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29 CFR Part 18

Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 18

RIN 1290–AA26

Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Labor proposes to revise and reorganize the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, from our regulations, which provide procedural guidance to administrative law judges, claimants, employers, and Department of Labor representatives seeking to resolve disputes under a variety of employment and labor laws. The Office of Administrative Law Judges promulgated these regulations in 1983. The regulations were modeled on the Federal Rules of Civil Procedure (FRCP) and have proved extraordinarily helpful in providing litigants with familiar rules governing hearing procedure.

Since 1983, the FRCP have been amended many times. Moreover, in 2007 the FRCP were given a complete revision to improve style and clarity. The nature of litigation has also changed in the past 28 years, particularly in the areas of discovery and electronic records. Thus, OALJ has revised its regulations to make the rules more accessible and useful to parties, and to harmonize administrative hearing procedures with the current FRCP. The goal in amending the regulations is to provide clarity through the use of consistent terminology, structure and formatting so that parties have clear direction when pursuing or defending against a claim.

In addition to revising the regulations to conform to modern legal procedure, the rules need to be modified to reflect the types of claims now heard by OALJ. When the rules were promulgated in 1983, OALJ primarily adjudicated occupational disease and injury cases. Presently, and looking ahead to the future, OALJ is and will be increasingly tasked with hearing whistleblower and other workplace retaliation claims, in addition to the occupational disease and injury cases. These types of cases require more structured management and oversight by the presiding administrative law judge and more sophisticated motions and discovery procedures than the current regulations provide. In order to best manage the complexities of whistleblower and discrimination claims, OALJ needs to update its rules to address the procedural questions that arise in these cases.

DATES: Submit comments on or before February 4, 2013.

ADDRESSES: You may submit comments by any of the following methods:

Electronically: You may submit your comments and attachments electronically at *www.regulations.gov.*

Mail, hand delivery, express mail, messenger or courier service: You may submit your comments and attachments to the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW., Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Office of Administrative Law Judges' normal business hours, 8:00 a.m.–4:30 p.m., e.t.

Instruction for submitting comments: Please submit only one copy of your comments via any of the methods noted in this section. All submissions received must include the agency name, as well as RIN 1290–AA26. Also, please note that due to security concerns, postal mail delivery in Washington, DC may be delayed. Therefore, in order to ensure that comments are received on time, the Department encourages the public to submit comments electronically as indicated above. For further information on submitting comments, plus additional information on the rulemaking process, see the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Todd Smyth at the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300.

SUPPLEMENTARY INFORMATION:

I. Background

Administrative law judges at the Office of Administrative Law Judges (OALJ), United States Department of Labor (Department), conduct formal hearings under the Administrative Procedure Act, 5 U.S.C. 554 through 557. An administrative law judge manages hearings that mirror federal civil litigation, is bound by applicable rules of evidence and procedure, and is insulated from political influence. *See Tennessee* v. *U.S. Dep't of Transp.,* 326 F.3d 729, 735–36 (6th Cir. 2003). An administrative law judge acts as the functional equivalent of a trial judge. *See Fed. Mar. Comm'n* v. *S.C. State Ports Auth.,* 535 U.S. 743, 756–57 (2002). The types of cases heard by administrative law judges involve a full range of complexity, from simple administrative review of an existing administrative record to de novo, trial-type litigation. Consequently, rules of practice and procedure are essential to a just, speedy, and inexpensive determination of every proceeding.

The current Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR part 18, subpart A (Part 18, Subpart A), were published on July 15, 1983. *See* 48 FR 32538, 32538, July 15, 1983. Rarely have they been altered. Some rules relating to discovery were amended in 1994. *See* 59 FR 41874, 41876, Aug. 15, 1994. The most recent amendment, made in August 1999, permitted the appointment of settlement judges in cases arising under the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.,* and associated statutes. *See* 64 FR 47088, 47089, Aug. 27, 1999. Since its original publication, Part 18, Subpart A has never been comprehensively revised to keep abreast of ongoing changes to the procedures that govern civil litigation in federal trial courts.

The OALJ rules of practice and procedure are analogous to the Federal Rules of Civil Procedure used in the United States District Courts. Congress authorized the Supreme Court to prescribe rules for the United States District Courts in 1934, under the Rules Enabling Act, 28 U.S.C. 2072. The original version of those rules became effective on September 16, 1938.[1] Since 1938, thirty-three sessions of Congress have approved changes to the FRCP, from 1941 through the most recent amendments that took effect on December 1, 2010. Significant amendments became effective in 1948, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, 2006, 2007, 2009, and 2010. *Id.* The procedural rules for OALJ have not kept pace with the eight groups of changes to the FRCP since the early 1980s.

The disputes that comprise the docket at OALJ have also changed with time. When the rules of practice and procedure were first published, OALJ's judges mainly (but not exclusively) were devoting their efforts to deciding benefit claims under two broad statutory categories:

[1] Staff of H. Comm. on the Judiciary, 111th Cong., Federal Rules of Civil Procedure with Forms at vii (Comm. Print 2010), *www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf.*

• The Black Lung Benefits Act, subchapter 4 of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* (1969); and

• The Longshore Act and its extensions, which included the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 (1927); the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 (1953); and the Defense Base Act, as amended, 42 U.S.C. 1651 (1941).[2]

Over the last nearly two decades, Congress charged the Department of Labor (and consequently the OALJ) with the responsibility to hear and decide matters under many new statutes. Most relate to complaints by employees who assert their employers retaliated against them after they engaged in whistleblower activity. Some of these statutes for example are:

• Section 110 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, Public Law 96–510, 94 Stat. 2787, enacted on December 11, 1980;

• Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. 31105, Public Law 97–424, 96 Stat. 2097, 2157–58, first enacted on January 6, 1983 (and originally codified as 49 U.S.C. 2301 *et seq.*), and last amended by sec. 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110–53, 121 Stat. 464, enacted on August 3, 2007;

• Section 212(n)(2)(C)(iv) of the Immigration and Nationality Act, 8 U.S.C. 1182(n)(2)(C)(iv), as amended by the American Competitiveness and Workforce Improvement Act of 1998, which was part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Public Law 105–277, div. C, tit. IV, sec. 411(a), 112 Stat. 2681–641 to 2681–657, enacted on October 21,1998;

• Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, Public Law 106–181, 114 Stat. 145, enacted on April 5, 2000;

• Section 6(a) of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. 60129, Public Law 107–355, 116 Stat. 2989, enacted on December 17, 2002;

• Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the Sarbanes-Oxley Act), 18 U.S.C. 1514A, Public Law 107–204, 116 Stat. 802, first enacted on July 30, 2002, and last amended by sec. 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1848, 1852, enacted on July 21, 2010;

• Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, 6 U.S.C. 1142, Public Law 100–53, 121 Stat. 414, that amended the National Transit Systems Security Act on August 3, 2007; and

• Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, 49 U.S.C. 20109, Public Law 100–53, 121 Stat. 444, that amended the Federal Railroad Safety Act on August 3, 2007.

Congress remains active in the area of whistleblower protection. On July 21, 2010, Congress created and expanded whistleblower protection for employees in the financial services industry under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203. On October 15, 2010, it amended another employment protection program that includes the opportunity for a hearing before an administrative law judge at the OALJ. *See* the amendment to the Seaman's Protection Act in sec. 611 of the Coast Guard Authorization Act of 2010, 46 U.S.C. 2114, Public Law 111–281, 124 Stat. 2969. This year Congress established an additional right to an administrative hearing for whistleblowing employees in sec. 402 of the FDA Food Safety Modernization Act, 21 U.S.C. 399d, Public Law 111–353, 124 Stat. 3968, enacted January 4, 2011.

The substantive program regulations the Department has published to implement many of the statutes that grant workers and employers formal hearings on claims of workplace retaliation offer limited guidance about the procedures those adjudications should follow. Regulations often incorporate instead the procedural rules of Part 18, Subpart A. *See, e.g.,* 29 CFR 1978.107(a), 1979.107(a), 1980.107(a) (2011) (STAA, AIR21, and Sarbanes-Oxley regulations, respectively). In adopting program regulations, the Department has acknowledged it was leaving matters like the ''place of hearing, right to counsel, procedures, evidence and record of hearing, oral arguments and briefs, and dismissal for cause'' to the Part 18, Subpart A rules precisely ''because the Office of Administrative Law Judges has adopted its own rules of practice that cover these matters.'' 76 FR 2808, 2814, Jan. 18, 2011 (amending the 29 CFR part 24 regulations that cover whistleblowers in the nuclear power and environmental industries).

The growth in whistleblower jurisdiction has led OALJ to search for ways to manage those proceedings efficiently. Implementing procedures the federal district courts have developed or refined since 1983 will improve the current Part 18, Subpart A rules.

For example, several regulations that govern whistleblower claims explicitly grant the presiding judge ''broad discretion to limit discovery'' as a way to ''expedite the hearing.'' 29 CFR 1979.107(b), 1980.107(b), 1981.107(b). The Department's discussion when it published the final rules on Sarbanes-Oxley matters offered as an illustration that the judge may ''limit the number of interrogatories, requests for production of documents or depositions allowed.'' 69 FR 52104, 52110, Aug. 24, 2004. Other program regulations, such as those that govern disputes under the Energy Reorganization Act and six environmental statutes that cover whistleblowers in the nuclear and environmental industries published at 29 CFR part 24, incorporate the Part 18, Subpart A regulations without an explicit reference to a judge's authority to control discovery. *See* 29 CFR 24.107(a). The Preface to those Part 24 regulations nonetheless recognizes that the current Part 18, Subpart A regulations invest a judge with broad authority ''to limit discovery in appropriate circumstances.'' 76 FR at 2815. Whether a program regulation specifically recognizes a judge's authority to limit or manage discovery, or implicitly does so by adopting the Part 18, Subpart A regulations, the judge will consider the parties' views on the discovery appropriate to develop the facts for hearing before limiting it. As detailed below, the early initial disclosures the federal courts now require parties to exchange under Fed. R. Civ. P. 26(a)(1) obviates the need for some formal discovery. The discovery plan that parties craft under Fed. R. Civ. P. 26(f) after they confer at the outset of the litigation offers a ready way to tailor discovery to the proceeding.

A 2010 study surveyed lawyers who were the attorneys of record in federal civil cases that terminated in the last quarter of 2008 about their satisfaction with the current FRCP. Lawyers from the Litigation Section of the American Bar Association and from the National Employment Lawyers Association were sampled too. The survey instrument had been developed jointly by the American

[2] Judges at OALJ continue to hear a very few claims under another Longshore Act extension, the District of Columbia Workmen's Compensation Act of 1928, 36 DC Code § 501 *et seq.,* despite the District's adoption of its own workers' compensation law. For claims that involve an injury suffered before the District's own law took effect in mid-1982, judges at OALJ continue to hear them. *Keener* v. *Wash. Metro. Transit Auth.,* 800 F.2d 1173, 1175 (D.C. Cir. 1986).

College of Trial Lawyers and the Institute for the Advancement of the American Legal System. A majority of lawyers across all the groups responded that active case management by judges offered a useful way to limit or avoid abusive, frivolous, or unnecessary discovery. Emery G. Lee & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 3, 9 (2010). These survey results mesh comfortably with comments the Department received as the 29 CFR part 24 regulations were amended. Some lawyers who commented there urged the Department, among other things, to require parties to those whistleblower claims to exchange the initial disclosures now mandated by Fed. R. Civ. P. 26(a)(1). 76 FR at 2815.

Updating the Part 18, Subpart A regulations has value beyond whistleblower litigation. Regulations for the Longshore and Harbor Workers' Compensation Act published at 20 CFR 702.331 through 702.351 predate Part 18, Subpart A. They sketch out only broad outlines of how hearings should proceed, so the parties and judges fall back on the Part 18, Subpart A rules in cases brought under the Longshore Act and its extensions. Workers, their employers, and insurance carriers also will profit from updated procedures that avoid the need to serve discovery to learn basic information, and allow more focused case management.

The Department believes that in many instances the current Part 18, Subpart A rules provide limited guidance. Judges have addressed the current rules' limitations by managing procedural matters through orders, often directing parties to follow aspects of the various updates to the FRCP. The consequent variety in approaches to case management has troubled some lawyers, especially those with nationwide client bases who routinely practice before different judges throughout the nation.

Lastly, the Department recognizes that the current Part 18, Subpart A rules can be stated more clearly, something the 2007 style amendments to the FRCP highlight. The style amendments were the first comprehensive overhaul since the FRCP were adopted in 1938. Taking more than four years to complete, they aspired to simplify and clarify federal procedure. The more austere sentence structure used throughout the restyled FRCP made them shorter, easier to read and more clearly articulated. The amendments proposed to Part 18, Subpart A emulate those improvements.

The Department's principal goals in revising Part 18, Subpart A were to:

- Bring the rules into closer alignment with the current FRCP;
- Revise the rules to aid the development of facts germane to additional sorts of adjudications the Department's judges handle;
- Enhance procedural uniformity, while allowing judges to manage cases flexibly, because (a) An administrative proceeding is meant to be less formal than a jury trial; (b) local trial practice in different regions of the country should be accommodated when doing so does not affect substantive rights; and (c) governing statutes and substantive regulations may impose their own specific procedural requirements; and
- Make the rules clearer and easier to understand through the use of consistent terminology, structure, and formatting.

II. Alignment With the Federal Rules of Civil Procedure

The decisions and orders that judges enter to resolve cases under sec. 556 and 557 of the Administrative Procedure Act resemble findings of fact and conclusions of law federal district and magistrate judges enter in non-jury cases under Fed. R. Civ. P. 52. Matters proceed before OALJ much the way non-jury cases move through the federal courts.

Using language similar or identical to the applicable FRCP gains the advantage of the broad experience of the federal courts and the well-developed precedent they have created to guide litigants, judges, and reviewing authorities within the Department on procedure. Parties and judges obtain the additional advantage of focusing primarily on the substance of the administrative disputes, spending less time on the distraction of litigating about procedure.

Part 18, Subpart A currently provides that the ''Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.'' 29 CFR 18.1(a). Experienced practitioners know to consult the FRCP for guidance in circumstances the current Part 18, Subpart A rules do not explicitly cover. Given the developments in the FRCP since 1983, parties and judges switch back and forth between two different sources of procedure (the Part 18, Subpart A rules and the FRCP). This is a less than ideal situation. The proposed revision continues the current practice of looking to the federal civil rules to resolve procedural questions that the revised Part 18, Subpart A rules do not explicitly cover, a principle that § 18.1(a) has embodied for over twenty-five years.

Pretrial procedures under the FRCP have significantly changed since Part 18, Subpart A was published in 1983. Some of the most significant changes have encompassed:

- The scope of pretrial discovery;
- How time is computed under the FRCP;
- The innovation of early mandatory disclosures about documentary proof and lay and expert witness testimony that were unknown to litigation practice in 1983, the related discovery plans the parties now negotiate, and the ongoing duty parties now bear to supplement their mandatory disclosures and discovery responses;
- Alterations to the rule on pretrial conferences to encourage judges to manage cases, and give them the tools to do so;
- Imposing presumptive limitations on aspects of discovery;
- Adding rules on the discovery of electronically stored information, a rare source of information in the early 1980's that has become ubiquitous today; and
- The procedure, but not the standard, for granting summary judgment under Fed. R. Civ. P. 56 that was substantially revised in 2010.

The 2007 style amendments to the FRCP in some instances altered the original numbering of provisions that first came into being after 1983. The current rule numbers from the 2010 edition of the FRCP are used in the following discussion of significant changes in litigation practice since 1983.

A. Scope of Discovery

The scope of discovery has changed. The formulation used in current Part 18, Subpart A at § 18.14 extends discovery to ''any matter, not privileged, which is relevant to the subject matter involved in the proceeding.'' The FRCP now permits parties the somewhat narrower opportunity to learn about unprivileged matters ''relevant to a party's claim or defense.'' Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(b)(1); Jeffery W. Stemple & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery,* 199 F.R.D. 396, 398 (2001).

B. Time Computation

Litigation requires timely filings and actions. The way time is calculated under Fed. R. Civ. P. 6 changed in 2009. In the Department's view, the Part 18, Subpart A rules should be harmonized with the FRCP so parties and their lawyers use the simpler, clearer, and more consistent way federal courts now

calculate time. Part 18, Subpart A presently excludes weekends and legal holidays when computing some deadlines but not others. *See* current 29 CFR 18.4(a). Fed. R. Civ. P. 6 now counts intervening weekends and holidays for all time periods. Most short periods found throughout the FRCP were extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. Five-day periods became 7-day periods and 10-day periods became 14-day periods, in effect maintaining the status quo.

Time periods in the FRCP shorter than 30 days also were revised to multiples of 7 days, to reduce the likelihood of ending on weekends. Other changes to the FRCP time-computation rules affect how to tell when the last day of a period ends, and how to compute backward-counted periods that end on a weekend or holiday.

C. Mandatory Disclosures, Their Supplements, and Discovery Plans

The Department believes that the success the federal courts have had with requiring parties to exchange elementary information early in the dispute, without the need for a formal discovery demand, should be incorporated into OALJ's procedures for most cases. The same is true for the way the federal courts require parties to disclose the opinions of experts, and to supplement disclosures and discovery responses.

Disclosures of information relevant to the claims or defenses a party may raise in the litigation were required in the 1993 amendments to the FRCP. *See* David D. Siegel, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, and a Word about Mandatory Disclosure,* 151 F.R.D. 147 (1993). Although originally subject to variation by local rule of a district court, by 2000 the disclosures became mandatory and nationally uniform (although the federal courts exempted a narrow group of cases that were unlikely to benefit from required disclosures).

The disclosure obligation was narrowed in 2000 to embrace only information the party would use to support its claims or defenses at a pretrial conference, to support a motion, to question a witness during a discovery deposition, or at trial. Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(a). These mandatory disclosures cover basic information needed to prepare most cases for trial or to make an informed decision about settlement. Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. P. 26(a). They must be exchanged at the outset of the proceeding, even before the opponent issues any discovery request, and for the most part there is a moratorium on discovery until the automatic disclosures are made. Fed. R. Civ. P. 26(d)(1). Few excuses for failing to make timely disclosures are countenanced. Fed. R. Civ. P. 26(a)(1)(E). These prompt initial disclosures lead to an early conference where the parties discuss whether the case can be settled and negotiate a proposed discovery schedule they report to the judge. Fed. R. Civ. P. 26(f)(2).

Other amendments enhanced the pretrial disclosure of the opinions of an expert witness. A party now is required to:

- Provide a detailed written report, signed by an expert who is retained or specially employed to give expert testimony, under Fed. R. Civ. P. 26(a)(2)(B);
- Deliver the report before the expert is deposed, under Fed. R. Civ. P. 26(b)(4); and
- Prepare and serve a disclosure of the expert's testimony if the expert was not retained or specially employed to testify (and so not required to write and sign a report), under Fed. R. Civ. P. 26(a)(2)(C).

By signing and serving a required disclosure (or any discovery response), the lawyer attests that it is complete and correct; consistent with the rules; not interposed for an improper purpose; and not unreasonable nor unduly burdensome or expensive, given the needs and prior discovery in the case, the amount in controversy, and the importance of the issues at stake. Fed. R. Civ. P. 26(g).

A required disclosure that turns out to have been incomplete or incorrect in some material respect must be supplemented ''in a timely manner.'' Fed. R. Civ. P. 26(e). The duty to supplement extends to a required report or disclosure about expert witness testimony and to a discovery response. *Id.*

D. Case Management Through Pretrial Conferences and Orders

The amendments to Fed. R. Civ. P. 16 made in 1993 enhanced a judge's authority to manage litigation with the goal of achieving the just, speedy, and inexpensive determination of a matter through the use of scheduling orders under Fed. R. Civ. P. 16(b) and pretrial conferences under Fed. R. Civ. P. 16(c). Those revisions to Fed. R. Civ. P. 16 expanded the judge's authority to ''take appropriate action'' in a civil case. Charles R. Ritchey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for the Benefit of the Bench and Bar,* 157 F.R.D. 69, 75 (1994).

A pretrial conference offers the opportunity to appropriately control the extent and timing of discovery. At a conference the parties and judge may consider ways to avoid unnecessary proof and cumulative evidence at trial (including expert testimony) under what is now Fed. R. Civ. P. 16(c)(2)(D). Determining whether a motion for summary adjudication is even appropriate, and setting the time to file it, may be discussed under Fed. R. Civ. P. 16(b)(3)(A), (c)(2)(E). *See generally* D. Brock Hornby, *Summary Judgment Without Illusions,* 13 Green Bag 2d 273, 284–85 (2010) (explaining the complexity of the summary judgment process). Controlling discovery and setting deadlines for initial, expert, and pretrial disclosures under Fed. R. Civ. P. 26; for stipulations under Fed. R. Civ. P. 29; and dealing with failures to make disclosures or to cooperate in discovery under Fed. R. Civ. P. 37, all may be considered at a pretrial conference under Fed. R. Civ. P. 16(c)(2)(F). A pretrial order that limits the length of trial under Fed. R. Civ. P. 16(c)(2)(O) offers the parties a better opportunity to determine their priorities and be selective in presenting their evidence than if limits are imposed only at the time of trial. Limits on trial time must be reasonable in the circumstances and ordinarily imposed only after the parties are given the opportunity to outline the nature of the testimony they expect to offer through various witnesses and the time they expect to need for direct and cross-examination. *See* Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 16(c)(15). Exploring settlement and the use of alternative dispute resolution procedures can be considered under Fed. R. Civ. P. 16(c)(2)(I). Separate trials may be set for potentially dispositive issues under Fed. R. Civ. P. 16(c)(2)(M).

E. Presumptive Limitations on Discovery

Discovery practice in federal court litigation has been altered since 1983 in a number of ways. The amendments were not meant to block needed discovery, but to provide judicial supervision to curtail excessive discovery. Advisory Committee Note to the 1993 Amendments to Fed. R. Civ. P. 33(a). The FRCP now presumptively limit the number of interrogatories a party may serve, including ''all discrete subparts;'' the number of depositions taken by oral examination or on written questions; taking the deposition of a

witness more than once; and restricting the deposition of a witness to one day of no more than seven hours. Fed. R. Civ. P. 33(a); Fed. R. Civ. P. 30(a)(2)(A)(i), (ii), (d)(1); and Fed. R. Civ. P. 31(a)(2)(A)(i).

These presumptive limitations are adjusted as a case requires, often through the scheduling order the judge enters on the discovery plan the parties propose after their initial conference. Fed. R. Civ. P. 26(b)(2)(A), (f)(3)(E); *see also,* Advisory Committee Notes to the 2000 Amendments to Fed. R. Civ. P. 26(b)(2).

Parties also must seek to resolve discovery disputes informally before filing a motion. Fed. R. Civ. P. 26(c)(1); *see also,* Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. P. 26(a) (concerning what was then the new subparagraph (B)).

F. Discovery of Electronically Stored Information

E-discovery provisions that recognize how pervasive digital information has become were incorporated into the FRCP in 2006. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?,* 236 F.R.D. 598, 604–605 (2006). The amendments recognize the integral role digital data such as email, instant messaging, and web-based information play in contemporary life and in discovery; they introduced into the FRCP the concept of ''electronically stored information.'' As with changes to the presumptive limits on various discovery methods, the discovery plan the parties develop is expected to address any issues about disclosure or discovery of electronically stored information, including the form in which it should be produced. Fed. R. Civ. P. 26(f)(3)(C); Fed. R. Civ. P. 34(b)(2)(D), (E); *see also* Advisory Committee Notes to the 2006 Amendments to Fed. R. Civ. P. 26(f); Advisory Committee Notes to the 2006 Amendments to Fed. R. Civ. P. 34(b); *Hopson* v. *Mayor & City Council of Balt.,* 232 F.R.D. 228, 245 (D. Md. 2006).

Digital information is so omnipresent that federal courts now deride as ''frankly ludicrous'' arguments that a trial lawyer who claims to be ''computer illiterate'' should be excused from fulfilling the rules' e-discovery obligations. *Martin* v. *Nw. Mut. Life Ins. Co.,* No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (unpublished). Today a lawyer bears an affirmative duty not just to ask a client to locate and gather paper and electronic documents, but to search out sources of electronic information. *Phoenix Four, Inc.* v. *Strategic Res. Corp.,* No. 05 Civ. 4837(HB), 2006 WL 2135798, at *5 (S.D.N.Y. Aug. 1, 2006) (unpublished); *In re A & M Fla. Prop. II, LLC,* No. 09–15173, 2010 WL 1418861, at *6 (Bankr. S.D.N.Y. Apr. 7, 2010) (unpublished). Those efforts must, however, be proportional to what is at stake in the litigation. Fed. R. Civ. P. 26(b)(2)(C)(iii); *see also, The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production*, Principle 2, cmt. 2.b., at 17 (2007) (''Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.''); *cf., Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of Am. Sec., LLC,* 685 F.Supp.2d 456, 464–65 (S.D.N.Y. 2010) (describing significant discovery burdens that were reasonable in a $550 million claim arising from the liquidation of hedge funds; but those burdens may be inappropriate in litigation where much less is at stake).

