–401 As Evidencing Coercion

737–7069, 737–8433–6727

The test to determine coercion under Section 8(a)(1) is an objective test, not a subjective one. Thus, testimony about what an employee understood the supervisor's statement to mean may not be relied on and is normally not admissible. See ***Miami Systems Corp.***, 320 NLRB 71, 71 fn. 4 (1995), enfd. in relevant part and remanded 111 F.3d 1284 (6th Cir. 1997). Compare ***NLRB v. Gissel Packing Co.***, 395 U.S. 575, 608–609, 89 S.Ct. 1918, 1941–1942 (1969).

§ 13–402 Findings of State Agencies

188–4050–3300, 737–7024–5067, 737–8433–6781

See **§ 13–110**, "State Unemployment Decisions," above.

Cardiovascular Consultants of Nevada, 323 NLRB 67, 67 fn. 1 (1997) (reversing the judge, the Board receives State unemployment compensation decision because established Board law holds them to be admissible but not controlling).

Whitesville Mill Service Co., 307 NLRB 937, 945 fn. 6 (1992) (the decision of the State agency that the employee was not fired for union activities was considered but found not to be persuasive because, at the State hearing, the plant manager refused to answer questions concerning his knowledge of union activity).

Koronis Parts, Inc., 324 NLRB 675, 675 JD fn. 2 (1997) (after discussing cases, the judge declines to reopen the record and receive a State unemployment compensation decision attached to the respondent's brief, observing that it would not change the result; without comment by the Board).

§ 13–403 Illegal Aliens

177–2401–8700

Illegal aliens are employees under the Act. Evidence to establish illegal status properly excluded. ***Apollo Tire Co.***, 236 NLRB 1627, 1635 fn. 28 (1978), enfd. 604 F.2d 1180 (9th Cir. 1979). But see **§ 13–406**, "Backpay and Reinstatement of Illegal Aliens," below.

§ 13–404 Evidence Affecting Remedy

§ 13–405 Instatement of Applicants Denied Employment

In ***FES***, 331 NLRB No. 20, slip opinion at 1–10 (2000), the Board issued a definitive decision, after oral argument, to "give guidance to all parties litigating refusal-to-hire and refusal-to-consider violations [to make] clear the elements of the violation, the respective burdens of the parties, and the stage at which issues are to be litigated."

In the decision, the Board adopted the framework of ***Wright Line***, 251 NLRB 1083

(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in allocating the burdens to establish discrimination and a defense. The Board defined what evidence affecting a possible backpay and instatement remedy is appropriate at the compliance stage.

§ 13–406 Backpay and Reinstatement of Illegal Aliens

625–3317–9400

It is appropriate for the judge to admit evidence of whether illegal aliens have been discriminatorily discharged and whether the employer was aware beforehand of their undocumented alien status. This evidence is necessary for the Board to determine if conditional reinstatement should be ordered, as explained in ***A.P.R.A. Fuel Oil Buyers Group***, 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2nd Cir. 1997). In ***Intersweet, Inc.***, 321 NLRB 1, 1 fn. 2 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997), the Board held: "We leave to the compliance stage . . . a determination [of] backpay and reinstatement in accordance with the Board's decision in ***A.P.R.A. Fuel Oil***," above.

§ 13–500 Reinstatement

§ 13–501 Litigation of Offer in Unfair Labor Practice Case

737–8433–6712–5000

In an 8(a)(3) case in which denial of reinstatement was affirmatively alleged in the complaint, the better practice would have been to admit the respondent's testimony of unconditional offers of reinstatement, because of the allegation and because the Board must fashion a remedy. ***Kelley Bros. Nurseries***, 145 NLRB 285, 285 fn. 2 (1963), enf. denied 341 F.2d 433 (2nd Cir. 1965).

In ***Baker Mfg. Co.***, 269 NLRB 794, 794 fn. 2, 813 (1984), enfd. in part 759 F.2d 1219 (5th Cir. 1985), the complaint alleged that the respondent had failed to reinstate an employee, and the respondent submitted in evidence a recall letter. Without making a determination whether the recall letter constituted a valid offer of reinstatement, the judge found that the General Counsel failed to meet his burden of litigating the issue and concluded that an order of reinstatement was inappropriate. The Board held that because "the record was not fully developed on the issue of whether the Respondent made a valid offer of reinstatement . . . we shall order the Respondent to offer reinstatement . . . and shall leave the matter to the compliance stage of this proceeding."

