

PRACTICE STANDARDS
(Revised June 11, 2012)

JUDGE PATRICK B. AUGUSTINE
UNITED STATES OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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I. GENERAL PROCEDURES

A. Applicable Rules

Those appearing before the Court must know and follow:

1. Federal Rules of Civil Procedure;
2. Federal Rules of Evidence;
3. Rules of Procedure of the United States Occupational Safety and Health Review Commission (“Commission Rules”); and
4. These Practice Standards.

B. Access to Rules and Practice Standards

Copies of the Commission Rules and these Practice Standards are available at <http://www.oshrc.gov> under the “Rules” and “Administrative Law Judge Practice” links.

C. Communications with Chambers

1. My legal assistant, Sharon M. Hall, can be contacted at 303-844-0418.
2. The Court permits telephonic or written contact concerning administrative, scheduling and other non-substantive routine matters. For information about the status of a motion, document, or for information about courtroom technology, trial preparation, or submission of trial exhibits, please contact my legal assistant.
3. All other communications with the Court should be made by the filing of pleadings, motions, applications, briefs or legal memoranda.
4. Under no circumstances may any party or counsel communicate *ex parte* with the Court’s office staff, who has no authority to render legal advice or grant continuances or any other relief.
5. Electronic filing of documents is the Court’s preferred method of filing. The Court finds that electronic filing provides greater efficiency and timeliness in managing cases. See Commission Rule 7(c), 29 C.F.R. § 2200.7(c) (Service and Notice - How Accomplished) and

Rule 8(g), 29 C.F.R. § 2200.8(g) (Filing - Electronic Filing). Instructions for electronic filing are located at http://www.oshrc.gov/publications/instructions_elec_filing.html. All documents, including exhibits, attachments and appendices shall be sent by email to denveroshrcjudges@oshrc.gov as an attachment in one of the following electronic formats: Adobe Portable Document Format (.pdf)(preferably) or Word (read only) Document (.doc). The email message should identify the case number and the document attached. You may, in the alternative, follow any procedure outlined in Commission Rule 8 for the filing of such documents.

D. Pretrial Conferences and Scheduling Orders

Upon assignment of a case the Court will issue a Pretrial Trial Conference Order which outlines the responsibility of the parties prior to the Pretrial Trial Conference. After the Initial Pretrial Conference the Court will issue a Scheduling Order that sets out deadlines for completion of discovery, filing of dispositive motions and other pretrial submissions.

E. Discovery

Discovery deadlines and limitations will be established in the Scheduling Order. The presumptive discovery period is six months for conventional cases.

F. Motions to Continue Conference, Hearing or Trial

Motions to continue (including motions to vacate or reset) conferences, hearings and trials, will be determined pursuant to Commission Rule 62, require good cause and shall be filed within the timeframes set forth in the Scheduling Order. Uncontested or joint motions for continuance are not effective until approved by the Court. When requesting a continuance to reschedule a conference, hearing or trial, the parties shall provide three alternative dates for the Court to consider, the specific grounds for the request, the date on which the parties conferred regarding the request and a statement as to whether the request is opposed or unopposed.

G. Motions for Extensions of Time to File or Respond

1. Motions for extension of time require a showing of good cause, which must be established with particularity. When requesting an extension of time, parties shall provide the Court with a proposed alternative date, the specific grounds for the request, the date on which the parties conferred regarding the request and a statement as to whether the request is opposed or unopposed.

2. Any motion for extension of time shall be filed no later than three business days prior to the date the motion, response, reply, or other documentation is due.

3. This practice standard is subject to Fed.R.Civ.P. 29 which governs extension by stipulation.

H. Settlement

1. If a settlement is reached before trial, please advise my legal assistant, Sharon Hall **within three business days prior to the trial**. However, no deadline, hearing or trial will be vacated, except upon the filing of a notice which states that all matters subject to the trial have

been resolved by the parties and the issuance of an order. A simple, concise, written notice stating that full settlement has been reached is sufficient. The settlement notice must be signed by at least one party representative and served on all parties. The specific terms of settlement do not need to be included with the initial notice as the Court will subsequently order the parties to file a detailed settlement agreement at a later date. Telephonic notification of settlement is not sufficient to cancel a scheduled trial date.

