

N. PREPARING FORMAL DOCUMENTS AND PRE-HEARING DISCLOSURE

OVERVIEW:

Section [2423.23](#), “Prehearing disclosure”, mandates that parties exchange proposed witness lists, copies of documents intended to be offered into evidence at the hearing, and a brief statement of the theory of the case at least 14 days prior to the hearing. The disclosure of the required information is an important device that facilitates dispute resolution, clarifies the matters to be adjudicated, informs the parties of the evidence to be adduced at the hearing, eliminates unnecessary duplication, and facilitates the development of a complete factual record during the hearing.

OBJECTIVE:

To provide guidance concerning which papers are formal, how they are presented in the record, and pre-trial matters relating to the exchange of documents and witness lists.

1. FORMAL PAPERS:

- a. *When are they presented?*
 - i. The Trial Attorney is required to put into evidence two copies of the GC’s formal exhibits at the beginning of each hearing.
 - ii. Ancillary documents, if attached to a charge, must be introduced separately.

b. *What documents are formal?*

At a minimum, the formal documents consist of the Charge, Amended Charge, Complaint, Amended Complaint, written Motions, written responses to Motions, Notice of Time, Date and Location of Hearing, Notice Rescheduling the Hearing, Answer to the Complaint and Amended Answer to the Complaint.

c. *What documents are **not** formal?*

i. The transmittal memo; and

ii. Subpoenas, absent extraordinary circumstances (e.g., when an issue relates to the subpoena).

 *Subpoenas are a part of the trial notebook. See [Part 1, Chapter M](#).*

d. *How are they presented?*

The formal papers are listed in an index and numbered G.C. Exhibit #1, with each document identified separately by distinct letter. (Example: Charge is G.C. Exhibit #1a, Complaint is G.C. Exhibit #1b, Answer to Complaint is G.C. Exhibit #1c.)

e. *Revision of list of exhibits:*

Trial Attorney is prepared to revise the GC's index of exhibits and numbering of exhibits during the pre-hearing conference in the event the exhibit is no longer needed due to duplication or stipulation.

2. PRE-HEARING DISCLOSURE--EXCHANGE OF COPIES OF DOCUMENTS, WITNESS LISTS, AND THEORIES OF THE CASE:

a. *What is exchanged and when?*

At least 14 days before hearing, the Trial Attorney exchanges with the party/ies, and, if ordered by the ALJ, copies are served on the ALJ, the following three types of information:

- proposed witness lists (including proposed [611\(c\)](#) witnesses), which includes a brief synopsis of the expected testimony of each witness, i.e., a brief statement of the facts about which the witness would testify or a summary of the testimony the witness would offer. A simple statement of the allegation(s) in the complaint the witness would address would **not** be sufficient because it would not disclose the substance of the testimony;
- copies of documents, including an index, intended to be offered at the hearing;
- a brief statement of the GC's theory of the case, including relief sought.

 Pursuant to § [2423.23\(c\)](#), the Respondent is required to disclose all defenses to the allegations in the complaint. The Trial Attorney specifically addresses this matter at the pre-hearing conference to ensure that the Respondent has raised any and all defenses that it intends to rely upon at the hearing.

See [Part 1, Chapter Q](#) concerning Pre-hearing Conference.

 A party may move the ALJ to change the disclosure date if 14 days is not deemed an appropriate time to exchange information in a given case. The Trial Attorney coordinates this with the other parties' representatives. Preferably, the parties will agree

and file a joint motion requesting the change in dates for pre-hearing disclosure. Absent agreement, the Trial Attorney considers requesting that the ALJ, in a pre-hearing order, change the schedule for pre-hearing disclosure.

b. *What is not exchanged?*

Potential rebuttal witnesses or documentary evidence are not identified or exchanged in advance because such evidence must be limited to evidence proffered in rebuttal of the Respondent's case-in-chief, and until Respondent's case has been presented the Trial Attorney is unable to determine what evidence to present on rebuttal.

c. *Motion to compel more definitive pre-hearing disclosure:*

If the Respondent's pre-hearing disclosure does not comply with the specificity required, the Trial Attorney files a Motion to Compel More Definitive Statement. For example, the following single-sentence statements of witnesses are insufficient: "Smith will testify concerning grievance practices" and "Groom will testify concerning his role as Agency representative, Agency practices, and the specifics of the event." These statements are too general, vague, and ambiguous and fall short of the requirements under section [2423.23\(a\)](#). See [ATTACHMENT 1N1](#) for an Example of a Motion to Compel More Definitive Statement.

d. *ALJ's role:*

- i. The ALJ does not participate in the pre-hearing disclosure phase of the proceeding except insofar as the pre-hearing order may set the schedule for pre-hearing disclosure.
- ii. The calling of witnesses or introduction of exhibits not exchanged prior to the hearing is subject to the ALJ's discretion. See [Part 2, Chapter J](#) concerning Enforcement of Subpoenas and Sanctions for further discussion.

f. *The importance of pre-hearing disclosure document in reviewing exceptions:*

The Authority will look at the record, including the parties' pre-hearing disclosure documents, in determining whether a matter was plead in the complaint and admitted to in the Respondent's answer. See [U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio](#), 55 FLRA No. 159, 55 FLRA 970-71 (1999) (Authority found, by examining the complaint, the Respondent's answer and **pre-hearing disclosure document**, and the parties' post-hearing briefs, that it intended to concede the allegation that a past practice had evolved of smoking inside fire stations).

See [ATTACHMENT 1N2](#) for examples of documents that meet the requirements for pre-hearing disclosure discussed above.

Q

[Part 1, Chapter M](#) concerning Trial Notebook (and [ATTACHMENT 1M](#));

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

[Part 2, Chapter J](#) concerning Enforcement of Subpoenas and Sanctions; and

[Part 2, Chapter U](#) concerning Adverse or Hostile Witness, Rule 611(c).

RESERVED