In addition, the parties should discuss and agree at the initial conference on how to handle inadvertent disclosure of digital information that otherwise would enjoy attorney-client privilege or work product protection. Fed. R. Civ. P. 26(f)(3)(D). Their agreement plays a pivotal role under recently enacted Fed. R. Evid. 502(b), (d), and (e). They avoid a waiver of privilege or work product protection when their agreement is incorporated into a scheduling order or another order. *See* Advisory Committee Notes to the 2006 amendments to Fed. R. Civ. P. 26(f).

The current FRCP not only guide the resolution of discovery disputes, but also set standards for allocating the potentially high cost of discovery among the parties when the sources of digital data are not readily accessible. Advisory Committee Notes to 2006 Amendments to Fed. R. Civ. P. 26(b)(2) (''The conditions [the judge imposes] may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.'')

G. Summary Decision

A motion for summary adjudication carries the potential to dispose of an entire claim or portions of it with finality but without a trial, so it plays a key role in litigation. The procedure ought to be the same at the OALJ as in U.S. district courts; any divergence creates an incentive for a party to prefer the forum with the summary decision régime most favorable to its position. This matters because under many statutes whistleblower litigation begins at OALJ, but the complainant may proceed in U.S. district court if a final order has not been entered within a relatively short time after the claim is first brought to the attention of the Department. *See, e.g.,* 18 U.S.C. 1514A(b)(1)(B) (2010) (Sarbanes-Oxley Act); 42 U.S.C. 5841(b)(4) (2010) (Energy Reorganization Act); 46 U.S.C. 2114(b) (2010) (Seaman's Protection Act); 49 U.S.C. 31105(c) (2010) (Surface Transportation Assistance Act).

Federal Rule of Civil Procedure 56 was recently revised effective December 1, 2010. It now instructs the judge to state a reason for granting or denying the motion, usually by identifying the central issues, which can help the parties focus any further proceedings. Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(a). The judge is not obliged to search the record independently to determine whether there is a factual dispute for trial, but nonetheless may consider record materials the parties never called to the judge's attention. Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(c)(3). A formal affidavit is not required to support the motion; an unsworn declaration signed under penalty of perjury suffices, recognizing the status 28 U.S.C. 1746 gives to those statements. Fed. R. Civ. P. 56(c)(4). Even if the motion is not granted, or granted only in part, the judge may find that certain facts are undisputed and treat them as established. Fed. R. Civ. P. 56(g). Invoking this authority demands care, however. To limit litigation expenses, a nonmovant who feels confident a genuine dispute as to one or a few facts will defeat the motion may choose not to file a detailed response to all facts the movant stated. That choice should not expose the party to the risk that the additional facts will be treated as established under subdivision (g). Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 56(h).

The judge may sanction a party who submits an affidavit or declaration with its motion papers in bad faith or solely for delay. Fed. R. Civ. P. 56(h).

H. Additional Matters

Other portions of the FRCP have also undergone significant changes, including rules on the subjects of:

- Sanctions under Fed. R. Civ. P. 11 in 1993, *see* Edward D. Cavanagh, *Rule 11 of The Federal Rules of Civil Procedure: The Case Against Turning Back the Clock,* 162 F.R.D. 383, 396 (1995); and
- Subpoenas under Fed. R. Civ. P. 45 in 1991, *see* David D. Siegel, *Federal*

Subpoena Practice Under the New Rule 45 of The Federal Rules of Civil Procedure, 139 F.R.D. 197, 197 (1992).

The proposed revisions to Part 18, Subpart A reflect the general tenor of these amendments.

III. Evolution in Types of Cases

Congress has vested the Department (and therefore OALJ) with the responsibility to conduct formal hearings pursuant to more than 60 laws, including at least 19 that protect employees from retaliation for whistleblowing.

The bulk of hearings conducted by OALJ involve longshore workers' compensation and black lung benefits claims. This was true when OALJ's rules of practice were published in 1983 and is still true today.[3] These cases have benefited from having established rules of practice and procedure modeled on the FRCP. The evolution in the types of cases heard by OALJ, however, has resulted in a significant increase in hearings that are the functional equivalent of a civil trial in federal or state court, absent only the jury. In particular, whistleblower cases now account for a significant portion of OALJ's workload, disproportionate to their percentage of the overall docket. As noted above, many of the statutes creating the responsibility for whistleblower adjudication by the Department of Labor were promulgated after the Part 18, Subpart A rules were published in 1983. Nine whistleblower laws with the potential for ALJ hearings within the Department of Labor were enacted after the year 2000. Hearings arising under these statutes often involve complex fact patterns and novel legal issues. Overall, whistleblower litigation typically requires more extensive discovery, case management, motion work, summary decision practice, and time in trial than many of the other types of cases heard by OALJ.

Moreover, intensive litigation is typical in cases arising under the Defense Base Act. Although the Defense Base Act has been in existence since World War II, increasing use of contract services by the military and other parts of the federal government has resulted in significantly more hearings conducted by OALJ under that law in recent years. These cases tend not to settle, and therefore require more case management by judges as compared with other workers' compensation cases adjudicated by OALJ. OALJ also now conducts hearings involving labor condition applications of employers who employ H–1B nonimmigrant workers. OALJ's experience is that many of these cases do not settle; they also involve extensive procedural motions and multi-day hearings.

Thus, the change in the case mix before OALJ has heightened the need for procedural rules that are clearly written, permit improved and more consistent case management by judges, and are familiar to the national legal community under current federal court practice.

IV. Flexibility/Uniformity

Notwithstanding the variety of statutes and regulations that generate disputes at OALJ, the provisions of the Administrative Procedure Act at 5 U.S.C. 556 offer broad guidance to administrative law judges about how to conduct proceedings. Flexibility in applying procedural rules is desirable, so that judges manage litigation according to the needs of an individual case. The Department's opportunity to review the decision of its administrative law judges under 5 U.S.C. 557(b) safeguards a party from an abuse of that discretion.

Some cases by their nature need special management. For example, applying a general rule that sets the time to respond to formal discovery demands may be inappropriate in a case that demands expedited handling. A striking illustration of an expedited proceeding is one to review a denial of an employer's application to the Office of Foreign Labor Certification under 20 CFR 655.103 to certify the use of non-immigrant workers in temporary agricultural employment under the H–2A visa program of the Immigration & Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188(e). In such cases, the employer only has five business days to seek review of an application's denial under 20 CFR 655.141(b)(4) and 655.142(c). Where the employer requests administrative review, the judge has only five business days after receipt of the administrative file from the Office of Foreign Labor Certification to render a decision. 20 CFR 655.171(a) (2011). Where the employer requests de novo review, the Part 18, Subpart A rules apply, but the hearing must be convened within five business days after the administrative law judge receives the administrative file, and the decision must follow within ten calendar days. 20 CFR 655.171(b). Additionally, for some types of cases—for example, those adjudicated under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.,* and its extensions such as the Defense Base Act, 42 U.S.C. 1651, *et seq.,* and the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*—the Department's substantive regulations also include procedural provisions. *See* 20 CFR parts 702 (Longshore) and 725 (Black Lung).

The proposed rules have been drafted to authorize a judge to tailor procedures to the case, through a prehearing order. A judge may take a broad range of actions under proposed § 18.50(b)(2) and (3). Parties may be ordered to confer about settlement early in the case, required to make prehearing disclosures without any formal discovery demand from the other party, and directed to draft a discovery plan. Yet the judge also may relieve the parties from the obligation to make initial disclosures, and alter the general limitations on the number of interrogatories and the number and length of depositions. This flexibility permits a judge to address, in an individualized way, the needs of any specific case. The judge also may address any regional differences in litigation practices that may require direction or clarification.

V. Clarity/Re-Organization

The FRCP underwent a complete revision that culminated in 2007 to improve their style and clarity. Restyled Federal Rules of Appellate Procedure took effect in 1998, as the restyled Federal Rules of Criminal Procedure did in 2002. Sources that guided drafting, usage, and style for all three revisions included the *Guidelines for Drafting and Editing Court Rules,* which the Standing Committee on Federal Rules of Practice and Procedure of the Judicial Conference of the United States published at 169 F.R.D. 171 (1997), and Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995). The purpose of the style revisions was twofold: to make the rules easier to understand, and to make style and terminology consistent throughout the rules. *See* Advisory Committee's Notes to the 2007 Amendments to Fed. R. Civ. P. 1. The restyled federal civil rules reduced the use of inconsistent, ambiguous, redundant, repetitive, or archaic words. For example, the restyled rules replaced ''shall'' with ''must,'' ''may,'' or ''should,'' as appropriate, based on which one the context and the established interpretation made correct. *Id.* The sole exception was the highly controversial restoration of the ''shall'' in Fed. R. Civ. P. 56(a) on summary judgment when it was amended in 2010. Advisory Committee's Notes to the 2010 Amendments to Fed. R. Civ. P. 56(a).

The drafting guidelines the authors of the 2007 style amendments used to

[3] OALJ also conducts administrative review in a large number of immigration-related appeals involving both permanent and temporary labor certification applications. Many of these reviews do not require an evidentiary hearing because the review is on the existing record.

enhance the clarity and readability of the FRCP also were used as the Department revised Part 18, Subpart A. Proposed revisions typically are based on the text of the restyled federal civil rule for the corresponding subject, unless there was a reason to deviate from the federal rule's language. As one example, the word ''court'' is replaced throughout with the word ''judge,'' because administrative adjudications do not take place in a court. Where substantive deviations from the FRCP were made, the reason for the deviation is noted in the portion of the Notice of Proposed Rulemaking pertaining to the specific proposed rule. Where there is no corresponding federal civil rule, the Department used the FRCP drafting guidelines to revise the existing Part 18, Subpart A rules, to improve their clarity and internal consistency. The ordering of some rules was altered to improve the overall clarity of the Part 18, Subpart A regulations. A conversion table that shows the current Part 18, Subpart A rules and their corresponding proposed rule appears at the end of this Preface. In drafting the text of the proposed rules, the Department also took into account two Executive Orders:

- Executive Order 12866 (1993), which requires that regulations be ''simple and easy to understand, with the goal of minimizing uncertainty and litigation * * *'' 58 FR 51735, sec. 1(b)(12), Sept. 30, 1993 (amended 2002 & 2007); and
- Executive Order 12988 (1996), which requires that regulations be written in ''clear language.'' 61 FR 4729, sec. 3(b)(2) (Feb. 5, 1996).

The Plain Writing Act of 2010, 5 U.S.C. 301, Public Law 111–274, 124 Stat. 2861 (2010), while not directly applicable to regulations, recognizes the value of plain writing in government documents by requiring clear, concise, and well-organized publications. The Office of Management and Budget has published a ''Best Practices Guide for Regulations'' available on the internet.[4] These proposed rules follow the guidance these sources offer.

Section 6(a) of Executive Order 13,563 (dated January 18, 2011), states: ''To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' 76 FR at 3821. The Executive Order also requires each agency to prepare a plan for reviewing its regulations. Although the revision of Part 18, Subpart A began well before this recent Executive Order, the proposed revisions meet the Order's requirements, by replacing outmoded rules with a more-readily understandable version.

VI. Regulatory Review

A. Executive Order 12866 (Regulatory Planning and Review)

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866. The Department of Labor, in coordination with the Office of Management and Budget (OMB), has determined that this proposed rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f) because rule because the rule will not have an annual effect on the economy of $100 million or more; nor create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, the rule does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities or the principles set forth in this Executive Order. Accordingly, the proposed rule has not been reviewed by OMB.

B. Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Department concludes that the Regulatory Flexibility Act, 5 U.S.C. 601 *et. seq.* does not apply since the changes proposed here consist of amendments to rules of agency organization, procedure and practice, and consequently are exempt from the notice and public comment requirements of the Administrative Procedure Act, *see* 5 U.S.C. 553(b)(3)(A).

C. Executive Order 12291 (Federal Regulation)

The Department has reviewed this rule in accordance with Executive Order 12291 and determined it is not a ''major rule'' under Executive Order 12291 because it is not likely to result in (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Accordingly, no regulatory impact analysis is required.

D. Unfunded Mandates Reform Act of 1995 and the Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with the requirements of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.,* and Executive Order 13132. The Department concludes that the requirements of these provisions do not apply to the proposed rule, because the proposed rule does not place any mandate on State, local, or tribal governments.

E. Paperwork Reduction Act

The Department certifies that this proposed rule has been assessed in accordance with the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (1995)(PRA). The Department concludes that the requirements of the PRA do not apply to this rulemaking because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget.

F. The National Environmental Policy Act of 1969 (Environmental Impact Assessment)

The Department has reviewed the proposed rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*) and the Department of Labor's NEPA procedures (29 CFR part 11). The Department concludes that the requirements of the NEPA do not apply to this rulemaking as there are no requirements or provisions contained in this proposed rule that involve assuring the maintenance of a healthful environment and there are no provisions impacting the responsibilities to preserve and enhance that environment contained herein and, thus, has not conducted an environmental assessment or an environmental impact statement.

G. The Privacy Act of 1974, 5 U.S.C. 552a, as Amended

The Department has reviewed this proposed rule in accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a). This rulemaking would not require any new process, filing or collection of any new information in the proceedings before the Office of

[4] This guide is available at *http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.*

Administrative Law Judges and therefore, the Department has determined this proposed rule would not result in a new or revised Privacy Act System of Records.

H. Federal Regulations and Policies on Families

The Department has reviewed this proposed rule in accordance with the requirements of the Federal Regulations and Policies on Families, Section 654 of the Treasury and General Government Appropriations Act of 1999. These proposed regulations were not found to have a potential negative effect on family well-being as it is defined there under.

I. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

The Department certifies that this proposed rule has been assessed regarding environmental health risks and safety risks that may disproportionately affect children. These proposed regulations were not found to have a potential negative effect on the health or safety of children.

J. Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)

The Department has reviewed this proposed rule in accordance with E.O. 12630 and has determined that it does not contain any ''policies that have takings implications'' in regard to the ''licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property.''

K. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The Department has reviewed this proposed rule in accordance with E.O. 13175 and has determined that it does not have ''tribal implications.'' The proposed rule does not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

L. Executive Order 12988 (Civil Justice Reform)

This regulation has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

M. Executive Order 13211 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use)

The Department has reviewed this proposed regulation in accordance with Executive Order 13211 and determined that the proposed rule is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866, will not have a significant adverse effect on the supply, distribution, or use of energy, and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

VII. Public Participation

A. APA Requirements for Notice and Comment

The changes proposed here consist of amendments to rules of agency organization, procedure and practice, and consequently are exempt from the notice and public comment requirements of the Administrative Procedure Act, *see* 5 U.S.C. 553(b)(3)(A). However, the Department wishes to provide the public with an opportunity to submit comments on any aspect of the entire proposed rule.

B. Publication of Comments

Please be advised that the Department will post all comments without making any change to the comments, including any personal information provided. The *www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments received electronically or by mail, hand delivery, express mail, messenger or courier service are available and accessible to the public on this Web site. Therefore, the Department recommends that commenters safeguard their personal information by not including social security numbers, personal addresses, telephone numbers, and email addresses in comments. It is the responsibility of the commenter to safeguard his or her information.

C. Access to Docket

In addition to all comments received by the Department being accessible on *www.regulations.gov,* the Department will make all the comments available for public inspection during normal business hours at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the proposed rule available, upon request, in large print or electronic file on computer disc. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the proposed rule in an alternate format, contact Todd Smyth at the U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street NW., Suite 400-North, Washington, DC 20001–8002; telephone (202) 693–7300.

PART 18, SUBPART A—CROSS REFERENCING CHART

New section	New section title	Old section	Old section title	Federal rule of civil procedure
		GENERAL PROVISIONS		
18.10	Scope and purpose	18.1/18.26	Scope of rules and conduct of hearings.	Fed. R. Civ. P. 1
18.11	Definitions	18.2	Definitions	
18.12	Proceedings before administrative law judge.	18.25/18.29(a)	Proceedings before administrative law judge/authority of the administrative law judge.	
18.13	Settlement judge procedure	18.9	Consent order or settlement; settlement judge procedure.	
18.14	Ex parte communication	18.38	Ex parte communications	
18.15	Substitution of administrative law judge.	18.30	Unavailability of administrative law judge.	Fed. R. Civ. P. 63
18.16	Disqualification	18.31	Disqualification	

PART 18, SUBPART A—CROSS REFERENCING CHART—Continued

New section	New section title	Old section	Old section title	Federal rule of civil procedure
18.17	Legal assistance	18.35	Legal assistance	
PARTIES AND REPRESENTATIVES				
18.20	Parties to a proceeding	18.10	Parties, how designated	
18.21	Party appearance and participation	18.39/18.34(a)	18.39, Waiver of right to appear and failure to participate or to appear—text was incorporated into proposed "participation" rule.	
18.22	Representatives	18.34	Representatives	
18.23	Disqualification and discipline of representatives.			
18.24	Briefs from amicus curiae	18.12	Amicus curiae	
SERVICE, FORMAT AND TIMING OF FILINGS AND OTHER PAPERS				
18.30	Service and filing	18.3	Service and filing	Fed. R. Civ. P. 5
18.31	Privacy protection for filings and exhibits.			Fed. R. Civ. P. 5.2
18.32	Computing and extending time	18.4	Time computations	Fed. R. Civ. P. 6
18.33	Motions and other papers	18.6	Motions and requests	Fed. R. Civ. P. 7(b) & 43(c)
18.34	Format of papers filed			
18.35	Signing motions and other papers; representations to the judge; sanctions.			Fed. R. Civ. P. 11
18.36	Amendments after referral to the Office of Administrative Law Judges.	18.5	Responsive pleadings—answer and request for hearings.	
PREHEARING PROCEDURE				
18.40	Notice of hearing	18.27	Notice of hearing	
18.41	Continuances and changes in place of hearing.	18.28	Continuances	
18.42	Expedited proceedings	18.42	Expedited proceedings	
18.43	Consolidation; separate hearings	18.11	Consolidation of hearings	Fed. R. Civ. P. 42
18.44	Prehearing conference	18.8	Prehearing conferences	Fed. R. Civ. P. 16
DISCLOSURE AND DISCOVERY				
18.50	General provisions governing disclosure and discovery.			Fed. R. Civ. P. 26(a), (d), (f), (g)
18.51	Discovery scope and limits	18.14	Scope of discovery	Fed. R. Civ. P. 26(b)
18.52	Protective orders	18.15	Protective orders	Fed. R. Civ. P. 26(c)
18.53	Supplementing disclosures and responses.	18.16	Supplementation of responses	Fed. R. Civ. P. 26(e)
18.54	Stipulations about discovery and procedure.	18.17	Stipulations regarding discovery	Fed. R. Civ. P. 29
18.55	Using depositions at hearings	18.23	Use of depositions at hearings	Fed. R. Civ. P. 32
18.56	Subpoena	18.24	Subpoenas	Fed. R. Civ. P. 45
18.57	Failure to make disclosures or to cooperate in discovery; sanctions.	18.21	Motion to compel discovery	Fed. R. Civ. P. 37
TYPES OF DISCOVERY				
18.60	Interrogatories to parties	18.18	Written interrogatories to parties/	Fed. R. Civ. P. 33
18.61	Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes..	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.	Fed. R. Civ. P. 34
18.62	Physical and mental examinations	18.19	Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.	Fed. R. Civ. P. 35
18.63	Requests for admission	18.20	Admissions	Fed. R. Civ. P. 36
18.64	Depositions by oral examination	18.22	Depositions by oral examinations	Fed. R. Civ. P. 30
18.65	Depositions by written questions			Fed. R. Civ. P. 31
DISPOSITION WITHOUT HEARING				
18.70	Motions for dispositive action			
18.71	Approval of settlement and consent findings.	18.9		

PART 18, SUBPART A—CROSS REFERENCING CHART—Continued

New section	New section title	Old section	Old section title	Federal rule of civil procedure
18.72	Summary decision	18.40/18.41	18.40, Motion for summary decision *merged with* 18.41, Summary decision.	Fed. R. Civ. P. 56
		HEARING		
18.80	Prehearing statement	18.7	Prehearing statements	
18.81	Formal hearing	18.43	Formal hearings	Fed. R. Civ. P. 43(a)
18.82	Exhibits	18.47/18.48 18.49/18.50	Exhibits/records in other proceedings/designation of parts of documents/authenticity.	
18.83	Stipulations	18.51	Stipulations	
18.84	Official notice	18.45	Official notice	
18.85	Privileged, sensitive, or classified materials.	18.46/18.56	In camera and protective orders/restricted access.	
18.86	Hearing room conduct	18.37	Hearing room conduct	
18.87	Standards of conduct	18.36	Standards of conduct	
18.88	Transcript of proceedings	18.52	Record of hearings	
		POST HEARING		
18.90	Closing the record; additional evidence.	18.54/18.55	Closing the record/receipt of documents after hearing.	
18.91	Post-hearing brief	18.57	Decision of the administrative law judge and post-hearing briefs.	
18.92	Decision and order	18.57	Decision of the administrative law judge and post-hearing briefs.	
18.93	Motion for reconsideration			Fed. R. Civ. P. 59(e)
18.94	Indicative ruling on a motion for relief that is barred by a pending petition for review.			Fed. R. Civ. P. 62.1
18.95	Review of Decision	18.58	Appeals	
		DELETED SECTIONS		
	Deleted	18.13	Discovery methods	
	Deleted	18.32	Separation of functions	
	Deleted	18.33	Expedition	
	Deleted	18.53	Closing of hearings	
	Deleted	18.59	Certification of official record	

General Provisions

§ 18.10 Scope and purpose.

The Department proposes to remove the current § 18.1 and add § 18.10. The proposed § 18.10 is modeled after Fed. R. Civ. P. 1.

As in the current rule, the proposed rule states that in the event the procedures in Part 18, Subpart A are inconsistent with a governing statute, regulation, or executive order, the latter controls. The Department recognizes that specific procedural regulations have already been promulgated for some statutes under which administrative law judges adjudicate cases, and that these regulations may prescribe procedures inconsistent with these proposed rules. The Department has found that the phrase ''rule of special application'' has not clearly conveyed the intent of this sentence. Thus, proposed § 18.10 rephrases this sentence as follows: ''To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation.''

Subdivision (a) recognizes that some of the Department's regulations involving proceedings before OALJ include extremely detailed procedures and requirements. These rules do not address requirements that are specific to certain types of cases. For example, the regulations for Black Lung compensation benefits proceedings, at 20 CFR parts 718 and 725, include specific evidentiary limitations (*see* 20 CFR 725.414). Similarly, the regulations in both Black Lung and Longshore compensation cases require that hearings be held within 75 miles of the claimants residence if possible. *See* 20 CFR 725.454(a), 702.337(a).

Additionally, the Department recognizes that the provisions of a specific regulation may be inconsistent with these rules. In such event, the specific regulation—and not these rules—applies. For example, in a case arising under the Black Lung Benefits Act, there is inconsistency between the regulation at proposed § 18.93, *Motion for reconsideration,* which provides parties 10 days after service of the judge's decision and order to file a motion for reconsideration, and the black lung regulation at 20 CFR 725.479(b), which provides 30 days after the filing of the judge's decision and order to file a motion for reconsideration. Because the regulations at 20 CFR part 725 govern proceedings arising under the Black Lung Benefits Act, the regulation at sec. 725.479(b) would control.

The Department proposes to relocate the language from current § 18.26 to proposed § 18.10 because it is more properly located with the other general guiding principles. The Department proposes to clarify the meaning of

current § 18.26 under subdivision (b). First, current § 18.26 only references sec. 554 of the APA. However, Subchapter II of Chapter 5 of the APA determines how the entire proceeding, including the hearing, will be conducted. Accordingly, the proposed rule revises and expands the reference to include all of Subchapter II, instead of only referencing sec. 554. Second, Subchapter II instructs how the entire proceeding should be conducted; accordingly, the reference to hearings in the current rule was changed to proceedings in order to encompass the entire process of adjudicating a case before OALJ.

The current § 18.1(b)—renumbered as § 18.10(c)—is revised to improve the clarity of the rule. The Department does not propose changes to the judge's ability to waive, modify, or suspend the rules by these revisions.

§ 18.11 Definitions.