§ 13–502 Misconduct—After-Acquired Evidence

675–4075–7550)

In determining whether a reinstatement and backpay remedy is appropriate for an unlawful discharge, the judge must receive and consider after-acquired evidence of misconduct which, if known before a discharge, would have required the discharge—provided, of course, the after-acquired evidence was acquired *before* the close of the trial.

The Board held in ***Tel Data Corp.***, 315 NLRB 364, 366–367 (1994), enfd. in part 90 F.3d 1195 (6th Cir. 1996), that under Board precedent, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct."

When knowledge of the after-acquired evidence was acquired *after* the trial, the Board in ***Bob's Ambulance Service***, 183 NLRB 961, 961 (1970), granted the respondent's motion to reopen the record and remanded the proceeding to the judge to decide if reinstatement was an appropriate remedy, ruling 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."

§ 13–600 Witnesses

In general, see Fed.R.Evid. Rules 601 to 706.

§ 13–601 Competency

737–5601

Under Fed.R.Evid. Rule 601, State law on competency of witnesses does not apply, because the Act is a Federal statute and Section 10(b) of the Act provides that the Federal rules of evidence, "so far as practicable," shall apply to Board proceedings. Regarding privileges, see **§ 13–261**, "General Rule—Fed.R.Evid. Rule 501," above.

§ 13–602 Trial Attorney for Party

737–5601–2500

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 fn. 18 (1995); ***Page Litho, Inc.***, 311 NLRB 881, 881 fn. 1, 889 (1993), enfd. in part mem. 65 F.3d 169 (6th Cir. 1995); and ***Operating Engineers Local 9 (Fountain Sand)***, 210 NLRB 129, 129 fn. 1 (1974). The Board's more recent rule, Section 102.177 (effective 1997), "Misconduct by Attorneys or Party Representatives," probably does not change this. See 61 Fed.Reg. 65,323 (1996). See also **§ 7–115**, "Attorney as Witness," above.

§ 13–603 Board Agents

737–5601–1700, 737–5601–5800

Ordinarily, a Board agent cannot be required to testify in a Board proceeding. See Board's Rules, Section 102.118(a), and ***Laidlaw Transit, Inc.***, 327 NLRB 315, 316 (1998) ("R" case, but states general policy in all Board proceedings, citing cases). See also ***Sunol Valley Golf Co.***, 305 NLRB 493, 495 (1991) (revg. judge on special appeal), supplemented by 310 NLRB 357, 365, 368 fns. 7 and 8 (1993), enfd. 48 F.3d 444 (9th Cir. 1995). It is improper for the judge to draw an adverse inference from General Counsel's failure to call a Board agent to testify. ***Independent Stations Co.***, 284 NLRB 394, 394 fn. 1, 412, 415 (1987).

§ 13–604 Experts

737–7030

See **§ 13–220**, "Expert Witness Testimony" and **§ 13–230**, "Polygraphs," above.

§ 13–605 Federal Mediator

737–5601–5800

See **§ 13–280** (privilege of Federal mediator), above.

§ 13–606 Interpreters

737–5601–3300

Increasingly, our cases require the use of interpreters to translate the testimony of witnesses who cannot speak English. See **§ 1–420**, "Interpreter's Oath," above.

Generally, there will be no objection or controversy 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.

In some circumstances, particular care should be given to the use of interpreters. For example, when alleged threats are made in English, the witness should be able to recount what was said in English. In ***Yaohan U.S.A. Corp.***, 319 NLRB 424, 424 fn. 2 (1995), enfd. mem. 121 F.3d 720 (9th Cir. 1997), the Board affirmed the judge's restrictions regarding the use of Spanish and Korean interpreters for two witnesses who demonstrated that they had some ability to converse in English.

§ 13–607 Appointment and Payment of Interpreters, Authority of Judge

596–7250–8050–2500

In ***George Joseph Orchard Siding, Inc.***, 325 NLRB 252, 252–253 (1998), the Board found (over the dissent of two Members) (1) that administrative law judges have "discretionary authority" to appoint interpreters in unfair labor practice cases, (2) that the General Counsel "failed to establish that the judge abused his discretion by ordering the Agency to provide [and pay for] an interpreter in this case," and (3) "Finally, like the judge, we limit our ruling to the facts of this case—indicating that "we believe this may be an issue that would more appropriately be addressed through rulemaking."

