

H. MOTIONS, in General

OVERVIEW:

At the opening of the hearing, to the extent that certain matters were not covered during the pre-hearing conference, the Trial Attorney addresses certain preliminary matters before calling any witnesses during the GC's case-in-chief. Such matters include various types of motions, the disposition of which facilitates the orderly presentation of evidence at trial.

OBJECTIVE:

To provide guidance concerning the various types of motions filed before the start of the hearing: motions for the sequestration of witnesses; motions to amend the complaint; and motions to introduce formal documents, joint exhibits, and stipulations.

1. MOTION FOR SEQUESTRATION:

a. *Regulatory authority:*

Under § [2423.31\(a\)](#), concerning the conduct of the hearing, an ALJ has broad discretion to rule on motions which includes a motion to sequester witnesses.

See, e.g., SBA, 54 FLRA No. 83, 54 FLRA 837, 847 (1998); United States Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA No. 97, 5 FLRA 725, 736-41 (1981) (MCLB, Barstow) (ALJD) (discussion and application of NLRB rule on sequestration).

b. [Rule 615](#) of the Federal Rules of Evidence provides:

“At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

- i. a party who is a natural person; or
- ii. an officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- iii. a person whose presence is shown by a party to be essential to the presentation of his cause.”

c. *Purpose of Motion:*

To prevent the shaping of testimony by witnesses to match that given by other witnesses, i.e., to prevent witnesses from modifying their testimony based on the testimony of others.

d. *Timing of Motion:*

Motion is either made pre-hearing and discussed at the pre-hearing conference or at the outset of the hearing. See [Part 1, Chapter Q](#) on Pre-hearing Conference. Whenever the motion is made, the intent is to minimize the witnesses’ opportunity to overhear on-the-record discussion of the case, even with respect to discussion of other preliminary matters.

e. *Content of Motion:*

Request that ALJ issue an order preventing the witnesses not only from hearing the testimony of other witnesses, but also from discussing their testimony with each other. Even though such a prohibition is not within the explicit wording of [Rule 615](#), it is necessary to prevent circumvention of the Rule.

f. *General Criteria: Motion to sequester witness is made when:*

- The credibility of witnesses is expected to be an issue and witness may need to testify on rebuttal;
- Where GC witnesses are subject to intimidation or other influence by the presence of supervisors, management officials, or union officials; and
- Where witness is the Charging Party (ask Charging Party to designate a representative in this instance).



As much as possible, seek to establish an environment in which witnesses are free of any possible influence by the prior testimony of other witnesses or by the presence of such persons during their testimony. To this end, always consider obtaining the testimony of a witness before other testimony is presented. However, this may present a problem if this witness testifies on rebuttal.

g. *Witnesses subject to sequestration order:*

i. The discriminatee:

In *MCLB, Barstow*, 5 FLRA at 736-37, after the discriminatee had completed his testimony, the Trial Attorney requested that the discriminatee be permitted to remain in the courtroom, and Respondent's counsel objected unless the GC waived its right to recall the discriminatee as a rebuttal witness. The Judge refused to allow the discriminatee to remain in the courtroom based on his determination that the case would "hinge upon close credibility resolutions," noting that the GC would still be permitted to call the discriminatee as a rebuttal witness. (The Authority did not rule on this sequestration order).

NLRB allows limited sequestration to the extent that alleged discriminatees should be excluded from overhearing the testimony of other witnesses but only with respect to events about which the discriminatee testifies or is expected to testify.

See Medite of New Mexico, Inc., 314 NLRB 1145, 1148-49 (1994) (discussing rule developed in Unga Painting Corporation, 237 NLRB 1306 (1978)). Rule is tempered by ALJ's ultimate discretion to modify its application in specific cases.



As a practical matter, even if the Trial Attorney believes the alleged discriminatee's unrestricted presence at the hearing would be helpful to prosecute of the case, the Trial Attorney weighs the possible disadvantage should credibility be crucial to successful litigation of the case. It is possible that the discriminatee's presence during critical testimony may unfavorably "color" the ALJ's assessment of the discriminatee's credibility.

ii. The Technical Advisor:


ALJs often exempt technical advisors from sequestration orders.