The Department proposes to revise the current § 18.2 and renumber it as § 18.11. The definitions in § 18.2 supplement the definitions stated in sec. 551 of the Administrative Procedure Act. The Department proposes to amend the opening sentence of this section by referencing the definitions provided in sec. 551 of the Administrative Procedure Act. The definitions in sec. 551 apply to OALJ proceedings.

The Department proposes to delete the following terms from the current § 18.2: (a), *Adjudicatory proceeding;* (c), *Administrative Procedure Act;* (d), *Complaint;* (g), *Party;* (h), *Person;* (i), *Pleading;* (j), *Respondent;* (k), *Secretary;* (l), *Complainant;* (m), *Petition;* (n), *Consent Agreement;* (o), *Commencement of Proceeding.* Except for the ''Administrative Procedure Act,'' those terms are no longer used in the proposed revisions to the rules or sec. 551 of the APA defines the term. When a proposed section references the Administrative Procedure Act, the name of the Act and the appropriate section number is stated.

The Department proposes to define the following terms that are not defined by the APA: (a), *Calendar call;* (b), *Chief Judge;* (c), *Docket clerk;* and (h), *Representative.* The terms ''calendar call,'' ''docket clerk'' and ''representative'' are used with more frequency in the proposed revision of the rules. The Department proposes to define ''Chief Judge'' to clarify that the term also includes a judge to whom the Chief Judge delegates authority. The Department proposes to define ''representative'' to clarify that, unless otherwise specified, the term applies to all representatives who represent a person or party before OALJ. The Department proposes to define ''docket clerk'' to clarify current practice before OALJ. When a case is first filed with OALJ it is received by the Chief Docket Clerk in the national office located in Washington, DC. But once a case is assigned to a judge in a district office all filings should be made with the docket staff in that office.

The Department proposes to amend the definitions of the following terms to improve clarity and specificity: (d), *Hearing;* (e), *Judge;* (f), *Order;* and (g), *Proceeding.* The Department proposes to expand the definition of ''hearing'' to encompass more than sessions where evidence is submitted. Hearings to determine issues of fact may rely on official notice rather than oral testimony subject to cross examination, and hearings to determine issues of law may not require the submission of evidence. The Department proposes to revise the definition of ''judge'' to eliminate the reference in the current rule to presiding officers not appointed as administrative law judges pursuant to 5 U.S.C. 3105.

The Department proposes to revise the definition of ''order'' and delete the reference in the current rule to rulemaking. The Part 18, Subpart A rules and these proposed revisions apply to the adjudication of cases and not rulemaking. This reference is therefore superfluous. The Department proposes to revise the definition of ''proceeding'' to avoid defining a term using the term itself; the proposed definition provides a more accurate definition, one that includes the creation of a record leading to an adjudication or order.

§ 18.12 Proceedings before administrative law judge.

The Department proposes to revise the current §§ 18.25 and 18.29(a) and combine the content into proposed § 18.12.

The proposed § 18.12 is divided into two subdivisions: designation and authority. The Department proposes to relocate the content of current § 18.25 to proposed § 18.12(a). This section incorporates the revised definition of ''judge'' and ''Chief Judge'' from proposed § 18.11.

The Department proposes to relocate the content of current § 18.29(a) to proposed § 18.12(b). The enumerated powers of the judge in the proposed subdivision (b) are similar to those listed in sec. 556 of the APA (5. U.S.C. 556) and those listed in the current § 18.29(a), except for stylistic changes. For example, proposed subparagraphs (b)(4), (b)(5) and part of (b)(2) are taken directly from sec. 556. Under subdivision (b), the Department clarifies that OALJ may conduct hearings as determined by the Secretary of Labor when no statute entitles a person to an ''on the record'' hearing. The proposed subparagraph (b)(1) is meant to clarify the administrative law judge's powers to regulate both formal and informal proceedings, including setting prehearing conferences, and when appointed as a settlement judge, to conduct settlement conferences. The current § 18.29 (a)(1) only addresses formal hearings. The current § 18.29(a)(6) and (a)(9) has been deleted because these provisions are redundant of the proposed introductory statement.

The difference between paragraph (b)(3) and (b)(4) is that the former applies to parties to the cause of action whereas the later applies to non-parties. Under (b)(3) judges have the authority to grant motions to compel a party to respond to a request for the production of documents, requests for written responses to interrogatories, requests for admission, and attendance at a proceeding. Issuing subpoenas authorized by law is the only way a judge can exercise control over non-parties.

The Department proposes to delete current § 18.29(b), because its content is addressed in the applicable statutes (e.g., 33 U.S.C. 927(b)(Longshore and Harbor Workers' Compensation Act).

§ 18.13 Settlement judge procedure.

The Department proposes to revise the current § 18.9 and renumber it as proposed § 18.13.

There are three topics addressed in the current § 18.9: (1) Motions for consent findings and order; (2) approval of settlement agreements; and (3) the settlement judge procedure. Motions for approval of a settlement agreement and for a consent finding and order (current § 18.9 (a)–(d)) are now addressed in the proposed § 18.71, *Approval of settlement or consent findings*). Proposed § 18.13 provides the procedures for parties wishing to use the settlement judge process. The revisions to the previous subdivision (e) are largely structural and stylistic.

Under proposed subdivision (c) the Department proposes to extend the number of days for the settlement proceeding from 30 to 60 days. Based on OALJ's experience related to Longshore and Harbor Worker's Compensation Act cases, 30 calendar days is not enough time to complete a settlement agreement. For example, parties may need more than 30 days in cases dealing with location issues, or Medicare set asides, or in international negotiations under the Defense Base Act.

The Department proposes to delete the cross-referencing clause in current subdivision (d) because it is inherent within the rule that a settlement judge's powers terminate immediately if settlement negotiations are terminated.

Under proposed subdivision (f) the Department proposes to provide the settlement judge the option of conducting the settlement conference in the manner he or she considers most appropriate, giving the settlement judge wider discretion over the mode of the settlement conference. The current § 18.9 requires the settlement judge to conduct the settlement conference by telephone, except in specific situations. The Department determined that telephone conferences have not been the most expedient way to conduct settlement conferences; therefore the proposed change expands the judge's authority to determine what process the parties want to use and to best utilize changing technology.

Under the proposed subdivision (g) the Department proposes to delete the language in current § 18.9(e)(8) regarding the inadmissibility of settlement statements and conduct because the confidentiality of dispute resolution communications is now extensively addressed by the Administrative Dispute Resolution Act. *See* 5 U.S.C. 574.

The Department proposes to delete the current § 18.9(e)(9) because the requirements for a consent order or settlement agreement are generally covered by the governing statute or implementing regulation. This language is possibly misleading because it implies that all settlements must have the elements of consent findings. There are also additional requirements found in specific regulations. *See, e.g.,* Clean Air Act 29 CFR 1979.11(d)(2) and Longshore and Harbor Worker's Compensation Act 20 CFR 702.242 and 702.243.

The language from the current § 18.9(e)(10) is relocated to proposed subdivision (h). The Department is extending the period of time parties have to submit the required settlement documents to the presiding judge from 7 days to 14 days. This will allow parties additional time to draft the settlement documents and will decrease the number of requests for an extension of time.

§ 18.14 Ex parte communication.

The Department proposes to revise the current § 18.38 and renumber it as proposed § 18.14.

The Department proposes stylistic changes to the current § 18.38, specifically subdivision (a). The language in the proposed rule clarifies that the prohibition against ex parte communication applies to the parties, their representatives, and other interested persons, as well as the judge. The Department proposes to change ''any person'' to ''interested persons'' to be consisted with the Administrative Procedure Act. *See* 5 U.S.C. 557(d)(1)(A).

The Department proposes to delete the description of ex parte communication; however, this change is not intended to change the definition of ex parte communication. The notification of procedural request requirement is now covered by proposed §§ 18.33, *Motions and other papers,* and 18.41, *Continuances and changes in place of hearing.*

The Department deleted the current subdivision (b), *Sanctions,* because sanctions are covered in applicable statutes. In particular, the Administrative Procedure Act provides an option of imposing sanctions following ex parte communications if sufficient grounds exist. *See* 5 U.S.C. 556(d)(2000); 5 U.S.C. 557(d)(1). Section 5 U.S.C. 557(d)(1)(D) gives the administrative law judge broad authority to sanction any knowing violation of the APA's prohibition on ex parte contacts. Accordingly, it is unnecessary to repeat the statute in these regulations.

§ 18.15 Substitution of administrative law judge.

The Department proposes to revise the current § 18.30 and renumber it as proposed § 18.15.

The Department proposes to change the title of this section to ''Substitution of administrative law judge'' to more accurately reflect the procedure provided by the rule—how a substitute judge is appointed when the presiding judge becomes unavailable.

The Department proposes a revision to the current subdivision (a) modeled after Fed. R. Civ. P. 63. The Department proposes to require the successor judge to certify that he or she is familiar with the record before continuing with the presentation of the evidence. Included in this subpart is a reference to proposed § 18.12, the section that defines the procedure for appointing a judge to a case.

Under the proposed subdivision (b), the Department proposes to codify the longstanding Department of Labor policy, based on *Strantz* v. *Director,* OWCP, 3 B.L.R. 1–431 (1981), of notifying the parties that the original judge is no longer available, allowing them to object to the successor judge issuing a decision based on the existing record, and ordering supplemental proceedings upon a showing of good cause.

Finally, administrative need within OALJ routinely requires that cases be reassigned among judges prior to the submission of evidence, such as where a case is continued prior to a scheduled docket. The proposed § 18.15 does not affect those reassignments.

§ 18.16 Disqualification.

The Department proposes to revise the current § 18.31 and renumber it as proposed § 18.16. The proposed revisions are largely stylistic.

Under subdivision (a), the Department proposes to delete the current notice requirement; however, this is not a procedural change. Parties will be notified when a presiding judge has disqualified himself or herself in due course with the appointment of a new judge.

The current § 18.31 requires a motion to disqualify to be accompanied by a supporting affidavit. The Department proposes to clarify in § 18.16(b) that as an alternative or addition to a supporting affidavit a motion to disqualify may be accompanied by supporting declarations or other documents. A presiding judge who receives a motion to disqualify must rule on the motion in a written order that states the grounds for the ruling.

The Department proposes to delete the current subdivision (c), which provides that the Chief Judge will appoint a new presiding judge if a judge recuses himself or herself. This procedure is covered by the substitution provisions of proposed § 18.15 and, therefore, is superfluous here.

§ 18.17 Legal assistance.

The Department proposes to revise the current § 18.35 and renumber it as proposed § 18.17. The Department proposes largely stylistic revisions to this section. The rule continues to be that OALJ does not appoint representatives or refer parties to representatives. In addition, the Department proposes to revise this section to expressly state that OALJ does not provide legal assistance to parties. The Department proposes to change the reference to ''counsel'' to ''representative'' because the former is too narrow and does not include non-attorney representatives.

Parties and Representatives

§ 18.20 Parties to a proceeding.

The Department proposes to revise the current § 18.10 and renumber it as proposed § 18.20.

The Department proposes to delete the definition of ''party'' in the current subdivision (a) because this definition is provided in the APA. *See* 5 U.S.C. 551(3).

The current § 18.10 includes provisions regarding how a party may intervene in a case. The Department proposes to delete subdivisions (b)–(d) because impleading and intervention are rare circumstances before OALJ. If circumstances require, then the parties or judge may refer to the Fed. R. Civ. P. 19, *Required joinder of parties,* Fed. R. Civ. P. 20, *Permissive joinder of parties,* and Fed. R. Civ. P. 24, *Intervention.* As set forth in proposed § 18.10(a) the rules of civil procedure will apply to circumstances not covered by the Department's rules.

§ 18.21 Party appearance and participation.

The Department proposes to revise and combine the current §§ 18.34(a) and 18.39 into proposed § 18.21, *Party appearance and participation,* because both address a party's right to appear.

The Department proposes to relocate the content from the current § 18.34(a) to proposed § 18.21(a). This subpart states that a party has a right to appear and participate in a proceeding in person or through a representative. The enumeration of the rights currently included in § 18.34(a) is summarized by the words ''appear and participate in the proceeding.'' The current § 18.34(a) addresses the possible actions a party may take during the course of a proceeding as provided by the rules. The Department proposes to delete this language because these actions are covered by other sections within the Rules, most specifically within Title III: Filings, Title V: Discovery, and Title VIII: Hearings.

The proposed subdivisions (b) and (c) are based on the current § 18.39(a) and (b), respectively. The Department has removed the 10-day timeframe with the intention that the presiding judge will set an appropriate time for response.

§ 18.22 Representatives.

The Department proposes to revise the current § 18.34 and renumber it as proposed § 18.22.

The Department proposes to narrow the scope of proposed § 18.22 so that it functions as a list of qualifications and duties for attorneys and non-attorney representatives who represent parties before OALJ. The content from the current subdivision (a) is not included in proposed § 18.22, as explained in the note to the proposed § 18.21, *Party appearance and participation.*

The Department proposes not to include the content from current subdivisions (c) through (f) in proposed § 18.22 because the substantive rights of parties and subpoenaed witnesses are delineated by other regulations under Part 18, Subpart A.

The Department proposes to relocate the current subdivision (b) to subdivision (a), *Notice of appearance.* Under the proposed subdivision (a), the Department clarifies that each representative must file a ''notice of appearance'' when first making an appearance and that the notice is to include the statements and documentation required for admission to appear as either an attorney or non-attorney representative. This provision codifies current practice and clarifies the timing of when the ''notice of appearance'' must be filed.

The Department proposes to relocate the current subdivision (g) to proposed subdivision (b), Categories of representation; admission standard. Under proposed paragraph (b)(1), the Department defines the terms ''attorney'' and ''attorney representative'' under the proposed rules. The current § 18.34(g) uses the phrase ''attorney at law'' to describe whose appearance is governed by current subsections (g)(1) and (g)(2); however, the Department proposes to delete this phrase from the proposed rules because it is ambiguous. As in the current § 18.34, an attorney who is in good standing in his or her licensing jurisdiction may represent a party or subpoenaed witness. An attorney's own representation of good standing is sufficient proof thereof, unless otherwise directed by the judge. Under new subparagraph (b)(1)(B), an attorney who is not in good standing in his or her licensing jurisdiction will not be permitted to appear before OALJ unless that attorney establishes in writing why the failure to maintain good standing is not disqualifying.

The Department proposes to add a new provision under subparagraph, (b)(1)(C) *Disclosure of discipline,* that places the duty on an attorney to promptly disclose to the judge any current action suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.

Under the proposed paragraph (b)(2), the Department clarifies that an individual who is not an attorney may represent a party or a subpoenaed witness upon the judge's approval. The Department proposes to clarify what information must be included in a written request to serve as a non-attorney representative and provides the standard the judge will use to determine whether the non-attorney representative has the qualifications or ability to render assistance. The judge may deny a person's request to serve as a non-attorney representative only after providing the party or subpoenaed witness with notice and an opportunity to be heard.

The Department proposes to add subdivisions (c), *Duties,* (d), *Prohibited actions,* and (e), *Withdrawal of appearance,* to proposed § 18.22. In subdivision (c), the Department determined that the best approach to determining the governing code of conduct is to require attorneys to adhere to the rules of conduct of their licensing jurisdiction. Under subdivision (d), the Department proposes to state specific actions a representative is prohibited from taking while representing a party before OALJ. The proposed subdivision (e) provides the procedure for a representative of record to withdraw as a representative before OALJ and codifies current practice.

§ 18.23 Disqualification and discipline of representatives.

The Department determined that a separate rule identifying the grounds and creating procedures for disqualification of a representative was appropriate. The proposed § 18.22, *Representatives,* addresses a representative's qualifications and duties. The proposed § 18.87, *Standards of conduct,* creates a procedure for excluding a party or representative for poor behavior during the course of a particular proceeding. The Department determined that the grounds and procedures for disqualifying a representative are distinct and separate from the concepts addressed in the current §§ 18.34 and 18.36, and, accordingly, proposes § 18.23.

The proposed § 18.23 deals with both the disqualification of lawyers from practicing before the Department because professional discipline has been imposed on them in other jurisdictions, and discipline the Department itself may impose on lawyers or other representatives who misbehave during administrative litigation.

Lawyers traditionally have been regulated under a state-centered regime of professional self-regulation, in which federal administrative agencies played no role. State supreme courts, the admitting and disciplinary authority for their states' lawyers, often delegate to the state bar association the regulatory task of writing advisory ethics opinions; they also rely heavily on the American Bar Association to develop model ethics

rules and to suggest how to structure their systems of lawyer discipline.

Administrative agencies may discipline lawyers who represent clients before them. Before the advent of the Administrative Procedure Act, the U.S. Supreme Court recognized that quasi-judicial agencies empowered to adopt rules of procedure could set admission requirements. *Goldsmith* v. *U.S. Bd. of Tax Appeals,* 270 U.S. 117, 122 (1926). The legislative history of sec. 6(a) of the federal Administrative Procedure Act ''leaves no doubt that Congress intended to keep unchanged the agencies' existing powers to regulate practice before them.'' 5 U.S.C. 555(b); Attorney General's Manual on the Administrative Procedure Act (U.S. Dep't of Justice 1947) (hereinafter Attorney General's Manual), at 65.

Congress later abolished nearly all agency requirements for admission to practice with the Agency Practice Act of 1965. 5 U.S.C. 500(b), first enacted in Public Law 89332, 79 Stat. 1281, later incorporated into the U.S. Code by Public Law 9083, 81 Stat. 195 (Sept. 11, 1967) (with minor stylistic changes). *See also* the Report to Accompany S. 1758, House Committee on the Judiciary, H.R. Rep. No. 1141, 89th Cong., 1st Sess.(1965), *reprinted in* 1965 U.S. Code Cong. & Admin. News, 89th Cong., 1st Sess at 4170. Any lawyer who is a member in good standing of a state bar could practice before federal agencies, unless an agency is authorized to impose additional requirements, something Congress did for the Patent and Trademark Office. 5 U.S.C. 500(d)(4). The Agency Practice Act is neutral on the authority of agencies to discipline representatives, including lawyers. 5 U.S.C. 500(d)(2) (stating that the Agency Practice Act does not ''authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency.''). The courts of appeals read the authority to adopt rules of practice and procedure as power to discipline the wayward, to protect the integrity of the agency's procedures and the public generally. *Polydorff* v. *ICC,* 773 F.2d 372 (DC Cir. 1985) (upholding the authority of the ICC to discipline an attorney); *Touche Ross & Co.* v. *SEC,* 609 F.2d 570, 581–582 (2d Cir. 1979) (upholding the authority of the SEC to discipline accountants who practice before it); *Koden* v. *U.S. Dep't of Justice,* 564 F.2d 228 (7th Cir. 1977) (upholding the authority of the Immigration and Naturalization Service to discipline attorneys who appeared before it).

According to the Reporter for the American Bar Association Special Committee on Evaluation of Ethical Standards, who drafted the Model Code of Professional Responsibility a generation ago, the ABA has long stated that its ethical standards apply to the conduct of lawyers before all adjudicatory entities. Michael P. Cox, Regulation of Attorneys Practicing Before Federal Agencies, 34 Case W. Res. L. Rev 173, 202 & n. 132 (1982). The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983, and have been amended several times thereafter. They serve as models for the legal ethics rules of most states. The current ABA Model Code of Professional Conduct (2010) imposes many obligations on trial lawyers. Among them are duties to exhibit candor; to follow procedural rules; to deal fairly with opposing parties and their lawyers, including the obligation to turn over evidence in discovery and refrain from altering evidence; and to avoid disruptive behavior. *See* Model Rules 3.3; 8.4 (c) and (d); 3.4(a) and (c); and 3.5(d). All apply to lawyers who practice before ''tribunals,'' a term that specifically embraces administrative agencies as well as courts. *See* Model Rule 1.0(m).

The Department proposes to divide § 18.23 into four subdivisions: (a), *Disqualification,* (b), *Discipline,* (c), *Notification,* and (d), *Reinstatement.* Under subdivision (a), the Department proposes to regulate lawyers who gained the right to practice before the Department through admission to the bar of the highest court of a State or similar governmental unit, but lost it or had the right to practice limited due to a criminal conviction or proven professional misconduct. The Department proposes that representatives qualified under proposed § 18.22 may be disqualified upon conviction of any of the serious crimes described in subparts (a)(1)(A) and (B).

A lawyer may also become disqualified under subparts (a)(1)(C) and (D), as reciprocal discipline when another jurisdiction finds the lawyer guilty of professional misconduct, or the lawyer consents to disbarment, suspension, or resigns while an investigation into allegations of misconduct is pending. Federal courts routinely enforce reciprocally any limitations on practice state courts have imposed, after satisfying themselves that those disciplinary proceedings met the substantive requirements the U.S. Supreme Court set nearly a century ago in *Selling* v. *Radford,* 243 U.S. 46 (1917). The Department has relied on this rule, and given reciprocal effect to discipline state courts imposed on lawyers who have appeared before the Department's administrative law judges. *In The Matter of the Qualifications of Edward A. Slavin, Jr.,* ARB Case No. 05–003, OALJ Case No. 2004–MIS–5 (Nov. 30, 2005), *also available* at 2005 WL 3263825 (DOL Adm.Rev.Bd).

Lawyers who litigate before the Department are expected to adhere to the rules of conduct promulgated by the jurisdiction(s) where they are admitted to practice, which typically are founded on the American Bar Association's Model Rules of Professional Conduct. Contumacious behavior, the violation of the rules of practice the Department has adopted, or failure to follow the procedural dictates of a governing statute, program regulation or of a judge's order also opens the lawyer to discipline by the Department. *See* proposed § 18.23 (b)(1). State supreme courts have disciplined lawyers for misconduct in litigation before the Department.

Under paragraph (a)(2), the Chief Judge must provide notice and an opportunity to be heard as to why the representative should not be disqualified from practice before the Office of Administrative Law Judges. The Chief Judge's determination must be based on the ''reliable, probative and substantial evidence of record, including the notice and response.''

Under subdivision (b), the Department proposes the procedure for disciplinary proceedings initiated because of a representative's conduct before OALJ. The disciplinary procedure is structured so that the representative's conduct and defense will be reviewed by a presiding judge, who applies the APA's review standard of reliable, probative, and substantial evidence of record. The representative may appeal the presiding judge's decision to the Chief Judge who reviews the decision under the substantial evidence standard. The Chief Judge's decision is not subject to review within the Department of Labor. The proposed § 18.95, *Review of Decision,* provides that the statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision.

Under subdivision (c), the Department proposes to provide notice that when an attorney representative is suspended or disqualified by OALJ, the Chief Judge will alert the attorney's licensing jurisdiction(s) and the National Lawyer Regulatory Data Bank by providing a copy of the decision and order. The National Lawyer Regulatory Data Bank is the national clearing house of

disciplinary information, maintained by the American Bar Association Standing Committee on Professional Discipline. All states and the District of Columbia, as well as many federal courts and some agencies, provide disciplinary information to the Data Bank. *See http://www.americanbar.org/groups/professional_responsibility/services/databank.html.*

Under subdivision (d), the Department proposes the procedure a representative suspended or disqualified under this section must follow to request reinstatement to practice before OALJ.

§ 18.24 Briefs from amicus curiae.

The Department proposes to delete the current § 18.12 and replace it with proposed § 18.24.

The title of § 18.24 was drafted to emphasize that an amicus curiae may participate in a proceeding only by filing a brief. The final statement that an amicus curiae brief must be filed by the close of the hearing was added to provide a timeframe for filing. If an amicus curiae wishes to participate in the formal hearing, then the person or organization must petition the judge to participate as an intervenor.

Service, Format and Timing of Filings and Other Papers

§ 18.30 Service and filing.

The Department proposes to revise the current § 18.3 and renumber it as proposed § 18.30. The proposed § 18.30 is modeled after Fed. R. Civ. P. 5. In the current Part 18, Subpart A rules service and filing requirements are listed under several sections. The Department proposes to delete those references and have this section address all the general service and filing procedures.

Similar to Fed. R. Civ. P. 5, the Department proposes to restructure the current § 18.3 into two subparts: (a), *Service on parties* and (b), *Filing with Office of Administrative Law Judges.* Portions of the current subdivision (a) and subdivision (e) that address the actual form of filings are not included in proposed § 18.30 and are instead addressed in proposed § 18.34, *Format of papers filed.* For example, current subdivision (a) states: ''All documents should clearly designate the docket number, if any, and short title of the matter.'' This language is included in proposed § 18.34.

The Department proposes to incorporate the content from the current subdivision (d) into proposed subdivision (a) because the service process is the same for all papers, including complaints.