In ***Domsey Trading Corp.***, 325 NLRB 429, 429–432 (1998), the dissenters in ***George Joseph Orchard*** were in the majority. They upheld the judge who, in a backpay proceeding involving about 200 unfair labor practice strikers, declined to order the General Counsel to pay an interpreter for discriminatees called by the respondent employer to sustain its burden to establish interim earnings and failure to mitigate its backpay liability. Doing so would give the respondent a "blank check" to pay for "interpretation of all testimony of non-English speaking witnesses it chose to call."

§ 13–608 Examination of Witnesses

737–5600

§ 13–609 Direct Examination Before Cross-Examination

In ***Boetticher & Kellogg Co.***, 137 NLRB 1392, 1392 fn. 1, 1398–1399 (1962). The Board held that the judge erred in directing a respondent to proceed with its cross-examination before the charging party union had interrogated one of the General Counsel's witnesses.

§ 13–610 Leading Questions

737–5650–5550, 596–7637–3300

Leading questions ordinarily are not permitted on direct examination or examination of a friendly witness, but are permitted on cross-examination or examination of an adverse witness. Fed.R.Evid. Rule 611(c). Leading questions may impair the probative value of the testimony. ***Greyston Bakery***, 327 NLRB 433, 440 fn. 13 (1999). Even when there is no objection to leading, the better practice is for the judge first to warn counsel. ***Liberty Coach Co.***, 128 NLRB 160, 162 fn. 7 (1960).

§ 13–611 Section 611(c) Witness

In ***Omaha Building Trades Council (Crossroads Joint Venture)***, 284 NLRB 328, 329 fn. 4 (1987), enfd. 856 F.2d 47 (8th Cir. 1988), the Board held that the General Counsel's failure to show a foundation and to obtain a ruling permitting examination of an adverse witness under Fed.R.Evid. Rule 611(c), as is customary, does not a waive the right to ask leading questions. The test of that right comes when the opponent objects that a question is leading.

If the General Counsel calls, for example, a manager of a respondent company and

examines the manager under Fed.R.Evid. Rule 611(c), and then tenders the witness (as does the charging party), the respondent may not ask leading questions of its own manager (or other person who meets the categories specified in the rule) because the examination, as an Advisory Committee's Note to Fed.R.Evid. Rule 611(c) reflects, savors more of redirect examination.

§ 13–612 Refreshing Recollection

737–5601–8300, 596–7637–4100

Ordinarily the recollection of one's own nonadverse witness should not be refreshed until his memory has been exhausted. The recollection of the witness may then be refreshed by leading questions or any artificial aid which, under the circumstances, seems appropriate and not improperly suggestive.

§ 13–613 Past Recollection Recorded

737–7042–0190–2500

See Fed.R.Evid. Rule 803(5).

A memorandum written, signed, or adopted by a witness reciting events which occurred in the past but of which the witness has no present recollection, is admissible in evidence as proof of the events, if a foundation is laid by testimony of the witness that at the time of the memo he had a recollection of the events and that (a) he then believed them to be as stated in the memo, or (b) he would not have approved the memo if it were not true. ***J. C. Penney Co. v. NLRB***, 384 F.2d 479, 484 (10th Cir. 1967).

§ 13–700 Cross-Examination

596–7637–6700

§ 13–701 Beyond the Scope

596–7637–6725

Under Fed.R.Evid. Rule 611(b), judges have discretion to, and often routinely do, allow questions beyond the scope of the direct examination, to develop a full record without recalling witnesses. The judge should use his or her best judgment in the circumstances.

Remoteness and potential complexity of evidence may justify curtailment of cross-examination. See ***NLRB v. Champa Linen Service***, 324 F.2d 28, 30 (10th Cir. 1963) (endorsing the judge's refusal to permit cross-examination of truth of a statement, which is alleged to be a Section 8(a)(1) violation, that union official "stole a million dollars").

§ 13–702 Names of Employees Who Supported Union Not Obtainable

737–5601–6700

In ***National Telephone Directory Corp.***, 319 NLRB 420, 422 (1995), the Board held that a company respondent's counsel, when cross-examining a union representative to test her credibility, could not obtain the identity of current employees who had signed authorization cards or attended union meetings.

In a subsequent unpublished order, the Board upheld a judge's ruling permitting production of cards and attendance sheets, but only after they had been redacted to show only the signatures of witnesses who testify about their own participation in these activities. The Board cited its ruling in ***National Telephone***, above, that "the right of confidentiality exists for the protection of witnesses, and thus cannot be waived by the Union, but only by the employees themselves."

