NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BENCH BOOK

An NLRB Trial Manual

August 2010

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INTRODUCTION

This *BENCH BOOK* has been compiled to provide the National Labor Relations Board's administrative law judges with a reference guide during trials when other resources are unavailable. It does not deal with issues that may arise during decision writing. It represents an effort to set forth Board precedent and other rulings and authorities on certain recurring procedural issues that may arise during the course of an NLRB trial. It is not a digest of substantive law. Nor should it be cited as precedent, or be considered a substitute for issue-specific research.

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, Board decisions, and the Federal Rules of Evidence (FRE) applicable in U.S. district courts, so far as practicable. The Bench Book sometimes refers to the Federal Rules of Civil Procedure (FRCP). It also refers to unpublished Board orders, unappealed administrative law judges' decisions, and other Board documents that are not binding precedent, but are included because they provide useful guidance.[*] Useful information is also available in the NLRB's *Classification Outline and Index* (also known as CITENET, the Board's website search database of Board cases) particularly in Chapter 596 "Procedure in ULP Proceedings," in Chapter 737 "Evidence," and in Chapter 700 "General Legal Principles."

[*] The Bench Book also includes citations to some of the two-Member Board decisions that issued from January 1, 2008 – March 29, 2010. The decisions, which are marked with an asterisk (*), may also lack precedential weight. See ***New Process Steel, L.P. v. NLRB***, 130 S.Ct. 2635 (2010) (holding that the two-Member Board lacked authority to issue its decision in that case). They should therefore be cited, if at all, with caution, unless and until they have been affirmed by a three-Member panel or the full Board. See, e.g., ***ADF, Inc.***, 355 NLRB No. 62 (2010), reaffirming and incorporating by reference 355 NLRB No. 14 (2010). However, like unpublished orders, they may provide useful guidance in evaluating similar issues and factual situations.

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 assigned to 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 or Associate 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.

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 or Associate 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. It is the policy of the Division of Judges to grant discretionary extensions only when they are clearly justified. Requests for extensions must contain specific reasons and show that the requesting party cannot reasonably meet the current deadline.

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

§ 1–300 Model Sequestration Order

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.

(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**, "Sequestration Order," below.

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

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

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

The sequestration order also prohibits all witnesses from discussing with any other witness or any possible witness the testimony he/she has already given or will give. Likewise, counsel for a party may not disclose to any witness the testimony of any other witness. Counsel may, however, inform his/her own witness of the content of testimony given by any opposing party's witness to prepare to rebut that witness' testimony.

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

NOTE: 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

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. FRCP 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 or Associate 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

§ 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). Nor shall any person "knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person." Board's Rules, Section 102.131.

An ex parte communication is any "oral or written communication not on the public record [about] which reasonable prior notice to all parties is not given." Board's Rules, Sections 102.127(b) and 102.129. The prohibition continues "until the issues are finally resolved by the Board." Section 102.128.

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

§ 2–220 Exceptions to Basic Prohibition

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). See **§2–300**, "Duties of Administrative Law Judges," 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). This includes, for example, calls to a party to ascertain if the trial, in fact, may be as long or short as estimated. 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) permitted a judge's call to counsel for the General Counsel to advise "that [the judge] would be presiding" and to request that counsel notify the respondent's counsel of that fact. The Board specifically noted "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). This includes, for example, a judge's settlement conversation with counsel for the General Counsel that 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 (2d 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, 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 102.133 set forth actions to be taken by the Board, but make no provision for further action by a judge who issues the notice to show cause.

§ 2–300 Duties of Administrative Law Judges

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 (3d Cir. 1990). Obviously, this duty is primarily accomplished by "presid[ing] over the [trial]." Statements of Procedure, Section 101.10. In doing so, the judge is responsible for (1) "courtroom administration," ***Liteky v. U.S.***, 510 U.S. 540, 555–556 (1994), (2) "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) "prevent[ing] improprieties during the trial," ***U.S. v. Warner***, 971 F.2d 1189, 1197 (6th Cir. 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 (1933).

Specific authority conferred upon administrative law judges by the Board is enumerated in Board's Rules, Section 102.35(a)(1)–(a)(13). Some of that authority is discussed further below.

To regulate the course of the trial. Board's Rules, Section 102.35(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. ***American Life Insurance and Accident Co.***, 123 NLRB 529, 530 (1959).

See also FRE 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue influence").

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." ***Indianapolis Glove Co***., above, 88 NLRB at 987. See also ***American Life Insurance and Accident. Co.***, above, 123 NLRB at 530. 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), or to an extent that "precludes a fair determination" of the merits of parties' cases, ***Dayton Power & Light Co.***, 267 NLRB 202, 202 (1983). See also ***Boetticher & Kellogg Co.***, 137 NLRB 1392, 1392 fn. 1, 1398–1399 (1962) (Board held that the judge erred by refusing to permit respondent to cross examine a General

Counsel witness because respondent refused judge's direction to conduct cross examination before the charging party union had questioned the witness).

In proper circumstances, however, the judge may place time limits on a party's presentation of its case. ***Dickens, Inc.***, 355 NLRB No. 44, slip op. at 4 (2010); ***University Medical Center***, 335 NLRB 1318, 1318 fn. 1, 1343 (2001), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003); and ***Teamsters Local 122 (August A. Busch & Co. of Massachusetts)***, 334 NLRB 1190, 1193, and 1255 (2001) (also ordering litigation costs for delaying trial). See also **§13–102**, "Taut Record," below.

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

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***, 971 F.2d 1189, 1197 (6th Cir. 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 record for a 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). Accord: ***Pathmark Stores, Inc.***, 324 NLRB 378, 378 fn. 1 (2004). See also **§11–300**, "Binding Precedent, Judge Required to Follow," below.

After a decision issues, the judge may issue an erratum. ***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 erratum 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 erratum 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 erratum may not be utilized to add names of discriminatees who were never mentioned in the decision. For those changes, parties "should seek correction . . . either through exceptions . . . or by motions to the Board."

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 FRE 614 and has generally been applied consistently therewith. Thus, a judge's decision to question witnesses, or even to call witnesses, is not improper. ***Hall Industries***, 293 NLRB 785, 785 fn. 1 (1989), enfd. mem. 914 F.2d 244 (3d Cir. 1990). "Judges may do so repeatedly and aggressively to clear up confusion and manage trials," or when "testimony is inarticulately or reluctantly given." ***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). See also ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1017 (1994), enfd. mem. 57 F.3d 1073 (7th Cir. 1995); and ***U.S. v. Filani***, 74 F.3d 378, 386 (2d Cir. 1996) (discussing judge's role in "clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings"). 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.

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 Co.***, 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).

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

§ 2–400 Trials

"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. Section 102.34 of the Board's Rules provides that our hearings "shall be public unless otherwise ordered by the Board or the administrative law judge." The Board's Statements of Procedure, Section 101.10(a) provides: "Except in extraordinary situations the [trial] is open to the public."

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 (2d 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 (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 (1984). See also **§7–110**, "Respondent Not Represented by Counsel," below.

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. 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]." "Whether to permit the parties to file post hearing briefs is a matter committed to the sound discretion of the administrative law judge." ***K.O. Steel Foundry & Machine***, 340 NLRB 1295 (2003). See also **CHAPTER 12**, "Oral Argument, Briefs, Judges Decisions," below.

§ 2–500 Disqualification of Judge

§ 2–510 Grounds Asserted for Disqualification

"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, that 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 (3d 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 (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, 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. 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 (2d 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).

Prior ruling against party. A judge is not disqualified from presiding over the remand of a case in which the same judge previously ruled against a respondent. Accordingly, the judge did not err in refusing to recuse himself simply because he had ruled against respondent's predecessor in an unrelated case. ***Waterbury Hotel Management v. NLRB***, 314 F.3d 645, 650–651 (D.C. Cir. 2003). But adherence to an erroneous ruling, after an initial remand, and allegations judge showed "irritation" and "impatience," were found to warrant a second remand, this time to another judge, to remove any suggestion of bias or prejudice. ***St. Mary's Nursing Home***, 342 NLRB 979, 980 fn. 6 (2004), second remand decision affd. 240 Fed. Appx. 8, 10, 12–13 (6th Cir. 2007).

Criticisms of counsel, parties, or witnesses. 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 (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). The Board has cautioned a judge against making intemperate comments about a witness and counsel for the General Counsel, to avoid giving even the appearance of bias, which might compromise the integrity of the Board's decision-making process. ***Victor's Café 52, Inc.***, 338 NLRB 753, 756–757 (2002).

Referral of Evidence of Attorney Misconduct under Section 102.177 of the Board's Rules. Judicial referral or reporting of evidence of attorney misconduct to disciplinary authorities is generally not grounds for recusal or disqualification. See ***U.S. v. Mendoza***, 468 F.3d 1256, 1262 (10th Cir. 2006); and ***Conklin v. Warrington***, 476 F. Supp. 2d 458, 464 (M.D. Pa. 2007), affd. in relevant part 304 Fed. Appx. 115 (3d Cir. 2008) (unpublished).

Comments about the merits and about evidence presented. A judge's opinions, formed "on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." ***Liteky v. U.S.***, 510 U.S. 540, 555 (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 viewed as improper either opinions expressed by judges about a particular defense, after all evidence has been received, ***Teamsters Local 722 (Kasper Trucking)***, 314 NLRB 1016, 1018 (1994), enfd. mem. 57 F.3d 1073 (7th Cir. 1995), or opinions "regarding the ultimate merits of the case . . . in the context of suggesting the possibility of settlement." ***Roto Rooter***, 288 NLRB 1025, 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 Insurance and Accident 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. "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." ***Liteky v. U.S.***, 510 U.S. 540, 555 (1994). 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). See also ***Bethlehem Temple Learning Center, Inc.***, 330 NLRB 1177, 1177 fn. 1 and 1182–1183 (2000).

Participation in questioning witnesses. As set forth in **§2–300**, "Duties of Administrative Law Judges," 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 may be found when those limits are exceeded.

Suggestions to counsel regarding how to proceed. It has been held improper for a judge to suggest that counsel "maintain a reasonably militant posture [regarding] the relevancy of . . . 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), enfd. mem. 57 F.3d 1073 (7th Cir. 1995).

Gratuitous and off-the-record remarks. A judge 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). It has also cautioned 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 (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 Insurance and Accident 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. See, for example, discussion of ***St. Mary's Nursing Home***, above.

Copying from briefs. Although it is not per se disqualifying for a judge to adopt one side's posthearing brief, "more or less verbatim," the practice is frowned upon. ***Waterbury Hotel Management v. NLRB***, 314 F.3d 645, 650–651 (D.C. Cir. 2003); ***Fairfield Tower Condominium Assn.***, 343 NLRB 923, 923 fn.1 (2004). However, where a judge, who had previously been warned against verbatim copying of briefs of the General Counsel and the Charging Party, did so again, the Board found that the judge's decision created the impression that he was not impartial and the judge had "failed to conduct an independent analysis of the case's underlying facts and legal issues." The Board therefore set aside the judge's decision and remanded the case to a new judge for an independent review of the record and preparation of a new decision. ***Dish Network Service Corp.***, 345 NLRB 1071 (2005). See also ***J.J. Cassone Bakery***, 345 NLRB 1305 (2005); and **§12–300**, "Post-Trial Briefs," below.

§ 2–520 Disqualification Procedure

"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). This means that if the asserted disqualifying facts are discovered after trial, but before issuance of the judge's decision, a motion for disqualification must be made to the judge. ***Al Bryant, Inc.***, 260 NLRB 128, 128 fn. 1 (1982), enfd. 711 F.2d 543 (3d 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. See also ***Manor West, Inc.***, 311 NLRB 655, 665 fn. 1 (1993) (motion to disqualify filed 7 weeks after trial closed but before judge's decision issued found timely).

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 (2d 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. See ***Al Bryant, Inc.***, above. 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

See Board's Rules, Section 102.9–102.14.

§ 3–110 General Principles

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)

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, 245 F.3d 803, 807 (D.C. Cir. 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

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

§ 3–140 Withdrawal or Dismissal

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 *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 evidence is introduced, but before the judge's decision issues, the charge may be withdrawn only with the consent of the judge usually as part of the withdrawal of the complaint allegations approved by the judge pursuant to approval of a settlement agreement. Alternatively, the judge may order the matter remanded to the Regional Director, who may rule on the withdrawal of the charge. After the judge's decision issues, the charge may be withdrawn only with the consent of the Board. Section 101.9 of the Board's Statement of Procedure. The Board has held 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). After evidence has been introduced, however, the General Counsel no longer has unreviewable discretion to withdraw a complaint allegation. ***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); ***Sioux City Foundry Co.***, 323 NLRB 1071, 1074 (1997), enfd. 154 F.3d 832, 837–838 (8th Cir. 1998) (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

The authority to issue complaints rests solely with the General Counsel. The disposition of charges, and the decision whether a complaint should issue or be litigated, is within the exclusive province of the General Counsel and is not subject to review. ***Vaca v. Sipes***, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"). It is therefore 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 (1987).

§ 3–210 Adequacy of Complaint

"The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." ***Curtiss-Wright Corp. v. NLRB***, 347 F.2d 61, 72 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." ***American Newspaper Publishers Assn. v. NLRB***,

193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953), quoting from ***NLRB v. Piqua Munising Wood Products Co.***, 109 F.2d 552, 557 (6th Cir. 1940). 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).

For another case discussing these principles, see ***Artesia Ready Mix Concrete, Inc.***, 339 NLRB 1224, 1226 (2003). See also **§3–230**, "Bill of Particulars," below.

§ 3–220 Complaint Closely Related to Timely Charge

A complaint is not restricted to the precise allegations of the charge. 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 (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 (2d Cir. 1952). Although ***Redd-I*** dealt with allegations in complaint amendments 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). 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).

The Board has also rejected a claim of different defenses when the complaint allegations involved the same unlawful object. ***Nickles***, above, at 928 fn. 6. Sufficient nexus has likewise been found when the disputed charge and existing charge allegations "all occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union." ***Well-Bred Loaf***, 303 NLRB 1016, 1016 fn. 1 (1991). See also ***Office Depot, Inc.***, 330 NLRB 640, 640–642 (2000). But see ***The Carney Hospital***, 350 NLRB 627, 630 (2007) ("Mere chronological coincidence during a union campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign"); and ***SKC Electric, Inc.***, 350 NLRB 857, 858 (2007) (applying ***Carney Hospital***).

Compare also ***Kentucky Tennessee Clay Co.***, 343 NLRB 931, 932 (2004), enfd. 179 Fed. Appx. 153 (4th Cir. 2006), (reduction in hours closely related to charge); with ***Trade Fair Supermarkets***, 354 NLRB No. 16 (2009) (failure to apply bargaining agreement to nonmembers not closely related to retaliation against employees for union activity).

See also **§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

Bills of particulars are normally handled at the pretrial stage by the Chief Judge or Deputy or Associate 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 1 (5th Cir. 1964). Nor is the General Counsel required to plead evidence or the 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 also cases cited in ***Artesia Ready Mix Concrete, Inc.***, 339 NLRB 1224, 1226 fn. 3 (2003).

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

§ 3–300 Amendments to Complaints

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

After the trial opens, the judge may amend the complaint only on motion by, or with the consent of, the General Counsel. ***GPS Terminal Services***, 333 NLRB 968, 968–969 (2001). The charging party cannot enlarge upon or change the General Counsel’s theory of the case. ***Kimtruss Corp.***, 305 NLRB 710, 711 (1991). However, 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 (1994).

§ 3–320 When Amendments Are Allowed

Board’s Rules, Section 102.17, permits complaint amendments “upon [terms that] may seem just.” This gives the trial judge wide discretion. **Empire State Weeklies, Inc.***, 354 NLRB No. 91, slip op. 2 (2009). 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). See also ***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).

In ***Stagehands Referral Service***, 347 NLRB 1167 (2006), the Board affirmed a judge who denied a motion to amend at the hearing. Citing ***Cab Associates***, 340 NLRB 1391, 1397 (2003), the Board analyzed three factors in determining whether the amendment was "just:" (1) whether there was surprise or lack of notice; (2) whether the General Counsel offered a valid excuse for its delay in moving to amend; and (3) whether the matter was fully litigated. In assessing those factors, the Board concluded that the proposed amendment would not be just in the circumstances presented. Id. at 1171.

Even when amendments would otherwise be permitted, 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. See generally ***Desert Aggregates***, 340 NLRB 289, 292–293 (2003). Minor discrepancies that are not material, such as dates, may not preclude a finding that is otherwise supported by the evidence. See ***Empire State Weeklies, Inc.***, above.

§ 3–330 Amendments and Section 10(b)

In certain circumstances, uncharged allegations may be the subject of amendments to the complaint. "If a charge was filed and served within 6 months after the violations alleged in the complaint, the complaint (or amended complaint), although filed after the 6 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 (2d Cir. 1952). See also ***Old Dominion Freight Line***, 331 NLRB 111 (2000).

Thus, Section 10(b) establishes two independent requirements for complaint allegations: they must be closely related to charge allegations, and the unfair labor practices alleged in the complaint must have occurred less than 6 months before the charge was filed. ***Trade Fair Supermarkets***, 354 NLRB No. 16, slip op. at 3 (2009).

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

An unpleaded matter may support an unfair labor practice finding if it is closely connected to the subject matter of the complaint and has been fully litigated. ***Pergament United Sales***, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); and ***Meisner Electric, Inc.***, 316 NLRB 597, 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996). See also ***Airborne Freight Corp.***, 343 NLRB 580, 581(2004); and ***Hi-Tech Cable Corp.***, 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).

"A respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." ***Allied Mechanical Services, Inc.***, 346 NLRB 326, 329 (2006). Thus, as the Board stated in **United States Postal Service***, 352 NLRB 923, 923 (2008):

> The determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made [citing ***Pergament***, above, 296 NLRB at 335]. Further, '[t]he presentation of evidence associated with an alleged claim . . . is insufficient to put the parties on notice that another, unalleged claim (for which the evidence might also be probative) is being litigated, especially where the two claims rely on different theories of liability,' [citing ***Dilling Mechanical Contractors***, 348 NLRB 98, 107 (2006)].

See also ****New York Post***, 353 NLRB No. 343 (2008); ***Lamar Advertising of Hartford***, 343 NLRB 261, 265 (2004); ***Desert Aggregates***, 340 NLRB 289, 292–293 (2003); and ***Champion International Corp.***, 339 NLRB 672 (2003), in which the Board likewise found the new matters were not fully litigated. But see ****AKAL Security, Inc.***, 354 NLRB No. 11, slip op. at 4 (2009) (judge's application of ***Burnup & Sims*** instead of ***Wright Line*** to find violation did not deny respondent due process as respondent clearly anticipated that ***Burnup & Sims*** could apply and litigated accordingly); and ***Facet Enterprises v. NLRB***, 907 F.2d 963, 969–975 (10th Cir. 1990) (upholding the Board's finding of a refusal-to-bargain violation based on a direct dealing theory even though the alleged refusal to bargain was based on a theory of attempted unit splitting—"quite a different offense," which was not explicitly mentioned in the complaint and which "requires divergent components of proof"—since 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. See ***Meisner Electric*** and ***Pergament***, above.

§ 3–400 Consolidation and Severance of Complaints

§ 3–410 General Principles

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

After issuance of a complaint and before a trial opens, the Chief Judge or Deputy or Associate 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 and granted by the trial judge. Board's Rules, Sections 102.33(d), 102.24, 102.25, and 102.35(a)(8). When the issue is presented, the judge has 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

Despite the discretion generally accorded to the General Counsel and (when the issue is presented to them) judges in determining whether cases should be consolidated (see ***Cresleigh Management***, above), the Board generally disfavors piecemeal litigation. Thus, the General Counsel is expected to consolidate all pending charges into one complaint and litigate all known issues in one case. See ***Peyton Packing Co.***, 129 NLRB 1358, 1360 (1961); 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. World Parts Division***, 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 9, 14 fn. 13 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). See also ***Beverly Health & Rehabilitation Services***, 346 NLRB 1319 fn. 3 and 1337 fn. 4 (2006). 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). Separate litigation is also permitted where the General Counsel focuses on a discrete, reasonably self-contained, set of issues. See ***Beverly Health***, above; and ***Goya Foods of Florida***, 351 NLRB 94, 94 fn. 4 (2007), enfd. 309 Fed. Appx. 422 (D.C. Cir. 2009).

The Board seems reluctant to dismiss a second case under ***Peyton Packing*** and ***Jefferson Chemical*** except in unusual circumstances. See ***Service Employees Local 87 (Cresleigh Management)***, above, 324 NLRB at 775; ***Frontier Hotel & Casino***, 324 NLRB 1225, 1225–1226 (1997); and ***Detroit Newspapers***, 330 NLRB 524, 525–526 (2000). Indeed, in ***U-Haul of Nevada, Inc.***, 345 NLRB 1301, 1302 (2005), enfd. 490 F.3d 957 (D.C. Cir. 2007), the Board stated that "[e]ven where the General Counsel fails to consolidate cases that the Board believes should have been consolidated, the Board will not dismiss the complaint in the absence of a showing of prejudice to the respondent."

§ 3–430 Severance

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). In ***Adair***, a technical 8(a)(5) refusal to bargain case had been consolidated by the Regional Director with an essentially 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 in such circumstances. ***Winchell Co.***, 315 NLRB 526, 532 (1994), enfd. mem. 74 F.3d 1227 (3d Cir. 1995).

§ 3–500 Answer to Complaint

Board's Rules, Section 102.20, sets forth the requirements for an answer. It provides that, if no answer is timely filed within 14 days after service, all allegations of the complaint are deemed to be admitted as true. It further provides that the answer must specifically admit, deny, or explain each of the facts alleged in the complaint.