Under subdivision (a), the Department proposes to provide general guidance on how parties are served. The Department proposes to add a certificate of service requirement under subparagraph (a)(3). The current Part 18, Subpart A does not define a certificate of service, so including the definition in the service and filing section clarifies the requirements of certifying that a paper was served on another party. In the past, pro se parties before OALJ have failed to provide certificates of service, requiring judges to follow up with the other parties to the case to verify that a paper was served.

In order to distinguish between a clerk employed at a party's place of business and the OALJ clerk who receives documents for the Office, the Department proposes to amend item (a)(2)(B)(iv) and paragraph (b)(2) by adding the term ''docket clerk.'' Docket clerk is defined in proposed § 18.2, *Definitions,* to clarify that the docket clerk is the Chief Docket Clerk at the Office of Administrative Law Judges in Washington, DC or, once a case is assigned to a judge in a district office, the docket staff in that office.

Under proposed subdivision (b), the Department specifies the procedure for filing papers with OALJ. Under subparagraph (b)(1), parties are required to file within a reasonable time papers served on other parties or participants. However, like the current rule, parties are not required to file discovery documents, unless the judge orders or the party uses them in the proceeding. The required filing provision also extends to any required disclosures ordered by the judge under § 18.50, *General provisions governing discovery and disclosure.*

The Department proposes to provide the procedure for filing by facsimile in proposed subparagraph (b)(3)(A)—currently subdivision (f). In recognition of OALJ's nationwide jurisdiction and circumstances requiring last-minute filings, the Department proposes to clarify that parties may file by facsimile only as directed or permitted by the judge.

The Department proposes to relocate the content from the current subdivisions (f)(6) and (g) to proposed subdivision (b) because theses subdivisions address those parts of the filing process.

The Department proposes to delete the current (f)(3) because paragraph (a)(3) will apply in all cases. The proposed section adds a specific mechanism by which the parties can establish that the fax was sent and received and puts the burden on the party to maintain the original document.

The Department proposes to delete the current (f)(7) to limit the use of fax submissions to times when ordered by the Judge.

§ 18.31 Privacy protection for filings and exhibits.

Proceedings before OALJ are open to the public. The current Part 18, Subpart A does not include a privacy requirement that parties redact personal data identifiers from filings. OALJ has a policy statement encouraging such redaction, but the notice is advisory, not mandatory. *See www.oalj.dol.gov/ACCESS_TO_COURT_RECORDS.HTM/.*

The 2007 revision of the FRCP included the addition of Fed. R. Civ. P. 5.2 in response to the E-Government Act of 2002, 44 U.S.C. 3501. The Advisory Committee Note addressing Fed. R. Civ. P. 5.2 states that the privacy and security concern addressed by this rule is the electronic availability of filed documents. The scope of Fed. R. Civ. P. 5.2 is limited to filings with the court, and extends to trial exhibits when they are filed with the court.

The Department proposes a privacy protection rule based on Fed. R. Civ. P. 5.2 which will serve two agency-specific purposes. Like Fed. R. Civ. P. 5.2, proposed § 18.31 will reach any electronic filings with OALJ. In addition, § 18.31 will clarify the job of the Freedom of Information Act officer who reviews files in the case of a FOIA request. As a result of the broader purpose of OALJ's privacy protection rule, the § 18.31 extends to filings and exhibits. The majority of personal information to be redacted by the FOIA officer is contained in the exhibits, not the filings.

The proposed subdivision (a) lists the personal data identifiers that parties must redact from filings submitted to OALJ, unless the judge orders otherwise. The Department also lists filings that are exempted from the redaction requirement under proposed subdivision (b). Under subdivision (b), OALJ has exempted the record of administrative proceedings and exhibits filed within the Department of Labor and submitted to OALJ.

Under subdivision (c), the Department proposes to provide parties with the option to file a reference list of redacted information. The term ''redacted'' is intended to govern a filing that is prepared with abbreviated or blocked-out identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Under subdivision (d), the Department proposes to allow a person to waive the protections of the rule as to that person's own personal

information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the judge.

The proposed subdivision (d) provides that a judge may, for good cause, require more extensive protection of material than otherwise required by this section. The Department does not intend for this subdivision to affect the limitations on sealing that are otherwise applicable to the judge. *See* § 18.85, *Privileged, sensitive and classified material.*

§ 18.32 Computing and extending time.

The Department proposes to delete the current § 18.4 and replace it with proposed § 18.32. The proposed § 18.32 is modeled after Fed. R. Civ. P. 6. References to service and filing in the current § 18.4 are now addressed in proposed § 18.30, *Service and filing.*

The Department proposes to increase the scope of the computation provisions in current § 18.4(a) to apply to time periods set out in ''these rules, [the] judge's order, or in any statute, regulation, or executive order that does not specify a method for computing time.'' The expanded scope creates consistency in cases that fall under statutes and regulations that do not have time computation provisions. The revisions do not supplant a computation scheme from another agency or rule.

Under proposed subdivision (a), the Department proposes to add the definitions of ''last day,'' ''next day,'' and ''legal holiday.'' The current subdivision (a) includes a sentence explaining the computation of time for periods less than 7 days. The Department proposes to delete this sentence from the proposed rule to be consistent with the Department's general revision to provide at least 14 days to respond or file.

Subdivision (b) provides the criteria judges will use when responding to a request for an extension of time. The Department proposes this subdivision to provide litigants with fair notice as to the applicable standard of review.

The Department proposes to delete the current § 18.4(c)(1) and (3), which permit the addition of 5 days for filing by mail and when a party is served by mail. Some litigants have found this time-calculation provision confusing. To replace these provisions, the Department proposes to add subdivision (c) to function like Fed. R. Civ. P. 6(d). Three days are added after particular types of service listed in proposed § 18.30(a)(2)(B)(iii) or (iv). The decrease in the number of days for responding is offset by the extension of time to respond from 10 days to 14 days. Days are no longer added to the date of filing when filing by mail. The Department proposes this change to make the practice before OALJ more uniform and consistent with the procedure in the district courts.

§ 18.33 Motions and other papers.

The Department proposes to revise current § 18.6 and renumber it as proposed § 18.33. Proposed § 18.33 is modeled after Fed. R. Civ. P. 7(b) and Fed. R. Civ. P. 43(c).

Under § 18.33, the Department proposes to clarify the filing requirements for motions and other papers and add the language from Fed. R. Civ. P. 7(b) to proposed § 18.33 (a) and (b). Under proposed subdivision (a) ''[a] request for an order must be made by motion.'' This applies to any requests made to a judge. A motion must: (1) Be in writing, unless made during a hearing; (2) state with particularity the grounds for seeking the order; (3) state the relief sought; and (4) unless the relief sought has been agreed to by all parties, be accompanied by affidavits, declarations, or other evidence, and (5) if required by subsection (C)(4), include a memorandum of the points and authorities supporting the movant's position.

The proposed subdivision (b) provides that ''the rules governing captions and other matters of form apply to motions and other requests.''

Under subdivision (c), the Department proposes to add that written motions before a hearing must be served with supporting papers at least 21 days prior to hearing. A written motion served within 21 days before the hearing must state why the motion was not made earlier. The current version of this section does not set a timeframe for serving and filing motions prior to the hearing. The Department proposes to add this timeframe to provide judges sufficient time to rule on pre-hearing motions. This may narrow the issues for the hearing and save witness travel time and expenses. The exceptions to this regulation include: (A) When the motion may be heard ex parte; (B) when these rules or an appropriate statute, regulation, or executive order set a different time; or (C) when an order sets a different time.

The proposed subdivision (d) requires that a response to a motion be filed within 14 days after the motion is served. The Department proposes to increase the amount of time a party has to respond from the 10 days in the current version of the rule to 14 days. The change to 14 days comports with the general revision to set time periods based on multiples of 7.

Under paragraph (c)(3), the Department proposes to add the requirement that counsel for the moving party confer or attempt to confer with opposing counsel in a good faith effort to resolve the subject matter of the motion, except when a party is unrepresented or for particular types of motions listed under subparagraphs (c)(3)(A) through (c)(3)(C). This provision is consistent with the FRCP and the Department anticipates that this will reduce the number of motions by encouraging the parties to resolve issues amongst themselves. Paragraph (c)(4) clarifies that unless the motion is unopposed, the supporting papers for the motion must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authorities must also be submitted. A judge may direct the parties file additional documents in support of any motion.

The Department proposes to delete the language in current § 18.6(d) from this section and address motions to compel in §§ 18.35, *Signing motions and other papers; representations to the judge; sanctions,* 18.56, *Subpoena,* and 18.57, *Failure to make disclosures or to cooperate in discovery; Sanctions.*

Cases may be reassigned to different judges based on the administrative needs of the Office of Administrative Law Judges. Therefore, the Department proposes to add subdivision (f) to address renewed or repeated motions made to a different judge than the judge who previously ruled on the motion.

§ 18.34 Format of papers filed.

The Department proposes to add a new § 18.34, *Format of papers filed,* to provide the format a party should use when filing papers with OALJ. This proposed section expands the current document filing requirements located under current § 18.3(a) to provide litigants with more specific formatting requirements. The current § 18.3(a) provides that ''all documents should clearly designate the docket number, if any, and short title of the matter'' and ''each document filed shall be clear and legible.'' The proposed § 18.34 states that every paper filed must be printed in black ink on 8.5 x 11-inch opaque white paper. The Department proposes the black ink requirement because litigants sometimes file handwritten papers with colored ink that can be difficult to read.

The current caption requirements are located under current § 18.3(e). Under proposed § 18.34, the Department clarifies that filed papers must begin with a caption that includes: (a) the parties' names, (b) a title that describes the paper's purpose, and (c) the docket number assigned by the Office of Administrative Law Judges. If the case number is an individual's Social Security number then only the last four digits may be used. *See* 18.31(a)(1). If OALJ has not assigned a docket number, the paper must bear the case number assigned by the Department of Labor agency where the matter originated. The Department proposes to relocate the address and telephone number requirement in the current § 18.3(e) to proposed § 18.35(a).

§ 18.35 Signing motions and other papers; representations to the judge; sanctions.

The Department proposes to add a new § 18.35 modeled after Fed. R. Civ. P. 11. This section establishes the standards attorneys and parties must meet when filing motions or other documents with OALJ. It also regulates the circumstances in which sanctions may be imposed if the standards of § 18.35 are not met.

Under subdivision (a), every written motion and other paper filed with OALJ must be dated and signed by a representative of record or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and email address, if any. If a document subject to § 18.35 is not signed, the judge has the power to strike the document unless the proponent signs it promptly upon notification of the missing signature.

Under subdivision (b), the Department sets the standards that motions and other papers regulated by § 18.35 must meet. It also specifically provides that the standards are applicable to later advocacy of such documents, as well as to the initial submission of the documents.

The Department proposes to regulate who may be sanctioned for violations of § 18.35(b), as well as how the sanctions process may be initiated under subdivision (a). This subdivision also governs the extent and limitations of the judge's sanctioning power.

Sections 18.50 through 18.65, governing the discovery process, control the circumstances when sanctions may be imposed for inappropriate behavior in discovery. For that reason, § 18.35(d) clarifies that § 18.35(a), (b) and (c) have no applicability to discovery issues.

§ 18.36 Amendments after referral to the Office of Administrative Law Judges.

The Department proposes to revise the current § 18.5 and renumber it as proposed § 18.36.

Proceedings before the Office of Administrative Law Judges are rarely initiated by a complaint and answer. Accordingly, the Department proposes to delete subdivisions (a)–(d) in current § 18.5. However, a judge may still require the parties to file a complaint and answer in certain cases for the purpose of clarifying the issues in the proceeding.

Amendments and supplemental pleadings are an infrequent occurrence because proceedings are rarely initiated before OALJ with a complaint and answer. If amended or supplemental complaints and answers are required, then the judge may apply Fed. R. Civ. P. 15. Accordingly, current § 18.5(e) is deleted and the proposed § 18.36 provides the judge discretion to allow parties to amend and supplement their filings.

Prehearing Procedure

§ 18.40 Notice of hearing.

The Department proposes to revise the current § 18.27 and renumber it as proposed § 18.40.

The current subdivision (a) makes reference to notice of prehearing conferences. Notice of prehearing conferences is controlled by proposed § 18.44, *Prehearing conferences,* so the Department deleted this reference in proposed § 18.40. In proposed § 18.40 (a), the number of days for timely notice is changed from 15 days to 14 days. The change comports with the general revision to set time periods based on multiples of 7.

The current subdivision (b) addresses the judge's ability to change the date, time, or place for a hearing and the number of days notice required for a change. The Department determined that this provision is appropriately grouped with continuances, instead of with the notice of hearing requirements. The Department proposes to relocate a revised version of this subpart to proposed § 18.41(a), *Continuances and changes in place of hearing.*

The current subdivision (c)—now proposed subdivision (b)—is edited to not only address how the judge will determine the location for the hearing, but also the date and time of the hearing. This proposed subdivision also includes a consideration of the ''necessity of the parties and witnesses in selecting the date, time and place of the hearing.'' This requirement is expressed in sec. 554 of the APA and more accurately reflects the considerations a judge must make when determining the date, time, and place for the hearing.

§ 18.41 Continuances and changes in place of hearing.

The Department proposes to revise the current § 18.28 and renumber it as proposed § 18.41.

The Department proposes to clarify in this section when a judge may continue a hearing. This procedure in part is located under current § 18.27(b); however, the Department determined that the procedure of a judge continuing a case is more appropriately grouped in this continuance rule. Under § 18.41(a), the Department proposes to require that the judge provide reasonable notice to the parties of a change in date, time or place of the hearing. The proposed change permits the judge to inform the parties of the changes within a reasonable time based on the circumstances of the continuance. This flexibility permits the judge to adjust the hearing schedule as needed without having to comport with a 14-day notice requirement. However, the reasonable notice still protects a party's due process rights to have notice of the hearing.

The Department proposes to revise the current subdivision (b) to address a party's request to continue or change the place of a hearing. The current regulation requires a party to file a motion for a continuance at least 14 days before the date set for hearing. The Department proposes to eliminate the 14-day filing requirement. Instead, the proposed regulation requires that a party ''promptly'' file a motion after becoming aware of the circumstances supporting a continuance. If a party is immediately aware of the conflict upon receipt of the notice of hearing, the party should file a motion to continue at once.

Under subdivision (b), the Department proposes to permit a party to orally move to continue a hearing, but only in exceptional circumstances. The proposed § 18.33, *Motions and other papers,* requires that motions be made in writing; this section, however, provides a limited exception. For the reasons discussed above, the time limit for an oral motion if the request is made 10 days before the hearing is not included. Under proposed paragraph (b)(1), if a party makes an oral motion for a continuance it must immediately notice the other parties of the request.

The final sentence of the current subdivision (b) addresses oral motions for a continuance at a calendar call or hearing. The Department proposes to

address oral motions at a hearing in proposed § 18.33(e). Therefore, the Department proposes to omit this reference from proposed subdivision (b).

The Department proposes to add a regulation under § 18.41 (b)(2). Under this paragraph, a party may move to change the location of the hearing. This proposed provision permits the parties to inform the judge when a more suitable hearing location is available.

§ 18.42 Expedited proceedings.

The Department proposes to delete the current § 18.42 and replace it with proposed § 18.42.

The Department proposes to delete the references to expedited proceedings that are required by statute or regulation in current subdivisions (a)-(d) and (f). Expedited hearings are controlled by the statute or regulation requiring the accelerated proceedings and do not require either party to file a motion requesting an expediting proceeding. The timing of the hearing and decision in cases expedited by statute or regulation is determined by the governing statute or law. For example, under 20 CFR 655.171(a), *Temporary Employment of Foreign Workers in the United States,* when an employer requests administrative review an ALJ must issue a decision within 5 business days of receipt of the administrative file. *See also* 20 CFR 655.33(f). The Department proposes not to include the current subdivision (f) in its entirety because it is unnecessary and may be in conflict with the governing law.

The proposed § 18.33, *Motions and other papers,* provides the requirements for filing a written motion, including a motion for an expedited proceeding. The Department proposes to delete the provisions in existing paragraphs (b)(1), (b)(2), and (b)(4) because a motion filed in accordance with proposed § 18.33 must be in writing and describe with particularity the circumstances for seeking relief. The time for responding to a motion under proposed § 18.33(d) is 14 days, an addition of 4 days to the 10 days required in existing § 18.42(d). This change to 14 days comports with the general revision to set time periods based on multiples of 7.

The Department proposes not to include the current subdivision (c) because service is addressed by proposed § 18.30, *Service and filing.*

The Department proposes to omit the provision in current subdivision (e) that provides for advanced pleading schedules, prehearing conferences, and hearings. The Department proposes to delete this regulation because setting the date for conferences is within the judge's general powers set forth in proposed §§ 18.44, *Prehearing conferences,* and 18.12, *Proceedings before administrative law judge.* The 5-day limitation on advancing the hearing is extended to 7 days. The change to 7 days comports with the general revision to set time periods based on multiples of 7.

§ 18.43 Consolidation; separate hearings.

The Department proposes to delete the current § 18.11 and replace it with the proposed § 18.43. The proposed § 18.43 is modeled after Fed. R. Civ. P. 42, *Consolidation; separate trials.*

The Department proposes to revise this section to more accurately reflect the practice before OALJ. The current § 18.11 describes the process of consolidating hearings, whereas the proposed § 18.43 addresses the judge's power to order consolidated and separate hearings. The proposed subdivision (a) clarifies that an administrative law judge may join for hearing any or all matters at issue in the proceedings or may issue any other order to avoid unnecessary cost or delay. The proposed subdivision (b) clarifies that for convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing on one or more issues.

§ 18.44 Prehearing conference.

The Department proposes to delete the current § 18.8 and replace it with proposed § 18.44. The proposed § 18.44 is modeled in part after Fed. R. Civ. P. 16.

The current § 18.8 states that the purpose of a prehearing conference is to ''expedite'' the proceedings. The Department proposes to expand the purpose for a prehearing conference in proposed subdivision (a) to include: establishing early and continuing control so that the case will not be protracted because of lack of management; discouraging wasteful prehearing activities; improving the quality of the hearing through more thorough preparation; and facilitating settlement. This revision more accurately reflects the purpose of prehearing conferences before OALJ.

The Department proposes subdivision (b) to provide guidance on the scheduling and notice of the prehearing conference. This procedure is currently located in § 18.8(a).

The Department proposes subdivision (c) to require parties to participate in the conference as directed by the judge. This requirement is currently located in § 18.8(a). In this subpart, the Department proposes to clarify that if a party is represented by an attorney or non-attorney representative, the representative must have authority to make stipulations and admissions and, to settle.

The Department proposes subdivision (d) to expand the current subparagraph (a)(2) to include additional matters for consideration that the judge can take action on during prehearing conferences. This revision is modeled after Fed. R. Civ. P. 16(c)(2) and accurately reflects the breadth of issues addressed in prehearing conferences before OALJ.

The Department proposes to combine the current subdivisions (b) and (c) into subdivision (e). Under this subdivision, the Department proposes to change the default by stating that judges may direct that the prehearing conference be recorded and transcribed. The current § 18.8 requires stenographic recording and transcription, unless otherwise directed by the judge. This change reflects the routine practice of unrecorded prehearing conferences. Typically there is no testimony taken during prehearing conferences so unrecorded conferences are more cost-efficient. In certain cases, such as those involving unrepresented parties, judges may continue to order recorded prehearing conferences.

Disclosure and Discovery

§ 18.50 General provisions governing disclosure and discovery.

The Department proposes to adopt a new section to govern discovery and disclosure, incorporating portions of Fed. R. Civ. P. 26 not already addressed by specific Part 18, Subpart A regulations. The current Part18A provides limited guidance regarding discovery and disclosure. The Department, therefore, is establishing better guidance in proposed § 18.50. The proposed subdivisions (a), (c), and (d) apply to all cases, except as specified, while subdivision (b) is invoked by a judge's order.

Under subdivision (a), a party may seek discovery at any time after a judge issues an initial notice or order. The rule creates a possibility that a party may seek discovery prior to the judge issuing an order requiring the parties to confer under § 18.50(b). Instead of providing for that situation in this section, the Department anticipates that the judge's initial notice or order would address discovery sought before the conference, or that a party may file an appropriate motion requesting relief or instruction.

Unless, on motion, the judge orders otherwise for the parties' and witnesses' convenience and in the interests of

justice, the methods of discovery may be used in any sequence and discovery by one party does not require any other party to delay its discovery. There is also no requirement that a party conduct discovery in a manner like that used by other parties; each party is free to conduct any authorized discovery in any sequence regardless of the discovery conducted by other parties.

Under subdivision (b), a judge may order parties to confer and develop a proposed discovery plan, to be submitted in writing, addressing the discovery schedule and any modifications to the limits or scope of discovery. The discovery plan should indicate the parties' positions or proposals concerning: Automatic discovery; discovery scope and schedule; electronic information; privilege issues; discovery limits; and other discovery orders. Section 18.50(b) places a joint obligation on the representatives (and on unrepresented parties) to schedule the discovery conference and to attempt in good faith to agree on a proposed discovery plan and a report outlining the plan.

The results of the discovery conference may be reported to the judge using Form 52 of the Appendix of Forms that is incorporated into the FRCP through Fed. R. Civ. P. 84. The judge uses that information to craft a scheduling order that controls the development of the case.

Under subdivision (c), parties are required to disclose certain information automatically, without the need for discovery requests, at two points during the litigation. First, at the commencement of a proceeding before OALJ, each party must automatically provide to the other parties the identity of individuals (including experts) likely to have discoverable information, a description of documents by category and location, and a computation of each category of damages. Under proposed subparagraph (c)(1)(B), five categories of proceedings are excluded from this initial disclosure, because in these proceedings discovery is generally not applicable, or is limited due to the nature of the proceeding. Second, later in the case litigants must serve written reports of experts they retained to testify; an expert not retained or specially employed to provide expert testimony—a treating physician often falls into this category—need not write a report, but the party must serve an equivalent disclosure about that expert's opinions and their bases.

Under proposed subparagraph (c)(1)(C), representatives of the Department's Office of Workers' Compensation Programs are exempted from the requirement to provide initial disclosure, except under specified circumstances. Under the governing regulation for Black Lung cases, the District Director is required to provide a complete copy of the administrative record to all parties. 20 CFR 725.421(b). In Longshore cases, the District Director provides a copy of the pre-hearing statements to the Office of Administrative Law Judges, but under the regulation is prohibited from transmitting the administrative record. 20 CFR 702.319. The proposed subparagraph also recognizes that under certain situations the Department's representative actively litigates (e.g., when representing the Black Lung Disability Trust Fund in a case in which no responsible operator has been identified, *see* 20 CFR 725.497(d); or when an employer in a Longshore case has made a claim under 33 U.S.C. 908(f) for reimbursement by the ''special fund.'') Then the Department's representative must make the initial disclosures.

Expert opinions ultimately are disclosed in one of two ways. Each witness retained to provide expert testimony must produce a report. Each expert report must be in writing, signed by the expert, and must contain the specific information listed under subparagraph (c)(2)(B). Under subparagraph (c)(2)(A), judges have the discretion to set the time for this disclosure by prehearing order. For witnesses who are not required to provide a written report, under subparagraph (c)(2)(C) a party must state the subject matter on which the witness is expected to present expert opinion evidence and provide a summary of the facts and opinions to which the witness is expected to testify. For example, under 20 CFR 725.414(c) in Black Lung cases an expert may testify in lieu of a report and is not required to submit a written report. Such expert witnesses in Black Lung cases are commonly treating physicians who do not prepare written expert reports in the course of business. This provision drawn from Fed. R. Civ. P. 26(a)(2)(C) provides the mechanism to get the equivalent information. Under subparagraph (c)(2)(D), parties must supplement expert disclosures when required under proposed § 18.53, *Supplementing disclosures and responses.*

Under paragraph (c)(3), in addition to required disclosures, a party must provide to the other parties and promptly file the prehearing disclosures described in proposed § 18.80, *Prehearing statements.*

Under paragraph (c)(4) unless the judge orders otherwise, all disclosures under this section must be in writing, signed, and served.

Under subdivision (d), every disclosure under § 18.50(c) and every discovery request, response, or objection must be signed by at least one of the party's representatives in the representative's own name, or by the party personally if unrepresented. The document must also contain the signer's address and telephone number. The signature constitutes a certification that the document is complete and correct to the best of the signer's knowledge, information, and belief, and it is being served for proper purposes within the rules. Under paragraph (d)(2), parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed and the judge must strike it unless a signature is promptly supplied after the omission is called to the representative's or party's attention. If a certification violates this regulation without substantial justification, judges have the authority to impose an appropriate sanction, either on motion or on his or her own, under paragraph (d)(3).

§ 18.51 Discovery scope and limits.