§ 13–703 Impeachment

737–5650–4900, 596–7637–5000

"Impeachment evidence is crucial in Board proceedings, because the [judge] sits as judge and jury." ***Halstead Metal Products v. NLRB***, 940 F.2d 66, 72–73 (4th Cir. 1991). In ***Halstead Industries***, 299 NLRB 759, 759 fn. 1 (1990), the judge, affirmed by the Board, had refused to receive evidence in support of Halstead's offer of proof that the General Counsel's main witness was biased against Halstead and in favor of the alleged discriminatee, because of the witness' "intimate relationship" with the company's former employee relations director who had demonstrated hostility toward the company. The company argued that the former director was using the General Counsel's main witness to give false testimony showing an unlawful motive by the plant manager. The court remanded the case so that the impeachment evidence could be considered and weighed.

A judge, however, has discretion to refuse to permit impeachment of a witness on a collateral matter. ***New York Sheet Metal Works, Inc.***, 243 NLRB 967, 967 fn. 3 (1979).

§ 13–704 Criminal Convictions

737–5650–4910

Fed.R.Evid. Rule 609 applies, in conjunction with Fed.R.Evid. Rule 403. Relevant convictions (not arrests) are those (1) punishable by death or imprisonment over 1 year, and (2) involving dishonesty or false statement regardless of the punishment. Fed.R.Evid. Rule 609 sets forth certain qualifying factors, such as time expired since convictions. See also Fed.R.Evid. Rule 404.

§ 13–706 Credibility Still Weighed

Service Employees (GMG Janitorial), 322 NLRB 402, 406 fn. 10 (1996) (mail fraud and conspiracy convictions within the last 10 years were considered, but the judge would have found the witness not credible, regardless). Proof of conviction does not automatically destroy credibility. ***Service Employees***, above, and ***Franklin Iron & Metal Corp.***, 315 NLRB 819, 819 fn. 1 (1994), enfd. 83 F.3d 156 (6th Cir. 1996) (the judge considers a felony conviction within the last 10 years for carrying a concealed weapon, but nevertheless credits the substantially corroborated testimony of the witness).

§ 13–707 Self-Incrimination

737–5601–1600

Because Board proceedings are not criminal cases (in which witnesses or parties may be taken into custody or deprived of their freedom), Board agents have no duty to warn charged parties of their constitutional rights. ***F. J. Buckner Corp. v. NLRB***, 401 F.2d 910 (9th Cir. 1968), cert. denied 393 U.S. 1084, 89 S.Ct. 868 (1969).

§ 13–800 Witness Statements (Jencks Rule)

For the origin of the Jencks rule, see ***Jencks v. U.S.***, 353 U.S. 657, 672, 77 S.Ct. 1007, 1015 (1957).

§ 13–801 In General

737–7084–0100, 596–7650–0100

Board's Rules, Section 102.118, prohibits any release of specified documents without the prior written consent specified in subsection (a) of the rule. An exception is provided in subsection (b) for pretrial "statements" given by a witness called by the General Counsel in an

unfair labor practice case (and also in subsection (c), for “statements” in a postelection case). The term “statement” is defined in subsection (d) of the rule.

See **§ 8–500**, “Jencks Statement,” above and **§§ 13–805** to **13–810**, below, concerning what constitutes a “statement.”

In ***Caterpillar, Inc.***, 313 NLRB 626, 626 (1994), the Board held that judges may not direct the General Counsel to produce affidavits from other cases, regarding matters on which the witness has not testified, particularly when the judge has not made an in camera inspection. Moreover, 313 NLRB at 627 fn. 4, the General Counsel has no obligation to produce exculpatory material contained in the Government's files.

Caterpillar, above, 313 NLRB at 626, also makes clear that when the General Counsel asserts that material in a Jencks statement does not relate to the subject matter of the witness' testimony on direct examination, the judge must inspect the statement in camera and excise any portion of the statement that does not relate to the testimony. Although the judge may exercise discretion in this respect, the judge may not refuse to consider whether material is unrelated or whether statements have been adopted by the witness within the meaning of the Board’s Rules.

§ 13–802 Copies in Possession of Others

In ***H. B. Zachry Co.***, 310 NLRB 1037, 1038 (1993), the subpoena served on the charging party union to produce copies of precomplaint affidavits taken by the Regional Office of a potential Government witnesses was quashed. Judges may not direct production of Jencks statements in advance of the witnesses testifying. Moreover, no waiver results from the fact that witnesses give copies of their affidavits to the charging party union).