Like FRCP 8(b), Section 102.20 allows an exception where the respondent is without knowledge sufficient to admit or deny the allegation, and so states in its answer, in which case the statement will operate as a denial. However, such a response may be stricken as a sham where the allegation involves the respondent's own conduct or is otherwise within its knowledge. See ***Information Processing SVC, Inc.***, 330 NLRB No. 95 (2000) (striking pro se respondent's responses to the service, jurisdictional, and supervisory allegations of the complaint), citing ***DPM of Kansas,*** 261 NLRB 220, 220 fn. 2 (1982). See also **§7–520** below, regarding authority to admonish or reprimand counsel for denying allegations without good cause and purely for delay.

In most cases in which no answer or an insufficient answer is filed, the General Counsel files a motion for default judgment directly with the Board pursuant to Board's Rules, Section 102.24(b). ***Clement-Blythe Cos.***, 168 NLRB 118, 118–119 (1967), enf. denied 415 F.2d 78 (4th Cir. 1969). Motions for default judgment must be filed no later than 28 days before the scheduled trial and are filed with the Executive Secretary of the Board and not the Division of Judges.

If for any reason the General Counsel fails to file a motion for default 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 194, 194 (1999) (respondent failed to file answer and did not appear at the trial). See also **§11–350**, "Motions for Summary and Default Judgment," below.

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

Amendment of an Answer. 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 FRCP 15(b) and ***Hylton v. John Deere Co.***, 802 F.2d 1011,1015 (8th Cir. 1986) (district court judge did not abuse his discretion by granting defendants in products liability case leave to amend their answer to respond to two allegations in amended complaint they had inadvertently failed to respond to). And see ***Baron Honda-Pontiac***, 316 NLRB 611, 611 (1995) (because an allegation in the amended complaint was substantially unchanged from the denied allegation in the initial complaint, the Board did not deem the undenied allegation admitted).

However, in ***St. George Warehouse, Inc.***, 349 NLRB 870 (2007), the Board upheld a judge's denial of respondent's motion, on the second day of trial, to amend its answer to deny a supervisory-status allegation that it had previously admitted, assertedly by mistake. See also ***Harco Trucking, LLC***, 344 NLRB 478, 479 (2005), holding that respondent's request to amend

its answer to deny corporate status for the first time in its posthearing brief to the judge was untimely.

The Board has repeatedly held that admissions in an answer, or other pleadings, are binding even where the admitting party later attempts to produce contrary evidence. ***C.P. Associates, Inc.***, 336 NLRB 167 (2001); ***Consolidated Bus Transit, Inc.***, 350 NLRB 1064, 1065 fn. 6 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). See also ***T. Steele Construction, Inc.***, 351 NLRB 1032 fn. 12 (2007) (rejecting respondent's argument that its previous admission in its answer should be amended to a denial to conform to the evidence presented at trial); and ***Boydston Electric, Inc.***, 331 NLRB 1450, 1451 (2000) (holding that judge erred in finding, based on the evidence at trial, that alleged discriminatee was not discharged, in light of respondent's previous admission to the discharge in its answer).

§ 3–550 Affirmative Defenses

Affirmative defenses must be pled in an answer. Affirmative defenses raised for the first time in posthearing briefs are untimely and may be considered waived. ***Harco Trucking, LLC***, 344 NLRB 478, 479 (2005); and ***Dayton Newspapers, Inc.***, 339 NLRB 650, 653 fn.8 (2003), enfd. in part 402 F.3d 651 (6th Cir. 2005).

Defenses should be stricken if they are not recognized affirmative defenses in law, are outside the scope of the complaint, or are irrelevant to the issues set for hearing. Thus, compliance matters, which are not litigated in a complaint case, may not be raised as affirmative defenses and must be stricken. ****Litigation Mediation Group, Inc.***, 12–CA–25513 (unpublished Board order, June 13, 2008).

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

§ 3–600 Section 10(b) Affirmative Defense

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

Section 10(b) is not jurisdictional. It is an affirmative defense and, if not timely raised, it is waived. ***Public Service Co.***, 312 NLRB 459, 461 (1993); and ***DTR Industries***, 311 NLRB 833, 833 fn. 1 (1993), enf. denied on other grounds, 39 F.3d 106 (6th Cir. 1994).

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

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

The requisite notice may be actual or constructive, i.e., sufficient notice may be found if the party should have become aware of a violation in the exercise of reasonable diligence. See, e.g., ***Moeller Bros. Body Shop***, 306 NLRB 191, 192 (1992). However, constructive notice will not be found where a delay in filing is a consequence of conflicting signals or otherwise

ambiguous conduct. ***A & L Underground***, 302 NLRB 467, 469 (1991). See also ***Cab Associates***, 340 NLRB 1391, 1392 (2003).

In ***Postal Service Marina Center***, 271 NLRB 397, 397–400 (1984), the Board held that the Section 10(b) period is computed from the date of the alleged unlawful act, rather than the date its consequences become effective. Thus, an employee who received notice that he would be terminated, but waited to file a charge until the termination became effective—more than 6 months from the date of the notice—was barred by Section 10(b). 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 at 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).

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

§ 3–620 Not a Rule of Evidence

Evidence may be admitted concerning events outside the 10(b) period, if the evidence is used only as background and not to prove a time-barred unfair labor practice. ***Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB***, 362 U.S. 411, 414–429 (1960). 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

An allegation that an employer maintained an unlawful no-solicitation rule within the 10(b) period is timely, even if the respondent promulgated the rule outside the period. ***Control Services***, 305 NLRB 435, 435 fn. 2, 442 (1991), citing ***Alamo Cement Co.***, 277 NLRB 1031, 1036–1037 (1985).

Similarly, the Board held in ***A & L Underground***, 302 NLRB 467, 468–469 (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. However, if the charging party had received clear and unequivocal notice of the total contract repudiation before the 10(b) cutoff date, it is time barred from subsequently alleging contract violations within the 10(b) period. See ***Chambersburg County Market***, 293 NLRB 654, 655 (1989) ("a charge alleging an unlawful refusal to execute a bargaining contract is cognizable only when filed within 6 months").

§ 3–635 Backpay for Continuing Violations

Where a continuing violation is found, and the charging party did not have clear and unequivocal notice of the original violation, the usual make whole remedy from the date of the original violation is normally appropriate, i.e., backpay may be ordered beyond the 10(b) period, even in the absence of any fraudulent concealment. See ***Vallow Floor Coverings, Inc.***, 335 NLRB 20, 20–21 (2001) (ordering employer to pay backpay since 1991, even though the charge was not filed until 6 years later, in 1997).

§ 3–640 Fraud or Deception

Fraudulent concealment of facts of an unfair labor practice from a charging party tolls Section 10(b), unless the charging party failed to exercise due diligence. ***Ladies Garment Workers (McLoughlin Mfg.) v. NLRB***, 463 F.2d 907, 921–923 (D.C. Cir. 1972) (false representation that the employer was going out of business when in fact it was secretly moving plant). 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

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. mem. 785 F.2d 304 (4th Cir. 1986).

There are, however, three exceptions to the general rule:

1) Fraudulent Concealment. If material facts have been concealed from the General Counsel, a dismissed or withdrawn charge may be revived. ***Kanakis Co.***, 293 NLRB 435, 435–437 (1989) (an affidavit submitted to General Counsel, upon which the General Counsel relied in dismissing the charge, was later discovered to have been perjured). Compare ***Brown & Sharpe Mfg. Co.***, 321 NLRB 924, 924–925 (1996), review denied 130 F.3d 1083, 1087 (D.C. Cir. 1997), cert. denied 524 U.S. 926 (1998) (finding no fraudulent concealment 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 590, 591–592 (2000) (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, 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 837, 840–841 (2001), the Board clarified that "material facts" means concealed evidence that would, "as an objective matter, make the critical difference in determining whether or not there was a reasonable cause to believe the Act was violated."

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

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

3) Closely Related to Current Complaint. If a viable and timely charge exists and the General Counsel seeks to add allegations that were contained in a previously withdrawn or dismissed charge, the closely related test applies. See ***Redd-I, Inc.***, above, 290 NLRB at 1115–1116. 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**, "Complaint Closely Related to Timely Charge" and **§3–330**, "Amendments and Section 10(b)," above.

Finally, as suggested above, the general rule set forth in ***Ducane*** prohibiting revival of dismissed charges does not apply to a charge that has not been finally dismissed, but is pending before the General Counsel on appeal. See **§3–140**, "Withdrawal or Dismissal," above. See also ***Smithfield Packing Co.***, 344 NLRB 1, 10 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006).

§ 3–700 Other Affirmative Defenses

§ 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 and Heating)***, 131 NLRB 1243, 1245–1247 (1961), enfd. 299 F.2d 497 (2d Cir. 1962).

But if, as a legal matter, proof of misconduct could affect 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). See also ***Chicago Tribune Co.***, 304 NLRB 259, 259–261 (1991) (bad-faith bargaining by the union may be raised as a defense to bad-faith bargaining by the respondent, even though the General Counsel dismissed the charge of union bad-faith bargaining). Compare ***Greyhound Lines***, 319 NLRB 554, 555–557 (1995) (affirmative defense based on alleged union misconduct was stricken because no nexus was shown between alleged misconduct and the respondent's refusal to bargain, which was the subject of the complaint).

Although not a defense to a complaint, union misconduct (violence) may require withholding a 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

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. J. H. Rutter-Rex Mfg. Co.***, 396 U.S. 258, 264 (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). Indeed, despite characterizing the General Counsel's 5 ½ year delay as "inordinate" and "inexcusable," the Board in ***United Electrical Contractors Assn.***, 347 NLRB 1, 2–3 (2006) denied a motion to dismiss in the

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

For an interesting discussion of whether and in what circumstances laches applies to the Government generally, see ***Martin v. Consultants & Administrators, Inc.***, 966 F.2d 1078, 1090–1091 (7th Cir. 1992).

§ 3–730 Inadequate Investigation/Compliance with Casehandling Manual

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

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

§ 3–740 Deferral to Grievance Arbitration

Deferral to the grievance and arbitration machinery of the collective-bargaining agreement pursuant to ***Collyer Insulated Wire***, 192 NLRB 837, 839 (1971) is an affirmative defense that must be timely raised in the answer to the complaint or at the trial. ****Airo Die Casting, Inc.***, 354 NLRB No. 8, slip op. 1 fn. 5 (2009). Therefore, the respondent's "interjection of this defense" after the trial closes is "untimely." ***Master Mechanical Insulation***, 320 NLRB 1134, 1134 fn. 2 (1996). See also ***Wisconsin Bell Telephone***, 346 NLRB 62, 64, fn. 8 (2005) (although respondent raised deferral as an affirmative defense in its answer, the Board held that it waived the argument by failing to raise the issue subsequently at the hearing or in its brief to the judge).

§ 3–750 Relitigation of Issues

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

See also ****Allied Mechanical Services, Inc.***, 352 NLRB 662, 664 (2008) (respondent collaterally estopped from alleging that its bargaining relationship with a union was based on Section 8(f) rather that Section 9(a) because a prior Board decision involving the same parties was necessarily premised on the existence of a Section 9(a) relationship and a prior settlement agreement confirmed such a relationship); and ***Great Lakes Chemical Corp.***, 300 NLRB 1024, 1025 and fns. 3 and 4 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992) (respondent collaterally estopped from relitigating facts relating to its duty to bargain as a successor, which were fully and fairly litigated and necessarily decided in prior proceeding involving same parties).

With respect to the application of collateral estoppel and res judicata to the General Counsel or Board, see ***Precision Industries***, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585

(8th Cir. 1997). In that case, the Board held that prior age and race discrimination charges filed with the EEOC by several discriminatees did not judicially estop the General Counsel from asserting that the failure to hire was based on antiunion animus, as neither the General Counsel nor the Charging Party Union were parties in the EEOC proceeding.

The Board in ***Precision Industries*** also rejected respondent's res-judicata argument that the complaint was barred because respondent had prevailed in an ERISA suit brought by the Union and certain former employees and retirees. The Board cited "the general rule that the Government is not precluded from litigating an issue involving the enforcement of Federal law that a private party has litigated unsuccessfully, when the Government was not a party to the private litigation." Ibid., citing ***Field Bridge Associates***, 306 NLRB 322 (1922), enfd. sub nom. ***Service Employees Local 32B–32J v. NLRB***, 982 F. 2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

See also ***Roadway Express***, 355 NLRB No. 23 (2010), where the respondent employer argued that a court's dismissal of the alleged discriminatee's hybrid 301/DFR claim against the employer and union collaterally estopped the General Counsel from subsequently opposing deferral of the related 8(a)(3) allegations against the employer on the ground that the union had breached its DFR in the prior grievance proceeding. Relying on the same "general rule" above, the Board rejected the respondent's argument as the General Counsel was neither a party to the unsuccessful lawsuit nor in privity with the alleged discriminatee (since the Board acts in the public interest), and the court dismissed the DFR claim on the ground that the discriminatee had waived it, rather than on the merits.

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

§ 3–760 Section 8(g) Notice

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

§ 3–770 Settlement Bar

A settlement agreement generally disposes of all issues unless the prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. ***Hollywood Roosevelt Hotel Co.***, 235 NLRB 1397, 1397 (1978).

This so-called “settlement bar” rule is likewise an affirmative defense and is waived if not timely raised in the pleadings or at the trial. See ***Richard Mellow Electrical Contractors Corp.***, 327 NLRB 1112, 1112–1113 (1999). See also **§9–620**, “Settlement Bar Rule,” below.

CHAPTER 4. SERVICE OF DOCUMENTS

§ 4–100 In General

Service is a concept distinct from filing. That is, filing refers to receipt "by the Board or the officer or agent designated to receive" a pleading or other document. 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 (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 Not Controlling

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), enfd. 961 F.2d 1568 (3d Cir. 1992).

§ 4–200 Methods of Service

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").

Service by Fax. 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 other 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), provides that a party shall serve copies "on all parties in the same way as used to serve the office where filed, or in a more expeditious manner," and faxes "shall be used for this purpose whenever possible." 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).

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

§ 4–300 Failure of Service

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

However, in ***Active Metal Mfg.***, 316 NLRB 974, 974–975 (1995), a self-represented respondent's timely-filed answer was rejected for failure to serve the charging party where there had been "repeated efforts by the Region to apprise the Respondent of its obligations under our Rules," but service was never made.

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

§ 4–310 Efforts to Frustrate Service

"[T]he Board has long held that a respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service will not be permitted to defeat the purposes of the Act" (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).

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

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

Personal service: the day "delivered in person."

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

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

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

§ 4–600 Proof of Service

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

For other parties, and for pleadings and other documents, 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).

However, "failure to make proof of service does not affect the validity of service." Board's Rules, Section 102.114(e). Thus, the absence of such a statement will not invalidate service, nor preclude other methods of proof of service. The Board has long held that procedural requirements regarding proof of service should be liberally construed. See ***Control Services***, 303 NLRB at 481–482 (1991). For example, in ***G. W. Truck***, 240 NLRB 333, 334–335 (1979), proof of a charge's service was based upon testimony by a Board agent, supported by her written description, "almost contemporaneous with service," of what had occurred when she served the charge.

§ 4–700 Special Aspects of Service of Particular Documents

§ 4–710 Charges and Amended Charges

As indicated in **§4–200**, above, 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."

Under the proviso of Section 10(b) of the Act, a charge must be both filed and served within the 6-month limitations period prescribed. Thus, the failure to make timely service warrants dismissal, even if 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).

As pointed out in ***Dun & Bradstreet***, above, the charging party, not the Regional Office, is responsible for assuring timely service of a charge. Although the Regional Office will normally serve a copy of the charge on the charged party, this is merely a courtesy and does not relieve the charging party of its service obligation. Board's Rules, Section 102.14(a) and (b), and Statements of Procedure, Section 101.4.

However, technical defects in the manner of service will not necessarily invalidate the service. See ***Control Services***, above, 303 NLRB at 481–482 (1991) ("when charges have in fact been received, technical defects in the form of service do not affect the validity of the service"). For example, service of an unsigned copy of a charge was held adequate in ***Freightway Corp.***, 299 NLRB 531, 531 (1990).

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

Where there are multiple charged parties, service on but one of them is sufficient if they 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 (2d Cir. 1988); and ***NLRB v. O'Neill***, 965 F.2d 1522, 1528–1529 (9th Cir. 1992), cert. denied 509 U.S. 904 (1993).

Single employers. ***Il Progresso Italo Americano Publishing Co.***, 299 NLRB 270, 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). See also ***United Electrical Contractors Assn.***, 347 NLRB 1, 1–2 (2006) (service of charge on multi-employer association amounts, under agency principles, to service on each of its members).

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

§ 4–720 Complaint and Notice of Hearing

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

§ 4–730 Compliance Specifications

"[T]he Regional Director may issue and serve on all parties a compliance specification in the name of the Board." 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). This is so, even if the attorney no longer represents the respondent, unless notice has been given to the Regional Director of discontinuance of representation. ***Hopkins Hardware***, 280 NLRB 1296, 1297 (1986).

§ 4–740 Answers to Complaints and to Compliance Specifications

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

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

§ 4–750 Subpoenas

Section 102.113(c) of the Board's Rules provides that. "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."

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

CHAPTER 5. PRETRIAL DISCOVERY AND DEPOSITIONS

§ 5–100 Pretrial Discovery

It is well established that pretrial discovery does not apply in Board proceedings. See ***Offshore Mariners United***, 338 NLRB 745, 746 (2002), and authorities cited therein. Thus, for example, in ***Bashas', Inc.***, 352 NLRB 661 (2008), the Board found that the judge improperly ordered the General Counsel to provide a list of witnesses in advance of their testimony because that would, in effect, amount to pretrial discovery.

§ 5–200 Depositions

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

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

See also **§11–620**, "Testimony by Video," below.

CHAPTER 6. TIME AND PLACE OF TRIAL

§ 6–100 Before Trial Opens

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. But when there are less than 21 days before the scheduled trial date and a party objects to a postponement, motions to reschedule the trial should be filed with the Division of Judges, which rules only on whether to grant the motion to extend the trial date. Board's Rules, Section 102.16(a). See also ***Carriage Inn of Steubenville***, 309 NLRB 383 (1992). The "Regional Director issuing the complaint shall retain the authority to order a new date for [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

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 [it] 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

Typically, two situations are presented: (1) when an unrepresented party is seeking a continuance to obtain counsel or other representative; and (2) when the counsel or representative of a party 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. 1939), cert. denied 306 U.S. 643 (1939). In striking that balance in particular situations, several relevant considerations have been identified:

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

2) 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").

3) 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.***, above, (after receiving one continuance to obtain counsel, the respondent "elected to do nothing except seek 'another eleventh hour postponement'").

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

1) Reason for unavailability. ***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).

2) When the conflicting commitment was made. ***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—to bargain on behalf of another client—was made "long after the notice of hearing" and "indeed only shortly before the scheduled [trial] date").

3) 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).

4) 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).

5) Whether it is the first request 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).

6) 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***, above (not unreasonable to deny when the corporate counsel, who had some familiarity with the circumstances leading to the discharge of the alleged discriminatees, was available to try case); ***Franks Flower Express***, above (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).

§ 6–310 Length of Continuance to Obtain Counsel or Substitute Counsel

In the following cases, the Board found that the time granted to obtain counsel or substitute counsel was reasonable in length: ***Peter Vitalie Co.***, above (40 days to secure counsel); ***Franks Flower Express***, above, 219 NLRB at 149 (1975) (5 days to secure substitute counsel); ***Wittek Industries***, above (1 day for counsel to be available); and ***NLRB v. Glacier Packing Co.***, above (4 hours to secure substitute counsel from same firm after pretrial denials of requests for further continuances).

§ 6–320 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). See also ***Ethan Enterprises, Inc.***, 342 NLRB 129, 129 fn. 2 (2004), enfd. 154 Fed. Appx. 23 (9th Cir. 2005) (approving judge's decision to proceed with hearing after departure of respondent's attorney, following adverse ruling, where the attorney agreed to notify respondent that hearing was going to proceed in his absence). And see **§7–250**, "Absence of Respondent's Attorney," below.

§ 6–400 Motions for Continuance to Prepare a Defense

The Board has upheld the denial of a respondent's request for a continuance, after the General Counsel rests, 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:

1) Whether the complaint complies with Board's Rules, Section 102.15, which requires the complaint to contain a "clear and concise description of the acts which are claimed to constitute unfair labor practices, including where known, the appropriate dates and places of such acts and the names of respondent's agents or other representatives by whom committed."

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

3) Nature of arguments advanced in support of motion. See ***Paint America Services, Inc.,*** 353 NLRB 973 (2009) (rejecting pro se respondent's arguments in support of request for further continuance); and ***East Bronx Health Center***, above ("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").

§ 6–500 Motions for Continuance Because of Unavailable Witness

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:

1) Existence of prior notice of likely involvement of witness, particularly when the witness is named in the complaint. ***Asher Candy, Inc.***, 353 NLRB 959 (2009); ***Quebecor Group, Inc.***, 258 NLRB 961, 961 fn. 1 (1981); and ***Don't Stop***, 298 NLRB 961, 962 (1990).

2) 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. See also ***Paint America Services, Inc.***, above (affirming judge's denial of pro se respondent's request for further continuance).

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

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

5) 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***, above ("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").

6) 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 (2d Cir. 1985).

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

8) 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, 1146 (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

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.