The Department proposes to delete the current § 18.14 and replace it with proposed § 18.51. The proposed § 18.51 is modeled after Fed. R. Civ. P. 26(b), *Discovery scope and limits.*

The Department proposes to revise the scope of discovery in current § 18.14(a) based on a 2000 amendment to Fed. R. Civ. P. 26(b)(1) which narrowed the scope of discovery. The current subdivision (a) permits parties to seek ''discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding * * *'' In the proposed § 18.51, the parties are instructed to confine requests to ''any nonprivileged matter that is relevant to any party's claim or defense * * *'' The Department proposes to incorporate this amendment to control discovery costs without interfering with the fair resolution of the case. The parties are permitted to seek discovery related to the claims or defenses and, if needed, the judge may permit a party to seek discovery of any matter related to the case's subject matter.

The Department proposes to relocate the limitations in current § 18.14(b) regarding objections to discovery to the third sentence of proposed § 18.51(a). The Department proposes to clarify that a party may seek discovery of relevant information, even if the information would not be admissible at the hearing, as long as the discovery ''appears

reasonably calculated to lead to the discovery of admissible evidence.''

In § 18.51(b), the Department proposes additional limitations on the frequency and extent of discovery not contained in the current § 18.14. The limitations imposed by the current § 18.14 are limited to relevant information and information that is protected by a privilege. The Department proposes limitations on discovery that are designed to control the costs and burdens of discovery, as appropriate.

The Department proposes to provide limitations on the frequency of using discovery tools in §§ 18.64, *Oral depositions,* 18.65, *Written depositions,* 18.60, *Interrogatories,* and 18.63, *Requests for admission.* The Department proposes paragraph (b)(1) to provide a judge the discretion to alter the limits imposed by these regulations.

The Department proposes paragraph (b)(2) to limit the discovery of electronically stored information (ESI). The existing Part 18, Subpart A rules, promulgated in 1983, do not mention ESI; the proposed changes governing ESI reflect the contemporary nature of document management and discovery methods. In order to control the costs and burdens of producing documents, proposed paragraph (b)(2) establishes a requirement that a party need not provide discovery of ESI if the information is not reasonably accessible because of undue burden or cost. If the party requesting the information files a motion to compel or the party holding the information seeks a protective order, the judge must consider the items in proposed paragraph (b)(4).

Under paragraph (b)(3), the Department states that by requesting electronically stored information, a party consents to the application of Federal Rule of Evidence 502 with regard to inadvertently disclosed privileged or protected information. Because there is currently no equivalent to Fed. R. Evid. 502 in OALJ's rules of evidence, 29 CFR part 18, subpart B, the Department proposes this regulation to inform parties that Fed. R. Evid. 502 is applicable to inadvertently disclosed privileged or protected ESI.

The factors a judge must consider when determining whether to limit the frequency or extent of discovery under proposed paragraph (b)(4) involve balancing the need for the information and the costs and burdens of producing the information. The limitations in paragraph (b)(4) apply to all motions to limit the frequency and extent of discovery under subdivision (b).

The Department proposes subdivisions (c) and (d) to elaborate the limitations on discovery of hearing preparation materials and experts, respectively. The proposed subdivision (c) contains the same limitations as the current § 18.14(c). A party may not discover documents and tangible things prepared in anticipation of litigation or the hearing unless the information is discoverable as relevant under subdivision (a) and the party requesting the information can show that there is a substantial need for the information and the party cannot obtain substantially equivalent information without undue hardship. Although enumerated differently in proposed subdivision (c), the requirements remain the same. Like the current subdivision (c), proposed paragraph (c)(2) instructs the judge to protect against disclosure of an attorney's or other representative's mental impressions, conclusion, opinions, or legal theories when ordering the production of hearing preparation material.

Proposed paragraph (c)(3) permits a party or witness access to the person's own previous statement by request. A party or witness may have provided a statement prior to retaining legal counsel or understanding the consequences of the statement regarding the subject matter of the litigation. The party or witness may obtain a copy of the statement by request without making an additional showing.

Proposed subdivision (d) is modeled after Fed. R. Civ. P. 26(b)(4) and addresses requests for hearing preparation information prepared by experts who may testify at the hearing. Effective cross-examination of an expert requires advance preparation and effective rebuttal requires knowledge of the line of testimony of the other side. This regulation helps the parties narrow the issues and eliminates surprises through prehearing disclosure of expert opinions.

As is the current practice before OALJ, proposed paragraph (d)(1) provides that a party may depose an expert whose opinions may be presented at the hearing. The proposed subpart is modeled after Fed. R. Civ. P. 26(b)(4)(A), which requires the expert's report to be provided prior to the deposition. However, the exchange of a physician's report prior to the deposition has not been a common practice before OALJ, mostly based on time constraints of the testifying experts. Paragraph (d)(1), therefore, permits the parties to stipulate to taking a deposition before reviewing the expert's report and then produce the report when it is available.

Proposed paragraph (d)(2) applies if a judge orders the parties to exchange required disclosures under proposed § 18.50(c)(2)(B). If the judge orders the disclosure of expert opinions under § 18.50(c)(2)(B), then § 18.51(d)(1) provides that the protections in paragraphs (c)(1) and(c)(2) will apply.

Proposed subdivision (e) creates a procedure a party must follow to claim a privilege or to protect hearing preparation materials. Paragraph (e)(1) explains that a party must expressly claim a privilege or state that the information is subject to hearing preparation protection and describe the material well enough that the opponent can adequately assess the protection claim.

Proposed paragraph (e)(2) provides the steps a party must take if it wishes to claim a privilege or other protection for discovery already produced. This regulation is modeled after Fed. R. Civ. P. 26(b)(5)(B). The proposed subpart provides for *in camera* review by the judge so that such materials may be handled consistent with the parties' expectations regarding privileged or other protected documents, prior to creation of a final administrative record.

§ 18.52 Protective Orders.

The Department proposes to delete the current § 18.15 and replace it with proposed § 18.52. The proposed § 18.52 is modeled after Fed. R. Civ. P. 26(c), *Protective orders.*

Similar to the current § 18.15, the Department proposes § 18.52(a) to provide that a party, or any person from whom discovery is sought, may file a motion for a protective order to protect the party from annoyance, embarrassment, oppression, or undue burden or expense. The motion can only be brought by the individual whose interests are affected. Normally, the motion must be filed before the discovery is to occur, unless there is no opportunity to do so. The proposed regulation requires that the motion include a certification that the movant conferred or attempted to confer with the other affected parties to resolve the dispute before filing the motion. This requirement encourages the parties to work together to resolve discovery disputes, without involving the judge.

The Department continues to require that the judge find good cause for issuing a protective order regarding the discovery sought. The judge has broad discretion in determining what constitutes good cause. Proposed paragraphs (a)(1) through (8) provide examples of orders the judge may enter. The proposed paragraphs (a)(1) through (5) provide the same remedies as the current paragraphs (a)(1) through (5); however, each paragraph is revised for

clarity. Similarly, the current paragraph (a)(6) is relocated to proposed paragraph (a)(7). The Department proposes to add paragraphs (a)(6) and (8) to provide the same remedies a judge may impose under Fed. R. Civ. P. 26(c)(1). Respectively, the judge may order that a deposition be sealed and opened as the judge orders or the judge may order the parties to simultaneously file documents or information in sealed envelopes, to be opened as the judge orders.

The Department proposes to clarify under subdivision (b) that when a judge denies a motion for a protective order in whole or in part, the judge may order that the party or person provide or permit discovery. This provision clarifies the control the judge exercises in resolving discovery disputes, as there is currently no regulatory guidance on this issue.

§ 18.53 Supplementing disclosures and responses.

The Department proposes to delete the current § 18.16 and replace it with proposed § 18.53. The proposed § 18.53 is modeled after Fed. R. Civ. P. 26(e), *Supplementing disclosures and responses.* This revision improves the clarity of the section while retaining the same procedural requirements.

§ 18.54 Stipulations about discovery and procedure.

The Department proposes to delete the current § 18.17 and replace it with proposed § 18.54. The proposed § 18.54 is modeled after Fed. R. Civ. P. 29, *Stipulations about discovery and procedure.*

The revision improves the clarity of the section while retaining the same procedural requirements. The Department proposes to clarify in subdivision (b) that ''a stipulation extending the time for any form of discovery must have the judge's approval if it would interfere with the time set for completing discovery, for hearing a motion, or for a hearing.''

§ 18.55 Using depositions at hearings.

The Department proposes to delete the current § 18.23 and replace it with the proposed § 18.55. The proposed § 18.55 is modeled after Fed. R. Civ. P. 32.

The Department states a new procedure in proposed § 18.55(a) modeled after Fed. R. Civ. P. 32(a)(5), *Limitations on use.* The Department proposes a specific provision, at proposed § 18.55(a)(4), regarding depositions of experts, treating physicians, or examining physicians. Deposition testimony from physicians is quite commonly used in proceedings before the Department's administrative law judges. The provision at current § 18.23(a)(2) covers expert witnesses, but does not address a treating physician (who is not necessarily an expert retained to testify). The proposed rule codifies current practice. Under proposed paragraph (a)(6)—the current § 18.23(a)(6) is relocated to proposed § 18.55(a)(8)—a deposition may be used against any party who had reasonable notice of the deposition. A deposition cannot be used against a party who received less than 14 days' notice and who has filed a motion for a protective order that was pending at the time of the deposition. Likewise, a deposition cannot be used against a party who demonstrates an inability to obtain counsel for representation at the deposition despite the exercise of diligence. The provision in Fed. R. Civ. P. 32(a)(7), which reflects the impact of FRCP on substitution of parties, has not been included because the proposed rule does not address the issue of substitution of a party. In general, except for situations where a named party dies and a successor is substituted, there is no substitution of parties in matters before OALJ. Successors to deceased claimants in Black Lung and Longshore cases are not uncommon; these may be covered under specific provisions. *See, e.g.,* 20 CFR 725.360, 33 U.S.C. 919(f).

The Department proposes to add subdivision (c) to clarify that a party must provide a transcript of any deposition testimony the party offers. The judge may receive testimony in non-transcript form as well. This addition codifies a current common procedure within OALJ.

The Department proposes to add subdivision (d), *Waiver of objections,* with four new regulations. These regulations are modeled after Fed. R. Civ. P. 32 and should be familiar federal practice to attorneys. First, under paragraph (d)(1), *To the notice,* an objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving notice. Second, paragraph (d)(2), *To the officer's qualification,* provides that an objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made before the deposition begins or promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. The Department proposes this regulation to be consistent with the federal rule; however, officer disqualification rarely comes up in current practice.

Third, under subparagraph (d)(3)(C), *Objection to a written question,* the Department proposes to clarify that an objection to the form of a written question is waived if not served in writing on the party which submitted the question within the time for serving a responsive question or, if the question is a recross-question, within 7 days after being served with it. The current regulation, located in current paragraph (b)(3), does not designate a set length of time a party has to object to a written question.

Lastly, the Department proposes to add paragraph (d)(4), *To completing and returning the deposition,* to clarify that an objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known. This is not a procedural change from the current § 18.23(b)(2).

The Department proposes to delete the current subdivision (c) because it does not align with the federal rule and is substantive rather than procedural.

§ 18.56 Subpoena.

The Department proposes to delete the current § 18.24 and replace it with proposed § 18.56. The proposed § 18.56 is modeled after Fed. R. Civ. P 45, *Subpoena.* Judges may issue subpoenas only as authorized by a statute or law and the Department does not propose any procedural changes to this rule. Instead, the Department proposes this section to help litigants better understand the subpoena process before OALJ.

The Department proposes to add form and content requirements for subpoenas under paragraph (a)(2). Under this new provision, every subpoena must state the title of the matter and, where applicable, show the case number assigned by OALJ or the Office of Worker's Compensation Programs (OWCP). In the event that the case number is an individual's Social Security number only the last four numbers may be used. *See* § 18.31(a)(1). The subpoena must bear either the signature of the issuing judge or the signature of an attorney authorized to issue the subpoena under proposed paragraph (a)(3). The subpoena must command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or

permit inspection of premises. The subpoena must set out the text of proposed subdivisions (c) and (d) of this section.

The Department proposes to add the following provisions under paragraph (a)(2). The proposed subparagraph (a)(2)(B) provides that a subpoena commanding attendance at a deposition must state the method for recording the testimony. The proposed subparagraph (a)(2)(C) provides that a command to produce documents or to inspect premises may be issued separately or joined with a command to appear to testify. Under subparagraph (a)(2)(D), the Department proposes to clarify that a subpoena can be used to obtain inspections, testing or samplings of the property, documents, or electronic data of a non-party.

Under paragraph (a)(3), the Department proposes to permit subpoenas to be issued by an attorney representative only when authorized by the presiding judge. This provision applies only to representatives who are attorneys. In the authorizing document, the presiding judge may limit the parameters under which the authorized attorney may issue subpoenas.

Under subdivision (b), the Department proposes to clarify the process of serving subpoenas. Under paragraph (b)(1), if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served, a notice must be served on each party. The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. In current practice, this notice requirement from Fed. R. Civ. P. 45(b)(1) is stated on subpoenas to produce documents, information or objects, or to permit inspection of premises. Additionally, the proposed § 18.56(b)(1) retains the provision in the current § 18.24(a) which allows parties to serve subpoenas by certified mail.

Under paragraph (b)(1), if the subpoena requires a person's attendance, the fees for 1 day's attendance and the mileage allowed by law must be tendered with the subpoena. This is a procedural change as the current § 18.24(a) requires that fees to be paid ''in advance of the date of the proceeding.''

Under paragraph (b)(2), the Department clarifies that subject to proposed § 18.56(c)(3)(A)(ii), a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia. Paragraph (b)(3) provides that 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. Under paragraph (b)(4), if necessary, service can be proved by the person making service by filing with the judge a statement showing the date and manner of service and the names of the persons served. This statement must be certified by the server. This regulation does not establish any cutoff or deadline for serving subpoenas. However, a subpoena for a deposition or for the production of documents may be governed by the discovery deadline.

The Department proposes to delete the current § 18.24(b) because under the proposed paragraph (c)(3) the presiding judge, rather than the chief judge, has the power to quash or modify a subpoena if it fails to allow a reasonable time to comply.

The Department proposes to expand the current subdivision (c) to include other provisions that protect a person subject to a subpoena. The core concept of the proposed subdivision is that an attorney or representative responsible for requesting, issuing, or serving a subpoena has a duty not to issue a subpoena for improper purposes or to impose undue burden on the recipient of the subpoena. The proposed subdivision (c) continues to provide the mechanisms for recipients of subpoenas to challenge subpoenas. The cautionary language in § 18.56(c) *must* be reprinted on every subpoena.

The Department proposes to clarify under paragraph (c)(1) that a party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and may impose an appropriate sanction.

Under subparagraph (c)(2)(A), the Department proposes a new regulation that a person subpoenaed to produce documents or things or to permit an inspection need not actually appear at the designated time, as long as the person complies with the subpoena, unless also commanded to appear for the deposition or hearing. A person subpoenaed to produce documents or things or to permit an inspection may serve an objection to all or part of the subpoena within 14 days after service of the subpoena (or before the time designated in the subpoena, if sooner).

Once an objection has been served on the party issuing the subpoena, the subpoena recipient is not obligated to comply with the subpoena. Failure to serve timely objections may constitute a waiver of objections to the subpoena other than objections relating to service. Only non-parties may serve objections; parties must contest a subpoena by a motion to quash or modify. If the subpoena recipient timely serves an objection to the subpoena under § 18.56(c)(2)(B), the serving party may file a motion to compel production or inspection under § 18.56(c)(2)(B)(i). This motion must be served on the subpoena recipient as well. Under § 18.56(c)(2)(B)(ii), the presiding judge may issue an order compelling the subpoena recipient to comply with the subpoena but the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

Under the proposed § 18.56, a subpoena recipient may still move to quash a subpoena under paragraph (c)(3). If the judge finds the subpoena objectionable he or she may quash it altogether or modify it to cure the objection. The Department proposes to delete the 10-day time period for filing and answering a motion and instead use Fed. R. Civ. P. 45(c)(3) as a model. Thus, under the proposed § 18.56 a motion to quash must be ''timely'' filed, and should certainly be filed before the subpoena's return date. Failure to file a motion to quash may constitute a waiver of objections to the subpoena. In subparagraph (c)(3)(A) the Department proposes to list situations in which a subpoena will be quashed or modified. These situations include: (i) Failing to allow a reasonable time to reply; (ii) requiring a non-party to travel too far; (iii) requiring disclosure of privileged or protected information; and (iv) subjecting a person to undue burden.

Under subparagraph (c)(3)(B), the Department proposes to list circumstances in which a subpoena will be quashed or modified unless the serving party shows a ''substantial need'' for the testimony, documents, or inspection. In such cases the judge will condition compliance on the serving party compensating the recipient. This subparagraph provides limited protection for trade secrets or other confidential research, development, or commercial information. It provides limited protection for unretained experts, so that parties cannot obtain their testimony without paying their fees. It also provides limited protection to nonparties who would incur substantial expenses to travel more than 100 miles to attend a hearing.

The Department proposes to add a new regulation under subdivision (d)—the current subdivision (d) is relocated to subdivision (e)—that provides that documents may be produced as they are normally kept or may be separated and

organized. When privileges are asserted, the privilege must be expressly described. The cautionary language of § 18.56(d) must be reprinted on every subpoena.

The Department proposes that the scope of production under a subpoena be the same as the scope of discovery generally under proposed § 18.51, *Discovery scope and limits.* The requirements also track closely those imposed in Fed. R. Civ. P. 45. Under proposed subparagraph (d)(1)(A), the Department proposes that the responding party has the option of allowing the serving party to inspect and copy the documents where they are normally kept or the party may collect the responsive documents and organize and label them to correspond to the categories in the demand. *See* Fed. R. Civ. P. 45(d)(1). The responding party may make copies for the requesting party, but is not obligated to do so. *See* Fed. R. Civ. P. 45(a)(1)(D).

Under subparagraph (d)(1)(B), the Department proposes to allow, but not require, the requesting party to specify the form in which it is requesting electronic data (i.e., hard copy or electronic; if electronic, the precise manner of production). If the requesting party does not specify the form, then the responding person must produce it in the form in which it is ordinarily maintained in or in a form that is reasonably usable. In any event, under proposed subparagraph (d)(1)(C) a party need not produce electronic data in more than one form. *See* Fed. R. Civ. P. 45(d)(1)(B) & (C).

Under subparagraph (d)(1)(D), the Department proposes that if the responding party believes that the production of electronic data from certain sources will cause undue burden or cost, the person can, in lieu of producing the documents, identify those sources. If a motion to compel or quash is filed, the responding party will have the burden of showing that production would cause undue burden or cost. The burden then shifts to the requesting party to show good cause why the data should be produced nonetheless. In such cases, the judge may specify conditions for the production. *See* Fed. R. Civ. P. 45(d)(1)(D).

Under paragraph (d)(2), the Department proposes that when a subpoena recipient seeks to withhold information that is privileged, the recipient must expressly claim the privilege and describe the nature of the documents, communications, or tangible things not produced in sufficient detail that the court and parties can assess the privilege. Under subparagraph (d)(2)(B), the Department proposes to establish a procedure to recall privileged information that has already been produced in response to a subpoena. *See* Fed. R. Civ. P. 45(d)(2)(A) & (B).

The Department proposes to relocate the content from the current subdivision (d) to subdivision (e) with no procedural changes.

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

The Department proposes to delete the current § 18.21 and replace it with proposed § 18.57. The proposed § 18.57 is modeled after Fed. R. Civ. P. 37 and incorporates the current § 18.6(d) and the current § 18.15(a).

The proposed § 18.57 provides the mechanisms for enforcing the provisions of the other discovery rules by imposing sanctions on parties who violate the discovery regulations. In general, sanctions are imposed in a two-step process in which a party must first obtain an order compelling discovery under proposed § 18.57(a), and then move for sanctions under proposed § 18.57(b). If, however, the responding party totally fails to respond to an entire discovery request, the sanctions may be available immediately. The Department proposes to grant judges greater discretion when imposing sanctions.

Under subdivision (a), the Department proposes to combine and expand the regulations under current §§ 18.6(d) and 18.21(a), and 18.15(a). This subdivision covers motions to compel discovery and motions to compel disclosure. A party may file a motion to compel under § 18.57(a)(2) after the opponent fails to make the automatic disclosures required by § 18.50(c), fails to respond to discovery served pursuant to the discovery rules, or makes an improper or incomplete disclosure or discovery response. When taking a deposition, the party asking a question may complete or adjourn the examination before moving for an order. Under proposed subdivision (a)(1), the motion to compel must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other party or person in an effort to resolve the dispute without the action of the judge. This is a procedural change proposed by the Department to encourage litigants to resolve matters amongst themselves and to help reduce litigation expenses. In current practice, many judges encourage parties to confer before filing certain motions.

The Department proposes to expand current § 18.21(c) to apply to evasive or incomplete disclosures in proposed § 18.57(a)(3). As under the current § 18.21(d), if the motion to compel is denied the judge may issue any protective order authorized under proposed § 18.52.

The Department proposes to add § 18.57(b), which sets forth the sanctions that become available if a party or deponent fails to obey a judge's order regarding discovery. Under this provision, a judge has the discretion to impose one or more of the listed sanctions or any other procedural sanction deemed appropriate, including: deeming facts established; prohibiting evidence; striking pleadings; and issuing a stay, dispositive ruling, or default judgment. The judge is not limited to the sanctions listed under § 18.57(b)(1) and may make any order that is ''just.''

Under proposed § 18.57(b)(2), if a party fails to comply with an order under § 18.62 to produce another for a mental or physical examination, the party is subject to the same sanctions under § 18.57(b)(1) that would apply if the party failed to appear, unless the party can show that the party was unable to produce the individual.

The Department proposes to add § 18.57(c), *Failure to disclose, to supplement an earlier response, or to admit,* which is a procedural change modeled after Fed. R. Civ. P. 37. Under this section, if a party: (1) Fails to make the automatic disclosures under § 18.50(c) in a timely manner; (2) makes false or misleading disclosures; (3) fails to supplement a prior discovery response as required by § 18.53; or (4) fails to supplement a prior discovery request, the party will not be permitted to use at trial or in a motion the documents, information, or witnesses not properly disclosed, unless the party had ''substantial justification'' or the failure was harmless. Under § 18.57(c), in addition to or in lieu of precluding the evidence, upon motion and after an opportunity to be heard, the judge may impose other appropriate sanctions, including any of the orders listed in § 18.57(b)(1).

The sanctions under this provision apply to an improper statement of inability to admit or deny, as well as to improper denial. The sanctions in this subdivision do not apply to failure to respond to a request for admissions because such a failure is deemed an admission.

The Department proposes to add § 18.57(d), *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.* This subdivision provides that upon motion sanctions are immediately available against a party who completely fails to participate in the discovery process. For example,

sanctions are available when the party fails to appear for the party's deposition after being served with proper notice, fails to answer or object to properly served interrogatories, or fails to serve a written response to a properly-served request to inspect documents or things. Thus, a judge's order is not a prerequisite to sanctions under this subdivision. While this subdivision does not specify when the motion for sanctions must be filed, it should be filed without ''unreasonable delay'' or before the entry of the decision and order.

The proposed subparagraph (d)(1)(B) states that a motion for sanctions under § 18.57(d), for failure to respond to interrogatories or requests for inspection, must include a certification that the movant has in good faith conferred or attempted to confer with the other party or person in an effort to obtain a response without court action. Note that this requirement does not apply to the failure to appear for a deposition.

The proposed paragraph (d)(2) states that a failure described in § 18.57(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a). Under proposed paragraph (d)(3), sanctions may include any of the orders listed in § 18.57(b)(1).

The Department proposes to add subdivision (e) to prohibit the imposition of sanctions for failure to produce certain types of electronically stored information, in the absence of exceptional circumstances. The Department recognizes that certain types of electronically stored information are lost during the regular operation of a computer system and therefore parties should not be sanctioned for failing to produce such data. An example of the type of data that is contemplated by this provision is the metadata (or data about data) that computers automatically store, such as the last time a document was opened. Each time the document is opened the information that was stored in that field is deleted and replaced by new data. A party would not likely be sanctioned for the loss of the data when a document was last opened.

The protections in proposed § 18.57(e) are expressly limited to the good-faith operation of the computer system. Thus, a party cannot exploit the protections of this subdivision to deliberately delete relevant information. Under certain circumstances, a party wishing to require another party to preserve electronic data can write a letter to the party placing it on notice that the electronic data may be relevant and should be preserved, or can seek a preservation order from the judge. If either action is taken, a party must suspend those features of its computer system that result in the routine loss of information.

