

Z. OBJECTIONS

OVERVIEW:

Unlike the parties to proceedings before the NLRB, under § [7118\(a\)\(6\)](#) of the Statute and § [2423.31\(b\)](#) of the Regulations, the parties to FLRA hearings are not bound by the Federal Rules of Evidence. See, e.g., Department of Veterans Affairs, Medical Center, Denver Colorado and Veterans Canteen Service, Denver, Colorado, 52 FLRA No. 2, 52 FLRA 16, 22 (1996) (VAMC, Canteen Service). However, reliance on rules of evidence in trial preparation and presentation as the basis for an objection is a way to ensure the orderly introduction of evidence.

OBJECTIVE:

To provide guidance concerning the specific grounds for objecting to evidence; when and how to make objections; and when and how to respond to opposing counsel's objections.

1. CRITERIA FOR ADMISSION OF EVIDENCE:

- a. Pursuant to § [2423.31\(b\)](#), the rules of evidence are not strictly followed.
- b. The ALJ may exclude any evidence which is immaterial, irrelevant, unduly repetitious or customarily privileged.

2. RULES GOVERNING OBJECTIONS:

- a. § [2423.30\(d\)](#):
 - Objections are oral or written complaints concerning the conduct of a hearing; and
 - Any objection not raised to an ALJ is deemed waived.

b. *ALJ's ruling on objections:*

- An ALJ has broad discretion to rule on objections;

See *VAMC, Canteen Service*, 52 FLRA at 22 (ALJ has broad discretion to rule on evidence or testimony offered).


- Appeals of adverse rulings are not made until exceptions to the ALJ's decision are filed with the Authority. See § [2423.40](#), which covers exceptions to the decision of the ALJ.

See [Part 2, Chapter I](#) concerning interlocutory appeals.

3. WHEN TO OBJECT:

Objections are appropriate when:

- There is a legal basis for one; and
- When, by objecting, the Trial Attorney can prevent harm to his/her case.

 *It is not necessary nor wise to object every time there is a basis to object. The strategic use of objections is a useful tool. Judges do not appreciate "technical" objections particularly when the objection is to otherwise admissible evidence. It is generally not good form to object merely to interrupt the flow of testimony of a witness; such an interruption usually only results in the repetition of the troubling testimony or argument.*

4. HOW TO OBJECT:

Objections are addressed to the court only. The Trial Attorney briefly explains his/her position regarding the objection (or his/her response to an objection). Generally, an objection is made in the following manner:

"Objection, Your Honor, on the basis (or grounds) of . . ." [followed by the specific reasons for the objection].

5. FORMS OF OBJECTIONS:

a. *General objections:*

Are usually worded: "We object," or "Objection," or "Objection, irrelevant." General objections can be made first and then followed by a more specific objection if the judge so requests.

b. *Specific objections:*

Are made with specific bases stated. Every basis for such an objection should be stated. For example:

"Objection, Your Honor, the question is leading, there is no foundation established for it, and concerns evidence not in the record."

c. *Continuing objections:*

May be made to an entire line of questioning. For example:

"Your Honor, I object to this entire line of questioning [describe the issue or subject under inquiry]. [Explain the bases]. I ask the court to please note this continuing objection."

The Trial Attorney may renew the continuing objection at the end of the testimony and then make a motion to strike based on the original objection to the line of questioning.

6. SPECIFIC OBJECTIONS TO QUESTIONS:

a. *Irrelevant:*

The question calls for an answer which will not tend to make any consequential fact more or less probable.

b. *Immaterial:*

The question calls for evidence which is not relevant and which does not go to substantial matters in the dispute. Material evidence goes to an issue which has bearing on the ultimate decision.

c. *Incompetent witness:*

The witness lacks the qualification of oath or mental capacity. [Fed. R. Evid. 601--605](#):

- 601 General Rule of Competency
- 602 Lack of Personal Knowledge
- 603 Oath or Affirmation
- 604 Interpreters
- 605 Competency of Judge as witness

d. *Best evidence rule:*

A question that calls for the witness to testify as to the content of a document is objectionable. The Trial Attorney argues that the document or an authenticated copy must be entered into evidence or its absence explained and that the document "speaks for itself." [Fed. R. Evid. 1002](#).

e. *Privileged communication:*

The question calls for testimony which would violate a recognized privilege such as attorney-client privilege, attorney work product, and union representative-employee. See § [2423.31](#)(b).