§ 7–110 Respondent Not Represented by Counsel

There is no constitutional or statutory right for the respondent to have an attorney appointed to represent it at government expense. ***Betra Mfg. Co.***, 233 NLRB 1126, 1126 fn. 2 (1977), enfd. mem. 624 F.2d 192 (9th Cir. 1980), cert. denied 450 U.S. 996 (1981). Further, 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), enfd. 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. ****Paint America Services, Inc.***, 353 NLRB 973 (2009); and ***American Cleaning Co.***, 291 NLRB 399, 399 fn. 1 (1988). As long as the judge remains impartial, he or she may go somewhat beyond according fundamental fairness and due process by answering procedural questions or explaining basic rights. See ***Dickens, Inc.***, 355 NLRB No. 44, slip op. at 3 (2010) (judge instructed unrepresented respondent regarding which areas of testimony would be relevant); ***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).

§ 7–120 Representations That Present Possible Conflicts

Courts clearly have the authority, derived from their "inherent power to preserve the integrity of the adversary process," to disqualify counsel due to a conflict of interest under the canons of ethics. See ***Hempstead Video, Inc. v. Village of Valley Stream***, 409 F.3d 127, 132–133 (2d Cir. 2005). See also ***Paul E. Iacono Structural Engineer, Inc. v. Humphrey***, 722 F.2d 435 (9th Cir. 1983).

For a discussion of whether the Board's judges have or should exercise similar authority to disqualify a party's attorney due to a conflict of interest under the canons of ethics, see ***Mack Trucks***, 277 NLRB 711 fn. 1 and 715–723 (1985). See also **§7–130**, "Attorney as Witness," below.

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

With respect to alleged conflicts involving counsel for the General Counsel, see ***AM Property Holding Corp.***, 350 NLRB 998, 1008 (2007) (counsel for the General Counsel, whose prior law firm had represented the charging party, had no conflict under applicable Federal statutes and regulations because she had not served as an attorney for the law firm in the last year).

§ 7–130 Attorney as Witness

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

§ 7–140 Representation at Postelection Proceedings

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 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

§ 7–250 Absence of Respondent's Attorney

When the respondent has filed an answer, but its lawyer or representative fails to appear at the trial, the judge should hear the General Counsel's evidence and issue a decision. ***Beta Steel Corp.***, 326 NLRB 1267, 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 (3d Cir. 1990).

Of course, if the answer previously filed by respondent is found insufficient, a default or summary judgment may be appropriate. See ***Asher Candy, Inc.***, 353 NLRB 959 (2009).

§ 7–300 Rights of Charging Parties and Discriminatees

Charging Parties. 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), enfd. 681 F.2d 557 (8th Cir. 1982). See **§13–803**, below.

Although the charging party may participate in the trial, it cannot amend the complaint. See ***GTE Automatic Electric***, 196 NLRB 902, 903 (1972) (judge erred by granting the charging party's motion to allege an additional discriminatee). See also ***Winn-Dixie Stores***, 224 NLRB 1418, 1420 (1976), enfd. in part 567 F.2d 1343 (5th Cir. 1978) (judge lacks authority to amend the complaint unless "sought or consented to by the General Counsel" or "evidence has been received . . . without objection"); and ***GPS Terminal Services***, 333 NLRB 968, 968–970 (2001) (judge erred by amending complaint consistent with respondent's request).

The General Counsel also 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 484 (1999); and ***Local 282 Teamsters***, 335 NLRB 1253, 1254 (2001).

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). However, the remedies must be consistent with 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 1181 (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.

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

(Board reversed judge who dismissed an 8(a)(3) violation because the employee abstained from appearing at the trial).

See also **§10–400**, below, regarding exclusion of charging parties and discriminatees from portions of the hearing pursuant to a sequestration order.

§ 7–400 Intervention at Trial

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." See also FRCP 24. 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).

For a good discussion of relevant factors to consider, see ***Camay Drilling Co.***, 239 NLRB 997, 998–998 (1978). In that case, the Board 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 (9th Cir. 1976), cert. denied, 434 U.S. 854 (1977), 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.

For a case where the judge and Board denied a motion to intervene, but granted the right to file an amicus brief, see ***Hotel Del Coronado***, 345 NLRB 306, 306 fn. 1, 308 fn. 1 (2005) (attorney for National Right to Work Legal Defense Foundation, who represented an employee of respondent opposed to unionization, sought to intervene in 8(a)(5) case to urge that a neutrality agreement entered into between respondent's predecessor and the union was improper).

§ 7–410 Necessary Parties

For a discussion of the application of FRCP 19 (required joinder of parties) to Board proceedings, see ***Expert Electric, Inc.***, 347 NLRB 18, 19 (2006) (holding that, even assuming FRCP 19 applies to Board proceedings, which is questionable, individual members of a multi-employer association were not necessary and indispensible parties to the 8(a)(5) refusal-to-bargain case against the association itself because the Board could accord full relief to the parties without the joinder of each individual member).

§ 7–420 Parties in Interest

A "party in interest" named in the complaint has the same rights as other named parties, under Section 102.38 of the Board's Rules, to notice and an opportunity to be heard, including presenting evidence and examining witnesses. See, e.g., ***Midwestern Personnel Services, Inc.***, 331 NLRB 348, 349 (2000); and ***U.S. Steel Corp.***, 280 NLRB 837 (1986). Thus, its position must also be considered in approving a settlement agreement, but only to the extent of its interest. See ***Haven Manor Health Related Facility***, 243 NLRB 39 (1979) (where union was party in interest only to 8(a)(2) allegations, its joining or becoming a party to settlement of 8(a)(1) and (3) allegations was unnecessary).

§ 7–500 Misconduct by Attorney or Representative

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

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

§ 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) (court reversed the Board's affirmance of a judge's decision to exclude counsel, criticizing both the judge and the Board for not providing detailed and specific references to the attorney's conduct that allegedly warranted exclusion). See also ***Operating Engineers District 1 (Crest Tankers)***, 274 NLRB 1481, 1482 (1985) (Board reversed judge who had 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).

Procedures before and after exclusion. If the judge decides to exercise the exclusion option, it is essential that he or she provide the offending party with several warnings, specifying the conduct that the judge considers inappropriate. The judge should also make a clear statement on the record that he or she will exclude the party if the conduct continues.

Further, 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).

For a good example of how to proceed both before and after excluding a respondent's representative from participating in the trial, see the judge's decision in ***USA Remediation Services, Inc.***, 5–CA–31524, JD–20–06 2006, WL 691192 (March 15, 2006) (slip op. at 15–20),

adopted by the Board in the absence of exceptions in a May 16, 2006 order. See also the subsequent, related disciplinary proceeding, ***In re David M. Kelsey***, 349 NLRB 327 (2007) (issuing default judgment imposing 6-month suspension for the same conduct).

Conduct warranting exclusion. For cases where the judge has excluded the charging party's representative, see ***Advance Waste Systems***, 306 NLRB 1020, 1032–1033 (1992) (representative excluded over the objection of the General Counsel and with assistance of Federal Protective Service); and ***State Bank of India***, 283 NLRB 266, 277–278 (1987). It is not clear whether an adjournment was requested or granted in either of these cases to permit the charging party to obtain a new representative. However, if an attorney for the charging party is excluded and the charging party requests an adjournment of the trial to obtain new counsel to appeal the exclusion ruling, the request should probably be granted. ***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 affirmed the judge's ruling that an attorney, who constantly interrupted witnesses, objected to questions the judge had previously ruled proper, and argued after his evidentiary rulings, should be precluded from speaking or examining witnesses, but could remain in the room to assist co-counsel. The Board concluded that judge's ruling limiting the participation of the attorney was not improper.

§ 7–520 Authority to Admonish or Reprimand Counsel

Boards Rules, Section 102.177(b), also authorizes judges and the Board to "admonish or reprimand, after due notice, any person who engages in misconduct at a [trial]." A "formal admonition or reprimand declares conduct improper and cautions the offender that repetition of offense will result in more severe discipline." ***Sargent Karch***, 314 NLRB 482, 486 fn. 14 (1994). See also ***675 West End Owners Corp.,*** 345 NLRB 324, 325–326 fn. 11 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008). But see ***Mail Contractors of America***, 347 NLRB 1158 (2006), enf. denied on other grounds, 514 F.3d 27 (D.C. Cir. 2008) (holding that judge's issuance in his decision of a "notice of potential admonishment, reprimand, or summary exclusion" stating that counsel's hearing conduct was unprofessional and, if repeated, could result in an admonishment, reprimand, or exclusion, was itself an admonishment or reprimand under Sec. 102.177).

The exclusion and formal-admonition remedies are not mutually exclusive and, in fact, in most cases, exclusion will also be accompanied by a formal admonition. See ***Advance Waste Systems***, 306 NLRB 1020, 1032–1033 (1992), and ***State Bank of India***, above, 283 NLRB at 277–278 (1987).

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

As indicated above, Section 102.177(b) also authorizes the Board to issue an admonishment or reprimand after due notice. In light of this, some judges have simply recommended in the decision that the lawyer or representative be admonished or reprimanded by the Board. This procedure allowed the representative to address the issue on exceptions before such discipline was actually administered. However, the Board has not been receptive to this procedure. See ***675 West End Owners,*** above (holding that the judge should have either

exercised her authority under 102.177(b) to issue the warning and reprimand herself, or referred the matter to the General Counsel for investigation under 102.177(e) [discussed below]).

Conduct warranting reprimand. Some examples of conduct found to warrant a formal reprimand, admonishment, or warning include: interrupting counsel, witnesses, and the judge and failing to follow the judge's instructions, ***Advance Waste***, above; inappropriate or unprofessional comments about the judge, ***Maietta Contracting***, 265 NLRB 1279, 1279–1280 (1982), enfd. mem. 729 F.2d 1448 (3d Cir. 1984); profanity directed towards counsel and the judge 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 (2d 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). Other examples include talking loudly, interrupting while witnesses are testifying, interposing baseless objections and evading or disregarding a judge's rulings. ***675 West End Owners***, above, 345 NLRB at 325–326. See also ***Government Employees (IBPO),*** 327 NLRB 676 (1999); and ***Alan Short Center***, 267 NLRB 886, 886 fn.1 (1983).

Frivolous answers. Note that a separate rule, Section 102.21, specifically provides for disciplinary action against an attorney or representative for willfully filing an answer that is without good grounds to support it and is interposed for delay. This section has frequently been cited by the Board in cautioning and warning attorneys against engaging in misconduct. See, e.g., ***In re Konig***, 318 NLRB 337, 338 fn.7 (1995); ***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 "at any stage of any Agency proceeding, including but not limited to the trial," which is "of an aggravated character, shall be grounds for suspension and/or disbarment from practice before the Board." This section, which had previously been incorporated in Section 102.44, now also sets forth a detailed procedure for implementation.

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

The explanatory material published in the Federal Register indicated that the judge could recommend disciplinary action in his or her decision, which may then be referred by the Board to the investigating officer. 61 Fed, Reg, 65323, 65329, fn. 12 (Dec. 12, 1996). However, in subsequent cases, the Board has expressed a preference that the judge separately submit a recommendation for discipline directly to the investigating officer. See ***Earthgrains Co.***, 351 NLRB 733, 733 fn. 3 (2007); ***675 West End Owners Corp.***, 345 NLRB 324, 325–326 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008); and ***McAllister Towing & Transportation***, 341 NLRB

394, 398 fn.7 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). See also ***Smithfield Packing Company, Inc.***, 344 NLRB 1, 19 fn. 59 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006) (agreeing with judge's recommendation to refer perjury and subornation of perjury allegations to the General Counsel, but noting that the judge had the authority to do so as well).

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

Definition of "aggravated" misconduct. The Board's Rules do not define the term "aggravated" misconduct. But Section 102.177(a) of the Rules states that attorneys and representatives "shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by these standards in interpreting and applying the provisions of this section." See also the supplementary information accompanying the final rule published in the Federal Register, 61 Fed. Reg. 65323, 65327 (Dec. 12, 1996) (stating that the Board would be guided by standards, "including the ABA Model Rules of Professional Conduct, other ABA standards adopted in the future, applicable State Bar rules, and court decisions applying [the] rules").

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

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

However, the Board made clear in ***Sargent Karch*** that it did not mean to imply that suspension would never be appropriate in the absence of a prior formal admonition or reprimand. The Board cited ***Matter of an Attorney***, 307 NLRB 913, 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. See also ***David M. Kelsey***, 349 NLRB 327 (2007) (despite lack of prior discipline, Board issued default judgment and ordered 6-month suspension of respondent employer's nonattorney representative for his misconduct during the trial in ***USA Remediation Services, Inc.***, 5–CA–31524, JD–20–06, 2006 WL 691192 (March 15, 2006), adopted in the absence of exceptions May 16, 2006).

Common types of misconduct found to warrant suspension include interruptions, refusals to obey judge's instructions or rulings, delaying tactics, and derogatory, abusive, or profane comments to opposing counsel and the judge. See ***Uzi Einy***, 352 NLRB 1178 (2008) (6-month suspension imposed on nonattorney respondent representative); and ***David M. Kelsey***, above (same).

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

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

§ 7–540 Awarding Litigation Costs

The Board has also upheld the award of litigation costs against a party whose counsel has engaged in conduct deliberately designed to cause delay and thereby draw out the litigation. See ***Teamsters Local 122 (August A. Busch & Co. of Massachusetts)***, 334 NLRB 1190, 1193, and 1255 (2001). See also ***675 West End Owners Corp.***, 345 NLRB 324, 326, and 340 (2005).

CHAPTER 8. SUBPOENAS

§ 8–100 In General

§ 8–110 Application for Subpoena

Board's Rules, Section 102.31, requires a written application for issuance of a subpoena. See **§8–210**, below. 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).

§ 8–120 Service of Subpoena

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). See also ***Offshore Mariners United***, 338 NLRB 745 (2002) .

It is not required that a subpoena served by the last of these methods be left with a person specifically authorized to accept service of subpoenas. See ***Packaging Techniques, Inc.,*** 317 NLRB 1252, 1253 (1995); and ***Control Services***, 303 NLRB 481, 483 fn. 13 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992) (table) (leaving a copy of the subpoena with the receptionist at the respondent's principal place of business was effective service on the respondent's officer under Section 102.113(c), even if the respondent had not authorized the receptionist to accept such service).

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). It is not essential to provide a postal return-receipt card signed by the person subpoenaed to effectuate service. Id. at 469.

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). See also **§4–750**, "Subpoenas," above.

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

§ 8–130 Geographic Reach of Subpoena

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

§ 8–140 Fees and Mileage Required to be Paid

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

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

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

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

Note that a respondent's failure to pay the witness fee and mileage to employees who appear at the hearing as required by the subpoena may also constitute a violation of the Act. See ***Howard Mfg. Co.***, 231 NLRB 731, 732 (1977) (respondent did not tender fees either upon service or thereafter).

§ 8–150 Expert Witnesses, Required Fees and Mileage

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

§ 8–200 Revocation of Subpoenas

§ 8–210 Petition to Revoke "In Writing"

Board's Rules, Section 102.31(b), provides that petitions to revoke "shall" be filed within 5 days after service, "in writing." However, to avoid unnecessary delay, a party may be required to argue orally against a subpoena. ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995)

(denying respondent's request for the full 5 days allowed by Sec. 102.31 to file a written petition to revoke a subpoena served on the morning of the trial).

§ 8–220 "Within 5 Days" Requirement

As indicated above, any party served with a subpoena has 5 days from the date of receipt in which to petition for revocation of the subpoena. See Sec. 11 of the Act and Board's Rules, Section 102.31(b). In computing the time period, the date of service and intermediate Saturdays, Sundays, and holidays are not counted. Board's Rules, Section 102.111(a).

However, to avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 days. ***Packaging Techniques, Inc.***, above, 317 NLRB at 1253.

Note that the 5-day rule may not be strictly applied if the subpoenaed material is subject to a privilege. See ***M. J. Mechanical Services***, 324 NLRB 812, 832 (1997) ("reporter's privilege") and cases cited by the judge there. See also the following court cases holding that a party did not waive its right to challenge subpoena enforcement by failing to exhaust administrative remedies by timely filing a petition to revoke: ***NLRB v. Midland Daily News***, 151 F.3d 472, 474–475 (6th Cir. 1998) (a Board subpoena that "constituted a constitutional infringement of [the respondent newspaper's] right to exercise commercial free speech"); and ***EEOC v. Lutheran Social Services***, 186 F.3d 959, 960 (D.C. Cir. 1999) (an EEOC document protected by the attorney-client privilege), discussed at length in ***NLRB v. Coughlin,*** 176 LRRM 3197, 2005 WL 850964 (S. Dist. Ill. 2005) (not reported in F. Supp. 2d) (following ***EEOC***, above, with respect to documents privileged by attorney client and work product doctrines).

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

§ 8–230 Grounds for Revoking Subpoena

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) (setting forth general principles with respect to subpoena revocation and noting "useful guidance" provided by Federal Rules of Civil Procedure, although those rules are not binding on the Agency).

§ 8–300 Scope of Subpoenas

§ 8–310 Material Must Be "Reasonably Relevant"

Subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. 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 Request Must Not Be Vague or Overbroad

Although a subpoena should be specific in asking for relevant information, a judge may often resolve objections that a subpoena is vague or overbroad by asking that the request be narrowed or made more specific. With a little time and attention, such objections may be resolved by compromise.

If pressed, however, the judge must rule on such objections. In an unpublished order, the Board reversed a judge's decision to quash a subpoena of the General Counsel for being vague and overbroad because the language in the subpoena asked for information about union pressure regarding employees' refusal to work overtime in language borrowed from Board cases dealing with concerted refusals to volunteer for overtime in the healthcare industry. ***SEIU United Healthcare Workers—West***, 20–CG–65 (October 24, 2006).

§ 8–330 Burdensomeness of Production

The party asserting burdensomeness must meet a high standard or burden of proof. A subpoena is not "unduly burdensome" simply because it requires the production of a large number of documents. To satisfy the burden, the party must show that production of the subpoenaed information "would seriously disrupt its normal business operations." ***NLRB v. Carolina Food Processors, Inc.***, 81 F.3d 507, 513–514 (4th Cir. 1996), cited with approval in ***McAllister Towing & Transportation Co.***, 341 NLRB 394, 397 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005); and ***CNN America, Inc.***, 352 NLRB 675, 676 (2008).

In ***CNN America***, above, the Board indicated that, when analyzing a large scale request for information under a subpoena, the judge must balance the relevancy and need for the information against the potential cost and burdensomeness of its production in the form requested. The Board in that case also endorsed application of the Federal Rules of Civil Procedure to aid in resolving such questions. 352 NLRB at 676. See also **§8–340**, below.

§ 8–340 Electronically Stored Information (Computer Records)

In ***CNN America***, discussed above, the Board found that the respondent made a "plausible argument" that production of certain types of information in electronic form could be disruptive of its business operations. Noting the "complex issues" involved with such electronic records, the Board directed the appointment of a special master to assist in resolving the matter. The Board directed that the special master (another administrative law judge) apply the balancing tests described in FRCP 26(b)(2)(C) and *The Sedona Principles*. Principle 3 of *Sedona* requires the assessment of the "realistic costs of preserving, retrieving, reviewing, and producing electronically stored information." *Sedona* also provides guidance in assessing the

burdensomeness of production of computer information in different formats (i.e. metadata) and from different sources (i.e. disaster recovery backup tapes).

In ***CNN America, Inc.***, 353 NLRB 891 (2009), the Board adopted the special master's analysis in the following two respects. Using the criteria contained in *Sedona* and FRCP 26(b)(2)(C), the special master concluded that a narrowly tailored demand for electronic discovery should be produced with accompanying metadata since such production "in a highly functional format . . . will increase the utility of this material." 353 NLRB at 902. By contrast, the master noted that the requesting party had failed to demonstrate the necessity for production of material from disaster recovery tapes. 353 NLRB at 902 fn. 21.

§ 8–350 Request for Bargaining Information

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

Respondent subpoenas that broadly requested union records relating to pending negotiations, including communications between the union and its members, have been revoked in order to protect the bargaining process. See judge's decision in ***Berbiglia, Inc.***, 233 NLRB 1476, 1495 (1977). See also ***Champ Corp.***, 291 NLRB 803, 817 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991) (judge cited ***Berbiglia***, as well as the subpoena's overbreadth and facial deficiency, as grounds for revoking respondent's subpoena seeking all union notes or other records describing or recording collective bargaining sessions).

This rationale would seem also to apply to employer notes relating to bargaining strategy. See ***Boise Cascade***, 279 NLRB 422, 432 (1986) (Board found no violation where employer refused to provide union requested information regarding historical overview of its negotiations and strategy, and adopted judge's reasoning that "[a] proper bargaining relationship between the parties mandates that Respondent be able to confidentially evaluate possible interpretations of the existing labor agreement and that it be able to plan in confidence a strategy for altering or changing [the terms and conditions]").

§ 8–360 Preserving Related Material

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

§ 8–400 Privileged Material

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

The party asserting a privilege bears the burden of proving that it is applicable. ***CNN America, Inc.***, 352 NLRB 448, 448–449 (2008). As part of this burden, the party must provide a privilege index log specifically identifying the documents it believes are covered by the privilege. The index must include "(1) a description of the document, including its subject matter and the

purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipient(s) of the document." See ***CNN America, Inc.***, above, 353 NLRB at 899 (quoting from the Board's unpublished order in ***Tri-Tech Services***, 15–CA–16707, dated July 17, 2003). See also ***U.S. v. Construction Products Research, Inc.***, 73 F.3d 464, 473 (2d Cir. 1996), cert. denied 519 U.S. 927 (1996). Once the index log is prepared and received, the judge may then, if necessary, review the documents in camera to decide whether the documents fall within the privilege.

§ 8–410 In Camera Inspections

In camera inspections conducted by administrative law judges have been specifically authorized by the Board. ***CNN America, Inc.***, 352 NLRB 448, 449 (2008); ***Kaiser Aluminum & Chemical Corp.***, 339 NLRB 829 (2003); and ***Brink's, Inc.***, 281 NLRB 468, 470 (1986). But see, to the contrary, ***NLRB v. Detroit Newspapers Agency***, 185 F.3d 602, 605 (6th Cir. 1999).