The Department proposes subdivision (f) to provide the procedure a judge must follow in impose sanctions under this section. A judge may impose sanctions under this section upon (1) a separately filed motion; or (2) notice from the judge followed by a reasonable opportunity to be heard.

The Department proposes to include the content from the current § 18.21(d) in the proposed § 18.33(a).

Types of Discovery

§ 18.60 Interrogatories to parties.

The Department proposes to revise the current § 18.18 and renumber it as proposed § 18.60. The proposed § 18.60 is modeled after Fed. R. Civ. P. 33 and should be read in conjunction with proposed § 18.51, which establishes the scope of all discovery rules.

The Department proposes to change the current subdivision (a) to state that unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with proposed § 18.51. The Department proposes this change to model Fed. R. Civ. P. 33 as the current § 18.18 does not set a limit on the number of written interrogatories a party may serve on another party.

The procedure for answering interrogatories is relocated from the current subdivision (a) to proposed subdivision (b). The Department proposes to delete the service and filing language from this section because the Department is proposing § 18.30, *Service and Filing,* to cover the service and filing regulations before OALJ.

The Department proposes to relocate the current subdivision (c) to proposed § 18.60(a)(2), *Scope.* Under this proposed subpart, the scope of interrogatories is the broad discovery available under § 18.51; thus, an interrogatory may relate to any matter that may be inquired into under proposed § 18.51. Interrogatories may be served after the parties have conducted the discovery conference under § 18.51, or earlier if the judge so orders. In the proceedings listed in § 18.50(c)(1)(B) as exempted from initial disclosures, there is no preliminary waiting period to serve interrogatories. The Part 18, Subpart A rules do not set an outer limit on how late in the case interrogatories may be served, but the judge may set such a limit.

The Department proposes subdivision (b), *Answers and objections,* to provide the procedural requirements parties must adhere to in answering and objecting to interrogatories. As under the current regulation, the responding party must answer interrogatories separately and in writing within 30 days after service.

Failure to serve a response in a timely manner may constitute a waiver of all objections. Under subdivision (b) the Department clarifies that the time period to answer may be shortened or extended by written agreement under proposed § 18.54, *Stipulations about discovery procedure.* This subpart also clarifies that the grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure. This is a procedural change modeled after Fed. R. Civ. P. 33.

The Department proposes to add a new subdivision (c) which provides that an answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence. This reflects the varying evidentiary requirements applicable to claims brought before OALJ. Interrogatory answers are not admissions, but generally may be used as though made in court by the party. Interrogatories may not be used to obtain documents. Rather, a document request must be made under proposed § 18.61, *Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.* However, interrogatories may inquire about the existence of documents and the facts contained therein. Documents may, under certain circumstances, be produced in lieu of answering an interrogatory, as discussed in proposed subdivision (d).

The Department proposes to add a new subdivision (d), *Option to produce business records.* A party may produce business records in lieu of answering an interrogatory when the burden of extracting the requested information would be substantially equal for either party. Only business records may be used in lieu of interrogatory answers; thus, a party cannot produce pleadings or deposition transcripts instead of answering an interrogatory. The responding party must specify the records that must be reviewed in sufficient detail to enable the interrogating party to locate and identify

them as readily as the responding party could. It is not sufficient to state that the business records may contain the information. The responding party must also give the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

The Department proposes to revise the current § 18.19 and renumber it as proposed § 18.61. The proposed § 18.61 is modeled after Fed. R. Civ. P. 34, *Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.*

The Department is proposing a separate section, § 18.62, for physical and mental examinations; therefore, the language regarding physical and mental examinations is not included in this proposed section. The purpose of proposed § 18.61 is to set forth the procedures for obtaining access to documents and things within the control of other parties, and for gaining entry upon other parties' land for inspection. This proposed section should be read in conjunction with proposed § 18.51, which establishes the scope of all discovery rules.

The proposed subdivision (a), like the current subdivision (a), generally addresses the scope of document requests. This subpart states that a party may serve on any party a request within the scope of § 18.51. Generally, any relevant, non-privileged document is discoverable unless it was prepared in anticipation of litigation, pertains to expert witnesses, or would be unreasonably burdensome to produce. ''Documents'' is broadly defined to include all forms of recorded information. For clarity, the proposed subdivision (a) lists writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations as discoverable documents. Under the proposed regulation, a party is generally not required to create documents to meet a document request, but only to produce documents already in existence.

The Department proposes to incorporate current subdivisions (c) and (d) into proposed § 18.61(b). These subparts are revised to improve clarity but retain the same procedural requirements.

Under subdivision (b), the Department proposes to regulate the form in which electronic data must be produced (i.e. hard copy or electronic, and if electronic, the precise manner of production). This regulation is not included in the current rule. It allows, but does not require, the requesting party to specify the form in which it is requesting electronic data. The responding party can then produce it in that form or object and specify the form in which it will produce the electronic data. If the requesting party does not specify the form, then the responding party must produce it in the form in which it is ordinarily maintained or in a form that is reasonably usable. Unless the responding party is producing the data in the form specified by the requesting party, the responding party must specify the form it intends to use for production in its written response to the document request. If the responding party objects to the form stated by the requesting party, or if the requesting party is not satisfied with the form specified by the responding party, then the parties must meet and confer under § 18.57(a)(1). Under any of these scenarios, a party need not produce electronic data in more than one form.

The Department proposes to add a new regulation under subdivision (c), *Nonparties,* as the current Part18A is silent on this issue. Although document requests or requests for inspection cannot be served on a non-party, documents or inspections can be obtained from a non-party by a subpoena under proposed § 18.56, *Subpoenas.*

The Department proposes to delete the service and filing language in the current subdivision (f) because the Department is proposing § 18.30, *Service and filing,* to cover the service and filing regulations before OALJ.

§ 18.62 Physical and mental examinations.

The Department proposes a new § 18.62 modeled after Fed. R. Civ. P. 35 to regulate physical and mental examinations. Physical and mental examinations are currently covered by § 18.19; however, due to the high frequency of requests for physical and mental examinations the Department determined that there is a need for a separate section that sets forth the procedure for such requests.

The Department proposes to divide § 18.62 into three subparts: Examinations by motion, examinations by notice, and examiner's reports. This proposal reflects the distinction between examination by notice and examination by motion found in the federal rule.

The proposed subdivision (a) clarifies that a party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitable licensed or certified examiner. This provision notifies parties they may serve a request to attend and submit to an examination on another party only if their mental or physical condition is in controversy. The examiner must be licensed or certified to perform the examination.

The Department proposes to amend the content requirements of a notice to attend a physical or mental examination, currently located under § 18.19(c)(4). The proposed paragraph (a)(2) provides that a notice must specify: (A) The legal basis for the examination; (B) the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and (C) how the reasonable transportation expenses were calculated.

The Department proposes to add the requirement that ''unless otherwise agreed by the parties, the notice must be served no fewer than 14 days before the examination date.'' The Department determined that a 14-day notice period provides the person to be examined enough time to make arrangements to attend the physical or mental examination or file an objection. Under paragraph (a)(4), the person to be examined must serve any objection to the notice no later than 7 days after the notice is served. The objection must be stated with particularity. Under the current § 18.19, the party to be examined has 30 days to object after service of the request. The Department proposes to shorten the timeframe a party has to object in order to quickly resolve the objection and expedite the proceedings.

Under subdivision (b), the Department proposes to provide the procedure for objecting to an examination. Upon objection, the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by § 18.62(a)(2).

The Department proposes to provide the procedure for examiner's reports under subdivision (c) in order to delete the reference to Fed. R. Civ. P. 35(b) in the current § 18.19(c)(4). The party who initiated the examination must deliver a complete copy of the examination report to the party examined, together with like reports of all earlier examinations of the same condition. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

§ 18.63 Requests for admission.

The Department proposes to revise the current § 18.20 and renumber it as proposed § 18.63. The proposed § 18.63 is modeled after Fed. R. Civ. P. 36.

The Department proposes to combine the current subdivisions (b), (c), and (d) into proposed subdivision (a). Under subdivision (a), the Department proposes to establish the procedure whereby one party serves requests for admission on another party, who must investigate and either admit, deny with specificity, or object to each requested admission.

The scope of requests for admission is the broad discovery available under proposed § 18.51. The proposed subdivision (a) clarifies that a party may serve on any party a written request to admit facts relating to facts, the application of law to facts, or opinions about either.

Under paragraph (a)(2), *Form; copy of a document,* the Department clarifies that each fact or matter for which admission is requested should be set forth in a separate paragraph. All facts that are part of the request should be set forth in the request—it is improper to incorporate facts by reference to other text.

Proposed paragraph (a)(3), *Time to respond; effect of not responding,* retains the same procedural requirements of current subdivision (b) and clarifies that a shorter or longer time for responding may be stipulated to under proposed § 18.54 or be ordered by the judge.

Proposed paragraph (a)(4), *Answer,* retains the same procedural requirements of current subdivision (c) and clarifies that if a matter is not admitted the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.

Under proposed paragraph (a)(5), *Objections,* the grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing. The proposed paragraph (a)(6) retains the same procedural requirements of current subdivision (d).

The Department proposes to combine and relocate the current subdivisions (e) and (f) to proposed subdivision (b), *Effect of an admission; withdrawing or amending it.* There are no procedural changes to these subparts; however, the proposed subdivision (b) clarifies that a judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.

§ 18.64 Depositions by oral examination.

The Department proposes to revise the current § 18.22 and renumber it as proposed § 18.64. The proposed § 18.64 is modeled after Fed. R. Civ. P. 30, *Depositions by oral examination.*

Under § 18.64 the Department expands the procedures for taking depositions by oral examination and this section must be considered in conjunction with the other discovery rules, in particular proposed § 18.51 governing the scope of discovery. The Department's regulations for depositions by written questions are located under proposed § 18.65.

The Department proposes to revise subdivision (a) to address when a deposition may be taken. The language regarding how and by whom a deposition may be taken in current subdivision (a) is relocated to proposed subdivision (b). The Department proposes to limit the number of depositions that parties may take to 10 depositions per side, absent leave of the judge or stipulation with the other parties. Depositions may be taken at any time after an initial notice or order is entered acknowledging that the proceeding has been docketed at OALJ. If the judge orders the parties to confer under proposed § 18.50(b), depositions must be taken within the time and sequence agreed upon by the parties. The Department proposes to limit the number of depositions to 10 to emphasize that representatives have an obligation to develop a mutually cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of proposed § 18.51(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles.

Under paragraph (a)(1), the Department clarifies that a deponent's attendance may be compelled by subpoena under § 18.56, *Subpoena.*

Leave of the judge is required to depose someone if the parties have not stipulated to the deposition and (i) The deposition would result in more than 10 depositions being taken under this section or § 18.65 by one of the parties; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in § 18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time. Leave of the judge must be obtained in order to take the deposition of a person confined to prison.

The Department proposes to combine current subdivisions (b) and (c) into proposed subdivision (b), *Notice of the deposition; other formal requirements.* The Department proposes to change the timeframes under § 18.64 to be consistent throughout Part18A. Under proposed paragraph (b)(1), except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The current § 18.22(c) provides that written notice must not be less than 5 days when the deposition is to be taken in the continental United States and not less than 20 days when the deposition is to be taken elsewhere. Under paragraph (b)(1), the Department proposes to clarify that if the name of the deponent is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

The Department proposes to delete the language in current subdivision (b) requiring that the party giving notice state the name of the person before whom the deposition is to be taken. The name of the person before whom the deposition is to be taken is not relevant as long as the person meets the requirements stated in the regulation.

The Department proposes to delete the filing language in the current subdivision (c) because the Department is proposing § 18.30, *Service and filing,* to cover the service and filing regulations before OALJ.

The Department proposes to add several regulations to proposed subdivision (b) that are not found in the current § 18.22. These provisions are modeled after Fed. R. Civ. P. 30(b)(2)–(b)(5) and come into current practice through the federal rule. Under proposed paragraph (b)(2), if a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party-deponent is accompanied by a request for production under § 18.61, the notice must comply with the requirements of § 18.61(b).

The Department proposes to regulate the method of recording depositions under paragraph (b)(3). The notice of

deposition must specify the method of recording the deposition testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition. Under proposed subparagraph (b)(3)(B) with prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. The party bears the expense of the additional recording or transcript unless the judge orders otherwise.

Under proposed paragraph (b)(4), the Department clarifies that parties may stipulate—or the judge may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

The Department proposes to regulate the officer's duties when taking a deposition. Under proposed subparagraph (b)(5)(A), unless the parties stipulate otherwise, a deposition must be conducted before a person having power to administer oaths. The officer must begin the deposition with an on-the-record statement that includes: (i) The officer's name and business address: (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; (v) the identity of all persons present; and (vi) the date and method of service of the notice of deposition. Specifically, (b)(5)(A)(vi) is in response to OALJ noticing that statements regarding notice are lacking in depositions.

The proposed subparagraph (b)(5)(B), provides that if the deposition is not recorded stenographically, the officer must repeat the items in proposed § 18.64(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

The proposed subparagraph (b)(5)(C), provides that at the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

The proposed paragraph (b)(6) provides that in its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

The Department proposes to incorporate a revised version of current subdivision (d) into proposed subdivision (c), *Examination and cross-examination; record of the examination; objections; written questions.* Proposed subdivision (c) clarifies that after putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under § 18.64(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

Under paragraph (c)(2), *Objections,* the Department proposes to add that an objection at the time of the examination— whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under § 18.64(d)(3).

Under paragraph (c)(3), *Participating through written questions,* the Department clarifies that instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

The Department proposes to delete the language in current § 18.22(d) regarding use of depositions at hearing because the Department is proposing section § 18.55, *Using depositions at hearing.*

The Department proposes to add subdivision (d), *Duration; sanction; motion to terminate or limit,* which incorporates current subdivision (e). The duration of depositions is not currently addressed by Part 18, Subpart A. Proposed subdivision (d), modeled after Fed. R. Civ. P. 30(d), provides for a 7-hour time limit on depositions, which may be extended by the judge's order. This subdivision also provides protections from unreasonable or vexatious examination during a deposition.

Under paragraph (d)(2) the judge may impose an appropriate sanction, in accordance with proposed § 18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent. Under proposed subparagraph (d)(3)(A), the Department clarifies that at any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

The Department proposes to relocate the language in the current § 18.22(e) regarding objections to the deposition conduct or proceeding to proposed § 18.55(b) and (d).

The Department proposes to add a new regulation under subdivision (e), *Review by the witness; changes,* modeled after Fed. R. Civ. P. 30(e). Under paragraph (e)(1), on request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) To review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. Under paragraph (e)(2) the officer must note in the certificate prescribed by proposed § 18.64(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

The Department proposes to add a new regulation under subdivision (f), *Certification and delivery; exhibits; copies of the transcript or recording; filing.* This subdivision provides that the officer must certify in writing that the witness was duly sworn and that the deposition transcript was a true record of the testimony given by the deponent. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name}'' and must promptly send it to the party or the party's representative

who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Proposed subparagraph (f)(2)(A) provides that documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. However, if the person who produced them wants to keep the originals, the person may: (i) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition. Any party may move for an order that the originals be attached to the deposition pending final deposition or the proceeding under proposed subparagraph (f)(2)(B).

Proposed paragraph (f)(3) provides that unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. Proposed paragraph (f)(4) provides that a party who files the deposition must promptly notify all other parties of the filing. But depositions are not ordinarily filed. *See* proposed § 18.30(b)(1)(B).

The Department proposes to add a new regulation under subdivision (g), *Failure to attend a deposition or serve a subpoena.* This provision provides for a judge to order sanctions, in accordance with § 18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to: (1) Attend and proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently did not attend. This sanction is permissive.

§ 18.65 Depositions by Written Questions.

The Department proposes to add a new § 18.65 modeled after Fed. R. Civ. P. 31. The Department proposes a new section to provide the procedure for taking depositions by written questions because the current Part 18, Subpart A rules do not specifically mention depositions by written questions. The current § 18.19 addresses written interrogatories to a party and the current § 18.22(a) states that ''[d]epositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.'' The current § 18.22(a) also provides that ''[d]epositions may be taken of any witness * * *.'' Since there is a specific rule addressing written interrogatories to a party, the Department determined that the current § 18.22 contemplates taking written depositions of any witness.

The proposed subdivision (a) addresses when a deposition may be taken. Any party may take depositions by serving written questions, which are asked by the deposition officer (stenographer) and answered orally by the witness. A party seeking to take a deposition by written questions must serve a notice on all other parties stating the name and address of the deponent, if known, or other general description sufficient to identify the deponent and providing the name or title and address of the stenographer or officer before whom the deposition will be taken.

The notice of written deposition may be served at any time after the parties have conducted the discovery conference under § 18.50(b), or earlier with leave of the judge. In proceedings listed in proposed § 18.51(c)(1)(B) as exempted from initial disclosures, there is no preliminary waiting period for written depositions. The latest time to conduct a deposition upon written questions will be governed by the judge's scheduling order. Subpoenas must be used to compel non-party witnesses.

The written deposition questions for direct examination are served upon all parties with the notice. Within 14 days of service of the notice and direct examination questions, any other party may serve cross-examination questions. The noticing party may then serve redirect examination questions within 7 days, and the other party may serve re-cross examination questions within 7 more days. The judge may shorten or lengthen these time periods upon motion and for cause shown. All questions must be served on all parties.

All parties, including third-party respondents, are limited to 10 depositions total, by written and/or oral examination. This number may be increased by stipulations or leave of the judge. Leave of the judge is required to depose someone a second time. If a deponent is in prison, leave of the judge is required to take a written deposition. The scope of the written questions is the same as oral questions, and is controlled by proposed § 18.50. Objections to the form of a written question must be served in writing upon the party propounding the question within the time for serving succeeding questions and within 5 days of the last questions authorized.

Under proposed subdivision (b), unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and a copy of the notice. The officer then promptly proceeds in the manner provided in proposed § 18.64 (c), (e), and (f) to take the deponent's testimony in response to the questions; prepare and certify the deposition; and send it to the party, attaching a copy of the questions and of the notice. A transcript is then prepared and submitted to the witness as provided in § 18.64 governing oral depositions.

Under proposed subdivision (c), the party who noticed the deposition must notify all other parties when it is completed. A party who files the depositions must promptly notify all other parties of the filing. But depositions are not ordinarily filed. *See* proposed § 18.30(b)(1)(B).

Disposition Without Hearing

§ 18.70 Motions for dispositive action.

The Department determined that Part 18, Subpart A does not currently address all of the potential dispositive motions available to the parties. The Department proposes to add § 18.70, *Motions for dispositive action,* to provide the regulations for filing dispositive motions in a single section. This proposed section codifies current practice and does not model a particular federal rule. The Department determined that motions for summary decision should remain a separate section because of the multiple requirements for filing and deciding a motion for summary decision and the need for that section to stand out among the rest.

Under proposed subdivision (a), when consistent with statute, regulation or executive order, any party may move under proposed § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject-matter jurisdiction is lacking, the judge must dismiss the matter.

Under proposed subdivision (b), a party may move to remand the matter to the referring agency when not precluded by statute or regulation. A remand order must include any terms or conditions and should state the reason for the remand.

Under proposed subdivision (c), a party may move to dismiss part or all of the matter for reasons recognized under

controlling law, such as lack of subject-matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

Under the proposed subdivision (d), when the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

§ 18.71 Approval of settlement and consent findings.

The Department proposes to revise the current § 18.9 and renumber it as proposed § 18.71.

The current § 18.9, *Settlement judge procedure,* addresses three topics: (1) Motions for consent findings and order; (2) approval of settlement agreements; (3) and the settlement judge procedure. The Department proposes that new § 18.71 provide the regulations for approval of settlement agreements and motions for consent findings and order. The Department proposes to address the settlement judge procedure in proposed § 18.13, *Settlement judge procedure.*

In subdivision (a) the Department proposes to clarify when a party must submit a settlement agreement for the judge's review and approval. The Department does not propose any procedural changes from the current § 18.9.

In subdivision (b) the Department proposes to clarify when a party may file a motion for consent findings and what the order must contain. The Department does not propose any procedural changes from the current § 18.9.

§ 18.72 Summary decision.

The current Part 18, Subpart A contains two sections, §§ 18.40 and 18.41, that address summary decision. The Department determined these sections are repetitive and inadequately organized and, therefore, proposes § 18.72, *Summary decision,* to address summary decision in a single section. The proposed § 18.72 is modeled after Fed. R. Civ. P. 56 (December 2010 amendment).

In addition to the significant stylistic changes, the Department proposes several procedural changes in § 18.72. Under subdivision (b), the Department proposes to change the time requirements for filing and responding to motions for summary judgment. The current § 18.40(a) provides that a party may, at least 20 days before the date fixed for any hearing, file a motion for summary judgment. It states that any other party may within 10 days after service of the motion, serve opposing affidavits or countermove for summary judgment. The Department proposes to increase the timeframe for filing motions for summary decision to 30 days before the date fixed for the formal hearing.

Parties should refer to proposed § 18.33 for the procedure on responding to motions. Under proposed § 18.33(d), the Department proposes to increase the number of days a party has to respond to a motion from 10 days to within 14 days from the date of service. Given the increased timeframe a party has to file an opposition or other response to a motion, the time for filing a summary decision motion must be extended to allow the judge an acceptable period of time to rule on the motion. If a motion is filed 30 days prior to the hearing date and the opposing party files an opposition or other response 14 days after receiving the motion, the judge will generally have adequate time to rule on the motion before the hearing date.

The current § 18.40(a) permits a party to ''move with or without supporting affidavits for a summary decision * * *.'' Under paragraph (c)(1), the Department proposes to require a party to cite specific parts of the record to support or oppose the motion. This proposed change comports with the standard the judge uses to review the motion, ''that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.''

The last sentence of the current § 18.40(a) states that the administrative law judge may set the matter for argument and/or call for submission of briefs. The Department proposes to relocate this language to proposed § 18.33(d).

The current § 18.40(b) states the procedure for filing and serving a motion for summary judgment. This provision is not included in the proposed § 18.72 because the service and filing of papers is covered by proposed § 18.30, *Service and filing.*

Under subdivision (c), the Department proposes a revised version of the current § 18.40(c). This subdivision applies to both the moving and nonmoving party. Under paragraph (c)(4) the Department proposes to clarify that ''an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.''

Under subdivision (d), the Department proposes a revised version of current § 18.40(d). The Department proposes to provide the judge with more options when a moving party denies access to information during discovery. In addition to denying the motion for summary decision, the judge may permit more time for discovery, or issue any other appropriate order.

The Department proposes to address three new topics under subdivisions (f), (g), and (h). Under subdivision (f), the Department proposes to clarify that after giving notice and a reasonable time to respond, the judge may: (1) Grant summary decision for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely disputed. Under the current regulations, a judge who considers summary decision on his or her own must reference Fed. R. Civ. P. 56 in order to order summary judgment without a motion from the parties. The addition of this power within this proposed section allows the judge to rely on the Department's regulations.

The Department does not propose to change the power a judge has to issue an order granting partial summary judgment. Under this proposed subdivision, the Department proposes a procedure that the judge and parties must follow in the hearing after the judge grants partial summary judgment. The judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treat the fact as established in the case.

Under proposed subdivision (h), the Department proposes to address the actions a judge may take if an affidavit or declaration is submitted in bad faith. These remedies are part of the judge's power to regulate the hearing under the Administrative Procedure Act.

The Department proposes to delete the language in the current § 18.41(a)(2) stating what a summary judgment decision must contain. The Department proposes § 18.92, *Decision and order,* to regulate the contents of summary judgment decisions.

The Department proposes to relocate the language from the current § 18.41(b) to the proposed 18.33(g) *Motion hearing.*

Hearing

§ 18.80 Prehearing statement.

The Department proposes to revise the current § 18.7 and renumber it as proposed § 18.80.

Under subdivision (a), the Department proposes to add the requirement that a participating party file a prehearing statement at least 21 days prior to the

date set for hearing, unless the judge orders otherwise. The current § 18.7 does not have a timeframe for filing prehearing statements. However, judges typically include a timeframe in prehearing orders. It is not the Department's intention to require the applicable Department's agency to file a pre-hearing statement when it is not actively participating in the proceeding. For example, in a Black Lung claim in which an employer has been identified as the responsible operator, the Office of Workers' Compensation Programs, though a party-in-interest, does not normally take an active role. In such circumstance it is not necessary for the Department's representative to file a pre-hearing statement.

The Department proposes to add a new provision under subdivision (b) that requires the parties confer in good faith to stipulate to facts to the fullest extent possible and to prepare exhibit lists prior to filing prehearing statements. The Department proposes this change to help narrow the issues to be addressed at hearing and eliminate unnecessary travel for potential witnesses.