See [Long Beach Naval Shipyard, Long Beach, California](#), 44 FLRA No. 83, 44 FLRA 1021, 1038-39 (1992); [U.S. Department of the Treasury, Customs Service, Washington, D.C.](#), 38 FLRA No. 103, 38 FLRA 1300, 1308-09 (1991) (recognition of union representative/unit employee privilege).

f. *Calls for conclusion:*

The question calls for the witness to make a conclusion rather than to testify as to the facts. A non-expert witness cannot make an inference or conclusion about a matter unless it is "rationally based on the perception of the witness" or "is helpful to the clear understanding of his testimony or the determination of the fact in issue." [Fed. R. Evid. 701](#).

Exception: An expert witness may make conclusions based on evidence in the record or based upon a hypothetical within his/her expertise. [Fed. R. Evid. 602](#).

g. *Calls for opinion (by an incompetent witness):*

Witness asked to give a lay opinion about a matter which is not within the witness' expertise. [Fed. R. Evid. 701](#) .

- i. Trial court has broad discretion to determine whether a lay witness is qualified to testify on a matter of opinion. [U.S. v. Borrelli](#), 621 F.2d 1092 (10th Cir. 1980).
- ii. Areas where lay opinion is allowed:
 - Handwriting (where one is familiar with it);
 - Physical condition (when based on facts--person was drunk because s/he appeared disheveled, stumbled and smelled of alcohol); and
 - Another person's knowledge or intent (co-worker testifies that another co-worker knew and understood the regulations).
- iii. Areas where lay opinion is not admissible:
 - Truth of a matter;
 - Meaning of someone else's words; and
 - Legal conclusions.

h. *Narrative answer:*

- i. The question is so broad that it allows the witness to ramble and possibly present hearsay or other incompetent evidence. [Fed. R. Evid. 611\(a\)](#).

- ii. The ALJ has broad discretion to allow narrative testimony. ALJ may allow narrative testimony when it would save time and make the testimony clearer. This is balanced against opposing counsel's right to object to inadmissible testimony before it is uttered.

i. *Hearsay:*

i. *Definition:*

The question calls for the witness to make "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." [Fed. R. Evid. 801\(c\)](#) .

ii. *Hearsay is admissible in FLRA hearings:*

However, the reliability and probative weight of the statement is weighed by the ALJ. U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 1-CA-00279, ALJD Rpt. No. 96 at p. 12 n.12 (1991); Veterans Administration Medical Center, John Cochran Division, St. Louis, Missouri, 7-CA-726, ALJD Rpt. No. 14 at p. 7 (1982).

iii. *Statements which are not hearsay--[Fed. R. Evid. 801\(d\)](#):*

(1) Prior statement by a witness which:

- Is either inconsistent with his/her hearing testimony; or
- Is consistent with hearing testimony **and** is offered to rebut a charge of recent fabrication; or
- Identifies a person made after perceiving him, or

(2) Admission by party-opponent and which is:

- His/her own statement in either his/her own or representative capacity; or
- A statement of which s/he has shown manifested an adoption or belief in its truth; or
- A statement made by a person authorized to do so; or
- A statement made by an agent (or servant) in the scope of his agency, made during the existence of the relationship.

iv. *Exceptions to the hearsay rule--[Fed. R. Evid. 803](#):*

Although hearsay, these statements or documents are reliable and admissible and apply whether or not the declarant is available to testify if they fit into one of the following categories:

- *Present sense impression;*
Statement describes or explains a condition or event and is made while the declarant was perceiving the event or condition.
- *Excited utterance;*
Statement related to a startling event or condition while the declarant is experiencing it.
- *Then existing mental, emotional, or physical condition;*
Statement of the declarant's state of mind, emotion, sensation or physical condition. (Example: "She said she was sick and was going home").
- *Medical diagnosis or treatment;*

Statements about a medical diagnosis or treatment; describing medical history, such as mental or conditions (pain, temperature, lucidity).

