

## **PRACTICE STANDARDS**

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 “Administrative Law Judge Practice” link.

#### **C. Format of Pleadings and Documents Presented for Filing (Commission Rules 30(a) and 107)**

- (i) Scope. This rule applies to all pleadings and documents presented for filing.
- (ii) Size. All pleadings and documents shall be on 8½ by 11-inch white paper.
- (iii) Margins. Margins shall be 1½ inches at the top and 1 inch at the left, right, and bottom of each page.
- (iv) Font. Unless otherwise ordered, all typewritten pleadings and documents shall use black ink and not less than 12-point font.
- (v) Spacing. All pleadings and documents shall be double spaced.
- (vi) Text. Text shall be printed on one side of the page only.
- (vii) Legible. All handwritten pleadings and documents shall be legible, utilizing upper- and lower-case lettering.

#### D. Communications with Chambers

1. My legal assistant, Elaine Nicholas, 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.

## II. FILING OF DOCUMENTS - eFiling

1. OSHRC has implemented a new nationwide electronic filing system (E-Filing system) pursuant to Commission Rule 8(c), 29 C.F.R. §2200.8(c). To use the new system, e-filers must first register within the system. To register, access the link at [www.oshrc.gov](http://www.oshrc.gov). Instructions for the E-Filing system are also posted on the OSHRC website under the "Rules" and "Instructions for Electronic Filing" tabs. Once registered, e-filers must enter an appearance in each specific case with which they are involved and will subsequently be able to file and receive pleadings in each of those cases electronically.

2. All represented parties, self-represented litigants and intervenors **must file** all documents, except for confidential and privileged documents, electronically in the Commission's E-File system. Self-represented parties and intervenors may submit a written statement to the Court requesting an exemption from the mandatory e-filing requirement on the grounds that it would place an undue burden on them to comply with the requirement. Commission Rule 8(c)(2), 29 C.F.R. § 2200.8(c)(2). General statements of undue hardship are not acceptable. Requests for an exemption must be detailed providing the Court with specific information to determine whether a hardship exists. E-Filers should take note that an electronically filed document must be simultaneously emailed to the other parties and intervenors to ensure service of the document is accomplished on the same date the document is e-filed with the Court. *See* Commission Rules 7(c)(1), 8(c)(9), 29 C.F.R. §§ 2200.7(c)(1) and 8(c)(9). Documents may not be filed with Court via email. Commission Rule 8(c)(2), 29 C.F.R. § 2200.08(c)(2).

3. Docket clerks, administrative assistants, and legal assistants, among others, may register as Active Contacts. Each registered Active Contact must file a notice of appearance in the Commission E-File system case file. In many cases, when the Active Contact attorney, non-attorney, representative, or self-represented Respondent employer, submits their notice of appearance in the electronic case file, they will include a docket clerk, administrative assistant, or legal assistant, on their notice of appearance, as an Active Contact in the electronic case file. Registered Active Contacts in the electronic case file will receive an automatic system email Notification of Electronic Filing (NEF) of all documents accepted for filing in the Commission's E-File System case file. Registered Active Contacts in the electronic case file will have access to review the electronic case file docket history.

4. All parties have a continuing obligation to update service and registration information pursuant to Commission Rule 6, 29 C.F.R. § 2200.6.

5. The general parameters for eFiling are as follows: (i) files must not exceed 50Mb in size; (ii) portable document format (PDF); (iii) Word 2010 or higher (Doc, Docx); (iv) audio preferred (Mp3) not to exceed 50Mb; (v) video preferred (Mp4) not to exceed 50Mb; and (vi) no DVD's.

### **III. PRETRIAL CONFERENCES AND SCHEDULING ORDERS**

Depending on the type of case, upon assignment, the Court will either issue a Pretrial Trial Conference Order or an Order requiring the parties to meet and confer and submit a Joint Pretrial Recommendations report. After the Initial Pretrial Conference or receipt of the Joint Pretrial Recommendations report, the Court will issue a Scheduling Order that sets out deadlines for completion of discovery, filing of dispositive motions and other pretrial submissions. Deadline dates established in the Scheduling Order shall be computed in accordance with Commission Rule 4 unless otherwise stated in the Scheduling Order.

### **IV. DISCOVERY**

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

### **V. MOTIONS**

#### i. Rule Governing Motions

All motions, objections and responses shall conform to the requirements of Commission Rule 40, including the requirement to confer. The Court will not consider email or letters from counsel as proper motion practice, nor will it consider email sufficient for the purposes of the conferral requirement.

#### ii. Responses and Replies

Consult Commission Rule 40(h) for applicable time limits for filing responsive pleadings. Commission Rule 4 controls the computation of time. Parties are not permitted to file reply, surreply, or supplemental briefs without leave of the Court and for good cause shown. Replies, surreplies, or supplemental briefs without permission of the Court will be rejected.

#### iii. Untimely or Noncomplying Motions, Objections, Responses, or Replies

Motions or replies that are untimely, noncomplying, or filed without a certification pursuant to Commission Rules 8(c)(9) and 40(b) may be denied with prejudice, stricken *sua sponte*, or rejected.

