

d. Ott

1 LOUISVILLE METRO COUNCIL

COMMONWEALTH OF KENTUCKY
LOUISVILLE METRO GOVERNMENT
JEFFERSON COUNTY

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4 **IN THE MATTER OF REMOVAL PROCEEDINGS AGAINST**
5 **DISTRICT 21 COUNCILMAN DAN JOHNSON**

6 **RESPONDENT'S MOTION FOR**

7 **SEPARATION OF WITNESSES**

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9 **(RESPONDENT'S MOTION NO. 4)**

10 Comes now the Respondent herein, Hon. Daniel Johnson, District 21 Louisville
11 Metro Councilman, by counsel, and respectfully moves the Louisville Metro Council Court
12 to enter the following Order. The undersigned hereby certifies that copies hereof were
13 mailed and emailed to the following individuals on October 16, 2017:

14
15 Hon. H. Stephen Ott
16 Clerk, Louisville Metro Council
17 City Hall, 601 West Jefferson Street
18 Louisville, Kentucky 40202
19 Stephen.Ott@louisvilleky.gov

Hon. Mike O'Connell
Jefferson County Attorney
Jefferson Hall of Justice
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20 Hon. Deborah K. Kent
21 Deborah Kent Law Office
22 Suite 211
23 120 Sears Avenue
24 Louisville, Kentucky 40207-5072
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26 Respectfully submitted,

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4 **IN THE MATTER OF REMOVAL PROCEEDINGS AGAINST**
5 **DISTRICT 21 COUNCILMAN DAN JOHNSON**

6 **MEMORANDUM IN SUPPORT OF**
7 **RESPONDENT’S MOTION FOR**
8 **SEPARATION OF WITNESSES**
9 **(RESPONDENT’S MOTION NO. 4)**

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12 Comes now the Respondent herein, Hon. Daniel Johnson, District 21 Louisville
13 Metro Councilman, by counsel, and respectfully moves the Louisville Metro Council Court
14 to enter the following Order, directing the separation of witnesses at the Removal Hearing
15 scheduled herein.
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17 (1) Rule 16 of the Louisville Metro Council Removal Hearing Rules and Procedures
18 provides that “Procedural and evidentiary rules will be those generally accepted in
19 Kentucky for administrative proceedings.”
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21 (2) The problem with this reference, of course, is that Kentucky is the only state in
22 the Union without a uniform code of administrative hearing procedures. In 1992, the
23 Kentucky Legislative Research Commission published Research Memorandum No. 461:
24 Report on Uniform Administrative Hearing Procedures, by Michael Greer. On Page 8 of
25 the Research Memorandum, Mr. Greer describes the computer search the LRC performed
26 on all of Kentucky’s statutes and administrative regulations:
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1 Through this statute search, a total of 450 different hearing processes was
2 identified, encompassing 1,089 statutes. Of these 450 processes, 265 are
3 processes of state agencies in the executive branch of government. Of the
4 remaining, 7 are legislative branch hearings, 57 are judicial hearings, and
5 121 related to hearings conducted by various jurisdictions of local
6 government.

7 Needless to say, there is wide variation in the approach to procedural due process
8 followed by Kentucky administrative agencies.

9 (3) Nevertheless, Kentucky has always followed the dictates of procedural due
10 process required by the Fourteenth Amendment to the U.S. Constitution, which
11 guarantees all citizens due process and equal protection of law:

12 No state shall make or enforce any law which shall abridge the privileges or
13 immunities of citizens of the United States; nor shall any State deprive any
14 person of life, liberty, or property, without due process of law; nor deny to
15 any person within its jurisdiction the equal protection of the laws.

16 Section 2 of the Kentucky Constitution has been interpreted by the Kentucky courts
17 as conveying the same basic rights of due process as contained in the federal Fourteenth
18 Amendment. Section 2 provides:

19 Absolute and arbitrary power over the lives, liberty, and property of free
20 men exists nowhere in a republic, not even in the largest majority.

21 Out of this has evolved a constitutional right to procedural due process which applies to
22 the conduct of administrative hearings, and, perforce, this removal hearing before the
23 Louisville Metro Council's Court.

24 (4) The separation of witnesses rule, in judicial and administrative tribunals, exists
25 to prevent a witness from having an opportunity to be schooled by the testimony of others.
26 KRE 615 makes the exclusion mandatory and removes the separate of witnesses from the
27 trial judge's discretion in the absence of one of the enumerated exceptions. Smith v.
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1 Miller, 127 S.W.3d 644 (Ky. 2004). KRE 615, Exclusion of Witnesses, provides: At the
2 request of a party the court shall order witnesses excluded so that they cannot hear the
3 testimony of other witnesses and it may make the order on its own motion. This rule does
4 not authorize exclusion of: (1) A party who is a natural person; (2) An officer or employee
5 of a party which is not a natural person designated as its representative by its attorney; or
6 (3) A person whose presence is shown by a party to be essential to the presentation of the
7 party's cause. Once the rule is invoked, counsel is responsible to ensure that all witnesses
8 remain outside the courtroom until they testify. It is advisable for the court to instruct the
9 witnesses not to discuss the case or their testimony with one another until all witnesses
10 have testified. This is particularly important because KRE 615 does not prevent the
11 interaction of witnesses outside the courtroom. Woodard v. Commonwealth, 219 S.W.3d
12 723 (Ky. 2007). This rule, however, should not restrict the lawyers from discussing
13 testimony with witnesses before they testify. Reams v Stutler, 642 S.W.2d. 586 (Ky. 1982).
14 If the rule is violated, the court has broad discretion to decide whether a witness violating
15 the rule should be permitted to testify. Sanders v. Drane, 432 S.W.2d. 54 (Ky. 1968).
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22 Respectfully submitted,

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24 Thomas A. McAdam, III,
25 Attorney for Respondent
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4 **IN THE MATTER OF REMOVAL PROCEEDINGS AGAINST**
5 **DISTRICT 21 COUNCILMAN DAN JOHNSON**

6 **ORDER FOR SEPARATION OF WITNESSES**

7 **(RESPONDENT'S MOTION NO. 4)**

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10 Motion having been made, and the Louisville Metro Council Court being otherwise
11 sufficiently advised, it is hereby Ordered:

12 1. Witnesses called to testify in The Matter of Removal Proceedings Against
13 District 21 Councilman Dan Johnson shall be separated from the hearing, and shall
14 remain separated until after they give testimony. No such witness shall be allowed to hear
15 the testimony of any witness appearing earlier in the proceeding.
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17 2. While separated, and at all times prior to giving testimony, witnesses are
18 ordered to refrain from listening to, or watching the proceedings on television. Witnesses
19 are ordered to refrain from discussing the matters which are the subject of the
20 proceedings with each other, or with any other person, except that they may discuss their
21 testimony with any of the parties hereto or their respective counsel.
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23 3. Subsequent to giving testimony, witness shall be permitted to remain in the
24 hearing chambers, and may view the proceedings on television, or via video recording.
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26 4. This Order shall apply to all members of the Charging Committee; except that
27 one (1) member of the Charging Committee may participate in all proceedings and advise
28 the Committee's counsel.