See, e.g., Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey, 24 FLRA No. 31, 24 FLRA 255, 256 (1986) (Authority rejected the Charging Party's claim that ALJ erred in permitting Respondent's technical advisor to testify without having been sequestered); compare F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 154-55 (1996) (Noting that content of excluded testimony was not critical to the case, Authority upheld ALJ's ruling that prevented technical advisor from testifying where Respondent made no effort to exempt its technical advisor from general sequestration order).

iii. Respondent's counsel:

If the Trial Attorney has reason to believe that Respondent's counsel plans to testify at hearing, the Trial Attorney advises opposing counsel by letter that s/he will move to preclude opposing counsel from serving as both a witness and Respondent's representative at the hearing.

Cf. United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Austin Service Center, Austin, Texas, 25 FLRA No. 4, 25 FLRA 71, 78 (1987) (ALJD) (After describing the ethical problems raised by **union attorney's** testimony, ALJ denied Respondent's motion to strike all documents filed by union attorney, who the GC called as a witness, finding that there was no issue because the attorney took no part in the examination of witnesses, made no objections, presented no oral argument, and because the attorney's testimony was wholly uncontroverted).

 *If the GC needs the attorney who acts as counsel for party to testify as a witness for the GC, request the party to secure an alternate representation to avoid compromising the credibility of the witness.*

iv. Summary and Expert Witnesses:

(1) Summary witnesses:

Present testimony based on other testimony rather than on own information, and are generally exempt from sequestration. Use of a summary witness is rare in ULP litigation.

(2) Expert witnesses:

Are also rarely used, but when called to testify at a ULP hearing, sequestration may be desirable if credibility is an issue. Where an expert witness does not testify regarding facts, but rather gives an opinion based on the testimony of others, there is little purpose served by sequestration. It may even assist such an expert witness to hear the testimony of others because the expert's testimony will then be based on a more accurate understanding of the others' testimony. United States v. Bertoli, 854 F. Supp. 975, 1037-38 (D.N.J. 1994), aff'd in part, vacated in part, 40 F.3d 1384 (3d Cir. 1994).

EXAMPLE OF MOTION FOR SEQUESTRATION

Trial Attorney: Your Honor, Counsel for the General Counsel moves for the sequestration of all witnesses to this proceeding, including any technical advisors, based on our expectation that credibility of witnesses will be an issue. To this end, the General Counsel requests the ALJ to issue an order to prevent the witnesses from hearing the testimony of other witnesses and also to prevent the witnesses from discussing their testimony with other witnesses until the hearing has been closed.

The sequestration order is ordinarily stated by the ALJ to witnesses present in the courtroom, but the ALJ will generally request that the Trial Attorney and opposing counsel “police” the order by instructing witnesses not to discuss their testimony until the hearing is closed.

2. MOTION TO AMEND COMPLAINT:

See [Part 1, Chapter L](#) subsection 2.d. concerning Pre-Hearing Motions.

3. MOTION TO INTRODUCE FORMAL DOCUMENTS:

See [Part 1, Chapter N](#).

 *The formal documents will be received by the ALJ as a matter of course.*

4. MOTION TO INTRODUCE JOINT EXHIBITS:

a. *Documents which are authentic, relevant and material.*

For example, the parties may stipulate to the introduction of the applicable collective bargaining agreement.

- b. *Early introduction of undisputed documents expedites the hearing.*
- c. *Trial Attorney describes joint exhibits briefly on the record.*
- d. *Two copies are submitted to the ALJ and copies given to each of the parties.*

5. MOTION TO RECEIVE STIPULATION(S):

- a. *Regulatory authority:*

Section [2423.26](#)(b) permits the ALJ to receive into evidence stipulations of fact with respect to any issue.

- b. *When to file a motion?*

Whenever possible, agreed-upon relevant facts are introduced into the record in the form of stipulations to streamline presentation.

- c. *How presented?*

The motion is presented in either written or oral form. A written stipulation may be introduced as a joint exhibit or may be read into the record. A stipulation which has not been reduced to writing may be orally stated on the record. In either case, each party must signify agreement to the accuracy of the contents and admissibility of the stipulation.

6. MOTION FOR SUMMARY JUDGMENT:

See [Part 1, Chapter F](#).

7. MOTION FOR COMPLIANCE WITH SUBPOENAS:

See [Part 2, Chapter J](#).

- Q** [Part 1, Chapter F](#) concerning Motion for Summary Judgment;
[Part 1, Chapter L](#) concerning Pre-Hearing Motions;

[Part 1, Chapter N](#) concerning Formal Documents;

[Part 1, Chapter Q](#) concerning Pre-hearing Conference; and

[Part 2, Chapter J](#) concerning Enforcement of Subpoenas.