#### iv. 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: (i) three alternative dates for the Court to consider; (ii) the specific grounds for the request; (iii) the date on which the parties conferred regarding the request; and (iv) a statement as to whether the request is opposed or unopposed.

v. 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: (i) a proposed alternative date; (ii) the specific grounds for the request; (iii) the date on which the parties conferred regarding the request; and (iv) 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.

vi. Motions *in limine*

The Court discourages motions *in limine* when they request advanced evidentiary rulings on particular pieces of evidence without the context provided by the testimony at trial and other evidence. Instead of a motion *in limine*, the Court prefers the parties to briefly summarize the disputed evidentiary issue(s) in a pretrial brief. Nevertheless, if a party chooses to file a motion *in limine*, it must be submitted fifteen days before trial unless the Scheduling Order establishes a different timeframe.

vii. 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 enforced.

viii Motions to Exclude Expert Testimony

The motion to exclude expert testimony shall identify with specificity each opinion the moving party seeks to exclude the proposed testimony. 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. Based on the motion and response, the Court may, in its discretion, order a hearing to determine whether the challenged opinions shall be admissible.

ix. Discovery Disputes

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

For all discovery disputes, the parties must meet and confer to attempt to resolve the dispute. This conferral must take place in person, by video conference, or by telephone. If the parties cannot reach a resolution, they must contact the Court to request a discovery dispute telephone conference. Two days prior to the conference call, the parties shall submit a joint statement of no more than five

pages, which: (1) certifies the parties have conferred; (2) identifies the discovery request(s) in dispute; (3) sets forth the parties' respective positions, including relevant caselaw; and (5) sets forth each parties' proposed compromise with respect to the issue(s). The Court will reject any unsolicited discovery motions filed prior to compliance with the foregoing process are admissible.

## VI. SETTLEMENT OF CASE

1. Settlement discussions are encouraged; however, hearings, trials, and pretrial deadlines will not be continued or vacated to facilitate settlement negotiations or alternative dispute resolution. Parties shall comply with the OSHRC Denver Office Standards on Settlement which is published at "[Administrative Law Judge Practices](#)."

2. Full Settlement. If a full settlement is reached before trial, please advise my legal assistant, Elaine Nicholas, **within three business days prior to the trial**. However, no deadline, hearing or trial will be vacated, except upon the filing of a written notice which states that all matters subject to the trial have been resolved by the parties and the issuance of an order by the Court. A written notice stating that full settlement has been reached is required. 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 Joint Notice of Full Settlement at a later date. Telephonic notification or email notification of settlement are not sufficient to cancel a scheduled trial or hearing date. *See* Commission Rule 100. *See also* "[Sample Documents](#)" tab on the Commission website.

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 Joint Notification of Partial Settlement. *See* Commission Rule 100. *See also* "[Sample Documents](#)" tab on the Commission website at [www.oshrc.gov](http://www.oshrc.gov).

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.

## VII. 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

The official record of all trials and proceedings will be taken by a real-time reporter. 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. Witness and Exhibit Lists. Parties are required to use the format in the Sample Forms section of these Standards in submitting the Witness list and Exhibit list. Witness list shall identify witness address and telephone numbers, a short statement as to the nature and purpose of the witness testimony, whether testimony will be in person or by deposition and estimated time for testimony. For expert witnesses his/her area(s) of expertise, a brief statement of those facts and conclusions to which the expert will testify will be required. Only the Exhibit list should be provided to the Court with the required Pretrial submissions. Each exhibit shall be identified by an exhibit number and a description

3. Exhibits. 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. 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.

Exhibits shall be available to the Court in hard copy as well as electronic copy in one of the following electronic formats: Adobe Portable Document Format (.pdf)(preferably) or Word (read only) Document (.doc). Documents more than 5 megabytes (MB), such as graphic intensive documents, must be filed on a CD-ROM or flash drive. 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 witness testifying and opposing counsel.

4. Audio or Video Files. 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.

(i) An audio file must be submitted as an MPEG-1 Audio-Layer 3 file (usually referred to as .mp3). The preferred sampling rate for the file is 44.1 kHz and the preferred bit rate for the audio file is 64 kbits/second. The Mp3 audio files must use a constant bit management rate. The files must not be password-protected, encrypted, or protected by rights management. Each audio file must not exceed 100 MB. If the recording is too long to fit in one file, it may be broken into multiple files.

(ii) A video file must be included as an MPEG-4 Part 14 file (usually referred to as .mp4). Data compression is encouraged, though the submitter must assure that the video and audio content have sufficient quality. The files should not be password-protected, encrypted, or protected by rights management. Each video file must not exceed 5 GB. If the recording is too long to fit in one file, it may be broken into multiple files.

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

6. Official Version of Exhibits – The electronic version of exhibits as required to be submitted in Paragraph 3 will serve as the official version of trial exhibits for court transcript certification.

## VIII. 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 or after the Court receives a Joint Submission of Pretrial Recommendations.

### C. Length of Trial

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

### D. Trials

1. Trials begin as stated 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.

## IX. 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 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. \_\_\_\_\_

**II. EXHIBIT LIST**

EXHIBIT LIST OF \_\_\_\_\_ CASE NUMBER \_\_\_\_\_

CASE CAPTION \_\_\_\_\_ v. \_\_\_\_\_ Page No. 1  
*List of Complainant's Exhibits by C1, C2, etc) and Respondent's Exhibits by R1, R2, etc.)*

EX NO.	WITNESS	DESCRIPTION	REC.	REJ.	RUL. RESVD.	COMMENTS