§ 13–803 Of Persons Not Government Witnesses

As held in ***Senftner Volkswagen Corp.***, 257 NLRB 178, 178 fn. 1, 186–187 (1981), enfd. 681 F.2d 557 (8th Cir. 1982), the judge did not err in allowing the charging party to utilize for cross-examination the pretrial affidavit given by a respondent witness.

§ 13–804 Section 611(c) Witnesses

In ***Kenrich Petrochemicals, Inc.***, 149 NLRB 910, 911 fn. 2 (1964), the Board found no merit in the respondent company’s contention that the trial examiner erred in refusing, on its demand when calling the charging party as a witness, to direct the General Counsel to furnish it with the charging party’s pretrial statement. The Board explained that when the respondent made its demand, the charging party “had not been called as a witness by the General Counsel, nor had testified in the case, but had been called by the [respondent] as its own witness.”

In ***NLRB v. Duquesne Electric Co.***, 518 F.2d 701, 705 (3rd Cir. 1975) the court, citing ***Kenrich Petrochemicals***, above, ruled that the administrative law judge was not in error when he refused to order the General Counsel to produce an affidavit given by an alleged discriminatee, whom the respondent’s counsel had called as an adverse party under (now) Fed.R.Evid. Rule 611(c). The court held that assuming “she was an adverse party impeachable under the rule,” the counsel had no need for the affidavit and was therefore “not entitled to it, until she had given testimony damaging to the [respondent’] case, which she never did.”

It is the General Counsel’s policy, on request, to furnish the Jencks affidavit or statement

to the charging party (whose interests are aligned with the General Counsel) for use in questioning the witness, before the witness is referred to the respondent for cross-examination. ***Senftner Volkswagen Corp***, above.

§ 13–805 What Is a Jencks Statement?

§ 13–806 Definition of Jencks Rule

737–7084–7000, 596–7650–2000

Board's Rules, Section 102.118(d), has this definition of a statement under the Jencks rule:

> The term “statement” as used in subsections (b) and (c) of this section means (1) a written statement made by [the] witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription . . . 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 **§ 8–500**, “Jencks Statement,” above.

§ 13–807 Notes Not Adopted

Caterpillar, Inc., 313 NLRB 626, 626 fn. 2, 627 fn. 4 (1994) (the judge erred by ordering the General Counsel to produce a Board agent’s notes of conversations with witnesses, in the absence of any evidence that the notes had been adopted, or that the witnesses were even aware of the notes).

Coca-Cola Bottling Co., 250 NLRB 1341, 1342 (1980) (a Board agent’s “writing something” as a witness spoke to him does not qualify [the document] either as a “statement” or a statement “adopted or approved”). Although the Board did not say, it would seem that the Board agent’s notes, without a more descriptive detail, would not constitute a stenographic recording that is a “substantially verbatim recital” of an “oral statement” made by the witness.

§ 13–808 Witness’ Notes Passed to General Counsel During Trial

Wabash Transformer Corp., 215 NLRB 546, 546 fn. 3 (1974), enfd. 509 F.2d 647 (8th Cir. 1975), cert. denied 423 U.S. 827 (1975) (on request of the respondent for all the notes that the witness had taken and passed to the General Counsel during the trial, the General Counsel produced the notes in his possession and stated on the record that he had probably discarded the others, because he did not consider them to be Jencks “statements”).

§ 13–809 Letters

Rosenberg v. U.S., 360 U.S. 367, 370, 79 S.Ct. 1231, 1233 (1959) (a signed letter relating to the direct examination constitutes a producible “statement”).

§ 13–810 Audio/Video Tapes

737–7084–5600, 596–7650–2025

In ***Delta Mechanical, Inc.***, 323 NLRB 76, 77 (1997), the Board held that a contemporaneous statement captured on a tape recording or videotape at a substantive event (union organizers applying for jobs) is not a Jencks statement because it is not a description of

a past event. Instead, it is direct evidence because it is part of the substantive event itself. Thus, it is subject to a subpoena. The Board expressly cited the ***Delta Mechanical*** line of cases in ***Leisure Knoll Assn.***, 327 NLRB 470, 470 fn. 1 (1999).

CAUTION**.** Regarding whether a subpoena served after the witness has turned over the tapes to the Regional Office will reach the tapes, see the last two paragraphs of **§ 8–500**, "Jencks Statements," above. Generally, the answer is "No," and the party serving the subpoenas must first file a written request under Board's Rules, Section 102.118.

