

the hearing clerk, who shall assign a docket number to the proceeding. Thereafter the proceeding shall be referred to by such number. The hearing clerk shall promptly transmit all such papers to the Office of the General Counsel for assignment of a presiding officer.

§ 202.109 Rule 9: Depositions.

(a) *Application.* Any party may file an application for an order for the taking of testimony by deposition, at any time after docketing of a proceeding and before the close of an oral hearing or the filing of such party's evidence in a written hearing therein. The application shall set forth: (1) The name and address of the proposed deponent; (2) the name and address of the person (referred to in this section as the "officer") before whom the proposed examination is to be made; (3) the reasons why such deposition should be taken, which must show that it may be able to be used as set forth in paragraph (i) of this section; (4) whether the proposed examination is to be on interrogatories or oral; and (5) if oral, a suggested time and place where the proposed deposition is to be made and a suggested manner in which the proposed deposition is to be conducted (telephone, audio-visual telecommunication, or by personal attendance of the individuals who are expected to participate in the deposition). The application for an order for the taking of testimony by deposition shall be made in writing, unless it is made orally on the record at an oral hearing.

(b) *Response; service.* If any such application is made orally on the record at an oral hearing, each party other than the applicant, present at such hearing, may respond to it orally. If any such application is in writing it shall be served on each party other than the applicant, and each such other party shall have not less than 20 days, from the date of service on such party of the application, to file a written response to it.

(c) *Written questions (interrogatories).* (1) If the examination will be oral, parties who will not be present or represented at it may file written questions with the officer prior to the time of the examination.

(2) The presiding officer may direct, or the parties may agree, that the deposition, if taken, shall be taken by means of written questions. If the presiding officer finds, upon the protest of a party to the proceeding, that such party has a principal place of business or residence more than 100 miles from the place of the examination and that it would constitute an undue hardship on such party to be present or represented at an oral examination at such place, the deposition, if taken, shall be taken by means of written questions. In any such case, the presiding officer shall state on the record at the oral hearing that, or shall serve the parties with notice that, the deposition, if taken, shall be taken by means of written questions.

(3) If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(d) *Order.* (1) The presiding officer, if satisfied that good cause for taking the deposition is present, may order the taking of the deposition.

(2) The order shall be served on the parties and shall include:

(i) The name and address of the officer before whom the deposition is to be made;

(ii) The name of the deponent;

(iii) Whether the deposition will be oral or on written questions;

(iv) If the deposition is oral, the manner in which the deposition is to be conducted (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition); and

(v) The time, which shall not be less than 20 days after the issuance of the order, and place.

(3) The officer, time, place, and manner of the deposition as stated in the presiding officer's order need not be the same as the officer, time, place, and manner suggested in the application.

(4) The deposition shall be conducted in the manner (telephone, audio-visual

telecommunication, or personal attendance of those who are to participate in the deposition) agreed to by the parties.

(5) If the parties cannot agree on the manner in which the deposition is to be conducted:

(i) The deposition shall be conducted by telephone unless the presiding officer determines that conducting the deposition by audio-visual telecommunication:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone.

(ii) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the presiding officer determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(e) *Qualifications of officer.* No deposition shall be made except before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths, or before the presiding officer. No deposition shall be made before an officer who is a relative (within the third degree by blood or marriage), employee, attorney, or representative of any party (or an employee of an attorney or representative of any party), or who is financially interested in the result of the proceeding.

(f) *Procedure on examination.* The deponent shall be examined under oath or affirmation, and the testimony of the deponent shall be recorded by the officer, or by some person under the direction and in the presence of the officer. If the examination is on interrogatories, they shall be propounded by

the officer. If the examination is oral, the deponent shall be examined first by the party at whose instance the deposition is taken, or the representative of such party, and shall be subject to cross-examination by any other party or the representative thereof who is present at the examination; the officer shall propound any interrogatories filed with the officer by parties not present or represented at the examination.

(g) *Certification and filing by officer.* The officer shall certify on the transcript or recording that the deponent was duly sworn by the officer and that the transcript or recording is a true record of the deponent's testimony, with such exceptions as the certificate shall specify. The officer shall then securely seal the transcript or recording, together with three copies of the transcript or recording, with an extra copy for each party in excess of two, in an envelope, and mail the same by registered or certified mail to the presiding officer.

(h) *Service; correction.* After the transcript or recording is received by the presiding officer, it shall promptly be served on all parties. Any party, within 20 days after such service, may file a written motion proposing corrections to the transcript or recording. Any such motion shall be served on each party other than the one filing it, who shall have 10 days to file a written response to it. Any such response shall be served on each party other than the one filing it. Such documents, if filed, shall be a part of the record of the proceeding if any portion of the transcript or recording is made a part of the record. All portions of the transcript or recording which are not referred to in any such motion shall be presumed to be accurate except for obvious typographical errors.

(i) *Use.* If a written hearing is held, a transcript or recording, of a deposition ordered and taken in accord with this section, may be made a part of the record as evidence by any party, by written motion filed with such party's evidence. If an oral hearing is held, except as otherwise provided in these rules, such a transcript or recording may be made a part of the record as evidence, on written motion filed by

any party, or oral motion of any party made at the oral hearing, if no party objects after reasonable notice and opportunity to do so, or if the presiding officer finds that the evidence is otherwise admissible and:

- (1) That the witness is dead;
- (2) That the witness is unable to attend or testify for any good reason including age, sickness, infirmity, or imprisonment;
- (3) That the party offering the transcript or recording has tried without success to procure the attendance of the witness by subpoena; or
- (4) That such exceptional circumstances exist as to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony orally before the presiding officer, to allow the transcript or recording to be used.

If any portion of a transcript or recording of a deposition is made a part of the record as evidence on motion of any party, any other party may make a part of the record as evidence the remainder, or any other portion, of the transcript or recording.

(j) *Expenses.* Fees and reimbursements payable to an officer taking a deposition, or other person recording the testimony in the deposition, shall be paid by the party at whose instance the deposition is taken.

(k) *Subpoenas.* No subpoena can issue, to compel attendance, testimony, or production of documentary evidence, at an examination under this rule 9.

(l) *Agreement of parties.* In any case, any transcript or recording of any deposition, or any part of such a transcript or recording, may be made a part of the record as evidence by agreement of the parties other than a party failing to file an answer as required in these rules.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990; 60 FR 8465, Feb. 14, 1995]

§ 202.110 Rule 10: Prehearing conference.

(a) The presiding officer, at any time prior to the commencement of the hearing, may request the parties or their counsel to appear at a conference before the presiding officer to consider:

- (1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of fact and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitation of the number of expert or other witnesses;

(5) The negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;

(7) The identification of documents or matters of which official notice may be requested;

(8) A schedule to be followed by the parties for completion of the actions decided at the conference; or

(9) Such other matters as may expedite and aid in the disposition of the proceeding.

No transcript or recording of such a conference shall be made, but the presiding officer shall prepare and file for the record a written summary if any action is taken at the conference, which shall incorporate any written stipulations or agreements made by the parties at the conference or as a result of the conference.

(b) *Manner of the prehearing conference.* (1) The prehearing conference shall be conducted by telephone or correspondence unless the presiding officer determines that conducting the prehearing conference by audio-visual telecommunication:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the prehearing conference; or

(iii) Would cost less than conducting the prehearing conference by telephone or correspondence. If the presiding officer determines that a prehearing conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the prehearing conference, the prehearing conference shall be conducted by personal attendance of any individual who is expected to participate in the prehearing conference, by telephone, or by correspondence.