If a party seeks in camera inspection of material that is claimed to be privileged, the judge should require that party to articulate specific grounds for the inspection. If the moving party shows an adequate factual basis to support a good-faith belief that such inspection may reveal evidence that is not protected by the privilege, an in camera inspection should be conducted and privileged information should be redacted from whatever material is turned over. See ***U.S. v. Zolin***, 491 U.S. 554, 571 (1989).

In camera inspections may also be used in other contexts. For example, where a party sought copies of minutes of union meetings, the Board noted that Section 7 gives employees the right to keep attendance at union meetings confidential. ***Guess, Inc.***, 339 NLRB 432, 434 (2003). Thus, if such material is found relevant, the judge should view it in camera and redact any portions identifying individuals other than the alleged discriminatee. ***R.K. Mechanical***, 27–CA–18863 (unpublished Board order, June 23, 2008, fn. 2). See also **§13–810, "**In Camera Inspection on Relatedness Issue**,"** below, with respect to Jencks statements.

§ 8–415 Protective Orders

It is clear that Board judges have the authority to issue protective orders in appropriate circumstances. ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010, 1011 (2005). Thus, 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

A party seeking a protective order in connection with subpoenaed documents bears the burden of establishing "good cause" for such an order. See FRCP Rule 26 (c). This requires a specific factual showing, as distinguished from mere conclusory statements, that disclosure will result in a clearly defined and serious injury. Further, even if such a showing is made (and, indeed, even if the parties stipulate to issuance of an order), the judge should balance this injury against other factors that may warrant denying or limiting the scope or duration of a protective order, including the public's right to obtain information concerning judicial proceedings. See ***Pansy v. Borough of Stroudsburg***, 23 F.3d 772, 786-789 (3rd Cir. 1994); and ***8A Fed. Prac. & Proc. Civ.*** § 2035 (3d Ed. 2010).

The judge has considerable discretion in deciding whether "good cause" exists to issue a protective order. However, it is not unlimited. For example, in ***Richmond Times Dispatch***, 5-CA-29157 et al, the judge granted a protective order relating to subpoenaed documents, including

timesheets that showed hours worked or wages paid to employees. The General Counsel requested special permission to appeal, and the Board in an unpublished order issued on August 1, 2002, reversed the judge, noting that the material consisted of "routine employment-related information," and that Respondent had "failed to demonstrate good cause warranting a protective order under FRCP 26 (c)." The Board majority did not pass at that time on whether the judge properly protected certain other information, including disciplinary records and electronic mail documents; however, the Board majority later denied the GC's appeal with respect to this information, noting that there had been no showing of prejudice from entry of the protective order. ***Richmond Times Dispatch***, 346 NLRB 74, 74 fn. 1 (2005). The judge should also be careful not to unduly restrict the rights of other parties and discriminatees to participate in the proceeding. See ***Waterbed World***, 289 NLRB 808, 809 (1988).

If it is determined that such an order is appropriate, the judge may ask the party seeking the order to submit a proposed protective order. The judge can then tailor the order to meet the legitimate needs of the moving party and the possible objections of other parties. Protective orders generally limit the persons who are to have access to the information and the use to which these persons may put the information.

If the protective order forbids disclosure of evidence to the general public or other nonparties or participants in the proceeding, it is essential that the judge place the evidence under seal. The failure to do so may undermine subsequent attempts to enforce the order. See ***United Parcel Service,*** 304 NLRB 693, 694 (1991). It is also advisable to include the protective order in any recommended order issued by the judge. ***National Football League***, 309 NLRB 78, 79 (1992); and ***Carthage Heating & Sheet Metal***, 273 NLRB 120, 123 (1984).

The following are examples of protective orders issued in Board cases:

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

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

3) ***United Parcel Service***, 304 NLRB 693, 693–694 (1991): The judge ruled that certain subpoenaed documents should be produced, over respondent's objection, but directed that "their use shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing." Two of the documents were later admitted into evidence. The issue in the case was whether the protective order was violated by use of the documents in another proceeding. The Board held that, because the judge did not order that the documents received in evidence be sealed and the respondent's attorney did not request a seal, their use in another case, after the close of the hearing, by the charging party's attorney was not improper. The Board noted that the judge "failed . . . to continue adequately the protection afforded by his extant order."

In ***United Parcel***, the Board also noted that violation of a protective order may be enforced by processing a charge of misconduct under Section 102.177 of the Board's Rules and Regulations. See **§7–500** et seq., above.

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 permitting this (even if there is no objection), the judge 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.

§ 8–420 Attorney-Client Privilege

The attorney-client privilege protects from disclosure communications from a client to an attorney and responsive communications from the attorney to the client. The privilege applies only if (1) the holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his or her client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. See ***U.S. v. United Shoe Machinery Corp.***, 89 F. Supp. 357, 358–359 (D. Mass. 1950). See also ***In re Vioxx Products Liability Litigation***, 501 F. Supp. 2d 789 (E.D. La. 2007).

In ruling on attorney-client privilege, the Board generally tracks the Supreme Court's decision in ***Upjohn Corp. v. U.S.***, 449 U.S. 383, 389–390 (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).

The privilege applies only to communications and not to facts. A witness may not refuse to disclose facts within his own knowledge simply because he incorporates those facts into a communication with his attorney. ***Sunland Construction Co.***, 311 NLRB 685, 699–700 (1993), quoting from ***Upjohn***, above, 449 U.S. at 396–397. See also ***B.P. Exploration, Inc.***, 337 NLRB 887, 889 (2002) (reports prepared at attorney's behest in preparation for litigation were privileged attorney-client communications and "it was the reports—not the factual information contained in them—that the Union sought."). Cf. ***Borgess Medical Center***, 342 NLRB 1105, 1106 fn. 5 (2004) (since incident reports sought by union in connection with arbitration proceeding were not prepared by or with participation of attorney, the privilege does not apply).

One recurring type of privilege issue concerns the proper characterization of communications involving in-house counsel in circumstances where it is shown that this official performs both legal and regular business functions. As one court has explained:

> It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel

participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.

In re Vioxx Products Liability Litigation, 501 F. Supp. 2d 789, 797 (E.D. La. 2007). The Board addressed the problem in ****CNN America, Inc.***, 352 NLRB 448, 448–449 (2008), affirming the judge's order for an in camera inspection of such communications to resolve claims of privilege. As the Board stated, an employer's mere assertion that information was "sent or received by . . . in house counsel is insufficient to meet its burden."

For an in-depth analysis of attorney-client and work-product issues, see ***Epstein, The Attorney-Client Privilege and the Work-Product Doctrine***, Fourth Edition, ABA Section of Litigation (2001).

§ 8–425 Business Records/Legal Advice in Collective Bargaining

Ordinary corporate records such as payroll or personnel records, cannot be swept within the privilege simply by being transmitted from the client to the attorney. Nevertheless, when legal advice relates to collective bargaining, the Board will not readily and broadly compel disclosure of confidential communications between attorney and client simply because the communications are intermixed with business and economic considerations. The notes of exchanges in a bargaining session with other parties are not protected, however, unless they are intermingled with privileged communications. See ****CNN America, Inc.***, above, 352 NLRB at 449; and ***Patrick Cudahy***, above, 288 NLRB at 971 fn. 13. See also ***Taylor Lumber & Treating, Inc.***, 326 NLRB 1298, 1298 fn. 2 (1998).

§ 8–430 Waiver of Attorney-Client Privilege

The attorney-client privilege may be waived, either deliberately or by inadvertence or failing to safeguard the material. Thus, in ***Farm Fresh, Inc.***, 301 NLRB 907, 917 (1991), the Board held that the privilege did not apply when a document, arguably subject to the privilege, was stolen and given to the union, as the respondent was required to safeguard the document. However, with respect to information disclosed in a Federal proceeding or to a Federal officer or agency, FRE 502 (enacted in September 2008), provides that an "inadvertent" disclosure will not operate as a waiver of the privilege if "reasonable steps" were taken to prevent disclosure and to rectify the error. As indicated in the Advisory Committee Notes, a number of factors may be considered in applying this rule, including the number of documents to be reviewed and the time constraints for production.

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 legal advice. ***U.S. v. Evans***, 113 F.3d 1457, 1462–1467 (7th Cir. 1997).

The privilege may also be waived by providing the documents in other proceedings. ***Wal-Mart Stores, Inc.***, 348 NLRB 833, 834 (2006). But see ***Taylor Lumber & Treating, Inc.***, above, 326 NLRB at 1300 (no waiver where attorney gave affidavit during the regional office's investigation, and the affidavit did not contain facts about privileged communications).

Once waived, the attorney-client privilege is lost in all forums for proceedings running concurrent with or after the waiver occurs. ***Wal-Mart Stores, Inc.***, above, 348 NLRB at 834, citing cases. In ***Wal-Mart***, the Board ruled that the respondent's production of subpoenaed documents in a state court proceeding constituted a waiver in the Board proceeding, even though the waiver came months after the judge's ruling in the NLRB case that the documents were privileged. The

judge's ruling was not final because the matter was pending before the Board on exceptions when the waiver took place.

See also the discussion of these issues in **§13–260** to **§13–263**, below.

§ 8–435 Crime/Fraud Exception to Attorney-Client Privilege

Attorney-client communications in furtherance of crimes or frauds are not protected by the attorney-client privilege. A sufficient showing of the applicability of the crime/fraud exception is made by evidence that, if believed, would prima facie establish the elements of an ongoing or future crime or fraud. See, e.g., ***Smithfield Packing Co.***, 344 NLRB 1, 13–14 fn. 60 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006) (testimony with respect to communications between respondent's former manager and respondent's attorney regarding the preparation of manager's affidavit, specifically as to whether manager gave a false affidavit to the respondent's attorney and whether the attorney knew it was false, came within crime fraud exception).

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

§ 8–440 Duration of Attorney-Client Privilege

In ***Swidler & Berlin v. U.S.***, 524 U.S. 399 (1998), the Supreme Court held that the attorney-client privilege survives the death of the client.

§ 8–445 Work Product Privilege

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

A document is covered by the privilege if it was prepared or obtained because of the prospect of litigation, rather than in the ordinary course of business, i.e. it would not have been prepared but for the "fairly foreseeable" prospect of litigation. See cases cited in ***Central Telephone Company of Texas***, 343 NLRB 987, 988 (2004) (finding that the privilege applied, and that the union was not entitled to copies of notes taken by respondent's human resources specialist while investigating alleged misconduct that later became the subject of a grievance, as the investigation was directed by in-house counsel, respondent did not ordinarily conduct such an extensive investigation, and its fear of litigation was "objectively reasonable" even though no litigation had been initiated and the employees had not yet been disciplined when the notes were prepared).

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

(respondent failed to show substantial need for copy of position statement submitted by charging party to General Counsel in support of its charge during the investigation).

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

For a case addressing waiver of the work product privilege, see ***Ralphs Grocery Co.***, 352 NLRB 128, 129 (2008) (finding no waiver by respondent employer). With respect to position statements, compare ***Kaiser Aluminum***, above (charging party does not waive privilege by giving position statement to General Counsel); with ***Evergreen America Corp.***, 348 NLRB 178, 187 (2006) (contrary rule applies where respondent submits position statement to General Counsel). See also FRE 502 (addressing waiver of the attorney-client and work-product privileges in connection with both intentional and inadvertent disclosures in Federal proceedings or to a Federal office or agency).

§ 8–450 Reporter's Privilege

In ***CNN America, Inc.***, 352 NLRB 675, 676–677 (2008), the Board did not specifically decide whether a reporter's privilege applies in Board proceedings. However, assuming for sake of argument that it did, the Board endorsed a balancing test to determine whether the subpoenaed information must be provided. Relevant factors to consider are: whether the information is not obtainable from alternative sources; whether it is crucial to establish the claim; and whether the need for the information outweighs the interest in protecting the substance of the reporter's newsgathering. Applying these factors, the Board found that the balance tipped in favor of disclosure to the General Counsel, noting the absence of any claim by CNN that the information sought was obtained from a confidential source or would likely lead to discovery of confidential information or sources.

§ 8–455 Testimony by Board Agents and Privileged Files

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

The same section also requires similar consent to obtain testimony by an Agency employee or agent. See also ***Laidlaw Transit, Inc.***, 327 NLRB 315, 316 (1998) (to avoid the appearance of partiality, the Board has a strong and longstanding policy against Board agents and employees appearing as witnesses in a legal proceeding). See also **§13–603**, "Board Agents," below.

§ 8–460 Mediator Not Subject to Subpoena

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

§ 8–465 State Confidentiality Rules Not Controlling

Evidence that is otherwise admissible is not rendered inadmissible in Board proceedings because it is privileged under State law. See ***R. Sabee Co.***, 351 NLRB 1350, 1350 fn. 3 (2007) (judge properly accepted into evidence statements made during state court injunction proceeding and related court-ordered mediation of state law claims, despite claim of privilege under Wisconsin law); and ***North Carolina License Plate Agency # 18***, 346 NLRB 293, 294 fn. 5 (2006), enfd. 243 Fed. Appx. 771 (4th Cir. 2007) (evidence from a state unemployment commission, which was privileged under state law, was nevertheless admissible in Board proceeding). See also ***Trinidad Logistics Co.***, 7–CA–44621 et. al., ALJ order dated June 4, 2002, 2002 WL 1466281 (California confidentiality provision precluding production of criminal convictions does not outweigh need of respondent to obtain such information by subpoena to use in impeaching an alleged discriminatee in Board proceeding).

§ 8–470 Union Authorization Cards Not Producible by Subpoena

A respondent may not obtain copies of union authorization cards by subpoena. The identity of card signers is deemed confidential and disclosure would have a chilling effect on union activity. See ***Wright Electric, Inc. v. NLRB***, 200 F. 3d. 1162, 1167 (8th Cir. 2000), citing with approval ***National Telephone Directory Corp.***, 319 NLRB 420, 421–422 (1995). See also **§13–702**, "Names of Employees Who Supported Union Not Obtainable," below.

§ 8–500 Jencks Statements Not Producible by Subpoena

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

Such statements or affidavits are producible only after the witness has testified for use on cross-examination of the witness. See Board's Rules Section 102.118(b)(c) and (d). For the origin of the rule, see ***Jencks v. U.S.***, 353 U.S. 657, 662 (1957). See also **§13–800** et seq., "Release of Witness Statements," below.

§ 8–510 Tape/Video Recordings

Tape recordings and transcripts of conversations between a supervisor and employee are not Jencks statements and need not be produced under Section 102.118(d). ***Leisure Knoll Assn.***, 327 NLRB 470, 470 fn. 1 (1999). Similarly, contemporaneous remarks captured on an audio or video tape, taken, for example, when applicants apply for work in an employer's office, are not a Jencks "statement" because they are "not a description of a past event" but part of the substantive event itself. ***Delta Mechanical, Inc.***, 323 NLRB 76, 77 (1997).

However, such recordings may be subpoenaed. ***Delta Mechanical***, above. See also **§13–218**, "Tape Recording Obtained by Subpoena," below. If the recording is in the sole possession of

the General Counsel, a written request must be made pursuant to Section 102.118(a). See ***Gallup, Inc.***, 349 NLRB 1213, 1218 (2007), discussed more fully in the next section below.

§ 8–520 Permission of the General Counsel

One issue that has arisen following ***Leisure Knoll*** and ***Delta Mechanical***, above, is whether a subpoena served on a witness to produce any audio or video tape recordings pertaining to the case, will reach the tapes if the witness had previously turned the tapes over to the Regional Office. In ***Gallup, Inc.***, above, the judge ruled that it did, and therefore struck the witness' testimony under ***Bannon Mills*** (see **§8–620**, "Failure to Produce Documents," below) when the General Counsel refused to turn the tapes over to the respondent pursuant to either the subpoena or the Jenks rule (as the recordings were not "statements" under that rule). On special appeal, however, the Board reversed, and held that the respondent must first request the General Counsel's consent to produce under Section 102.118(a).

A second question is whether the trial must be delayed while the respondent 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, and/or serves a new subpoena on the Regional Director or the Government's trial attorney. This will probably depend on the specific circumstances of each case. The judge should utilize his or her discretion.

§ 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 a party for whom the witness would normally be expected to give favorable testimony may appropriately give rise to an inference that the witness' testimony would be unfavorable to that party (i.e. would favor the adverse party). ***Carpenters Local 405***, 328 NLRB 788, 788 fn. 2 (1999). See also **§13–235**, "Adverse Inferences," below.

§ 8–620 Failure to Produce Documents

Several options are available to a judge where a party refuses to comply with a subpoena and the General Counsel has chosen not to initiate court enforcement proceedings to avoid undue delay in the hearing or for some other reason (see **§8–700**, below, "Enforcement of Subpoenas on Behalf of Private Party"). ***McAllister Towing & Transportation***, 341 NLRB 394, 396–397 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). The appropriate option, if any, is within the discretion of the judge, who may choose any or all of them, depending on the circumstances. Ibid. The judge may:

1) Draw an adverse inference. See ***ADF, Inc.***, 355 NLRB No. 14, slip op. at 6 (2010), reaffirmed and incorporated by reference 355 NLRB No. 62 (2010); ****Paint America Services, Inc.***, 353 NLRB 973, 989 (2009); ****Essex Valley Visiting Nurses Assoc.***, 352 NLRB 427, 440–443 (2008); and ***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***, 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833–834 (D.C. Cir. 1998); and ***Packaging Techniques, Inc.***, 317 NLRB 1252, 1253 (1995); and

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).

A good discussion of the use of such sanctions is found in ***McAllister Towing & Transportation***, above. In that case, the Board approved the judge's imposition of limited sanctions for the failure of a party to comply and delay in complying with a valid subpoena. The Board noted that "[a] subpoena is not an invitation to comply at a mutually convenient time," and that a party has an obligation "to begin a good faith effort to gather responsive documents" upon service of the subpoenas. 341 NLRB at 397. The Board therefore affirmed the judge's approval of the use of secondary evidence by the party seeking production, her refusal to permit the noncomplying party from rebutting such evidence or cross-examining witnesses about it, and her drawing of adverse inferences against the noncomplying party.

As indicated in ***McAllister Towing***, the courts have generally upheld the Board's authority to impose sanctions as an alternative to seeking court enforcement, based on the Board's "inherent interest in maintaining the integrity of the hearing process." But see ***NLRB v. Int'l Medication Systems***, 640 F.2d 1110 (9th Cir. 1981), denying enf. of 244 NLRB 861 (1979).

The adverse inference rule is not mandatory. See ***National Specialties Installations, Inc.***, 344 NLRB 191 (2005). Generally, it would be improper to draw an adverse inference if a satisfactory explanation is provided for the failure to produce the documents. See ***Hansen Bros. Enterprises***, 313 NLRB 599, 608 (1993) (discriminatee credibly testified that old tax returns did not exist); ***Champ Corp.***, 291 NLRB 803 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991) (union presented credible testimony concerning its good faith but unsuccessful search for subpoenaed notes and other evidence supported reasonable inference that notes could have been inadvertently destroyed or misplaced). The judge may, in his or her discretion, also decline to make an adverse inference under the particular circumstances presented. See ***CPS Chemical Co.***, 324 NLRB 1018, 1019 (1997), enfd. 160 F.3d 150 (3d Cir. 1998) (no prejudice suffered by non-production). See also **§13–235**, "Adverse Inferences," below.

Noncompliance with a subpoena does not warrant the dismissal of a complaint. In ***Teamsters Local 917 (Peerless Importers)***, 345 NLRB 1010 (2005), the Board reversed a judge who had dismissed the General Counsel's complaint because the charging party failed fully to comply with the respondent's subpoena, finding that the judge had abused his discretion. Citing ***McAllister Towing***, above, the Board noted that there were other less drastic sanctions available to the judge and observed that dismissing a complaint because of subpoena noncompliance would have been unprecedented. 345 NLRB at 1011.

§ 8–630 Interference with Subpoena Compliance

It is a violation of the Act to state or imply that compliance with a subpoena is optional. ***Bobs Motors, Inc.***, 241 NLRB 1236, 1236 (1979). Attempting to dissuade an employee from speaking to a Board agent or appearing at a Board trial also violates the Act. ***Alterman Transport Lines, Inc.***, 127 NLRB 803, 804 (1960); ***Certain-Teed Products Corp.***, 147 NLRB 1517, 1520 (1964); and ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46, 54 (1998). See also ***U.S. Precision Lens***, 288 NLRB 505, 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 firmly warning against it.

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

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

Section 102.31(d) of the Board's Rules provides that upon a party's failure to comply with a subpoena issued on request of a private party, the General Counsel "shall" institute (but 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."

The Board, however, has made clear that the General Counsel is not required to institute enforcement proceedings sua sponte, but only on request of the party on whose behalf the subpoena was issued. See ***Best Western City View Motor Inn***, 325 NLRB 1186, 1186 (1998). Nor is the General Counsel required to initiate enforcement proceedings where the subpoena is incapable of being enforced. See ***Champ Corp.***, 291 NLRB 803 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991) (subpoena was incapable of being enforced as documents were unavailable).

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

CHAPTER 9. SETTLEMENTS

§ 9–100 In General

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

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

§ 9–200 Promoting Settlement

§ 9–220 At Pretrial Conference

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

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

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

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

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

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

§ 9–230 At the Trial

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

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

§ 9–240 After the Trial

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

§ 9–300 Settlements Approved

§ 9–320 Settlements Before Record Opens and Testimony Taken

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

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

However, if the settlement is non-Board, i.e. the General Counsel is not a party to the settlement, it may properly be submitted to the judge for review and approval after the hearing has opened, even if no evidence has been introduced. See ***Flint Iceland Arenas***, 325 NLRB 318 (1998), where both the judge and the Board (on appeal) reviewed and applied the relevant factors

in considering a non-Board settlement opposed by General Counsel at the beginning of the hearing and before any evidence was introduced.

