

PRACTICE STANDARDS
(Revised October 3, 2018)

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. 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, Eliz Padilla, can be contacted at 303-844-2282.
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.

E. Filing of Documents - eFiling

1. 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. OSHRC has implemented a new nationwide electronic filing system (E-Filing system) pursuant to Commission Rule 8(g), 29 C.F.R. §2200.8(g). In order to use the new system, e-filers must first register within the system. To register, access the link at www.oshrc.gov. Instructions for the E-Filing system are also posted on the OSHRC website. 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. Parties can designate additional individuals who are authorized to receive notice of case filings and activity. The primary party must file a separate pleading entitled "Designation of Authorized Individuals for E-Filing system Notification" in which the authorized individuals are clearly identified by name, address, phone, and e-mail address. All persons designated to receive notice of case filings and activity must be a registered user within the E-Filing system. All parties have a continuing obligation to update service and registration information pursuant to Commission Rule 6, 29 C.F.R. § 2200.6.

3. 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.

4. You may, in the alternative, follow any procedure outlined in Commission Rule 8 for the filing of such documents.

F. 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 Submission report. After the Initial Pretrial Conference or receipt of the Joint Pretrial Schedule 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.

G. Discovery

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

H. 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.

I. 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.

J. 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. Parties shall comply with the OSHRC Denver Office Standards on Settlement which is published at www.oshrc.gov under the heading “Administrative Law Standard Practices.”

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. 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, 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 in excess of 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 in to 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..

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 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.

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. _____