- *Recorded recollection;*

A memorandum or record concerning a matter about which the witness once had recollection, but no longer does. If efforts to refresh the witness' recollection fail, the document may be entered into evidence as proof of a fact.

- *Records of regularly-scheduled activity;*

A memorandum, report, or other document, in any form, kept in the regular course of business in a routine manner, if identified by the custodian of the record.

- *Public records and reports;*

Records, reports, statements or data compilations, in any form, of public offices or agencies which set forth--

- The activities of the office or agency, or
- Matters observed pursuant to the required activities or duties where the record was required by law.

- *Learned treatises;*

May be used to cross-examine expert witnesses. If admitted in testimony, the treatise is not received into evidence.

- *Reputation--character; and*

Among the person's associates or in the community.

- *Other exceptions--the "catch-all"*

Allows the introduction of evidence which is--

- Evidence of a material fact;
- More probative on the point than any other evidence which can be reasonably obtained; and
- Serves the purposes of the Fed. R. of Evid. and justice.

v. *Exceptions where declarant is unavailable--[Rule 804](#):*

(1) Unavailability means any of the following:

- Exempted by court ruling or privilege;
- Persists in refusing to testify despite court order;
- Testifies that s/he does not recall;

- Unable to be present due to physical or mental illness or death; and
- Absent from hearing and proponent of his statement could not secure the witness' presence by process or otherwise reasonable means. For example, witness is in Europe and will not return for the hearing.

(2) Specific Exceptions:

Former testimony of the unavailable witness--transcript of hearing or deposition or sworn interrogatories.

(3) Other exceptions--the "catch all"--evidence is admissible if:


- It is offered as evidence of material fact;
- It is more probative than any other evidence; and
- The purposes of rules and interests of justice would be served by the admission of the evidence.

Proponent of the statement must give advance notice to the adverse party that s/he intends to use the statement or document, including the name and address of the declarant.

j. *Leading question:*

Question invites a particular answer. [Fed. R. Evid. 611\(c\)](#). Leading questions are generally not allowed during direct examination.

See [Part 2, Chapter S](#) concerning Leading Questions on Direct Examination.

 *Objections to leading questions are waived if not made. The ALJ has no duty to stop leading questions in the absence of an objection.*

k. *Repetitive/asked and answered:*

Question calls for an answer which has been previously given.

l. *Beyond the scope of direct, cross or re-direct:*

Question calls for an answer about facts beyond the information elicited on direct, cross or re-direct.

m. *Assumes facts not in evidence:*

Question calls for an answer which depends on facts not presented. The judge usually will allow the questioner to "back up" and establish a foundation by putting in the facts "not in evidence."

n. *Confusing, ambiguous, vague:*

Objection goes to the form of the question, not to the evidence it elicits.

o. *Calls for speculation:*

Calls for an answer about which the witness lacks knowledge.

p. *Compound/double question:*

Asks more than one question.

q. *Argumentative:*

Calls for a particular answer suggested by attorney, similar to leading; also, attorney's questioning is really quibbling with the witness.

r. *Misstates facts in evidence:*

Attorney's question misstates evidence in the record--similar to a question calling for evidence not in the record. The effect is to mislead the witness.

s. *Cumulative:*

Question calls for facts or testimony previously provided.

t. *Question calls for testimony barred by court order:*

This could occur where sanctions are granted for failure to comply with a subpoena, or where sequestration rules have been violated. In these circumstances, the ALJ would bar certain evidence or testimony.