Under subdivision (c), the Department proposes to provide a revised version of the content requirements for a prehearing statement from the current § 18.7(b). The Department proposes to add that the prehearing statement must include a statement of the relief sought, a list of the party's exhibits and the joint exhibits. Otherwise, the content requirements remain procedurally the same as those in the current § 18.7.

The Department proposes to add a new regulation under subdivision (d) that permits the judge to require a joint prehearing statement instead of individual prehearing statements by the parties.

The Department proposes to add a new regulation under subdivision (e) that requires a party to file objections to an opposing party's proposed exhibits or use of deposition testimony within 14 days of being served. A party's failure to object waives the objection unless the judge finds good cause for the failure to object.

§ 18.81 Formal hearing.

The Department proposes to revise the current § 18.43 and renumber it as proposed § 18.81. The proposed § 18.81 is modeled after Fed. R. Civ. P. 43.

The Department proposes to revise the current subdivision (a) to more accurately address the situations when a hearing would be closed to the public. The current subdivision (a) states that hearings may be closed to the public when it is in the ''best interests of the parties, a witness, the public or other affected persons.'' The Department proposes to delete this language and instead state that hearings may be closed to the public ''when authorized by law and only to the minimum extent necessary.'' The proposed change states the standard a judge will apply when determining whether to close all or part of a hearing. The applicable law does not suggest that hearings are closed based on the ''best interests'' of the parties. Further, the presumption of open hearings is supported by the requirement that a judge close a hearing only to the minimum extent possible. The proposed subdivision (a) clarifies that the judge's order closing the hearing must explain why the reasons for closure outweigh the presumption of public access to the hearing. The Department proposes to clarify that the judge may also close the hearing to anticipated witnesses. Parties would not be excluded, however. *See* Fed. R. Evid. 615 cmt.

The Department proposes to delete current subdivisions (b) and (c). The judge's jurisdiction to decide all issues of fact and related issues of law is addressed by proposed § 18.12, *Proceedings before administrative law judge.* Amendments to conform to the evidence is addressed by proposed § 18.36, *Amendments after referral to the Office of Administrative Law Judges,* and the note referring the parties to Fed. R. Civ. P. 15.

The Department proposes to model a new subdivision (b) after Fed. R. Civ. P. 43(a). The proposed subdivision (b) requires that a witness testify in an open hearing. However, a judge may permit testimony in an open hearing by contemporaneous transmission from a different location ''for good cause and with appropriate safeguards.'' The Department determined that if a witness needs to testify remotely, the witness or party must show good cause, instead of having to show compelling circumstances, which is the higher legal standard set forth in Fed. R. Civ. P. 43(a). The Department's decision to set a lesser standard is not intended to diminish the importance of presenting live testimony in hearings. The very ceremony of a hearing and the presence of the factfinder may exert a powerful force for telling the truth. However, in contrast to the federal courts, OALJ has more relaxed evidentiary standards. Hearings take place worldwide and are not constrained by the concept of ''venue.'' Appropriate safeguards will be addressed by the judge in the prehearing order or conference and may include the exchange of exhibits and assurances that the witness will not be coached during the testimony.

Similarly, the Department proposes a new subdivision (c) to permit a party to participate in an open hearing by contemporaneous transmission from a different location for good cause and with appropriate safeguards. This provision accounts for the fact that some cases involve parties located outside the United States or in other remote locations that are unable to attend hearings in person. Subdivisions (b) and (c) are not intended to suggest that contemporaneous transmission is routine practice. The presiding judge may require advance notice to determine whether good cause exists.

§ 18.82 Exhibits.

The Department proposes to revise the current §§ 18.47 through 18.50 as part of the general restyling of the Part 18, Subpart A rules of procedure. The current §§ 18.47 through 18.50 are combined into a single section covering exhibits, proposed § 18.82.

The Department proposes to relocate the language from the current § 18.47 to subdivisions (a), *Identification,* (b), *Electronic data,* (c), *Exchange of exhibits,* and (e), *Substitution of copies for original exhibits,* in § 18.82. In subdivision (a), the Department proposes to add a provision stating that the exhibits should be numbered and paginated as the judge directs. The Department determined that this requirement is sufficiently broad to cover the variety of judges' preferences for organizing exhibits, so that references in the testimonial record to exhibit pages will be clear.

The Department proposes to relocate the language from the current § 18.48 to proposed subdivision (g), *Records in other proceedings.* The Department proposes to revise the structure of this subdivision for clarity, but does not propose any procedural changes.

The Department proposes to relocate the language from the current § 18.49 to proposed subdivision (f), *Designation of parts of documents.* The Department proposes to revise the structure of this subdivision and delete the redundant language. The Department proposes to revise the first sentence to emphasize the procedure for excluding irrelevant material. The second sentence is deleted as a matter left to each judge's discretion and because other rules will apply to submitting evidence and marking exhibits.

The Department proposes to relocate the language from current § 18.50 to proposed subdivision (d), *Authenticity.* The Department proposes to revise the structure of this subdivision to improve

clarity, but does not propose any procedural changes.

Under subdivision (b), *Electronic data,* the Department proposes that ''by order the judge may prescribe the format for the submission of data that is in electronic form.''

§ 18.83 Stipulations.

The Department proposes to revise the current § 18.51, renumber it as proposed § 18.83, and include it under subdivision (a). The Department does not propose any procedural changes to this subpart.

The Department proposes to add new regulations under subdivisions (b) and (c). These provisions are based on current practice as stipulations typically result from a judge's order. The proposed subdivision (b) applies to extensions of time not covered by proposed §§ 18.33, *Motions and other papers,* and 18.41, *Continuances and changes in place of hearing.* The new provision states that ''[e]very stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.''

Under proposed subdivision (c), the Department proposes that ''[a] proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, 'Pursuant to stipulation, it is so ordered' with spaces designated for the date and the signature of the judge.''

§ 18.84 Official notice.

The Department proposes to revise the current § 18.45 and renumber it as proposed § 18.84.

Under this section, the Department proposes to clarify the procedures a judge must follow when taking official notice. The Department proposes that official notice may be taken on motion of a party or on the judge's own. The current § 18.45 states that official notice may be taken on ''any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice.'' This proposed change clarifies that official notice may be taken of any ''adjudicative fact or matter subject to judicial notice.''

The proposed § 18.63, *Request for admission* and the current § 18.201, *Official notice of adjudicative facts,* do not require advance notice before the judge takes official notice, but rather an opportunity to be heard. The Department, therefore, decided not to propose an advance notice requirement in this section. In some situations the judge may take official notice of a noncontroversial fact that was omitted in the evidence without noticing the parties before issuing a decision and order. The parties have an opportunity to be heard after the order is issued.

§ 18.85 Privileged, sensitive, or classified materials.

The Department proposes to revise the current §§ 18.46 and 18.56 and combine them into a single section, proposed § 18.85, covering privileged, sensitive, or classified material.

The Department proposes to relocate the content from the current § 18.46 to subdivision (a). The current § 18.46 addresses several topics: (1) Limiting discovery and the introduction of evidence based on claims of privilege; (2) limiting the introduction of evidence based on claims of classified or sensitive information; (3) providing a summary or extracted version of a document to limit disclosures of classified or sensitive material; (4) permitting access to classified or sensitive matters despite their nature; and (5) requiring a representative to seek a security clearance in order to view the information.

The proposed subdivision (a) is more limited in scope than the current § 18.46. The procedures to limit the scope of discovery based on claims of privilege or sensitive information are addressed by proposed §§ 18.51, *Discovery scope and limits,* and 18.52, *Protective orders.* Accordingly, the references to limiting discovery in current subdivision (a) and paragraph (b)(1) are deleted.

The references to obtaining a security clearance in current paragraph (b)(2) are also deleted. The need for a participant in a hearing to obtain a security clearance is a rare event before OALJ. The Part 18, Subpart A rules are designed to apply to the typical types of cases heard by OALJ; the rules do not address all of the exceptions or possibilities that may occur in specific cases. Further, the process for seeking a security clearance would be determined by the federal agency holding the classified or sensitive information. OALJ does not independently facilitate a security clearance process. For these reasons, the references to obtaining a security clearance are deleted from proposed § 18.85.

The Department proposes to relocate the content from the current § 18.56 to subdivision (b). The proposed rule retains the option provided in current subdivision (a) that a party or the judge may move to seal a portion of the record. This section continues to require that the sealed portion of the record be clearly marked and maintained separately from other parts of the record in the case.

The proposed subdivision (b) imposes new requirements on parties. When filing a motion to seal the record, a party must propose a redaction no broader than necessary for inclusion in the public record. If the movant finds that a redaction would be so extensive as to make the material meaningless, the movant must file a summary of the material to be included in the public record. The requirement of filing a redacted copy or summary along with the motion to seal the record ensures that the public continues to have access to as much information as possible regarding the proceedings.

Under paragraph (b)(2), if the judge issues an order sealing all or part of the record, the judge must explain why the need to seal part of the record outweighs the presumption of public access. A redacted version or summary of the material must be included in the record unless the redactions make the public version of the material meaningless, or if the redacted version or summary defeats the reason the original is sealed. Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

§ 18.86 Hearing room conduct.

The Department proposes to revise the current § 18.37 and renumber it as proposed § 18.86.

The first sentence of the current § 18.37 states that proceedings are to be conducted in an orderly manner. The Department proposes to amend this sentence to directly address how participants must conduct themselves during a hearing, instead of generally stating how the hearing should be managed. The proposed change provides direct instructions to the participants.

The Department proposes to retain the prohibition on food and beverage consumption and the rearranging of furniture in the hearing location. The Department proposes to delete the reference to smoking. Prohibitions on smoking in public places, specifically hearing locations, are more ubiquitous than in 1983 when the current Part 18, Subpart A was adopted. A specific prohibition in Part 18, Subpart A, therefore, is not required.

The Department proposes to add a prohibition on disrupting proceedings with electronic devices. This addition is a result of changing technology since the current Part 18, Subpart A was adopted. Electronic devices and their use can be distracting and disruptive during a hearing. Accordingly, limiting

the use and noise produced by electronic devices facilitates the orderly conduct of a hearing. Parties, witnesses and spectators are also prohibited from using video or audio recording devices to record hearings.

§ 18.87 Standards of conduct.

The Department proposes to revise the current § 18.36 and renumber it as proposed § 18.87.

The Department proposes to divide the current subdivision (b) into two subdivisions: (b), *Exclusion for misconduct,* and (c), *Review of representative's exclusion.* Under 18.87 (b), the Department proposes to define the types of conduct that may result in a party or the party's representative being excluded from a proceeding.

Under subdivision (c), the Department proposes to provide the procedure a party's representative must initiate in order to be reinstated as a representative in a particular matter. The current § 18.36 does not indicate a time period in which the representative must seek reinstatement. The Department proposes a 7-day time period for a representative to request reinstatement. Seven days is proposed so as not to create too long a delay in proceeding with the claim.

§ 18.88 Transcript of proceedings.

The Department proposes to revise the current § 18.52 and renumber it as proposed § 18.88.

The Department proposes to limit the application of this section to hearing transcripts and corrections to the transcript. The Department, therefore, proposes to delete the second and third sentences of the current subdivision (a). The second sentence refers to the basis of the judge's decision, which is controlled by sec. 557(b) of the APA. Because this current provision is covered by a statute, it is unnecessary to include the provision in the proposed § 18.88. The Department propose to delete the references to exhibits in the third sentence because the identification, marking, and inclusion of exhibits in the record are addressed by proposed § 18.82, *Exhibits.*

The Department proposes to amend the first sentence of the current subdivision (a) to require that all hearings be recorded and transcribed. The Department proposes to delete the methods of recording and transcription in recognition of the variety of technologies used to record and transcribe proceedings. The deletion, however, does not alter the meaning or application of the rule. The rule continues to require a transcript of a hearing.

Under subdivision (b), the Department proposes to extend the time permitted to file a motion to correct a transcript to 14 days. The current subdivision (b) requires that a party file the motion within 10 days of receipt of the transcript. This change to 14 days comports with the general revision to set time periods based on multiples of 7.

The Department proposes to add a new provision under subdivision (b) to permit a judge to correct a transcript on his or her own, without a prior motion from a party, prior to issuing a decision. If a judge corrects the transcript, the judge must provide notice to the parties.

Post Hearing

§ 18.90 Closing the record; additional evidence.

The Department proposes to revise the current §§ 18.54 and 18.55 and combine them into proposed § 18.90.

The Department proposes to combine the current § 18.54(a) and (b) into proposed subdivision (a). The Department proposes only stylistic changes to the language of these current subdivisions.

The Department proposes to incorporate the provisions contained in existing §§ 18.54(c) and 18.55 into proposed subdivision (b). The paragraph (b)(1) provides the standard the judge will apply when ruling on a motion to admit additional evidence. The proposed section retains the requirement that the additional evidence be ''new and material evidence.'' The proposed section requires that the party demonstrate that it could not have discovered the new evidence with reasonable diligence before the record closed.

Under paragraph (b)(1), the Department proposes to require the party offering the additional evidence to file a motion promptly after discovering the evidence. This sentence makes several changes to the existing requirement in § 18.55. First, the proposed section emphasizes that a party must file a motion asking to reopen the record for filing additional evidence. Requiring the party to file a motion incorporates the requirements of proposed § 18.33, *Motions and other papers,* including the time to respond to motions.

The Department proposes to delete the timeframe for filing and responding to additional evidence in the current § 18.55. Constraining the party to filing new evidence 20 days after the close of the hearing was an unnecessarily restrictive time limit. If a party promptly files a motion seeking to reopen the record based on new and material evidence that was not available before the hearing, the judge will consider the motion based on the requirements of the proposed (b)(1).

The Department proposes to clarify in paragraph (b)(2) that if the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

The Department proposes to revise the final sentence of the current § 18.54(c) and relocate it to proposed subdivision (c). The Department proposes to revise this subdivision to instruct the parties that the record will remain open for additional appropriate motions; the content of the record is defined in proposed § 18.88.

§ 18.91 Post-hearing brief.

The Department proposes to revise the current § 18.57 and separate the content into two separate sections: §§ 18.91, *Post-hearing briefs,* and 18.92, *Decisions of the administrative law judge.* The Department proposes to relocate the content from the current § 18.57(a) to proposed § 18.91.

The Department proposes to eliminate the 20-day filing period set in the current § 18.57(a). The 20-day timeframe for filing proposed findings of fact, conclusions of law, and a proposed order is rarely used by parties before OALJ. Instead, the parties follow the schedule ordered by the judge at the close of the formal hearing or the judge's order granting a hearing on the record. Accordingly, the proposed section permits the parties to file closing briefs within the time period established by the judge.

The Department determined that parties before OALJ rarely file proposed findings of facts and proposed order, as litigants file in state or federal district court. Rather, parties or their representatives typically file post-hearing briefs. Under the proposed § 19.91, the Department proposes that judges allow a party or representative to file a post-hearing brief that emphasizes the three major items parties should emphasize in closing briefs: findings of fact, conclusions of law and the specific relief sought. Like the current regulation, the proposed section requires that the post-hearing briefs refer to all portions of the record and cite authorities supporting the party's assertions.

The Department proposes to delete the provision in the current § 18.57(a) that requires parties to serve post-hearing filings on all parties. Under proposed § 18.30, *Service and filing,* all papers must be served on every party.

Therefore, it is unnecessary to repeat the requirement in this section.

§ 18.92 Decision and order.

The Department proposes to revise the current § 18.57 and separate the content into separate sections: §§ 18.91, *Post hearing briefs* and 18.92, *Decisions and order*. The Department proposes to delete the language from the current § 18.57(b) and replace it with proposed § 18.92.

The Department proposes to delete the reference to issuing a decision and order within 30 days of receipt of proposed consent findings and order. Instead, the proposed section states that ''at the conclusion of the proceeding, the judge must issue a written decision and order.'' OALJ has jurisdiction to decide claims under a variety of statutes which impose different, but specific timeframes for issuing a decision and order. When a statute or regulation does not specifically mention a timeframe for issuing a decision and order, the judge, as is current practice, will issue a decision and order within a reasonable time.

The Department proposes to delete the last three sentences of the current § 18.57. The statements repeat the requirements imposed by sec. 557(c) of the APA, therefore, the Department determined that it is unnecessary to repeat the substantive requirements of the judge's decision in OALJ's rules of procedure. These APA requirements will continue to apply to decisions and orders issued by OALJ judges.

§ 18.93 Motion for reconsideration.

The Department proposes to add a new § 18.93 modeled after Fed. R. Civ. P. 59(e), *Motions to alter or amend a judgment*.

Under proposed § 18.93, the Department proposes that ''a motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.'' The purpose of this section is to make clear that judges possess the power to alter or amend a judgment after its entry.

The Department proposes to set a 10-day limitation on filing a motion for reconsideration; however, it recognizes that governing statutes, regulations, and executive orders, such as the Black Lung regulations, may provide a different time for filing motions for reconsideration. In those circumstances, the rule of special application will apply.

§ 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.

The Department proposes to add a new § 18.94 modeled after Fed. R. Civ. P. 62.1 (December 1, 2009). The current Part 18, Subpart A does not specifically mention indicative rulings on a motion for relief that is barred by a pending appeal or petition for review. The proposed § 18.94 applies to motions made before a judge after an appeal has been docketed with an appellate board, and the judge no longer has jurisdiction over the merits of the case. At OALJ parties occasionally file post-appeal motions, so the Department determined that it is helpful to have a section that informs the judge and the appellate board how the motion should be addressed. Inclusion of this section is consistent with the Department's approach to include provisions from the FRCP unless the rule is inapplicable to OALJ proceedings.

The proposed § 18.94 does not attempt to define the circumstances in which an appeal limits or defeats the judge's authority to act in the face of a pending appeal. This section applies only when the rules that govern the relationship between the judge and appellate review boards deprive the judge of the authority to grant relief without appellate permission. If a judge concludes that he or she has authority to grant relief without appellate permission, he or she may act without falling back on the indicative ruling procedure.

Often it will be appropriate for the judge to determine whether the judge in fact would grant the motion if the appellate review board remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the judge may prefer to state that the motion raises a substantial issue, and to state the reasons why the judge prefers to decide it only if the appellate review board agrees that it would be useful to decide the motion before decision of the pending appeal. The judge is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not to be granted.

§ 18.95 Review of Decision

The Department proposes to revise the current § 18.58 and renumber it as proposed § 18.95. As in the current rule, the proposed rule states that the statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision. The Department does not propose any procedural changes to this rule.

Section Deletions

The Department proposes to delete the current § 18.13. The first sentence of the rule lists the methods of discovery available to a party. Prior to the 2007 amendments, the FRCP included a similar provision under Fed. R. Civ. P. 26; however, the 2007 amendments to the FRCP deleted this provision. The 2007 Advisory Committee Notes to Fed. R. Civ. P. 26 state that ''former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant.'' Similarly, the Department proposes to delete the first sentence of the current § 18.13 just as Fed. R. Civ. P. 26(a)(5) was deleted. The second sentence to the current § 18.13 explains that, unless the judge orders otherwise, there are no limits on the frequency or sequence for use of the discovery methods. The frequency, timing, and sequence of discovery are addressed by proposed § 18.50, *General provisions governing disclosure and discovery*. Accordingly, the Department proposes to delete the second sentence of the current § 18.13.

The Department proposes to delete the current § 18.32. The text of current § 18.32 is based on § 554(d) of the APA. This regulation repeats the statute without adding additional procedures or guidance, therefore, the Department proposes to delete it.

The Department proposes to delete the current § 18.33. The parties' right to a hearing within a reasonable time is encompassed in proposed § 18.10, *Scope and purpose*. The proposed § 18.10(a) states that the rules of procedure ''should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.'' The Department determined that repeating the statement of a speedy determination in current § 18.33 is redundant.

The Department proposes to delete the current § 18.53. The proposed § 18.12, *Proceedings before administrative law judge,* which combines the current §§ 18.25 and 18.29, addresses the ability of the judge to conduct the hearing. The contents of the current § 18.53 are repetitious given the revisions to the proposed § 18.12.

The Department proposes to delete the current § 18.59. If OALJ receives a request for a certified copy of the record,

the request would originate with a reviewing body or court. The terms of sending the record would be controlled by the request or court order. Thus, it is not practicable to have a uniform rule governing the procedure for sending a certified copy of the record. Further, determining the appropriate record custodian and the procedures for certifying the record are internal matters within OALJ and the Department. Based on these facts, the Department has determined that the current § 18.59 should be deleted.

List of Subjects in 29 CFR Part 18

Administrative practice and procedure, Labor.

Signed at Washington, DC.

Hilda L. Solis,

U.S. Secretary of Labor.

For the reasons set out in the Preamble, the Office of the Secretary, Labor proposes to amend 29 CFR part 18 as set forth below.

PART 18—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

1. The authority citations for Part 18 continue to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 551–553; 5 U.S.C. 571 note; E.O. 12778; 57 FR 7292.

2. Revise Subpart A to read as follows:

Subpart A—General

Sec.

General Provisions

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18.11 Definitions.
18.12 Proceedings before administrative law judge.
18.13 Settlement judge procedure.
18.14 Ex parte communication.
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Parties and Representatives

18.20 Parties to a proceeding.
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18.23 Disqualification and discipline of representatives.
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Service, Format and Timing of Filings and Other Papers

18.30 Service and filing.
18.31 Privacy protection for filings and exhibits.
18.32 Computing and extending time.
18.33 Motions and other papers.
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Prehearing Procedure

18.40 Notice of hearing.
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18.42 Expedited proceedings.
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Disclosure and Discovery

18.50 General provisions governing disclosure and discovery.
18.51 Discovery scope and limits.
18.52 Protective orders.
18.53 Supplementing disclosures and responses.
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18.55 Using depositions at hearings.
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Types of Discovery

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18.62 Physical and mental examinations.
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Disposition Without Hearing

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18.80 Prehearing statement.
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Post Hearing

18.90 Closing the record; subsequent motions.
18.91 Post-hearing brief.
18.92 Decision and order.
18.93 Motion for reconsideration.
18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.
18.95 Review of Decision.

General Provisions

§ 18.10 Scope and purpose.

(a) *In general.* These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

(b) *Type of proceeding.* Unless the governing statute, regulation, or executive order prescribes a different procedure, proceedings follow the Administrative Procedure Act, 5 U.S.C. 551 through 559.

(c) *Waiver, modification, and suspension.* Upon notice to all parties, the presiding judge may waive, modify, or suspend any rule under this subpart when doing so will not prejudice a party and will serve the ends of justice.

§ 18.11 Definitions.

For purposes of these rules, these definitions supplement the definitions in the Administrative Procedure Act, 5 U.S.C. 551.

(a) *Calendar call* means a meeting in which the judge calls cases awaiting hearings, determines case status, and assigns a hearing date and time.

(b) *Chief Judge* means the Chief Administrative Law Judge of the United States Department of Labor Office of Administrative Law Judges and judges to whom the Chief Judge delegates authority.

(c) *Docket clerk* means the Chief Docket Clerk at the Office of Administrative Law Judges in Washington, DC. But once a case is assigned to a judge in a district office, *docket clerk* means the docket staff in that office.

(d) *Hearing* means that part of a proceeding consisting of a session to decide issues of fact or law that is recorded and transcribed and provides the opportunity to present evidence or argument.

(e) *Judge* means an administrative law judge appointed under the provisions of 5 U.S.C. 3105.

(f) *Order* means the judge's disposition of one or more procedural or substantive issues, or of the entire matter.

(g) *Proceeding* means an action before the Office of Administrative Law Judges that creates a record leading to an adjudication or order.

(h) *Representative* means any person permitted to represent another in a proceeding before the Office of Administrative Law Judges.

§ 18.12 Proceedings before administrative law judge.

(a) *Designation.* The Chief Judge designates the presiding judge for all proceedings.

(b) *Authority.* In all proceedings under this Part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

(1) regulate the course of proceedings in accordance with applicable statute, regulation or executive order;

(2) administer oaths and affirmations and examine witnesses;

(3) compel the production of documents and appearance of witnesses within a party's control;

(4) issue subpoenas authorized by law;

(5) rule on offers of proof and receive relevant evidence;

(6) dispose of procedural requests and similar matters;

(7) terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order;

(8) issue decisions and orders;

(9) exercise powers vested in the Secretary of Labor that relate to proceedings before the Office of Administrative Law Judges; and

(10) take actions authorized by the FRCP.

§ 18.13 Settlement judge procedure.

