
This content is from the eCFR and is authoritative but unofficial.

Title 40 —Protection of Environment

Chapter VI —Chemical Safety and Hazard Investigation Board

Part 1610 Administrative Investigations

- § 1610.1 Representation of witnesses in investigations.
- § 1610.2 Repeated attorney misconduct, sanctions, hearings.
- § 1610.3 Sequestration of witnesses and exclusion of Counsel.
- § 1610.4 Deposition Transcripts.

PART 1610—ADMINISTRATIVE INVESTIGATIONS

Authority: 42 U.S.C. 7412(r)(6)(C)(i), 7412(r)(6)(L), 7412(r)(6)(N).

Section 1610.4 also issued under 5 U.S.C. 555.

Source: 66 FR 1050, Jan. 5, 2001, unless otherwise noted.

§ 1610.1 Representation of witnesses in investigations.

- (a) **Witnesses who are compelled to appear.** Witnesses who are compelled to appear for a deposition (i.e., by subpoena) are entitled to be accompanied, represented, and advised by an attorney as follows:
 - (1) Counsel for a witness may advise the witness with respect to any question asked where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence. For these allowable objections, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. If the witness refuses to answer a question, then counsel may briefly state on the record that counsel has advised the witness not to answer the question and the legal grounds for such refusal. The witness and his or her counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.
 - (2) Any objections made will be treated as continuing objections and preserved throughout the further course of the deposition without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.
 - (3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (a)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record.
 - (4) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the deposition to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the deposition.

(5) The person conducting the deposition shall take all necessary action to regulate the course of the deposition, to avoid delay, and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Board any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the deposition. The Board may thereupon take such further action, if any, as the circumstances warrant, including exclusion of that attorney from further participation in the particular investigation.

(b) **Voluntary interviews.** Witnesses appearing voluntarily do not have a right to have an attorney present during questioning. The Investigator-in-Charge (IIC), in consultation with the General Counsel, may permit a witness to be accompanied by an attorney or non-attorney representative. If so accompanied, the role of the attorney or non-attorney representative is limited to raising objections to questions that are outside the scope of the investigation and to advising the witness with respect to any legal privilege such as, for example, under the Fifth Amendment to the U. S. Constitution. Attorney and non-attorney representatives may not represent more than one witness in each investigation in this fashion, absent the consent of the IIC and the General Counsel.

§ 1610.2 Repeated attorney misconduct, sanctions, hearings.

(a) If an attorney who has been sanctioned by the Board for disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of a deposition under § 1610.1(a)(5) is sanctioned again by the Board in a subsequent deposition or investigation, the Board, after offering the attorney an opportunity to be heard, may reprimand, censure the attorney, or suspend the attorney from further practice before the Board for such period of time as the Board deems advisable.

(b) A reprimand or a censure shall be ordered with grounds stated on the record of the proceeding. A suspension shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal.

(c) An attorney suspended pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Board. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. If necessary for a full and fair consideration of the facts, the Board as a whole may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. Such presiding officer may be an attorney who is a Member of the Board or is employed in the Office of General Counsel, or an administrative law judge detailed from another agency pursuant to 5 U.S.C. 3344. If the Board refers the matter to a presiding officer, unless the Board provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. If no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Board, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Board.

[66 FR 17363, Mar. 30, 2001]

§ 1610.3 Sequestration of witnesses and exclusion of Counsel.

- (a) All witnesses compelled by subpoena to submit to CSB depositions shall be sequestered unless the official conducting the depositions permits otherwise.
- (b) Any witness compelled by subpoena to appear at a deposition during a CSB investigation may be accompanied, represented, and advised by an attorney in good standing of his or her choice, pursuant to § 1610.1. However, when the CSB official conducting the investigation determines, after consultation with the Office of General Counsel, that the CSB has concrete evidence that the presence of an attorney representing multiple interests would obstruct and impede the investigation or inspection, the CSB official may prohibit that counsel from being present during the deposition.
- (c) The deposing official is to provide a witness whose counsel has been excluded under paragraph (b) of this section, and the witness' counsel, a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after exclusion, must explain the basis for the counsel's exclusion. This statement must also advise the witness of the witness' right to appeal the exclusion decision and obtain an automatic stay of the effectiveness of the subpoena by filing a motion to quash the subpoena with the Board within five days of receipt of this written statement.
- (d) Within five days after receipt of the written notification required in paragraph (c) of this section, a witness whose counsel has been excluded may appeal the exclusion decision by filing a motion to quash the subpoena with the Board. The filing of the motion to quash will stay the effectiveness of the subpoena pending the Board's decision on the motion.
- (e) If a witness' counsel is excluded under paragraph (b) of this section, the deposition may, at the witness' request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The deposition may also be rescheduled to a subsequent date established by the CSB, although the deposition shall not be rescheduled by the CSB to a date that precedes the expiration of the time provided in paragraph (d) of this section for appeal of the exclusion of counsel, unless the witness consents to an earlier date.

[66 FR 17363, Mar. 30, 2001]

§ 1610.4 Deposition Transcripts.

- (a) Transcripts of depositions of witnesses compelled by subpoena to appear during a Board investigation, shall be recorded solely by an official reporter designated by the person conducting the deposition.
- (b) Such a witness, after completing the compelled testimony, may file a petition with the Board's General Counsel to procure a copy of the official transcript of such testimony. The General Counsel shall rule on the petition, and may deny it for good cause. Whether or not such a petition is filed, the witness (and his or her attorney), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony. If such a petition is denied by the General Counsel, he shall inform the petitioner of the right to inspect the transcript.
- (c) Good cause for denying a witness' petition to procure a transcript of his or her testimony may include, but shall not be limited to, the protection of: trade secrets and confidential business information contained in the testimony, security-sensitive operational and vulnerability information, and the integrity of Board investigations.

[68 FR 4393, Jan. 29, 2003]