§ 13–811 Time of Production

The proper time for a request is at the close of the direct examination. ***U.S. v. Martinez***, 151 F.3d 384, 390–391 (5th Cir. 1998), cert. denied 525 U.S. 1031 and 1085 (1998 and 1999). It is premature to demand production earlier. See also ***H. B. Zachry Co.***, 310 NLRB 1037, 1038 (1993) (production cannot be required by subpoena on theory that employee witness waived confidentiality by giving copy to the union) and ***Edwards Trucking Co.***, 129 NLRB 385, 386 fn. 1 (1960). It may come too late to demand production after the witness has been excused. ***Walsh Lumpkin Drug Co.***, 129 NLRB 294, 296 (1960). Thus, if a respondent waits until "well into" the cross-examination, the judge has discretion to rule that the respondent has waived its right to receive any "statement" in the General Counsel's possession. ***Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring)***, 323 NLRB 1115, 1120 (1997) and ***I-O Services***, 218 NLRB 566, 566 fn. 1 (1975).

§ 13–812 Counsel Entitled to Sufficient Time to Study

Denial of 15 minutes' time for study after the statement was produced was error. Remanded for that opportunity. ***A. R. Blase Co.***, 143 NLRB 197, 197–198 (1963), enf. denied 338 F.2d 327 (9th Cir. 1964).

§ 13–813 Affidavits Admissible in Evidence

See also **§ 13–207** (affidavits, in general), above.

When a respondent on cross-examination had read portions of an affidavit into the record to refresh the recollection of a witness, it was error to reject the General Counsel's offer of entire affidavit into evidence. ***J. G. Braun Co.***, 126 NLRB 368, 369 fn. 3 (1960). See also ***Baker Hotel of Dallas***, 134 NLRB 524, 524 fn. 1 (1961), enfd. 311 F.2d 528 (5th Cir. 1963). See Fed.R.Evid. Rule 106 regarding remainder of writing.

§ 13–815 Right to Copy Jencks Statements

In ***Manbeck Baking Co.***, 130 NLRB 1186, 1189–1190 (1961), the Board held when affidavits of the General Counsel's witnesses are made available to a respondent, there is no absolute right to make copies of them, unless they are admitted into evidence. Whether the respondent may copy them is within the discretion of the judge.

Following the decision in ***Manbeck Baking***, above, the General Counsel revised the *NLRB Casehandling Manual* (Part One), Unfair Labor Practice Proceedings (June 1989) so that Section 10394.11 now provides that, for witness statements required to be produced by the General Counsel to a respondent, the General Counsel will produce both the original and a copy. On request, the respondent may retain the copies throughout the trial for legitimate trial

purposes, returning them at the close of the trial (unless, of course, the statement has been made an exhibit).

Because some counsel may make notes that they would be reluctant to disclose to the General Counsel, it is prudent to establish a procedure in advance, such as an agreed upon destruction of copies with attorney notes, to avoid later controversy and dispute.

§ 13–900 Rebuttal and Surrebuttal Testimony

737–7018–6700

A judge has broad discretion in deciding whether rebuttal and surrebuttal testimony would be helpful in developing the evidence, or whether it would inappropriately and unnecessarily prolong the trial.

The Board held in ***Water's Edge***, 293 NLRB 465, 465 fn. 2 (1989), enfd. in part 14 F.3d 811 (2nd Cir. 1994):

> We agree with the judge that O'Reilly's testimony was technically not proper rebuttal because it was not introduced to refute evidence provided by the Respondent's witness. We note, however, that the admissibility of evidence on rebuttal is committed to the discretion of the judge. . . . Thus, although the General Counsel should have elicited O'Reilly's testimony during her case-in-chief, we find the judge did not err in admitting it. We reject the Respondent's contention that O'Reilly's testimony should be stricken.

On the other hand, the Board has held the judge did not abuse his discretion in rejecting rebuttal and surrebuttal testimony. In ***Bethlehem Temple Learning Center***, 330 NLRB No. 166, slip op. at 1 fn. 1 (2000), the respondent proffered evidence on surrebuttal that a witness had a criminal conviction, to attack her credibility. The Board held that judge did not abuse his discretion in ruling that the respondent "made this proffer at a point too late in the trial." In ***First Class Maintenance***, 289 NLRB 484, 485 fn. 4 (1988), the Board upheld the judge's refusal to allow certain rebuttal testimony offered by the General Counsel, finding both that the evidence would have been cumulative and that the General Counsel had 9 days notice that he might desire the testimony. See also ***Tramonte v. Fibreboard Corp.***, 947 F.2d 762, 764 (5th Cir. 1991).

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