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

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

If the judge approves or rejects the settlement over the objection of a party, the aggrieved party may file a special appeal with the Board pursuant to section 102.26 of the Board's rules. See **§11-500,** "Interlocutory Appeals from Judges Rulings," below.

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

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

The parties may also avail themselves of the Board's voluntary Alternative Dispute Resolution (ADR) program, which applies to certain unfair labor practice cases pending before the Board on appeal. Typically an NLRB judge, not the judge who issued the underlying decision, will be appointed to mediate the matter. Details of the ADR program may be found in the Board's May 2009 press release announcing that the pilot program had been made permanent. See http://www.nlrb.gov/shared_files/Press%20Releases/2009/R-2684.pdf. For more information, the parties should consult the Executive Secretary's office.

§ 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. The General Counsel is not a party to a non-Board settlement, even though he may be involved in the settlement discussions and post-settlement compliance. Thus, a complaint may not be dismissed because of an alleged breach by the General Counsel of a non-Board settlement. See ***Dilling Mechanical Contractors,*** 348 NLRB 98, 103 (2006).

§ 9–420 Formal Settlements

The *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 *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. But see ***Pipefitters Local 290, UFCW***, 348 NLRB 998 (2006) (Board majority rejected proposed formal settlement because it did not contain provisions memorializing the parties' reported agreement that the General Counsel would only seek enforcement of the order if the respondent failed to comply with it).

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

§ 9–430 Informal and Non-Board Settlements

In 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 stated that it would not reject the parties' non-Board settlement "simply because it does not mirror a full remedy;" rather, it would

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

Applying these factors, the Board approved the settlement (which had been signed by three of the four alleged discriminatees) over the General Counsel's objection. See also ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614 (2007), where the Board applied the same factors to private termination agreements in which employees waived or released any subsequent claims, including the right to file charges with or obtain any relief from the Board arising out of

their prior employment. (A further discussion of such releases is found in **§9–640**, "Releases," below.)

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

For other case examples applying the above factors, compare ***American Pacific Pipe Co.***, 290 NLRB 623, 623–624 (1988) (approving non-Board settlement of a backpay claim over General Counsel's objection); ***Longshoremen ILA Local 1814 (Amstar Sugar)***, 301 NLRB 764, 764–765 (1991) (approving non-Board settlement over the opposition of the General Counsel after the judge issued his decision), with ***Flint Iceland Arenas***, 325 NLRB 318, 318–319 (1998), and ***Alamo Rent-A-Car, Inc.***, 338 NLRB 275 (2002) (rejecting non-Board settlements opposed by the General Counsel). See also ***Frontier Foundries, Inc.***, 312 NLRB 73 (1993) (rejecting non-Board settlement that provided only 6 percent backpay, even though it also provided for additional amounts as "liquidated damages," allegedly to avoid being taxed as income).

§ 9–440 Settlement by Consent Order

In very limited circumstances, the judge may also approve a settlement by "consent order"—that is, a unilateral settlement offered by the respondent and opposed by both the General Counsel and the charging party, but approved by the judge.

Although the Board has cited ***Independent Stave*** in evaluating such consent orders, the key factor appears to be whether the proffered unilateral settlement addresses and fully remedies all the unfair labor practices alleged in the complaint. Compare ***Iron Workers Local 27 (Morrison-Knudson)***, 313 NLRB 215, 217 (1993), enfd. mem. 70 F.3d 119 (9th Cir. 1995); ***Food Lion, Inc.***, 304 NLRB 602, 602 fn. 4 (1991); and ***Copper State Rubber***, 301 NLRB 138, 138 (1991) (rejecting proposed unilateral settlements), with ***National Telephone Services***, 301 NLRB 1, fn. 2 (1991); and ***Electrical Workers IUE Local 201 (General Electric Co.)***, 188 NLRB 855, 857 (1971) (accepting proposed unilateral settlements). See also the Board's unpublished order of August 29, 2008, in ***Spurlino Materials, LLC***, 25–CA–29866, where the Board cited and applied the ***Independent Stave*** factors in affirming a judge who had approved a consent order to which the General Counsel objected.

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

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

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

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

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

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

Right to Appeal. If the judge approves or rejects the settlement over the objection of a party, the aggrieved party should be advised of the right to file a special appeal with the Board pursuant to section 102.26 of the Board's rules. See Section 101.9(d)(2) of the Statements of Procedure. See also **§11–500**, "Interlocutory Appeals from Judges Rulings," below.

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

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

Formal Settlements. If the judge approves a formal settlement, as indicated in **§9–420**, "Formal Settlements," above, it should be approved in writing and left with the Regional Office so that the procedure in the *NLRB Casehandling Manual* (Part One) Settlements Section 10164.6 for obtaining approval of the Board can be implemented.

§ 9–550 Summary Judgment to Enforce Settlement

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

§ 9–600 Various Provisions of Settlement Agreements

§ 9–610 Nonadmission Clauses

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

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

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

§ 9–620 Settlement Bar Rule

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

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

§ 9–630 Joint and Several Liability

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

§ 9–640 Releases

Release and discharge of the respondent from all claims by an employee is permissible as part of a settlement, unless it prohibits filing future unfair labor practice charges that are unrelated to the past dispute or employment. See ***First National Supermarkets***, 302 NLRB 727, 727–728 (1991) (Board found release lawful, as it was limited to claims arising out of the past employment relationship). See also ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614, 615–616 (2007) (Board approved settlement agreement entered into prior to the filing of charges, providing for waiver and release of claim to file charges over terminations); and ***Septix Waste, Inc.***, 346 NLRB 494 (2006) (Board upheld settlement stipulation between union and employer that resolved all potential charges that were or could have been raised at the time of the stipulation).

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

§ 9–650 Taxability

Backpay is generally taxable as income in the year it is received. See ***Webco, Inc.***, 340 NLRB 1, 12, 16 (2003) (reversing judge's order in compliance proceeding requiring respondent to reimburse discriminatees for any higher federal and state income taxes they might incur as a result of a multi-year lump-sum award, as this remedy was not raised or addressed in the underlying unfair labor practice case); and ***Frontier Foundries, Inc***., 312 NLRB 73 (1993) (rejecting non-Board settlement that provided only 6% backpay, even though it also provided for additional amounts as "liquidated damages," allegedly to avoid being taxed as income). See also ***U.S. v. Burke***, 504 U.S. 229, 242 (1992) (Title VII case); and ***CIR v. Schleier***, 515 U.S. 323 (1995) (ADEA case). But see ***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).

§ 9–700 Deferral to Grievance/Arbitration Settlements

The Board applies the principles of ***Spielberg Mfg. Co.***, 112 NLRB 1080, 1082 (1955) and ***Olin Corp.***, 268 NLRB 573, 573–575 (1984) in deciding whether to defer to a settlement agreement reached between an employer and union pursuant to their contractual grievance/

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

In applying these standards, however, the Board may look to the ***Independent Stave*** factors in determining whether the settlement is "clearly repugnant" or "palpably wrong." See ***Postal Service***, 300 NLRB 196, 198, fn. 13 (1990).

§ 9–800 Setting Aside Settlement Agreements

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

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

The Regional Director's action in setting aside the settlement and reactivating the case is reviewable by the judge and the Board in the new complaint trial. For cases upholding the Regional Director's action, see ***Nations Rent, Inc.***, 339 NLRB 830, 831 (2003) (employer reinstated and made whole employee, but continued to maintain overbroad rule and failed to notify employee in writing that his discipline had been expunged); and ***American Postal Workers Local 735***, 340 NLRB 1363, 1364–1365 (2003) (respondent union's president published a post-settlement column condemning the charging party and lauding the steward whose conduct led to the original charge). But see ***The Courier Journal***, 342 NLRB 1148, 1149–1150 (2004) (Board majority found union's failure to protest closure of original case on compliance, pursuant to settlement agreement, precluded unfair labor practice predicated on company's failure to furnish certain information not provided at time of compliance).

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

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

Ambiguous Agreement. An informal settlement may also be set aside if the agreement is so ambiguous that a conclusion is warranted that there was no meeting of the minds on a settlement. See ***Doubletree Guest Suites Santa Monica***, 347 NLRB 782, 782–783 (2006)

(setting aside prior informal settlement on this basis, and therefore finding no settlement bar to issuing new complaint).

§ 9–850 Decision Vacated by Settlement

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

§ 9–900 Role of Settlement Judge

The role of a 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 or Associate 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.

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

CHAPTER 10. SEQUESTRATION ORDER

§ 10–100 In General

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

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

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

§ 10–200 Scope of Order

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

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

§ 10–210 Conferring with Counsel

The judge has the discretion to prohibit counsel "from conferring with a witness during the witness' testimony, including during any recesses in the trial." ***Geders v. U.S.,*** 425 U.S. 80, 87–88 (1976). Similarly, it is not a denial of the right to assistance of counsel to prohibit a respondent from consulting with counsel during a short recess between direct and cross-examinations. ***Perry v. Leeke***, 488 U.S. 272, 283–284 (1989).

However, the judge may not prohibit "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." Ibid. See also ***United Chrome Products***, 288 NLRB 1176, 1176 fn. 1 (1988). (During a 10-minute recess while the General Counsel was examining an adverse-party witness, it was not error for the 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").

§ 10–220 Showing Transcripts to Witnesses

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

Greyhound modifies the Board's prior seemingly absolute prohibition on showing separated witnesses the transcripts of other witnesses' testimony. See ***El Mundo Corp.***, 301 NLRB 351, 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

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

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

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

§ 10–400 Who Should and Should Not Be Separated

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

Party who is a natural person. See FRE 615(1) ("a party who is a natural person") and ***Greyhound***, above, 319 NLRB at 554 ("natural persons who are parties").

Officer or employee of a non-natural party who is designated as its representative by its attorney. FRE 615(2). See also ***Greyhound Lines***, above, 319 NLRB at 554 ("representatives of nonnatural parties"). The Board reads this exception as limiting a corporate respondent to its attorney and one other representative. ***Unga Painting Corp.***, above, 237 NLRB at 1308 fn. 16. Further, in ***Opus 3 Ltd. v. Heritage Park***, 91 F.3d 625, 630 (4th Cir. 1996), the court held that the representative must be an employee, and that the corporation's "mere designation of a person to act on its behalf at trial" does not convert the person into its employee.

Person essential to a party's presentation. See FRE 615(3) ("a person whose presence is shown by a party to be essential to the presentation of his cause"); and ***Greyhound Lines***, above, 319 NLRB at 554 ("a person who is shown by a party to be essential to the presentation of the party's cause"). It must be shown that the presence is "'essential,' rather than simply desirable." ***U.S. v. Jackson***, 60 F.3d 128, 135 (2d Cir. 1995), cert. denied 516 U.S. 980, 1130, 1165 (1995 and 1996). See also ***Opus 3 Ltd. v. Heritage Park***, above, 91 F.3d at 628 (burden is on party asserting that witness's presence is essential).

Alleged discriminatees. The Board allows a limited exemption for alleged discriminatees. They 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." ***Unga Painting Corp.***, above, 237 NLRB at 1307. See also ***Greyhound Lines***, above, 319 NLRB at 554.

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

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

§ 10–500 Violation of Sequestration Order

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

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

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

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

As discussed above in **§7–500** et seq. (Misconduct by Attorney or Representative), violations of a sequestration order by counsel may warrant an admonishment or reprimand or referral to the General Counsel under Section 102.177 of the Board's rules. See ***Sargent Karch***, 314 NLRB 482 (1994) (suspending attorney for 6 months after second violation).

CHAPTER 11. MISCELLANEOUS PROCEDURAL MATTERS

§ 11–100 Use of Audio and Video Equipment

§ 11–110 Auditory Equipment Use, Whether Required

In ***Manno Electric***, 321 NLRB 278, 278 fn. 7 (1996), the Board held that respondents were not denied due process when the judge failed to provide or offer special auditory enhancement devices to assist the company president who was hearing impaired. Although 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.

§ 11–120 Tape Recorders in Trial, Whether Allowed

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

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

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

§ 11–130 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

"It is well established that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers." ***Bristol Nursing Home,*** 338 NLRB 737, 737 fn. 1 (2002) (citations omitted). See also ***Cardinal Services***, 295 NLRB 933 fn. 2 (1989); ***Phoenix Co.***, 274 NLRB 995, 995 (1985); and ***NLRB v. Evans Plumbing Co.***, 639 F.2d 291, 293 (5th Cir. 1981). Collection of backpay, however, requires a separate application to the bankruptcy court. ***NLRB v. Continental Hagen Corp.,*** 932 F.2d 828,

832–833 (9th Cir. 1991); and ***NLRB v. 15th Avenue Iron Works***, 964 F.2d 1336, 1337 (2d. Cir. 1992).

§ 11–300 Binding Precedent, Judge Required to Follow

The judge is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals. See, e.g., ***Waco, Inc.***, 273 NLRB 746, 749 fn. 14 (1984)); ***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).

Of course, a judge is also bound to follow particular Board findings in a prior case, where appropriate, under the doctrine of collateral estoppel. See ***Great Lakes Chemical Corp.,*** 300 NLRB 1024, 1024–1025 and fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). See also **§3–750**, "Relitigation of Issues," above. And compare **§11–320**, "Reliance on Prior Findings of Another Judge," below.

§ 11–310 Judges Decisions, When Not Binding Precedent

When the Board has adopted all or even a portion of a judge's decision to which no exceptions have been filed, that decision or portion is not binding precedent for any other case. ****California Gas Transportation, Inc.***, 352 NLRB 246, 246 fn. 3 (2008); ***Pathmark Stores, Inc.***, 342 NLRB 378, 378 fn. 1 (2004); ***Watsonville Register-Pajaronian***, 327 NLRB 957, 959 fn. 4 (1999); and ***Colgate-Palmolive Co.***, 323 NLRB 515, 515 fn. 1 (1997).

§ 11–320 Reliance on Prior Findings of Another Judge

The Board does not take judicial notice of a judge's decision in another case pending review before the Board because that decision is not binding authority. ***St. Vincent Medical Center,*** 338 NLRB 888 (2003), remanded on other grounds, 463 F.3d 909 (9th Cir. 2006). But a judge may rely on the factual findings made by another judge in a prior case, even though it is still pending before the Board. See ***Grand Rapids Press of Booth Newspapers***, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000) (judge's findings in earlier case relied upon as showing evidence of animus in present case); and ***Detroit Newspapers Agency***, 326 NLRB 782 fn. 3 (1998), enf. denied 216 F.3d 109 (D.C Cir. 2000) (judge properly relied on earlier decision of another judge in a case pending before the Board to find that a strike was an unfair labor practice strike). This approach advances judicial efficiency, and avoids inconsistent results and delays attendant to awaiting the Board's review of the judge's decision in the earlier case.

The judge, however, has the discretion, in appropriate circumstances, not to rely on another judge's prior findings, particularly where they involve credibility. See ***Fluor Daniel, Inc. v. NLRB***, 332 F.3d 961, 972 (6th Cir. 2003), cert. denied, 543 U.S. 1089 (2005) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness"). See also ***Electrical Workers (Nixdorf Computers Corp.)***, 252 NLRB 539, 539 fn. 1 (1980) (it is "generally inappropriate" to base credibility determinations solely on credibility determinations made in a prior case).

Further, in giving effect to the earlier judge's findings, the judge should keep in mind that, if the Board (or a court) reverses the earlier judge's findings on review, the judge's findings in the second case may likewise be vulnerable to reversal. The second judge's decision in this respect is contingent on the Board's ultimate disposition of the issue litigated in the prior case.

§ 11–330 Reliance on Portions of Other Records

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

§ 11–340 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 ruling on such a motion under Section 102.35(a)(8) of the Board's Rules, the judge should follow the same standard the Board uses in ruling on motions to dismiss under Section 102.24; that is, the judge should "construe the complaint in the light most favorable to the General Counsel, accept all factual allegations as true, and determine whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." ***Detroit Newspapers Agency***, 330 NLRB 524, 525 fn. 7 (2000). See also ***Central Telephone Company of Texas,*** 343 NLRB 987, 998, Appendix B (2004) (upholding judge's dismissal of complaint allegations). Cf. ***St. Mary's Nursing Home***, cited in full in **§2–510**, above, 342 NLRB 979, 980 fn. 6 (2004) (finding that the judge erroneously ruled from the bench that the General Counsel had failed to establish animus in a discrimination case) .

When granting a motion to dismiss in these circumstances, the judge should issue a "decision" under Section 102.45(a) of the Board's Rules, so that the appropriate procedures for appealing under Section 102.46 will apply. See ***Technology Service Solutions***, 332 NLRB 1096, 1096 and fn. 3 (2000).

§ 11–350 Motions for Summary and Default Judgment

A judge has the authority to rule on motions for summary and default judgment under Section 102.35(a)(8) of the Board's Rules and Regulations. This authority exists notwithstanding the failure of the moving party to file such a motion with the Board under Section 102.24 of the Rules. See ***Calyer Architectural Woodworking Corp.,*** 338 NLRB 315 (2002).

§ 11–400 Correction of Transcript

The judge should not unilaterally correct a trial transcript, except for obvious typographical errors. Corrections should be made pursuant to a motion by a party or, if there is none, after issuance of an order to show cause. ***Serv-Air, Inc.***, 161 NLRB 382, 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).

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

§ 11–500 Interlocutory Appeals from Judges Rulings

A judge need not 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. However, if

the judge has a genuine doubt about the ruling, any recess should allow adequate time for the Board to rule. It is suggested that the judge set a date by which the request for leave to appeal should be filed and set a resumption date no less than one week later.

Note that 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

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

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

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

A similar procedure 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. The judge then traveled to the trial site when the parties were ready to resume the trial.

§ 11–610 Testimony by Telephone

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

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

§ 11–620 Testimony by Video

The Board has not yet passed on the use of video testimony in a contested unfair labor practice case, in which one of the parties has objected to the procedure. However, FRCP 43 specifically provides that a court "may for good cause shown in compelling circumstances and

upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location."

Video testimony has been used in Board trials without objection. See ***M.V.M., Inc.***, 352 NLRB 1165, 1165 fn.1 (2008) (testimony of one witness taken by video without objection, where original testimony of witness erroneously was not transcribed). Moreover, the Board has instituted a pilot project for use of video testimony in representation cases. Pursuant to a January 2008 memorandum from Associate General Counsel Richard Siegel (OM 08–20), regional directors are authorized to use video testimony in representation cases "when warranted," even if a party objects.

Video testimony may ameliorate any problems associated with telephone testimony (see **§11–610**, above). Indeed, the Merit Systems Protection Board (MSPB) has approved the use of video testimony in its cases, notwithstanding the objection of a party (***Koehler v. Department of the Air Force***, 99 M.S.P.R. 82 (2005)), even though, like the NLRB, it has disapproved of telephonic testimony (***Robertson v. Dept. of Transportation***, 113 M.S.P.R. 16 (2009)). Nevertheless, the judge should be satisfied that the proponent has shown a need—"good cause"—for video testimony, and carefully weigh any objections before approving it.

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

§ 11–700 Remands, Limited Issues

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

A stipulation of fact is ordinarily conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the judge accepts it (***Kroger Co.***, 211 NLRB 363, 364 (1974)), except on a showing of honest mistake or newly discovered evidence. See also ***Graham, 3 Handbook of Fed. Evid***. Sec. 801:26 (6th Ed. 2009).

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), petition for review denied 231 F.2d 237 (7th Cir. 1956), cert. denied 352 U.S. 908 (1956).

Under Section 102.35(a)(9) of the Board's Rules, a record may be stipulated directly to the Board for decision, provided all parties consent and waive a trial and the issuance of a decision by the judge.

Under Section 102.35(a)(9), 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 file a motion with the judge to reopen the record on the basis of "newly discovered evidence." The judge is authorized to rule on such a procedural motion under Board's Rules, Section 102.35(a)(8).

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

First, the movant must demonstrate that the evidence is truly "newly discovered." In ***Fitel/Lucent Technologies, Inc.***, 326 NLRB 46, 46 fn. 1 (1998), the Board held that newly discovered evidence is "evidence which was in existence" at the time of the trial, and the movant was "excusably ignorant" of it, i.e. the movant "acted with reasonable diligence to uncover and introduce the evidence." Thus, evidence that did not exist at the time of the trial because it relates to events that occurred after the close of the trial is not "newly discovered." ***Allis-Chalmers Corp.***, 286 NLRB 219, 219 fn. 1 (1987). See also ***Planned Building Services, Inc.***, 347 NLRB 670, 670 fn. 2 (2006) (Board affirmed judge's refusal to accept documents submitted by respondent after close of hearing on grounds that the evidence was not newly discovered).

Second, the movant must "demonstrate that the introduction of the [evidence in question] would require a different result than that reached by the judge." ***Fitel/Lucent Technologies***, above. See also ***County Waste of Ulster***, 354 NLRB No. 54 (2009), reaffirmed and incorporated by reference 355 NLRB No. 64 (2010).

§ 11–1000 Compliance Proceeding

Special procedural rules govern supplemental backpay proceedings, particularly regarding the allocation of the burden of proof on various issues. For a case setting forth 10 of these burden-of-proof rules into a single list, see ***Minette Mills, Inc.,*** 316 NLRB 1009, 1010–1011 (1995). See also ***St. George Warehouse***, 351 NLRB 961 (2007) (Board majority modified traditional rule and shifted burden of going forward to the discriminatee and General Counsel to present evidence that the discriminatee took reasonable steps to apply for substantially equivalent jobs).