2. Settlement discussions are encouraged; however, hearings, trials, and pretrial deadlines will not be continued or vacated to facilitate settlement negotiations or alternative dispute resolution.

3. Partial Case Settlement/Dismissal – The parties shall promptly notify the Court by written notice if a partial settlement is reached. The Court will then provide the parties sufficient time to submit a partial settlement agreement to the Court for approval.

4. Once approved and final, the Court will not retain jurisdiction over cases that have been settled. The proper mechanism for enforcing a settlement is, in almost all cases, through a new action.

II. COURTROOM PROCEDURES

A. Courtroom Protocol

1. Professional courtesy and civility are expected during all court appearances, as well as during pretrial interaction among the parties. Respect for the Court, respect for one another, respect for witnesses and respect for the judicial process are paramount. All trial proceedings and other scheduled hearings will begin promptly at their scheduled times. There will be no visual or verbal gestures of approval or disapproval of any witness testimony, any comments by counsel, or any rulings by the Court. All mobile phones and pagers must be either turned off or placed in vibrate mode while in the courtroom.

2. It is the policy of the Court that witnesses will be sequestered unless the witness is representing the party as its official representative.

B. Recording of Proceedings

1. The official record of all trials and proceedings will be taken by a real-time reporter.

2. Transcripts of proceedings may be ordered directly from the court reporter.

C. Exhibits and Witness Lists and Recordings

1. The Scheduling Order will provide the date for the filing of the Exhibit list, Witness list and exchange of the proposed exhibits.

2. Parties are required to use the format in the Sample Forms section of these Standards in submitting the Witness list and Exhibit list.

3. Exhibits shall be pre-marked with the docket number and exhibit number. Complainant's exhibits shall be marked beginning with "C-1. Respondent's exhibits shall be

marked beginning with "R-1." To the extent possible, exhibits should be marked in order of their anticipated use in the trial, Commission Rule 70(a). Exhibits smaller than 8½ by 11 inches, such as photographs, should be mounted individually on 8½ by 11 sheets of paper. Copies of each exhibit, together with an index and placed in a three ring binder, shall be provided to the Judge, the court reporter, the witnesses testifying on the day of the trial. Parties shall exchange copies of the exhibits identified on the exhibit list with each other ten (10) calendar days prior to the trial.

4. An edited recording, capable of continuous playback and purged of unnecessary portions should be provided. Any portion of a recording containing an audio component, such as employee interviews or other conversations, which a party intends to introduce into the record, must be fully transcribed. The unedited original recording shall be available at the trial. Any party desiring to use a recording at the trial shall be responsible for having appropriate playback equipment and a competent operator at trial.

5. Any stipulations of fact should be formatted as a pleading and marked as an exhibit.

6. Trial Documents – In addition to hard copy submission of exhibits, each party shall provide to the Court an electronic copy of the exhibits (CD or flash drive) in one of the following electronic formats: Adobe Portable Document format (.pdf)(preferred) or Word (read only) Document (.doc). Materials that cannot be converted to electronic form (e.g., videotape, audiotape, etc) should be submitted to the Court in original form. Over-size documents such as overheads, charts, graphs or demonstrative exhibits may be used during court proceedings but they shall be reduced, photocopied or otherwise produced so that they can be submitted as a paper exhibit and electronically.

III. MOTION PRACTICE

A. Requirements

All motions, objections and responses shall conform to the requirements of Commission Rule 40. The parties have a “confer” requirement under Commission Rule 40. The Court will not consider correspondence or letters from counsel as proper motion practice.