7. OBJECTIONS TO ANSWERS:

Even though a question may be properly stated, the answer given may contain impermissible characteristics. Therefore, answers are objectionable for many of the same bases as discussed above (e.g., Irrelevant; Immaterial; Privileged; Conclusion; Opinion; and Hearsay) and on the grounds that:

- The narrative answer goes on without interruption, making it difficult for Trial Attorney to properly object to questions and answers;
- The answer contains an improper characterization which is an opinion for which there is no basis or conclusion, i.e., answer is speculative;
- Rather than testimony about a document, there is the document itself which contains the evidence requested, i.e., Best Evidence Rule;
- Witness blurts out remarks which may or may not be responsive to something going on in the court room; however, witnesses should respond to questions only, i.e., no question pending; and
- Witness' answers are uncontrolled, unresponsive, or volunteered.

8. WHEN TO MAKE OBJECTIONS TO TESTIMONY:

Allow the witness to finish answering the question before objecting to the answer. If the objection is sustained, move to have the objectionable answer stricken from the record.

9. OBJECTIONS TO EXHIBITS:

Documents, like questions and testimony, are subject to objections.

- a. *Specific objections to exhibits:*
- Irrelevant;

- Immaterial;
- No foundation;
- No authentication;

The document has not been identified by a person competent to do so, i.e., record keeper, writer, recipient.

- Contains hearsay/double hearsay;
- Violates best evidence rule;
- Prejudice outweighs probative value;
- Contains inadmissible matter (matters subject to limiting sanctions, unreliable hearsay, self-serving statements, notations not identified or authenticated);
- Reading from exhibit not in evidence--not allowed unless the document is used to refresh recollection. Once refreshed, the witness must testify from memory, not the document; and
- Reading from exhibit unfairly or out of context--if a portion comes in, the rest may come in for clarity and fairness.

See [Fed. R. Evid. 106](#)--"Rule of Completeness."

b. *When to make:*

After opposing attorney moves to enter the exhibit into evidence. Usually, the ALJ will ask if there are any objections.

10. OBJECTIONS TO OPENING STATEMENTS:

Opening statements are not evidence. The purpose of an opening statement is to summarize the case the attorney will present through witnesses and documents. Therefore, opening arguments are objectionable on the following grounds:

- *Arguing law;*
- *Argumentative;*
- *Inadmissible evidence mentioned;*

A very rare instance, since all evidence is admissible, except evidence which is immaterial, irrelevant, unduly repetitious or customarily privileged. If sanctions have been imposed, evidence covered by the sanctions may not be argued or mentioned.

- *Mentions "unprovable" points;*
- *Gives personal opinions; and*
- *Anticipates Respondent's evidence;*

Unless the answer provides the Respondent's defense, this is speculation. Often, however, the Trial Attorney knows what defenses will be presented and mentioning them is not improper.

11. OBJECTIONS TO CLOSING ARGUMENTS:

- May become more important in cases which are argued orally without submission of a brief.*
- Are rarely made since most cases have not been orally argued.*
- The most common type of objections to closing statements are:*
 - Misstates the evidence;
 - Misstates the law;
 - Gives personal opinions;
 - Personal attacks on parties or trial attorney;
 - Argues facts not in evidence; and
 - Uses exhibits not in evidence.


12. RESPONDING TO RESPONDENT'S OBJECTIONS:

- When:*

The ALJ usually asks the Trial Attorney to respond to an objection. If the ALJ does not so request, the Trial Attorney asks the judge for an opportunity to do so. This request is appropriate after the objection is made and before the ALJ rules.

- How to respond:*

Trial Attorney addresses the reasons why the testimony or document is admissible, based on the specific objections made.

 *Acknowledge when the opposing attorney has stated appropriate grounds for an objection and the Trial Attorney does not have a sufficient explanation. In this instance, withdraw the question, rephrase the question, or do whatever is appropriate under the circumstances.*

If a Respondent's objection is sustained without explanation, the Trial Attorney may ask the ALJ for an explanation. This is helpful if you are not sure why the form of your question was objectionable.

Q Trial Notebook, [ATTACHMENT 1M](#), Objections Checklist.

RESERVED