CHAPTER 12. ORAL ARGUMENT, BRIEFS, JUDGES DECISIONS

§ 12–100 Pretrial or Trial Briefs

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

However, like post-trial briefs, the judge may not require the submission of briefs or draw any type of adverse inference from the nonsubmission of briefs.

§ 12–200 Post-Trial Oral Argument

Board's Rules, Section 102.42, specifically provides that "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

Board's Rules, Section 102.42, provides that the judge has discretion whether to allow time for parties to file post-trial briefs. See also ***K.O. Steel Foundry & Machine****,* 340 NLRB 1295, 1295 (2003) (upholding judge's discretion to allow oral argument in lieu of briefs). However, in most cases, judges will allow parties to file post-trial briefs, as they can be quite helpful.

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

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

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

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

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

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

CAUTION: Judges should not use excerpts from the briefs of the parties as a substitute for their findings and legal analysis in the written decision. Extensive and verbatim copying from the brief of the prevailing party in the judge's decision not only creates the appearance of partiality, but also gives the impression that the judge failed to conduct "an independent analysis of the case's underlying facts and legal issues." ***Dish Network Service Corp.,*** 345 NLRB 1071 (2005). See also **§2–510**, "Grounds Asserted for Disqualification," copying from briefs, above.

§ 12–400 Briefs Not Part of Official Record

Briefs to the judge do not normally become part of the official record in the case. See Board's Rules, Section 102.45(b). See also ***Vanguard Fire & Security Systems***, 345 NLRB 1016, 1020 (2005).

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

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

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

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

An expedited decision may be preferred as an alternative to a bench decision, discussed below in **§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 that administrative law judges shall have authority "to make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89–554, 5 U.S.C. § 557." This procedure has received court approval. See ***NLRB v. Beverly Manor Nursing Home***, 174 F.3d 13, 35 (1st Cir. 1999), enfg. 325 NLRB 598 (1998).

§ 12–620 Deciding to Issue Bench Decision

Whether to issue a bench decision is within the informed discretion of the trial judge. However, bench decisions should not be issued in complex cases. ***Des Moines Register and Tribune Co.***, 339 NLRB 1035, 1035 fn. 1 (2003), petition for review denied, 381 F.3d 767 (8th Cir. 2004) (Board cautioned that judges should not issue bench decisions in complex cases, but should invite briefs and conduct a more thorough analysis in a written decision). Rather, they should be rendered only in those cases that "turn on a very straightforward credibility issue; cases involving one day [trials]; cases involving a well settled legal issue when there is no dispute [over] the facts; short single issue cases; or cases in which a party defaults by not appearing at the [trial]. . . . [I]n more complex cases, including cases with lengthy records, [bench decisions] would likely not be appropriate." Proposed Board Guidelines on Bench Decisions, 59 Fed. Reg. 65, 942–965, 943 (Dec. 22, 1994), adopted as a final rule, 61 Fed. Reg. 6941 (1996), codified as 29 CFR §102.35.

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

§ 12–630 Procedures for Issuance of Bench Decisions

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

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

The court reporter prepares the transcript of the proceedings, including the transcription of the orally delivered bench decision. 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 judge should be very attentive to the time restrictions of these provisions and comply with them.

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

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

Under 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

"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

The Board's position is that it is not required to apply the Federal Rules of Evidence (FRE) strictly. ***International Business Systems***, 258 NLRB 181, 181 fn. 5 (1981), enfd. mem. 659 F.2d 1069 (3d Cir. 1981). 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).

The Board is not bound by state rules of evidence. ***R. Sabee Co.***, 351 NLRB 1350, 1350 fn. 3 (2007). See also **§13–214**, "Dead Man's Statutes," below.

§ 13–102 Taut Record

Ideally, the judge will receive evidence that is competent, relevant, and material, and exclude that which is not, resulting in a "taut" record. However, the judge may be presented with circumstances where the evidence is relevant but could result in significant delay in the trial. In these circumstances, the judge should refer to FRE 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.

FRE 403 creates a balancing test, and necessarily involves the exercise of discretion. Although the rule generally favors admission, evidence that has scant probative value may be excluded under the rule. See ***22 Wright & Gold, Fed. Prac. & Proc. Evid***. § 5214 (1st Ed. 2009); and ***Goode and Wellborne, Courtroom Handbook on Federal Evidence,*** pp. 257–261 (West 2008).

For cases upholding the judge's exercise of discretion, see, e.g., ***J.S. Troupe Electric, Inc.***, 344 NLRB 1009, 1010 (2005) (Board cited both FRE 403 and FRE 608(b) in upholding judge's exclusion of primary and secondary evidence of alleged discriminatee's false claim for unemployment or workers compensation benefits, notwithstanding that the judge broadly credited the discriminatee); ***Dickens, Inc.***, 355 NLRB No. 44, slip op. at 4 (2010) (judge properly exercised discretion in terminating unrepresented respondent's cross-examination, directing him to present his own testimony at that time, and subsequently cutting off his narrative testimony after several hours); ***University Medical Center***, 335 NLRB 1318, 1318 fn. 1 & 1342–1343 (2001), enfd. in part 335 F.3d 1079 (D.C. Cir. 2003) (upholding judge's imposition of time limits on presentation of respondent's case); ***Teamsters Local 122 (August A. Busch & Co. of Massachusetts)***, 334 NLRB 1190, 1193, and 1255 (2001) (same; also ordering litigation costs for delaying trial); and ***NLRB v. Champa Linen Service***, 324 F.2d 28, 30 (10th Cir. 1963)

(endorsing the judge's refusal to permit cross-examination of truth of a statement, which was alleged to be a Section 8(a)(1) violation, that union official "stole a million dollars").

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

§ 13–104 Background Evidence

§ 13–105 Admissible to Show Motive

It is well established that evidence of events occurring more than 6 months before the charge "may be considered as background to shed light on a respondent's motivation for conduct within the 10(b) period." ***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

Under well-established Board law, presettlement conduct may properly be considered as background evidence to establish the motive for the Respondent's postsettlement conduct. ***Host International***, 290 NLRB 442, 442 (1988).

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

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

Normally, evidence of settlement discussions is inadmissible to prove or disprove liability under FRE 408, but not if the evidence is used for other legitimate purposes. See **§13–245**, "Settlement Discussions," below.

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

To show animus, the General Counsel may offer unalleged statements (made either beyond or within the 6-month limitation period) indicating opposition to unionization. The Board relies on such statements on the issue of motivation, notwithstanding Section 8(c) of the Act. See

Sunshine Piping, Inc., 351 NLRB 1371 (2007); ***Tejas Electrical Services,*** 338 NLRB 416, 417 (2002); ***Tim Foley Plumbing Services***, 337 NLRB 328, 329 (2001); and ***Stoody Co.***, 312 NLRB 1175, 1176–1177, 1182 (1993).

Some courts of appeals have disagreed with the Board's reliance on such statements. See cases listed in ***Tim Foley Plumbing Services***, above, at fn. 5; and ***Norton Audubon Hospital,*** 338 NLRB 320, 320 fn. 1 (2002). However, NLRB judges are bound to apply established Board law. See **§11**–**300**, above.

§ 13–108 Judicial or Official Notice

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

For Board cases approving of taking judicial notice, see ***E & I Specialists***, 349 NLRB 446, 455 (2007) (Rand McNally publication showing distances between cities); ***Rhee Brothers, Inc.***, 343 NLRB 695, 697–698 fn. 5 (2004) (the week date of a given calendar date); ***Amptech, Inc.***, 342 NLRB 1131, 1146 (2004), enfd. 165 Fed. Appx. 435 (2006) (the general impact of historical events such as September 11); ***Mimbres Memorial Hospital & Nursing Home,*** 342 NLRB 398, 403 fn. 14 (2004), enfd. 483 F.3d 683 (2007) (requirements mandated by state statutes).

See also ***Metro Demolition Co.***, 348 NLRB 272, 272 fn. 3 (2006) (Board may take administrative notice of its own proceedings); and ***Drummond Coal Co.***, 277 NLRB 1618, 1618 fn. 1 (1986) (after due notice, Board took official notice of an arbitral award issued after close of hearing, despite party's objection).

Courts also sometimes take notice of official documents. See ***Johnson v. Morgenthau***, 160 F.3d 897, 898 (2d Cir. 1998) (notice taken of a party's death when a copy of the death certificate is furnished to the court). But see ***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).

§ 13–109 NLRB Decisions

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). See also ***Planned Building Services, Inc.***, 347 NLRB 670, 670 fn. 2 (2006) (Board affirmed that judge could rely, at least in part, on prior cases involving the same respondent to find animus in the present case); and ***Success Village Apartments, Inc.,*** 348 NLRB 579, 579 fn. 4 (2006) (same). See also **§11–300** to **§11–330,** above.

§ 13–110 State Unemployment Decisions

The Board receives in evidence and considers decisions in State unemployment compensation proceedings, but does not give the decisions controlling weight on unfair labor practice issues. See ***Cardiovascular Consultants of Nevada***, 323 NLRB 67, 67 fn. 1 (1997) (reversing the judge, the Board received State unemployment compensation decision because established Board law holds them to be admissible but not controlling); and ***Whitesville Mill Service Co.***, 307 NLRB 937, 945 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).

§ 13–111 Offers of Proof

§ 13–112 In General

When the judge sustains an objection to a question propounded to a witness, the proponent may make an offer of proof to show the substance of the excluded evidence. FRE 103(a)(2). Counsel normally makes a narrative offer by stating what the witness would testify if permitted to answer. See ***NLRB v. Augusta Bakery Corp.***, 957 F.2d 1467, 1479–1480 (7th Cir. 1992).

The judge may also direct that the offer be made by questions and answers (Q and A). FRE 103(b). See, e.g., ***Smithfield Packing Co.***, 344 NLRB 1, 13–14 and fn. 60 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006) (judge properly permitted testimonial offer of proof with respect to communications between respondent's former manager and respondent's attorney regarding the preparation of manager's affidavit, specifically as to whether manager gave a false affidavit to the respondent's attorney and whether the attorney knew it was false, in order to determine whether the evidence came within crime fraud exception to attorney/client privilege).

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

§ 13–113 During Examination of Adverse Witness

If the offer of proof is made on cross-examination, or on direct examination of an adverse witness, the judge may inquire of 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." See generally ***Beacon Electric Co.***, 350 NLRB 238, 254 (2007), where the judge did not permit such an inquiry because respondent's attorney was unable to show relevance.

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

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

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

§ 13–115 Waiver of Objection to Offer of Proof

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

§ 13–200 Hearsay

§ 13–201 In General

Hearsay rules are contained in FRE 801–807. As with other rules of evidence, the Board applies these rules "so far as practicable." See **§13–100**, "Applicable Rules of Evidence, in General," above.

However, like other administrative agencies, the Board does "not invoke a technical rule of exclusion but admit[s] hearsay evidence and give[s] it such weight as its inherent quality justifies." ***Midland Hilton & Towers***, 324 NLRB 1141, 1141 fn. 1 (1997), citing ***Alvin J. Bart & Co.***, 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979). Thus, hearsay evidence may be admitted "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." Ibid., citing ***RJR Communications, Inc.***, 248 NLRB 920, 921 (1980). See also ***RC Aluminum Industries, Inc***., 343 NLRB 939, 940 (2004) (affirming judge's ruling admitting corroborated hearsay). But cf. ***NLRB v. First Termite Control Co.***, 646 F.2d 424 (9th Cir. 1981) (holding that the evidence supporting legal jurisdiction was hearsay and remanding the case to the Board).

In general, 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.

§ 13–202 Double Hearsay Excluded

The Board upheld the judge's exclusion of double hearsay in ***T.L.C. St. Petersburg***, 307 NLRB 605, 605 (1992), affd. mem. 985 F.2d 579 (11th Cir. 1993) (judge properly accorded no weight to twice-removed hearsay). See also ***Auto Workers Local 651 (General Motors)***, 331 NLRB 479, 481 (2000) (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 242, 242 fn. 4 (2001) (purported "double hearsay" admissible as admission of a party).

§ 13–203 Admissible if Corroborated

The Board held that the judge should have admitted corroborated hearsay in ***Dauman Pallet, Inc.***, 314 NLRB 185, 186 (1994) (overturning judge's exclusion of corroborated hearsay and according it weight). See also ***RC Aluminum Industries,*** above, 343 NLRB at 940 (affirming

judge's ruling admitting corroborated hearsay); and ***Meyers Transport of New York***, 338 NLRB 958, 968–969 (2003) (unobjected to and corroborated hearsay is admissible and may be used as basis for findings of fact).

§ 13–204 Exceptions to Hearsay Rules

Hearsay is also admissible under familiar exceptions set forth in FRE 803 and 804. Helpful guidance in applying these rules can be found in the notes and comments accompanying the rules.

§ 13–205 Notice Not Required

"The Board does not require adherence to the [Federal Rules of Evidence] requirement that the proponent of a hearsay statement make known to the adverse party, with a fair opportunity to prepare to meet it, of the intention to offer the statement, and the particulars of it, including the name and address of the declarant." ***Sheet Metal Workers Local 28 (Borella Bros.)***, 323 NLRB 207, 209 fn. 2 (1997). [Note: the notice requirement was previously set forth in FRE 803(24), but is now contained only in FRE 807, the "Residual Exception"].

The judge, however, may exercise his or her discretion to impose a notice requirement in circumstances indicating that a lack of some notice will prejudice the adverse party or prolong the trial.

§ 13–206 Affidavits

It is well established that "a party may use an affidavit to refresh a witness' recollection, to rehabilitate a witness' direct examination testimony on cross-examination, or to prove a witness' prior statements when a witness' testimony at hearing differs from that witness's affidavit." ***W & M Properties of Connecticut, Inc.***, 348 NLRB 162, 162 (2006), enfd. 514 F.3d 1341 (D.C. Cir. 2008).

The following sections address the use of affidavits as substantive evidence under the hearsay rules. See also **§13–240,** "Admissions"; **§13–612,** "Refreshing Recollection"; **§13–613** "Past Recollection Recorded"; **§13–706** "Inconsistent Prior Statements"; and **§3–800** et seq., "Release of Witness Statements", below**.**

§ 13–207 In General

Unless used to impeach or establish admissions of a party (discussed in other sections listed above), affidavits generally are received substantively only if the declarant is deceased or "unavailable," or the taking of testimony poses a threat to the health of the witness. This is because there is no opportunity for the opponent to cross-examine or the judge to observe demeanor. ***Weco Cleaning Specialists***, 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, discussing the Board's policy (contrary to the "Dead Man's" statutes of some States) admitting statements attributed to deceased persons or those too ill to testify. See also Board's Classified Index code numbers 737–8401–8400, "Affidavit of decedent," and 737–8401–8500, "Affidavit of unavailable or hostile witness."

§ 13–208 Declarant Deceased

For a Board case involving a deceased declarant, see ***Weco Cleaning Specialists***, above, 308 NLRB at 311 fn. 7, 314–315. In that case, the Board affirmed 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 was corroborated by other evidence. But the Board attached less weight to the affidavit than did the judge.

§ 13–209 Declarant Unavailable

See FRE 804 regarding examples of unavailability. For Board cases, see ***Park Maintenance***, 348 NLRB 1373, 1373 fn. 2 (2006) (Board reversed judge's ruling admitting affidavits in the absence of a showing that the affiants were unavailable to testify, but found that the ruling constituted harmless error because the judge discredited the statements in the affidavit); and ***Marine Engineers District 1 (Dutra Construction)***, 312 NLRB 55, 55 (1993) (Board held that the judge properly struck the non-Board affidavit of a nonappearing witness, offered in support of an affirmative defense, as the proponent did not allege that the affiant was unavailable to testify).

For a case involving a frightened witness, see ***Three Sisters Sportswear Co.***, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996). In that case, the pretrial affidavit of a frightened witness (a current employee), who claimed not to remember anything about her affidavit other than her signature, was received in evidence as past recollection recorded under FRE 803(5).

§ 13–210 Of Recanting Witness

The judge has considerable discretion, under the Act's guidance to apply the Federal Rules of Evidence "so far as practicable," to rely on hearsay evidence as substantive evidence, where corroborated, to allay concerns over witness intimidation. See ***Conley Trucking v. NLRB***, 520 F.3d 629 (6th Cir. 2008), enfg. 349 NLRB 308, 309–313 (2007) (upholding, as an "exemplary application" of the above principles, the judge's admission into evidence of the pretrial affidavits of a recanting witness and his reliance on the affidavits as credited substantive evidence where corroborated).

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

§ 13–211 Bargaining Notes

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

Newspaper articles and job advertisements are self-authenticating. FRE 902(6). Self-authenticating documents, however, are not necessarily admissible. See, for example, ***Sheet Metal Workers Local 15,*** 346 NLRB 199, 202 (2006), enf. denied on other grounds, 491 F.3d 429 (D.C. Cir. 2007) (newspaper article's quotation of a CEO excluded as hearsay). See also ***B. N. Beard Co.***, 248 NLRB 198, 199 fn. 9 (1980) (Board avoided the hearsay problem of an article quoting respondent's president by disregarding the quote and instead considering only the newspaper reporter's credited testimony describing what the president told him).

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

Television interviews may require different treatment. TV videotapes are not listed in FRE 902 as self-authenticating. Questions are more likely to arise over the integrity of a TV news clip (has it been edited?) than whether a page from a newspaper is a forgery. In addition, once a TV videotape has been authenticated, it helps if the parties agree on a transcript of the text of the remarks, by speaker, shown on the TV videotape. Any remarks on the videotape of an absent witness possibly could be admissible under the "unavailability" exception in FRE 804.

§ 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." FRE 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

Because unfair labor practice proceedings before the Board derive substantively and procedurally from a Federal statute, State law does not supply the "rule of decision" under FRE 601. Accordingly, the Board is not bound to apply State "Dead Man's" statutes excluding "statements attributed to deceased persons or those too ill to testify." ***West Texas Utilities***, 94 NLRB 1638, 1639 fn. 3 (1951), enfd. 195 F.2d 519 (5th Cir. 1952); ***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).

However, the Board subjects such a statement to "the closest scrutiny before deciding what weight to give it." ***West Texas Utilities***, above, 94 NLRB at 1639. See also ***Ann's Laundry***, 276 NLRB 269, 270 fn. 3 (1985) (same).

§ 13–215 Position Letters or Statements

A respondent's position statement, submitted by its attorney, is admissible in evidence as an admission by a party-opponent under FRE 801(d)(2), even if submitted by the respondent's former counsel. See ***United Scrap Metal, Inc.***, 344 NLRB 467, 467–468 and fn. 5 (2005); and ***Optica Lee Borinquen***, 307 NLRB 705 fn. 6 (1992), enfd. 991 F.2d 786 (1st Cir. 1993) (Table). See also **§13–243**, "Admissions by Attorney/Position Statements," below.

§ 13–216 Recordings

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

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

A different result possibly might obtain if the Federal wiretapping statute were violated: that is, if the recording was secretly made in conjunction with the interception of a telephone conversation between two or more other parties. But the interception of a conversation over a cordless 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 jobsite. In ***McAllister Bros.***, 278 NLRB 601, 601 fn. 2 (1986), enfd. 819 F.2d 439 (4th Cir. 1987), the Board expressly disavowed a statement by the judge that the Board historically has taken a dim view of personnel who tape-record meetings with their employer. Indeed, citing cases, the Board stated that it "has sometimes found tape recordings of employee meetings to be the best evidence of what was said." Ibid.

Such conduct, however, is not a basis to discredit the individual who made the recording. See ***Fleming Companies***, 336 NLRB 192, 192 fn. 2 (2001), enfd. in part, 349 F.3d 968 (7th Cir. 2003) (Board stated that a witness's surreptitious taping of a conversation with management representatives is not a basis for discrediting the witness's testimony). However, it may be grounds for employer discipline. See ***Opryland Hotel***, 323 NLRB 723, 723 fn. 3 (1997) (Board implied 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).

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

Authentication. 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.

Defects in Recording. 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

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. See also ***Leisure Knoll Assn.***, 327 NLRB 470, 470 fn. 1 (1999). And, of course, it is, under proper circumstances, admissible as evidence. See also **§8–500** and **§8–510**, above.

§ 13–219 Opinion Testimony by Lay Witness

FRE 701, Opinion Testimony by Lay Witnesses, allows a lay witness to give an opinion or inference only if: "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." See also **§13–401,** below, regarding employee subjective or opinion testimony about alleged 8(a)(1) statements.

§ 13–220 Expert Witness Testimony, In General

FRE 702, Testimony by Experts, sets forth the criteria for receiving an expert's opinion. The judge must be satisfied that the expert is qualified, the subject matter is appropriate for expert testimony, and the expert testimony will assist in deciding the case. In addition, the testimony should be "based upon sufficient facts or data" and "the product of reliable principles and methods," and the witness should have "applied the principles and methods reliably to the facts of the case."

For examples where Rule 702 has been applied in Board proceedings, see the judge's decision in ***Fluor Daniel, Inc.***, 350 NLRB 702, 713 (2007) and cases cited there.

§ 13–221 Appropriateness of Expert Testimony

Under FRE 704, expert testimony is not inadmissible simply "because it embraces an ultimate issue to be decided by the trier of fact." However, to be admitted, the testimony must still satisfy the standards set forth in Rule 702 (as well as 403). See also cases cited in **§13–222**, below.

But expert opinions on ultimate legal issues are properly excluded as within the exclusive province of the judge and Board. See generally ***Nationwide Transport Finance v. Cass Information,*** 523 F.3d 1051, 1058 (9th Cir. 2008) (expert testimony on ultimate legal issues inadmissible). See also ***Gilson v. Sirmons***, 520 F.3d 1196, 1243 (10th Cir. 2008) (expert testimony on witness's credibility inappropriate).