B. Responses and Replies

1. See Commission Rule 40(c) for applicable time limits for filing responsive pleadings. Commission Rule 4 controls the computation of time.

2. No reply, surreply or supplemental brief shall be filed without leave from the Court.

C. Untimely or Noncomplying Motions, Objections, Responses, or Replies

1. Motions that are untimely, noncomplying, or filed without a certification pursuant to Commission Rule 40(a) may be denied with prejudice or stricken *sua sponte*.

2. Untimely or noncomplying objections, responses, or replies may be denied with prejudice, stricken, or ignored.

D. Motions In Limine

Motions in limine are discouraged when they request advanced evidentiary rulings, as they are typically more appropriate for the court to consider during trial. Instead, the disputed issue can be summarized briefly in a pretrial brief. If a party files a motion in limine, it is due fifteen days before the trial unless the Scheduling Order establishes a different timeframe.

E. Dispositive Motions

Procedures for motions seeking relief pursuant to Fed.R.Civ.P. 12 or 56 are governed by the Scheduling Order and deadlines will be strictly adhered.

F. Motions to Exclude Expert Testimony

A party objecting to the admissibility of opinion testimony by an expert witness shall file a written motion seeking its exclusion. Failure of an opponent to file such a motion, however, does not relieve the proponent of its burden to show that the proffered testimony is admissible at trial.

The motion shall identify with specificity each opinion the moving party seeks to exclude. The motion shall also identify the specific ground(s) on which each opinion is challenged, e.g., relevancy, sufficiency of facts and data, methodology. See Fed. R. Evid. 702. The deadline for filing all such motions is established in the Scheduling Order.

Upon the filing of a motion, the Court, in its discretion, may set a hearing to determine whether the challenged opinions are admissible under the relevant Federal Rules of Evidence. The setting of such hearing does not obviate the need for opposing counsel to respond to such motion. If such a hearing is ordered, the parties shall proceed as follows: the hearing will begin, if necessary, with brief opening arguments by the parties, followed immediately by the challenging party's examination of the expert witness. The proponent will then be permitted to ask questions of the expert witness.

IV. TRIALS

A. Final Pretrial Conference

The Court will conduct a final pretrial conference approximately twenty (20) days prior to the trial to address trial management issues. Counsel/Representatives who will try the case must attend.

B. Trial Setting

The case will be set for trial during the initial pretrial conference with the parties.

C. Length of Trial

The time frame established for the trial will be adhered to absent good cause. The Court will issue a Trial Management Order setting forth the time parameters for the examination of witnesses by the parties.

D. Trials

1. Trials begin at 8:30 a.m. on the first day of trial unless stated otherwise in the Notice of Trial.
2. Closing arguments will generally be dispensed with in favor of the submission of a post-trial brief.

F. Pretrial Briefs

Pretrial briefs are encouraged, but not required absent specific Court order. Please flag evidentiary issues in a trial brief rather than by motion in limine. A trial brief may not be used as a substitute for a motion. The Scheduling Order sets forth the requirements for the submission of a pretrial brief.

V. POST TRIAL PROCEDURES

In lieu of Closing Argument, the Court will issue an Order to the parties requiring the submission of post trial briefs to the Court within the time period specified in the Order. The Order will not be issued until the Court has received the certified copy of the trial transcript from the Court Reporter. Post trial briefs should contain each party's proposed factual findings, a discussion of whether the *prima facie* elements required to prove each alleged violation were established, a discussion of whether the *prima facie* elements required to prove each alleged affirmative defense were established, as well as a discussion of any other pertinent issues the parties believe the Court should address in its decision.

SAMPLE FORMS

I. WITNESS LIST

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Case No. _____ Date _____

Case Title: _____

COMPLAINANT/RESPONDENT WITNESS LIST

(Circle One)

WITNESS NAME

TIME ESTIMATED FOR EXAMINATION

Direct

Cross

Re-Direct

Re-Cross

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