Thus, the judge in a Board proceeding may exclude an expert opinion on such issues as the impact of allegedly objectionable conduct during the critical period before an election, whether alleged 8(a)(1) statements would have coerced employees, or whether the statements have caused employees to abandon their support of a union.

§ 13–222 Flawed Premises

Where expert testimony has been received, the judge may disregard it if the premises on which the analysis and conclusions rest are flawed. See ***Raley's***, 348 NLRB 382, 562–563 (2006) (handwriting expert testifying about signatures based on flawed premises); ***H. B. Zachry Co.***, 319 NLRB 967, 979–980 (1995), modified on different point, 127 F.3d 1300 (11th Cir. 1997) (judge disregarded 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. 976 F.2d 744 (11th Cir. 1992) (judge disregarded the conclusions of a consultant on statistics because he relied on flawed assumptions).

See also ***Parts Depot, Inc.***, 348 NLRB 152, 152 fn. 6 (2006) (judge properly refused to permit an expert witness to opine in backpay proceeding, based on an analysis of employment trends, that employees did not make reasonable efforts to seek interim employment, since Board precedent requires consideration of an individual's particular circumstances rather than just probabilities).

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

§ 13–223 Handwriting/Union Authorization Cards

Either the judge or an expert (or both) may compare handwriting and signatures with authenticated specimens in order to authenticate union authorization cards. See FRE 901(b)(3) and ***Parts Depot, Inc.***, 332 NLRB 670, 674 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001) ("[T]he Board has long held, consistent with Section 901(b)(3) of the Federal Rules of Evidence, that a judge or a handwriting expert may determine the genuineness of signatures on authorization cards by comparing them to W–4 forms in the employer's records" or other employment documents). See also ***Traction Wholesale Center Co. v. NLRB***, 216 F.3d 92, 105 (D.C. Cir. 2000), enfd. 328 NLRB 1058, 1059–1060 (1999).

§ 13–224 Prior Notice to Opponent

Prior notice should normally be given by a party intending to use an expert witness at the trial so that the opposing party may have time to obtain its own expert. The failure to do so may be considered by the judge in ruling on the admissibility of the expert testimony under FRE 403. See **§13–102**, above.

§ 13–230 Polygraphs

A polygraph was admitted by the judge and given some, but not controlling, weight in assessing credibility in ***J.C. Penny Co.***, 172 NLRB 1279 (1968), enfd. in relevant part 416 F.2d 702, 705 (7th Cir. 1969). Some courts have also accepted such evidence upon stipulation or for impeachment or corroboration. See ***U.S. v. Piccinonna***, 885 F.2d 1529 (11th Cir. 1989). See also ***Lee v. Martinez***, 136 N.M. 166, 168 (2004) (summarizing treatment of polygraph evidence by jurisdiction).

However, the Board has not directly spoken on the admissibility of evidence concerning polygraph tests. Further, it appears that federal appellate courts will uphold a trial court's discretion to reject such evidence as inadmissible. See ***U.S. v. Henderson***, 409 F.3d 1293, 1303

(11th Cir. 2005), cert denied 126 S.Ct. 1331 (2006); and ***U.S. v. Cordoba***, 194 F.3d 1053 (9th Cir. 1999).

See also ***Ludlum v. Department of Justice***, 87 M.S.P.R. 56, 66 fn. 3 (2000) (Merit Systems Protection Board refused to consider agency's failure to use a polygraph test or the employee's willingness to undergo one as probative, stating that "even if a polygraph examination had been conducted, it is not clear that the results would be admissible or probative"); and ***Finley Lines Joint Protective Board Unit 200 v. Norfolk Southern Ry.***, 312 F.3d 943, 947 (8th Cir. 2002) (upholding the assignment of no weight to polygraph evidence by a public law board).

§ 13–235 Adverse Inferences

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. See ***Advocate South Suburban Hospital v. NLRB***, 468 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006); and ***Parksite Group***, 354 NLRB No. 90, slip op. 5 (2009) (failure of respondent to call its manager who evaluated alleged discriminatees for rehire subject to adverse inference; General Counsel not required to subpoena manager). Cf. ***Forsyth Electric Co.***, 332 NLRB 801, 818 (2000) (rejecting General Counsel's request for adverse inference as testimony was not relevant and it was not naturally in the respondent's interest to produce it).

A party's failure to explain why it did not call the witness may support drawing the adverse inference. See ***Martin Luther King, Sr. Nursing Center***, 231 NLRB 15, 15 fn. 1 (1977) (judge properly drew adverse inference in absence of explanation). But see ***Roosevelt Memorial Medical Center***, 348 NLRB 1016, 1022 (2006) (judge abused his discretion by drawing adverse inference from respondent's failure to call a manager; circumstances indicated manager was not called because his testimony was unnecessary, not because it would have been adverse). Conversely, of course, an adverse inference would normally not be appropriate where an adequate explanation is provided.

Bystander employees. Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling a bystander employee. ***Torbitt & Castleman, Inc.***, 320 NLRB 907, 910 fn. 6 (1996), affd. on point, 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. ***C & S Distributors***, 321 NLRB 404, 404 fn. 2 (1996), citing ***Queen of the Valley Hospital***, 316 NLRB 721, 721 fn. 1 (1995).

Former Supervisors. No adverse inference is drawn from the failure of a respondent to call a former co-owner, manager, or supervisor when the record does not show it is reasonable to assume that the person is favorably disposed toward the respondent. See ***Goldsmith Motors Corp.***, 310 NLRB 1279, 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).

Failure to Honor Subpoena. See **§8–620**, "Failure to Produce Documents," above, 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 also cases cited under Board Classified Index code numbers, 596–7682–3320, 737–4267–2700, and 737–8433–6796.

Destroyed Evidence. See ***Akiona v. U.S.***, 938 F.2d 158, 160–161 (9th Cir. 1991), cert. denied 503 U.S. 962 (1992) ("Generally, a trier of fact may draw an adverse inference from the

destruction of evidence relevant to a case"). But see ***BP Amoco Chemical—Chocolate Bayou***, 351 NLRB 614, 636 (2007) (no inference of unlawful intent drawn from supervisors' destruction of their worksheets used during selection process where respondent had no legal duty to retain the records and there was no business or personal reason for the supervisors to keep them).

§ 13–240 Admissions

Statements by a party or its agents are covered by FRE 801(d)(2), Admissions by Party Opponent: Statements Which Are Not Hearsay.

§ 13–241 Admissions by Supervisor in Affidavit

Prehearing affidavits given to the General Counsel by supervisors while employed by the respondent concerning matters within the scope of employment are nonhearsay admissions under FRE 801(d)(2). See ***Fredericksburg Glass & Mirror***, 323 NLRB 165, 175–176 (1997) and cases cited there. See also ***Weco Cleaning Specialists***, 308 NLRB 310, 311 fn. 7, 315 (1992) (judge admitted and relied on pretrial affidavit given by deceased manager to charging party; however, Board found it unnecessary to rely on the affidavit in affirming the judge's decision).

With respect to affidavits given by former managers (which would normally fall under FRE 803 or 804, rather than 801(d)(2)), see ***Success Village Apartments, Inc.,*** 347 NLRB 1065, 1065 (2006). In that case, the Board affirmed the judge's admission of an affidavit of a former manager of the respondent taken "ex parte" by the General Counsel after the manager ceased working for the respondent. The Board rejected the argument that the affidavit was taken in contravention of applicable ethical standards. The former manager testified at the trial and his affidavit was turned over to the respondent after his testimony, in accordance with Section 102.118(b)(1) of the Board's Rules.

§ 13–242 Statements of Non-Charging Party Witness Not Admission

Affidavits or statements of a noncharging party discriminatee generally are not admissible as substantive evidence because he/she is not a "party opponent" under FRE 801(d)(2). See ***Performance Friction Corp.***, 335 NLRB 1117, 1120 fn. 20 (2001); and ***Vencor Hospital Los Angeles***, 324 NLRB, 235 fn. 5 (1997). But see **§13–210**, "Of Recanting Witness," above.

§ 13–243 Admissions by Attorney/Position Statements

Many cases find attorney statements, both in and out of court, to be admissions. For example, it is well-established Board law that a lawyer's position letter can be received as an admission if it contains a statement or statements conflicting with the party's position. See, e.g., ***Raley's***, 348 NLRB 382, 501–502 (2006); ***McKenzie Engineering Co.***, 326 NLRB 473, 485 fn. 6 (1998); ***Hogan Masonry***, 314 NLRB 332, 333 fn. 1 (1994); and ***Massillon Community Hospital***, 282 NLRB 675, 675 fn. 5 (1987). See also ***United Technologies Corp.***, 310 NLRB 1126, 1127 fn. 1 (1993), enfd. mem. 29 F.3d 621 (2d Cir. 1994) (position letter attached to an unsuccessful motion to dismiss the complaint). Indeed, it is reversible error for the judge to refuse to admit into evidence such a position paper. ***Massillon Community Hospital***, supra; ***Florida Steel Co.***, 235 NLRB 1010, 1011-1012 (1978); ***Ablon Poultry & Egg Co.***, 134 NLRB 827 fn. 1 (1961).

The rule applies even to position statements previously submitted in representation proceedings. See ***Evergreen America***, 348 NLRB 178 (2006), previously discussed in **§ 8-445**, "Work Product Privilege," above. See also ***Bliss & Laughlin Steel Co.***, 266 NLRB 1165, 1167 fn.

2 (1983), enfd. 754 F.2d 229 (7th Cir. 1985). However, it is unclear what, if any, weight the judge may give a position statement that has been disavowed by the attorney prior to trial. See ***Orland Park Motor***, 333 NLRB 1017 fn. 1 & 1024-1026 (2001).

Of course, a lawyer's position letter can also be used to impeach the lawyer's conflicting testimony at the trial. ***Harowe Servo Controls, Inc.***, 250 NLRB 958, 1033 (1980). See also ***Performance Friction Corp.***, 335 NLRB 1117, 1149 (2001), describing other ways an attorney can make admissions in Board proceedings.

However, a party may not affirmatively rely on its own assertions in position statements or briefs to help establish a point on which it carries the burden of proof. See ***Cannondale Corp.***, 310 NLRB 845, 852 (1993) (attorney's position letter); ***Domsey Trading Corp.***, 310 NLRB 777, 814 fn. 35 (1993), enfd. 16 F.3d 517 (2d Cir. 1994) (attorney's letter to the judge in the nature of a supplemental brief); ***Auburn Foundry***, 274 NLRB 1317, 1317 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 (2d Cir. 1994) (statement 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 a nonparty 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

FRE 408 prohibits use of offers of settlement or other statements during settlement discussions as admissions, but does not prohibit their use other purposes. Thus, for example, alleged threats made during informal grievance settlement discussions may be admitted in a subsequent NLRB case. ***Miami Systems Corp.***, 320 NLRB 71, 71 fn. 2 (1995), modified but affirmed on point, ***Uforma/Shelby Business Forms v. NLRB***, 111 F.3d 1284, 1293–1294 (6th Cir. 1997). See also ***R. Sabee Co.***, 351 NLRB 1350, 1350 fn. 3 (2007) (anti-union statements of respondent's negotiator during mediation of state claims admissible in NLRB proceeding).

§ 13–246 Document in Personnel File

A document in an employee's personnel file may be received under FRE 801(d)(2) 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).

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 such 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 memos and other

documents may be admissible under FRE 803(6), the hearsay exception applicable to "records of regularly conducted activity" (business records).

However, FRE 803(6) specifically provides for exclusion of such documents if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Thus, 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. See ***Pierce v. Atchison Topeka & Santa Fe***, 110 F.3d 431, 444 (7th Cir. 1997 (trial judge excluded memo and the Seventh Circuit refused to "second-guess [that] determination").

§ 13–250 Formal Papers—General Counsel Exhibit 1

Generally, documents contained in General Counsel's Exhibit 1 (charges, pleadings, motions, orders, and other matters that are part of the "record" under Section 102.45(b) of the Board's Rules), should not be relied on as substantive evidence unless they contain an admission. For a case where the judge relied on a respondent's precomplaint position statement, which was attached to a motion to dismiss and included in the "record," apparently as part of GC Exh. 1, see ***United Technologies Corp.***, 310 NLRB 1126, 1127 fn. 1 (1993).

§ 13–255 Summaries

Summaries of documents are often prepared and offered in evidence in our cases where the documents themselves are too voluminous or complicated to be conveniently presented in their entirety. Under FRE Rule 1006, such summaries are admissible if the underlying documents would be admissible and have been made available to opposing counsel for examination, and a proper foundation for the summary is established (usually by the person who prepared the summary).

A party may also offer a summary of documents already in the record. In such circumstances, the judge may properly consider whether admission of the summary is warranted under FRE 611(a). Other types of summaries or compilations may require evaluation under one or more rules, such as FRE 803(5) (recorded recollection) or FRE 803(6) (summaries or compilations made at or near the time of the events and kept in the regular course of business).

Regardless of which type of summary is involved, in evaluating its admissibility and/or probative weight, the judge should carefully consider the circumstances under which the summary was prepared, and whether it reflects the author's subjective view or interpretation of the underlying information. See ***Monfort of Colorado***, 298 NLRB 73, 82 fn. 37 (1990).

§ 13–260 Privileges

§ 13–261 General Rule—FRE 501

As the committee and conference reports on FRE 501 indicate, in civil cases State law on privileges chiefly applies in diversity cases, with Federal law applying otherwise. Hence, in unfair labor practice trials before the NLRB, Federal law applies. See ***Quarles Mfg. Co.***, 83 NLRB 697, 699 fn. 8 (1949), above, citing Section 10(b) of the Act in declining to apply the Texas "Dead Man's" statute, as discussed in **§13–214**, above. See also ***R. Sabee Co.,*** above, 351 NLRB at 1350 fn. 3, discussed in **§13–101** and **§13–245**, above.

For a more detailed discussion of privileges, including the attorney-client privilege, the work-product privilege, the reporter's privilege, privileges connected with the production of Board files and testimony of Board agents, and the mediator's privilege, see **§8–400** et seq., above, dealing with subpoenas. The same principles apply where parties attempt to submit testimony or evidence involving the named privileges during the hearing.

Protective orders may also be appropriate when handling testimony or evidence that may call into question confidential information. For a more detailed discussion of protective orders, see **§8–415**, above.

§ 13–262 Attorney-Client Privilege

A full discussion of the privilege can be found in **§8–420,** et seq., above.

§ 13–263 Work Product Privilege

A full discussion of the work product privilege is found in **§8–445**, above.

§ 13–264 Testimony of a Mediator

As indicated above, a mediator cannot be compelled to testify in Board proceedings. See **§8–460**, above. Note also that 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 not if offered for the fact of what was said). See ***Granite Construction Co.***, 330 NLRB 205, 210–211 fn. 1 (1999).

§ 13–265 Fifth Amendment Claims

There is no deprivation of rights under the Fifth Amendment simply because a civil or administrative proceeding goes forward while a criminal proceeding involving the same party is in progress. See ***United States v. White***, 589 F.2d. 1283, 1286 (5th Cir. 1979); ***Diebold v. Civil Service Commission of St. Louis County***, 611 F.2d 697, 700**–**701 (1979). "At the administrative hearing [the individual] will have a 'free choice to admit, to deny, or to refuse to answer.' This is full vindication of the Fifth Amendment privilege against self-incrimination." ***Luman v. Tanzler***, 411 F.2d 164, 167 (5th Cir. 1969), cert. denied, 396 U.S. 929 (1969).

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

§ 13–266 Adverse Inference May Be Drawn

In civil cases, the trier of fact may draw an adverse inference from the invocation of a privilege under the Fifth Amendment. ***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). See also ***Sunshine Piping, Inc.***, 351 NLRB 1371, 1378 fn. 28 (2007) (Board relied on supervisor's initial invocation of the Fifth Amendment as evidence that she sincerely believed that she had done something wrong).

§ 13–267 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 Fifth Amendment, the party may request the judge to recommend that the Board seek approval from the Attorney General to issue an order requiring the witness to testify (under a grant of immunity). Absent such an order, the witness should not be asked or permitted to testify about the subject matter of his Fifth Amendment claim. See ***Domsey Trading Corp.***, 351 NLRB 824, 897 fn. 76 (2007).

§ 13–300 Parol Evidence

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).

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

For a case addressing a respondent's argument that parol evidence should likewise be admitted to show "fraud in the execution" of an agreement, see ***Sheehy Enterprises, Inc.***, 353 NLRB 803 (2009), reaffirmed and incorporated by reference 355 NLRB No. 83 (2010) (Board found it unnecessary to decide whether parol evidence is admissible under Board law to prove the defense, since, even if the evidence were considered and credited, it failed to establish the defense). See also ***Horizon Group of New England***, 347 NLRB 795 (2006) (same).

§ 13–301 Evidence Improperly Obtained

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

Note that it is not improper for the General Counsel to take the affidavit of a respondent's former manager "ex parte" (i.e. without respondent's counsel present). See ***Success Village Apartments, Inc.,*** 347 NLRB 1065, 1065 (2006).

§ 13–400 State of Mind

§ 13–401 As Evidencing Coercion

The test to determine coercion under Section 8(a)(1) is an objective test, not a subjective one. See, e.g., ***Multi-Ad Services***, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Thus, testimony about what an employee understood the supervisor's statement to mean may not be relied on and is normally not admissible. ***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 (1969).

§ 13–403 Evidence Affecting Remedy

§ 13–405 Instatement of Applicants Denied Employment

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

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

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

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

§ 13–406 Undocumented Workers

Although undocumented workers are employees entitled to exercise their rights under the Act, they are not entitled to backpay or reinstatement during the period when they are not authorized to be present in the United States. See ***Domsey Trading Corp.***, 351 NLRB 824, 825 (2007), citing ***Hoffman Plastics Compounds v. NLRB***, 535 U.S. 137 (2002). For the appropriate remedy in such cases, see ***Case Farms of North Carolina, Inc.***, 353 NLRB 257, 263 (2008).

§ 13–500 Reinstatement

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

In an 8(a)(3) case in which denial of reinstatement is affirmatively alleged in the complaint, the better practice is to admit the respondent's testimony of unconditional offers of reinstatement,

because the Board must fashion a remedy. ***Charles E. McCauley Assoc., Inc.***, 266 NLRB 649 (1983); and ***Kelley Bros. Nurseries***, 145 NLRB 285, 285 fn. 2 (1963), enf. denied 341 F.2d 433 (2d Cir. 1965).

However, where the matter has not been fully litigated in the merits hearing, the Board has found no prejudice by deferring the matter to the compliance proceeding. See ***Charles E. McCauley***, above; ***Baker Mfg. Co.***, 269 NLRB 794, 794 fn. 2, 813 (1984), enfd. in part 759 F.2d 1219 (5th Cir. 1985).

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§ 13–502 Misconduct—After-Acquired Evidence

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

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

§ 13–600 Witnesses

The general rules governing witnesses are set forth in FRE 601**–**706.

§ 13–601 Competency

Under FRE 601, "every person is competent to be a witness except as otherwise provided in the rules." State law on competency of witnesses does not apply in Board proceedings, because the Act is a Federal statute and Section 10(b) of the Act provides that the Federal rules of evidence, "so far as practicable," shall apply to Board proceedings. See also **§13–261**, "General Rule—FRE 501," above. As a result, most objections to competency are eliminated, and are properly treated instead as bearing on credibility and weight.

§ 13–602 Trial Attorney for Party

Unlike the courts, the Board does not pass on, and leaves to State bar associations to decide, questions of ethical propriety of a party's trial attorney testifying in a Board proceeding. Thus, when the trial attorney's testimony is otherwise relevant and competent, judges should overrule objections based on canons of ethics. ***Reno Hilton***, 319 NLRB 1154, 1185 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). See also **§7–130**, "Attorney as Witness," above.

§ 13–603 Board Agents

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), supplemented by 310 NLRB 357, 365, 368 fns. 7 and 8 (1993), enfd. 48 F.3d 444 (9th Cir. 1995).

It is also improper for the judge to draw an adverse inference from General Counsel's failure to call a Board agent to testify. ***Independent Stations Co.***, 284 NLRB 394, 394 fn. 1, 412, 415 (1987).

§ 13–606 Interpreters

FRE 604 provides that: "[a]n interpreter is subject to the provision of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." See **§1–420**, "Interpreter's Oath," above.

Interpreters should strive to translate exactly what was said, without comment or embellishment. Generally, there is no objection over the use of interpreters, although sometimes questions arise over the accuracy of the translation. In such cases, the version of the official interpreter governs, unless the judge, after due consideration, decides otherwise. See ***NLRB v. Bakers of Paris, Inc.***, 929 F. 2d 1427, 1436 fn. 4 (9th Cir. 1991) (acknowledging "the need for the trier of fact in any judicial proceeding to consider the accuracy of the translations presented" and suggesting that the presence of an "official" translation may not always resolve the issue). See also ***Coastal Insulation Corp.***, 354 NLRB No. 70, slip op. at 4 (2009) (judge advised that interpreter's translation would constitute the transcribed record, but allowed charging party an opportunity to challenge the translation).

Particular care should be given to the use of interpreters when assessing the credibility of a witness. It may be appropriate for the judge to restrict the use of interpreters in certain circumstances; for example, when alleged threats are made in English, the witness should be able to recount what was said in English. See ***Northern Cap Mfg. Co.***, 146 NLRB 198, 201-204 (1964). See also ***Yaohan U.S.A. Corp.***, 319 NLRB 424, 424 fn. 2 (1995), enfd. mem. 121 F.3d 720 (9th Cir. 1997) (affirming judge's restrictions on use of interpreters for witnesses who demonstrated some ability to converse in English). Where interpretation is necessary, the judge should carefully monitor the translation process to ensure that both the translator and the witness understood the questions asked and that the witness' answers were accurately interpreted. See ***NLRB v. Del Ray Tortilleria, Inc.***, 787 F.2d 1118, 1121-1122 (7th Cir. 1986), enfg. 272 NLRB 1106, 1115 fn. 21 (1984).

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

In ***George Joseph Orchard Siding, Inc.***, 325 NLRB 252, 252–253 (1998), the Board upheld the discretion of the judge to order the General Counsel to provide an interpreter in the unfair labor practice proceeding. Specifically, the Board (over the dissent of two Members) found: (1) that administrative law judges have "discretionary authority" to appoint interpreters in unfair labor practice cases, and (2) that the General Counsel "failed to establish that the judge abused his discretion by ordering the Agency to provide [and pay for] an interpreter in this case."

However, in a later backpay case involving about 200 unfair labor practice strikers, the Board also upheld the discretion of the judge to *decline* to order the General Counsel to provide and pay for an interpreter. ***Domsey Trading Corp.***, 325 NLRB 429, 429–432 (1998). The judge declined to order the General Counsel to pay an interpreter for discriminatees called by the respondent employer because it was the respondent's burden to establish interim earnings and failure to mitigate its backpay liability, and requiring the Agency to pay the cost of interpreters would "in essence, give the Respondent a blank check to spend the Government's money to defend itself." The Board (with the dissenters in ***George Joseph Orchard*** now in the majority) found that the judge properly exercised his discretion under the circumstances.

NOTE: In both cases, the Board emphasized that it was limiting its ruling to the facts of the case, and that the matter might be more appropriately addressed through rulemaking.

§ 13–608 Examination of Witnesses

FRE 611(a) provides that the judge "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue influence."

See also **§2–300**, "Duties of Administrative Law Judges," and **§13–102**, "Taut Record: FRE 403," above.

§ 13–609 Order of Examination

FRE 611(a) grants the trial judge wide discretion to allow witnesses to testify out-of-turn, for example to save time, avoid confusion, or accommodate the schedule of a critical witness. See ***28 Wright & Gold, Fed. Prac. & Proc. Evid***. § 6164 (1st Ed 2009); and ***Goode & Wellborne, Courtroom Handbook on Federal Evidence*** 376 (West 2008). But see ***Boetticher & Kellogg Co.***, 137 NLRB 1392, 1392 fn. 1, 1398–1399 (1962) (judge erred in precluding a respondent from conducting any cross examination of a General Counsel witness after the respondent refused the judge's direction to cross examine the witness before the charging party union had questioned the witness).

§ 13–610 Leading Questions

Under FRE 611(c), leading questions ordinarily are not permitted on direct examination or examination of a friendly witness, except as may be necessary to develop the witness' testimony, but are permitted on cross-examination or examination of an adverse witness.

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 questions on direct, the better practice is for the judge first to warn counsel not to lead. ***Liberty Coach Co.***, 128

NLRB 160, 162 fn. 7 (1960). But see ***W & M Properties of Connecticut, Inc.***, above, 348 NLRB 162 (no error for judge to permit General Counsel to ask leading questions on direct examination "to develop the witness's testimony" after several nonleading questions were unsuccessful in eliciting certain testimony).

§ 13–611 Section 611(c) Witness

No advance request or ruling is necessary before beginning examination of a hostile or adverse witness under FRE 611(c). The test of that right comes when the opponent objects that a question is leading. ***Omaha Building Trades Council (Crossroads Joint Venture)***, 284 NLRB 328, 329 fn. 4 (1987), enfd. 856 F.2d 47 (8th Cir. 1988).

Generally, after direct examination of the adverse witness under 611(c), the nonadverse party may not ask leading questions on cross-examination. Nevertheless, the judge retains discretion to allow it. See ***28 Wright & Gold, Fed. Prac. & Proc. Evid.*** § 6168 (1st Ed 2009).

A charging party discriminatee is an adverse party under FRE 611(c) (formerly FRCP 43(b)) and can be called as an adverse witness by the respondent. ***Security Services, Inc.***, 198 NLRB 1166, 1166 (1972) (reversible error for the judge to preclude the respondent from calling the charging party discriminatee as an adverse witness rather than its own witness).

§ 13–612 Refreshing Recollection

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 if appropriate and not improperly suggestive.

Adverse Party's Right to Introduce Refreshing Document. Under FRE 612 an adverse party is entitled to documents used by the witness to refresh recollection while testifying or in preparation for testifying, if the judge in his or her discretion "determines it is necessary in the interests of justice." The adverse party "is entitled to inspect it, cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." See, e.g., ***J. G. Braun Co.***, 126 NLRB 368, 369 fn. 3 (1960) (where respondent on cross-examination had read portions of an affidavit into the record to refresh the recollection of a witness, it was error for judge to reject the General Counsel's offer of the entire affidavit into evidence); and ***Baker Hotel of Dallas***, 134 NLRB 524, 524 fn. 1 (1961), enfd. 311 F.2d 528 (5th Cir. 1963). See also FRE 106 (Remainder of or Related Writings or Recorded Statements).

In Camera Inspection and Redaction. FRE 612 also provides that the judge may examine the documents in camera to excise any portion of the document not relevant to the subject matter of the testimony. In ***CNN America, Inc.***, 352 NLRB 265 (2008), the Board indicated that, with respect to documents used in preparation for testifying, the judge's review should be done after the witness has testified. In that case, the Board reversed a judge's ruling that the respondent was required, before the witness testified, to provide opposing counsel with all documents that had been reviewed by the witness within 6 months prior to the hearing. The Board held that the judge read Rule 612(2) too broadly. For the rule to apply, the documents must have been viewed for the purpose of refreshing a witness' recollection and the refreshing must be undertaken for the purpose of testifying. The Board held that the judge should only order documents to be turned over under Rule 612 after the witness has testified so that the judge may properly apply the conditions set forth in the rule.

§ 13–613 Past Recollection Recorded

Under FRE 803(5), the contents of a memorandum or record written, signed, or adopted by a witness reciting events which occurred in the past, but of which the witness has no present recollection, are admissible in evidence as substantive proof of the events. See ***J. C. Penney Co. v. NLRB***, 384 F.2d 479, 484 (10th Cir. 1967) (distinguishing between writings admitted as past recollection recorded and writings used to stimulate memory [present recollection revived] or to determine truthfulness [prior inconsistent statements]).

Reading Document vs. Submitting as Exhibit. If admissible under FRE 803(5), the memorandum or record may be read into the record by the party offering it as substantive evidence, and the adverse party may actually submit it as an exhibit.

Foundation Required. Normally, a foundation must be laid, through testimony of the witness, that at the time of the memorandum he had a recollection of the events, and that he made or adopted them believing them to be true. ***J.C. Penney Co***, above. But cf. ***Three Sisters Sportswear Co.***, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (9th Cir. 1995), cert. denied 516 U.S. 1093 (1996), where the pretrial affidavit of a frightened witness (a current employee), who claimed not to remember anything about her affidavit other than her signature, was received in evidence as past recollection recorded under FRE 803(5).

§ 13–700 Cross-Examination

§ 13–701 Beyond the Scope

FRE 611(b) provides that cross examination should be limited to the subject matter of direct examination. However, the rule gives judges discretion to allow questions beyond the scope of direct examination, and judges often do so (for example, to develop a full record without recalling witnesses). The judge should use his or her best judgment in the circumstances.

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

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 testified 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

"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).

The judge should be careful not to unduly restrict questions or evidence pertaining to impeachment. In ***Halstead Industries***, 299 NLRB 759, 759 fn. 1 (1990), remanded, 940 F.2d 66,

72–73 (4th Cir. 1991), 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.

However, it is "generally inappropriate" to consider credibility determinations made in a different case in making credibility determinations in a subsequent case. ***Electrical Workers (Nixdorf Computers Corp.)***, 252 NLRB 539, 539 fn. 1 (1980). As discussed below, there are also restrictions on the use of certain other types of impeachment evidence.

§ 13–704 No Impeachment on Collateral Matters

Under FRE 608(b), a judge has discretion to refuse to permit impeachment of a witness on a collateral matter that is not probative of the witness' propensity to testify untruthfully concerning a material issue. ***Sunshine Piping, Inc.***, 351 NLRB 1371, 1374–1376 (2007) (judge could have excluded cross-examination of witness' prior drug related acts as it was not relevant to alleged alteration of attendance records). See also ***New York Sheet Metal Works, Inc.***, 243 NLRB 967, 967 fn. 3 (1979).

Further, even if testimony on such collateral matters is allowed, the use of "extrinsic" evidence to impeach is generally prohibited (unless it involves a criminal conviction, see **§13–705**, below). Thus, admission of extrinsic evidence of specific acts to attack the witness' response is not permitted, unless it tends to show bias or motive to testify untruthfully. ***Sunshine Piping***, above. See also ***J.S. Troup Electric, Inc.***, 344 NLRB 1009, 1009–1010 (2005) (application of FRE 608(b) is subject to Rule 403, which permits a judge to exclude impeachment evidence if its probative value is outweighed by considerations of undue delay or waste of time).

With respect to the appropriate weight to give specific prior acts in evaluating credibility, see ***Double D Construction Group***, 339 NLRB 303, 306 (2003), in which the Board criticized a judge for discrediting a witness for lying about his social security number in the past, without taking into account all of the factors tending to support his credibility at the time of his testimony. See also ***Boardwalk Regency Corp.***, 344 NLRB 984, 984 fn. 1 (2005), pet. for review denied, 196 Fed. Appx. 59 (3d Cir. 2006) (***Double D Construction*** stands for the proposition that "a judge should not rely solely on a single prior act of falsification" in making credibility determinations; if there are other factors supporting the witness's credibility, "they too must be considered").

§ 13–705 Criminal Convictions

Under FRE 608(b) and 609, a witness may be impeached, subject to FRE 403, by reference to prior criminal convictions (not just arrests) if they are either (1) punishable by death or imprisonment over 1 year, or (2) the elements of the crime required proof or admission of an act of dishonesty or false statement. See ***Service Employees (GMG Janitorial)***, 322 NLRB 402, 406 (1996) (mail fraud and conspiracy convictions admitted and considered under FRE 609).

FRE 609 also sets forth time limits: the evidence may only be used within 10 years of the witness' conviction or release from confinement, whichever is later (although the judge retains the discretion to allow older evidence if "the probative value. . . substantially outweighs its prejudicial effect").

The judge may, of course, still credit a witness, notwithstanding such convictions. See ***Franklin Iron & Metal Corp.***, 315 NLRB 819 fn. 1 (1994), enfd. 83 F.3d 156 (6th Cir. 1996) (judge considered a felony conviction within the last 10 years for carrying a concealed weapon, but nevertheless credited the substantially corroborated testimony of the witness).

§ 13–706 Inconsistent Prior Statements

A witness may be impeached by reference to a prior inconsistent statement. Under FRE 613, the inconsistent statement need not be shown or its contents disclosed to the witness during the examination, but must be shown or disclosed to the adverse party on request. Further, the statement generally cannot be admitted into evidence until the witness has been afforded an opportunity to explain or deny the statement and the opposing party has had an opportunity to question the witness about it. See also **§13–800**, with respect to the release of Jencks statements generally.

In evaluating prior inconsistent statements, the judge must carefully weigh the circumstances and relevance of the alleged contradictions. See ***Advocate South Suburban Hospital v. NLRB***, 468 F. 3d 1038, 1046 (7th Cir. 2006) ("where a contradiction goes to the heart of a witness's story, belief can be error. But crediting the witness makes sense when the impeaching statements differ only with respect to minor aspects of the story or where the discrepancies are easily explained." [citations omitted]).

§ 13–800 Release of Witness Statements

§ 13–801 Generally Not Released/Jencks Exception

The General Counsel has no obligation to produce exculpatory material contained in the Government's files. Indeed, Section 102.118 of the Board's Rules prohibits any release of specified documents without the Board or General Counsel's prior written consent.

An exception is provided in 102.118(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 **§13–805**, below. Such pretrial statements or affidavits are also referred to as Jencks statements. See **§8–500**, above.

However, even Jencks statements need not be released or produced until after the witness has testified. Further, the entire statement need not be produced unless the entire contents relate to the subject matter about which the witness testified. Section 102.118(b)(1).

Thus, in ***Caterpillar, Inc.***, 313 NLRB 626, 626 (1993), the Board held that when the General Counsel asserts that material in a Jencks statement does not relate to the subject matter of the witness' testimony on direct examination, the judge must inspect the statement in camera and excise any portion of the statement that does not relate to the testimony. The judge may exercise discretion in this respect, and retain portions that relate to the pleadings, even if not to the testimony. However, judges may not direct the General Counsel to produce affidavits from other cases, regarding matters on which the witness has not testified. See also ***Tejas Electrical Services, Inc.***, 338 NLRB 416, 416 fn. 2 (2002).

With respect to the General Counsel's obligations to search its files, on January 29, 1999, the Board issued an unpublished interim order in ***Albertson's, Inc.***, Case 27–CA–13390, ruling

that the General Counsel is obligated to search its files [before, it is implied, the witness testifies] for any statements in cases involving charges filed by the charging party union against the respondent during the period covered by the pending charges. Further, the Board denied the General Counsel's request to restrict the search to the same Regional Office where the pending charges were filed. However, it ruled that the General Counsel was not required to search files in cases involving charges against other employers.

§ 13–802 Copies in Possession of Others

In ***H. B. Zachry Co.***, 310 NLRB 1037, 1038 (1993), the Board made it clear that Section 102.118(b)(1) also applies to affidavits in the possession of a charging party, i.e. the respondent is not entitled to the affidavits until after the witness is called and testifies on behalf of the General Counsel. No waiver results from the fact that witnesses give copies of their affidavits to the charging party union.

§ 13–803 Charging Party Entitled to Statements

A charging party is entitled, on request and for the purpose of cross-examination, to a pretrial statement of an agent who testifies on behalf of the respondent. See ***Senftner Volkswagen Corp.***, 257 NLRB 178, 178 fn. 1, 186–187 (1981), enfd. 681 F.2d 557 (8th Cir. 1982), where the Board upheld the judge's ruling that allowed the charging party to utilize for cross-examination the pretrial affidavit given by a respondent witness. See also Section 10394.7 of the *NLRB Casehandling Manual* (Part One).

Board law is somewhat unclear whether a charging party may demand a copy of a witness' Jencks statement before or after calling the witness as an adverse or hostile witness under Section 611(c) of the Federal Rules of Evidence. See ***Louisiana Dock Co.***, 293 NLRB 233, 250–251 (1989), enf. denied, 909 F.2d 281 (7th Cir. 1990). However, based on decisions dealing with 611(c) witnesses called by respondents, the answer would appear to be "no." See ***Kenrich Petrochemicals, Inc.***, 149 NLRB 910, 911 fn. 2 (1964) (respondent not entitled to Jencks statement given by charging party, when charging party was called by respondent rather than the General Counsel, even though called as an adverse witness under FRCP 43(b)[now FRE 611(c)]). See also ***NLRB v. Duquesne Electric Co.***, 518 F.2d 701, 705 (3d Cir. 1975) (upholding judge's application of ***Kenrich Petrochemicals*** where respondent called a discriminatee to testify, noting that FRCP 43(b) [now FRE 611(c)] only authorizes leading questions, not cross-examination).

§ 13–804 Statements by Respondent's Witnesses

Respondents are not entitled to Jencks statements of their own witnesses. ***Clear Channel Outdoor, Inc.***, 346 NLRB 696 fn. 1 (2006). This is true even if called as an adverse or hostile witness under FRE 611(c). See ***Kenrich Petrochemicals, Inc.***, above, and ***NLRB v. Duquesne Electric Co.***, above. Note, however, that the court in ***Duquesne*** suggested that respondent might have been entitled to the discriminatee's affidavit to impeach if "she had given testimony damaging to the [respondent'] case, which she never did." 518 F.2d at 705.

§ 13–805 What Is a Jencks Statement?

Section 102.118(d) defines a Jencks "statement" to mean any written statement by the witness that is signed or otherwise adopted or approved by him/her, as well as a tape recording or transcription that is a substantially verbatim recital of an oral statement made by the witness to

the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement.

If notes taken by a Board agent (or a memo made of an interview with the witness) are not adopted or approved by the witness, they are not a Jencks "statement" and are therefore not producible under Section 102.118(b)(1). ***Caterpillar, Inc.***, above, 313 NLRB at 627 fn. 4. See also ***National Specialties Installations, Inc.***, 344 NLRB 191 (2005) (written notice from third party to a witness, such as a notice from a witness' bank, is not a "statement made by said witness" within the meaning of the Rule; and since it was not adopted by the witness, it is not producible). See also **§8–510**, above, with respect to other documents that are not considered "Jencks statements."

§ 13–807 Notes Not Adopted

In ***Caterpillar, Inc.***, 313 NLRB 626, 626 fn. 2, 627 fn. 4 (1993), the Board held that 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.

Similarly, in ***Coca-Cola Bottling Co.***, 250 NLRB 1341, 1342 (1980), a Board agent's "writing something" as a witness spoke to him did not qualify the document either as a "statement" or a statement "adopted or approved."

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

In ***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), the respondent requested all notes that a witness had passed to the General Counsel during the trial. The General Counsel produced the notes in his possession, but stated on the record that he had probably discarded the others, because he did not consider them to be Jencks "statements" and the respondent had not previously shown any interest in them. Assuming arguendo that the notes constituted "statements," the Board found no basis for rejecting the witness' testimony under the circumstances.

§ 13–809 Letters

A signed letter constitutes a producible "statement." See ***Rosenberg v. U.S.***, 360 U.S. 367, 370 (1959).

§ 13–810 In Camera Inspection on Relatedness Issue

As discussed above in **§13–801**, 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 judge should review the statement in camera and excise any portions that do not relate to the subject matter of the testimony of the witness or the pleadings.

§ 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).

Similarly, it may be too late to demand production after the witness has been excused. ***Walsh Lumpkin Wholesale Drug Co.***, 129 NLRB 294, 296 (1960). See also ***Earthgrains Co.,*** 336 NLRB 1119, 1122 (2001) (request for affidavits untimely when made immediately prior to close of trial after last witness had been excused); ***SBC California*****,** 344 NLRB 243, 243 fn. 3 (2005) (request for affidavit untimely when made at the close of respondent's case).

Requests have also been ruled untimely when not made until "well into" the cross-examination of the witness. See ***I-O Services***, 218 NLRB 566, 566 fn. 1 (1975) (holding that judge's ruling was not an abuse of discretion under all the circumstances). See also the judge's unexcepted-to ruling in ***Longshoremen ILA Local 20 (Ryan-Walsh Stevedoring)***, 323 NLRB 1115, 1120 (1997) (request for affidavit after 2 hours of cross-examination could unnecessarily prolong the trial as counsel would likely attempt to "re-plough ground already covered").

§ 13–812 Sufficient Time to Study

A judge's denial of 15 minutes time to study the statement after production was found to be prejudicial error requiring a remand in ***A. R. Blase Co.***, 143 NLRB 197, 197–198 (1963), enf. denied 338 F.2d 327 (9th Cir. 1964). Normally, the General Counsel should not oppose a request for a reasonable time for study. See Section 10394.9 of the *NLRB Casehandling Manual* (Part One).

§ 13–813 Affidavits Admissible in Evidence

See **§13–206** et seq., above, for a discussion of the admissibility of affidavits.

§ 13–815 Right to Copy Jencks Statements

There is no absolute right to make copies of the statements, unless the statements are admitted into evidence. This is within the judge's discretion. ***Manbeck Baking Co.***, 130 NLRB 1186, 1189–1190 (1961). However, Section 10394.9 of the *NLRB Casehandling Manual* (Part One), now provides that, for witness statements required to be produced by the General Counsel to a respondent, the General Counsel will produce both the original and a copy.

With respect to retention of the statement, in ***Wal-Mart Stores, Inc.***, 339 NLRB 64 (2003), the Board held that a Jencks witness statement may not be retained after the close of the trial. After the witness has testified, the exception to the general prohibition against using Board files under Section 102.118(b)(1) of the Board's Rules no longer applies and the prohibition of the Rule is restored. Nonetheless, the Board confirmed that a judge may, in his or her discretion, permit counsel to copy the statement and to retain it throughout the hearing "for any legitimate trial purpose." Id. at fn. 3. See also Section 10394.9 of the *NLRB Casehandling Manual* (Part One) (providing that, on request, the respondent may retain the copies throughout the trial for legitimate trial purposes, returning them at the close of the trial (unless, of course, the statement has been made an exhibit)).

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

§ 13–816 Translation of Affidavit

In ***NLRB v. Doral Building Services***, 666 F.2d 432, 435 (9th Cir. 1982), the court held that the General Counsel erroneously failed to provide an official translation of non-English language affidavits of his witnesses. It is not adequate to simply provide the original affidavits to the respondent and leave it up to the respondent to provide its own translator. The case was remanded so that the respondent could be provided with an official English translation of the original foreign language statements. See also ***NLRB v. Bakers of Paris, Inc.***, 929 F.2d 1427 (9th Cir. 1991) (discussing both admissibility and use for impeachment of English affidavits taken of non-English speaking witnesses).

§ 13–900 Rebuttal and Surrebuttal Testimony

FRE 611 makes no mention of redirect and re-cross examination. However, the judge has broad discretion in deciding whether rebuttal and surrebuttal testimony would be helpful in developing the evidence, or whether it would inappropriately and unnecessarily prolong the trial. See ***Garden Ridge Management, Inc.***, 347 NLRB 131, 131 fn. 3 (2006), citing ***Water's Edge***, 293 NLRB 465, 465 fn. 2 (1989), enfd. in part 14 F.3d 811 (2d Cir. 1994). In ***Water's Edge***, the Board stated:

> 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.

In ***Bethlehem Temple Learning Center, Inc.***, 330 NLRB 1177, 1177 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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