(a) *How initiated.* The Office of Administrative Law Judges provides settlement judges to aid the parties in resolving the matter that is the subject of the controversy. Upon a joint request by the parties or upon referral by the judge when no party objects, the Chief Judge may appoint a settlement judge. A settlement judge will not be appointed when settlement proceedings would be inconsistent with a statute, regulation, or executive order.

(b) *Appointment.* The Chief Judge has discretion to appoint a settlement judge, who must be an active or retired judge. The settlement judge will not be appointed to hear and decide the case or approve the settlement without the parties' consent and the approval of the Chief Judge.

(c) *Duration of settlement proceeding.* Unless the Chief Judge directs otherwise, settlement negotiations under this section must be completed within 60 days from the date of the settlement judge's appointment. The settlement judge may request that the Chief Judge extend the appointment. The negotiations will be terminated if a party withdraws from participation, or if the settlement judge determines that further negotiations would be unproductive or inappropriate.

(d) *Powers of the settlement judge.* The settlement judge may convene settlement conferences; require the parties or their representatives to attend with full authority to settle any disputes; and impose other reasonable requirements to expedite an amicable resolution of the case.

(e) *Stay of proceedings before presiding judge.* The appointment of a settlement judge does not stay any aspect of the proceeding before the presiding judge. Any motion to stay must be directed to the presiding judge.

(f) *Settlement conferences.* Settlement conferences may be conducted by telephone, videoconference or in person at the discretion of the settlement judge after considering the nature of the case, location of the participants, availability of technology, and efficiency of administration.

(g) *Confidentiality.* All discussions with the settlement judge are confidential; none may be recorded or transcribed. The settlement judge must not disclose any confidential communications made during settlement proceedings, except as required by statute, executive order, or court order. The settlement judge may not be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings before the Department to testify to statements made or conduct during the settlement discussions.

(h) *Report.* The parties must promptly inform the presiding judge of the outcome of the settlement negotiations. If a settlement is reached, the parties must submit the required documents to the presiding judge within 14 days of the conclusion of settlement discussions unless the presiding judge orders otherwise.

(i) *Non-reviewable decisions.* Whether a settlement judge should be appointed, the selection of a particular settlement judge, or the termination of proceedings under this section, are matters not subject to review by Department officials.

§ 18.14 Ex parte communication.

The parties, their representatives, or other interested persons must not engage in ex parte communications on the merits of a case with the judge.

§ 18.15 Substitution of administrative law judge.

(a) *Substitution during hearing.* If the judge is unable to complete a hearing, a successor judge designated pursuant to § 18.12 may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. The successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(b) *Substitution following hearing.* If the judge is unable to proceed after the hearing is concluded, the successor judge appointed pursuant to § 18.12 may issue a decision and order based upon the existing record after notifying the parties and giving them an opportunity to respond. Within 14 days of receipt of the judge's notice, a party may file an objection to the judge issuing a decision based on the existing record. If no objection is filed, the objection is considered waived. Upon good cause shown, the judge may order supplemental proceedings.

§ 18.16 Disqualification.

(a) *Disqualification on judge's initiative.* A judge must withdraw from a proceeding whenever he or she considers himself or herself disqualified.

(b) *Request for disqualification.* A party may file a motion to disqualify the judge. The motion must allege grounds for disqualification, and include any appropriate supporting affidavits, declarations or other documents. The presiding judge must rule on the motion in a written order that states the grounds for the ruling.

§ 18.17 Legal assistance.

The Office of Administrative Law Judges does not appoint representatives, refer parties to representatives, or provide legal assistance.

Parties and Representatives

§ 18.20 Parties to a proceeding.

A party seeking original relief or action is designated a complainant, claimant or plaintiff, as appropriate. A party against whom relief or other action is sought is designated a respondent or defendant, as appropriate. When participating in a proceeding, the applicable Department of Labor's agency is a party or party-in-interest.

§ 18.21 Party appearance and participation.

(a) *In general.* A party may appear and participate in the proceeding in person or through a representative.

(b) *Waiver of participation.* By filing notice with the judge, a party may waive the right to participate in the hearing or the entire proceeding. When all parties waive the right to participate in the hearing, the judge may issue a decision and order based on the pleadings, evidence, and briefs.

(c) *Failure to appear.* When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

§ 18.22 Representatives.

(a) *Notice of appearance.* When first making an appearance, each representative must file a notice of appearance that indicates on whose behalf the appearance is made and the proceeding name and docket number. The notice of appearance shall also include the statements and documentation required for admission to appear for the applicable category of representation found in subdivision (b) of this section.

(b) *Categories of representation; admission standards.*

(1) *Attorney representative.* Under these rules, ''attorney'' or ''attorney representative'' means an individual who has been admitted to the bar of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(A) *Attorney in good standing.* An attorney who is in good standing in his or her licensing jurisdiction may represent a party or subpoenaed witness before the Office of Administrative Law Judges. The attorney's representation of good standing is sufficient proof of good standing, unless otherwise directed by the judge.

(B) *Attorney not in good standing.* An attorney who is not in good standing in his or her licensing jurisdiction may not represent a party or subpoenaed witness before the Office of Administrative Law Judges, unless he or she obtains the judge's approval. Such an attorney must file a written statement that establishes why the failure to maintain good standing is not disqualifying. The judge may deny approval for the appearance of such an attorney after providing notice and an opportunity to be heard.

(C) *Disclosure of discipline.* An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting him or her in the practice of law.

(2) *Non-attorney representative.* An individual who is not an attorney as defined by paragraph (b)(1) may represent a party or subpoenaed witness upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party or subpoenaed witness represented and certifies that the party or subpoenaed witness desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

(c) *Duties.* A representative must be diligent, prompt, and forthright when dealing with parties, representatives and the judge, and act in a manner that furthers the efficient, fair and orderly conduct of the proceeding. An attorney representative must adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice.

(d) *Prohibited actions.* A representative must not:

(1) threaten, coerce, intimidate, deceive or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in the proceeding regarding any matter related to the proceeding;

(2) knowingly make or present false or misleading statements, assertions or representations about a material fact or law related to the proceeding;

(3) unreasonably delay, or cause to be delayed, without good cause, any proceeding; or

(4) engage in any other action or behavior prejudicial to the fair and orderly conduct of the proceeding.

(e) *Withdrawal of appearance.* A representative who desires to withdraw after filing a notice of appearance or a party desiring to withdraw the appearance of a representative must file a motion with the judge. The motion must state that notice of the withdrawal has been given to the party, client or representative. The judge may deny a representative's motion to withdraw when necessary to avoid undue delay or prejudice to the rights of a party.

§ 18.23 Disqualification and discipline of representatives.

(a) *Disqualification.*

(1) *Grounds for disqualification.* Representatives qualified under § 18.22 may be disqualified upon:

(A) conviction of a felony;

(B) conviction of a misdemeanor, a necessary element of which includes:

(i) interference with the administration of justice;

(ii) false swearing;

(iii) misrepresentation;

(iv) fraud;

(v) willful failure to file an income tax return;

(vi) deceit;

(vii) bribery;

(viii) extortion;

(ix) misappropriation;

(x) theft; or

(xi) attempt, conspiracy, or solicitation to commit a serious crime.

(C) suspension or disbarment by any court or agency of the United States, the District of Columbia, any state, territory, commonwealth or possession of the United States;

(D) disbarment on consent or resignation from the bar of a court or agency while an investigation into an allegation of misconduct is pending;

(2) *Disqualification procedure.* The Chief Judge must provide notice and an opportunity to be heard as to why the representative should not be disqualified from practice before the Office of Administrative Law Judges. The notice will include a copy of the document that provides the grounds for the disqualification. Unless otherwise directed, any response must be filed within 21 days of service of the notice. The Chief Judge's determination must be based on the reliable, probative and substantial evidence of record, including the notice and response.

(b) *Discipline.*

(1) *Grounds for discipline.* The Office of Administrative Law Judges may suspend, disqualify, or otherwise discipline a representative. Conduct that may result in discipline includes:

(A) an act, omission, or contumacious conduct relating to any proceeding before OALJ that violates these rules, an applicable statute, an applicable regulation, or the judge's order or instruction; or

(B) failure to adhere to the applicable rules of conduct for the jurisdiction(s) in which the attorney is admitted to practice in any proceeding before OALJ.

(2) *Disciplinary procedure.*

(A) *Notice.* The Chief Judge must notify the representative of the grounds for proposed discipline, and of the opportunity for a hearing. A request for hearing must be filed within 21 days of service of the notice.

(B) *Default.* If the representative does not respond to the notice, the Chief Judge may issue a final disciplinary order.

(C) *Disciplinary proceedings.* If the representative responds to the notice, the Chief Judge will designate a judge to conduct a hearing, if requested, and to

issue a decision and order. The representative has the opportunity to present evidence, and argument. The decision must be based on the reliable, probative and substantial evidence of record, including any submissions from the representative.

(D) *Petition for review.* A petition to review the decision and order must be filed with the Chief Judge within 30 days of the date of the decision and order, and state the grounds for review. The Chief Judge reviews the decision and order under the substantial evidence standard. The Chief Judge's decision is not subject to review within the Department of Labor.

(c) *Notification of disciplinary action.* When an attorney representative is suspended or disqualified, the Chief Judge will notify the jurisdiction(s) in which the attorney is admitted to practice and the National Lawyer Regulatory Data Bank maintained by the American Bar Association Standing Committee on Professional Discipline, by providing a copy of the decision and order.

(d) *Application for reinstatement.* A representative suspended or disqualified under this section may be reinstated by the Chief Judge upon application. At the discretion of the Chief Judge, consideration of an application for reinstatement may be limited to written submissions or may be referred for further proceedings pursuant to paragraph (b)(2) of this section.

§ 18.24 Briefs from amicus curiae.

The United States or an officer or agency thereof, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief without the consent of the parties or leave of the judge. Any other amicus curiae may file a brief only by leave of the judge, upon the judge's request, or if the brief states that all parties have consented to its filing. A request for leave to file an amicus brief must be made by written motion that states the interest of the movant in the proceeding. Unless otherwise directed by the judge, an amicus brief must be filed by the close of the hearing.

Service, Format and Timing of Filings and Other Papers

§ 18.30 Service and filing.

(a) *Service on parties.*

(1) *In general.* Unless these rules provide otherwise, all papers filed with OALJ or with the judge must be served on every party.

(2) *Service: how made.*

(A) *Serving a party's representative.* If a party is represented, service under this section must be made on the representative. The judge also may order service on the party.

(B) *Service in general.* A paper is served under this section by:

(i) handing it to the person;

(ii) leaving it:

(a) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(b) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(iii) mailing it to the person's last known address—in which event service is complete upon mailing;

(iv) leaving it with the docket clerk if the person has no known address;

(v) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(vi) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) *Certificate of service.* A certificate of service is a signed written statement that the paper was served on all parties. The statement must include:

(A) the title of the document;

(B) the name and address of each person or representative being served;

(C) the name of the party filing the paper and the party's representative, if any;

(D) the date of service; and

(E) how the paper was served.

(b) *Filing with Office of Administrative Law Judges.*

(1) *Required filings.* Any paper that is required to be served must be filed within a reasonable time after service with a certificate of service. But disclosures under § 18.50(c) and the following discovery requests and responses must not be filed until they are used in the proceeding or the judge orders filing:

(A) notices of deposition,

(B) depositions,

(C) interrogatories,

(D) requests for documents or tangible things or to permit entry onto land; and

(E) requests for admission.

(2) *Filing: when made—in general.* A paper is filed when received by the docket clerk or the judge during a hearing.

(3) *Filing how made.* A paper may be filed by mail, courier service, hand delivery, facsimile or electronic delivery.

(A) *Filing by facsimile.*

(i) *When permitted.* A party may file by facsimile only as directed or permitted by the judge. If a party cannot obtain prior permission because the judge is unavailable, a party may file by facsimile up to 12 pages, including a statement of the circumstances precluding filing by delivery or mail. Based on the statement, the judge may later accept the document as properly filed at the time transmitted.

(ii) *Cover sheet.* Filings by facsimile must include a cover sheet that identifies the sender, the total number of pages transmitted, and the matter's docket number and the document's title.

(iii) *Retention of the original document.* The original signed document will not be substituted into the record unless required by law or the judge.

(B) Any party filing a facsimile of a document must maintain the original document and transmission record until the case is final. A transmission record is a paper printed by the transmitting facsimile machine that states the telephone number of the receiving machine, the number of pages sent, the transmission time and an indication that no error in transmission occurred.

(C) Upon a party's request or judge's order, the filing party must provide for review the original transmitted document from which the facsimile was produced.

(4) *Electronic filing, signing, or verification.* A judge may allow papers to be filed, signed, or verified by electronic means.

§ 18.31 Privacy protection for filings and exhibits.

(a) *Redacted filings and exhibits.* Unless the judge orders otherwise, in an electronic or paper filing or exhibit that contains an individual's Social-Security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, the party or nonparty making the filing must redact all such information, except:

(1) the last four digits of the Social-Security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) *Exemptions from the redaction requirement.* The redaction requirement does not apply to the following:

(1) the record of an administrative or agency proceeding;

(2) the official record of a state-court proceeding;

(3) the record of a court or tribunal, if that record was not subject to the

redaction requirement when originally filed; and

(4) a filing or exhibit covered by paragraph (c) of this section.

(c) *Option for filing a reference list.* A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(d) *Waiver of protection of identifiers.* A person waives the protection of paragraph (a) of this section as to the person's own information by filing or offering it without redaction and not under seal.

(e) *Protection of material.* For good cause, the judge may order protection of material pursuant to §§ 18.85, *Privileged, sensitive, or classified material* and 18.52, *Protective orders.*

§ 18.32 Computing and extending time.

(a) *Computing time.* The following rules apply in computing any time period specified in these rules, a judge's order, or in any statute, regulation, or executive order that does not specify a method of computing time.

(1) When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *''Last day'' defined.* Unless a different time is set by a statute, regulation, executive order, or judge's order, the ''last day'' ends at 4:30 p.m. local time where the event is to occur.

(3) *''Next day'' defined.* The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(4) *''Legal holiday'' defined.* ''Legal holiday'' means the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and any day declared a holiday by the President or Congress.

(b) *Extending time.* When an act may or must be done within a specified time, the judge may, for good cause, extend the time:

(1) with or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or

(2) on motion made after the time has expired if the party failed to act because of excusable neglect.

(c) *Additional time after certain kinds of service.* When a party may or must act within a specified time after service and service is made under § 18.30(a)(2)(B)(iii) or (iv), 3 days are added after the period would otherwise expire under paragraph (a) of this section.

§ 18.33 Motions and other papers.

(a) *In general.* A request for an order must be made by motion. The motion must:

(1) be in writing, unless made during a hearing;

(2) state with particularity the grounds for seeking the order;

(3) state the relief sought;

(4) unless the relief sought has been agreed to by all parties, be accompanied by affidavits, declarations, or other evidence; and

(5) if required by subsection (c)(4), include a memorandum of points and authority supporting the movant's position.

(b) *Form.* The rules governing captions and other matters of form apply to motions and other requests.

(c) *Written motion before hearing.*

(1) A written motion before a hearing must be served with supporting papers, at least 21 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules or an appropriate statute, regulation, or executive order set a different time; or,

(C) when an order sets a different time.

(2) A written motion served within 21 days before the hearing must state why the motion was not made earlier.

(3) A written motion before hearing must state that counsel conferred, or attempted to confer, with opposing counsel in a good faith effort to resolve the motion's subject matter, and whether the motion is opposed or unopposed. A statement of consultation is not required with pro se litigants or with the following motions:

(A) to dismiss;

(B) for summary decision; and

(C) any motion filed as ''joint,'' ''agreed,'' or ''unopposed.''

(4) Unless the motion is unopposed, the supporting papers must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authority must also be submitted. A Judge may direct the parties file additional documents in support of any motion.

(d) *Opposition or other response to a motion filed prior to hearing.* A party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. The opposition or response may be accompanied by affidavits, declarations, or other evidence, and a memorandum of the points and authorities supporting the party's position. Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted. Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

(e) A *motions made at hearing.* A motion made at a hearing may be stated orally unless the judge determines that a written motion or response would best serve the ends of justice.

(f) *Renewed or repeated motions.* A motion seeking the same or substantially similar relief previously denied, in whole or in part, must include the following information:

(1) the earlier motion(s);

(2) when the respective motion was made,

(3) the judge to whom the motion was made,

(4) the earlier ruling(s), and

(5) the basis for the current motion.

(g) *Motion hearing.* The judge may order a hearing to take evidence or oral argument on a motion.

§ 18.34 Format of papers filed.

Every paper filed must be printed in black ink on 8.5 x 11-inch opaque white paper and begin with a caption that includes:

(a) the parties' names,

(b) a title that describes the paper's purpose, and

(c) the docket number assigned by the Office of Administrative Law Judges. If the Office has not assigned a docket number, the paper must bear the case number assigned by the Department of Labor agency where the matter originated. If the case number is an individual's Social Security number then only the last four digits may be used. *See* 18.31(a)(1).

§ 18.35 Signing motions and other papers; representations to the judge; sanctions.

(a) *Date and signature.* Every written motion and other paper filed with OALJ must be dated and signed by at least one

representative of record in the representative's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and email address, if any. The judge must strike an unsigned paper unless the omission is promptly corrected after being called to the representative's or party's attention.

(b) *Representations to the judge.* By presenting to the judge a written motion or other paper—whether by signing, filing, submitting, or later advocating it—the representative or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceedings;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) *Sanctions.*

(1) *In general.* If, after notice and a reasonable opportunity to respond, the judge determines that paragraph (b) of this section has been violated, the judge may impose an appropriate sanction on any representative, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates paragraph (b) of this section. The motion must be served under § 18.30(a), but it must not be filed or be presented to the judge if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the judge sets.

(3) *On the judge's initiative.* On his or her own, the judge may order a representative, law firm, or party to show cause why conduct specifically described in the order has not violated paragraph (b) of this section.

(4) *Nature of a sanction.* A sanction imposed under this section must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.

(5) *Requirements for an order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to discovery.* This section does not apply to disclosures and discovery requests, responses, objections, and motions under §§ 18.50 through 18.65.

§ 18.36 Amendments after referral to the Office of Administrative Law Judges.

The judge may allow parties to amend and supplement their filings.

Prehearing Procedure

§ 18.40 Notice of hearing.

(a) *In general.* Except when the hearing is scheduled by calendar call, the judge must notify the parties of the hearing's date, time, and place at least 14 days before the hearing. The notice is sent by regular, first-class mail, unless the judge determines that circumstances require service by certified mail or other means. The parties may agree to waive the 14-day notice for the hearing.

(b) *Date, time, and place.* The judge must consider the convenience and necessity of the parties and the witnesses in selecting the date, time, and place of the hearing.

§ 18.41 Continuances and changes in place of hearing.

(a) *By the judge.* Upon reasonable notice to the parties, the judge may change the time, date, and place of the hearing.

(b) *By a party's motion.* A request by a party to continue a hearing or to change the place of the hearing must be made by motion.

(1) *Continuances.* A motion for continuance must be filed promptly after the party becomes aware of the circumstances supporting the continuance. In exceptional circumstances, a party may orally request a continuance and must immediately notify the other parties of the continuance request.

(2) *Change in place of hearing.* A motion to change the place of a hearing must be filed promptly.

§ 18.42 Expedited proceedings.

A party may move to expedite the proceeding. The motion must demonstrate the specific harm that would result if the proceeding is not expedited. If the motion is granted, the formal hearing ordinarily will not be scheduled with less than 7 days notice to the parties, unless all parties consent to an earlier hearing.

§ 18.43 Consolidation; separate hearings.

(a) *Consolidation.* If separate proceedings before the Office of the Administrative Law Judges involve a common question of law or fact, a judge may:

(1) join for hearing any or all matters at issue in the proceedings;

(2) consolidate the proceedings; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate hearings.* For convenience, to avoid prejudice, or to expedite and economize, the judge may order a separate hearing of one or more issues.

§ 18.44 Prehearing conference.

(a) *In general.* The judge, with or without a motion, may order one or more prehearing conferences for such purposes as:

(1) expediting disposition of the proceeding;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful prehearing activities;

(4) improving the quality of the hearing through more thorough preparation; and

(5) facilitating settlement.

(b) *Scheduling.* Prehearing conferences may be conducted in person, by telephone, or other means after reasonable notice of time, place and manner of conference has been given.

(c) *Participation.* All parties must participate in prehearing conferences as directed by the judge. A represented party must authorize at least one of its attorneys or representatives to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at the prehearing conference, including possible settlement.

(d) *Matters for consideration.* At the conference, the judge may consider and take appropriate actions on the following matters:

(1) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(2) amending the papers that had framed the issues before the matter was referred for hearing;

(3) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(4) avoiding unnecessary proof and cumulative evidence, and limiting the number of expert or other witnesses;

(5) determining the appropriateness and timing of dispositive motions under §§ 18.70 and 18.72;

(6) controlling and scheduling discovery, including orders affecting disclosures and discovery under §§ 18.50 through 18.65;

(7) identifying witnesses and documents, scheduling the filing and exchange of any exhibits and prehearing submissions, and setting dates for further conferences and for the hearing;

(8) referring matters to a special master;

(9) settling the case and using special procedures to assist in resolving the dispute such as the settlement judge procedure under § 18.13, private mediation, and other means authorized by statute or regulation;

(10) determining the form and content of prehearing orders;

(11) disposing of pending motions;

(12) adopting special procedures for managing potentially difficult or protracted proceedings that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) consolidating or ordering separate hearings under § 18.43;

(14) ordering the presentation of evidence early in the proceeding on a manageable issue that might, on the evidence, be the basis for disposing of the proceeding;

(15) establishing a reasonable limit on the time allowed to present evidence; and

(16) facilitating in other ways the just, speedy, and inexpensive disposition of the proceeding.

(e) *Reporting.* The judge may direct that the prehearing conference be recorded and transcribed. If the conference is not recorded, the judge should summarize the conference proceedings on the record at the hearing or by separate prehearing notice or order.

Disclosure and Discovery

§ 18.50 General provisions governing disclosure and discovery.

(a) *Timing and sequence of discovery.*

(1) *Timing.* A party may seek discovery at any time after a judge issues an initial notice or order. But if the judge orders the parties to confer under paragraph (b) of this section:

(A) the time to respond to any pending discovery requests is extended until the time agreed in the discovery plan, or that the judge sets in resolving disputes about the discovery plan, and

(B) no party may seek additional discovery from any source before the parties have conferred as required by paragraph (b) of this section, except by stipulation.

(2) *Sequence.* Unless, on motion, the judge orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(b) *Conference of the parties; planning for discovery.*

(1) *In general.* The judge may order the parties to confer on the matters described in paragraphs (b)(2) and (3) of this section.

(2) *Conference content; parties' responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by paragraph (c) of this section; discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The representatives of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the judge within 14 days after the conference a written report outlining the plan. The judge may order the parties or representatives to attend the conference in person.

(3) *Discovery plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under paragraph (c) of this section, including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as hearing-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the judge to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed; and

(F) any other orders that the judge should issue under § 18.52 or under § 18.44.

(c) *Required disclosures.*

(1) *Initial disclosure.*

(A) *In general.* Except as exempted by paragraph (c)(1)(B) of this section or otherwise ordered by the judge, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under § 18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

(B) *Proceedings exempt from initial disclosure.* The following proceedings are exempt from initial disclosure:

(i) a proceeding under 29 CFR part 20 for review of an agency determination regarding the existence or amount of a debt, or the repayment schedule proposed by the agency;

(ii) a proceeding before the Board of Alien Labor Certification Appeals under the Immigration and Nationality Act; and

(iii) a proceeding under the regulations governing certification of H–2 non-immigrant temporary agricultural employment at 20 CFR part 655, subpart B;

(iv) a rulemaking proceeding under the Occupational Safety and Health Act of 1970; and

(v) a proceeding for civil penalty assessments under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132.

(C) *Parties Exempt from Initial Disclosure.* The following parties are exempt from initial disclosure:

(i) in a Black Lung benefits proceeding under 30 U.S.C. 901 *et seq.,* the representative of the Office of

Workers' Compensation Programs of the Department of Labor, if an employer has been identified as the Responsible Operator and is a party to the proceeding (*see* 20 CFR 725.418(d)); and

(ii) in a proceeding under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.,* or an associated statute such as the Defense Base Act, 42 U.S.C. 1651 *et seq.,* the representative of the Office of Workers' Compensation Programs of the Department of Labor, unless the Solicitor of Labor or the Solicitor's designee has elected to participate in the proceeding under 20 CFR 702.333(b), or unless an employer or carrier has applied for relief under the special fund, as defined in 33 U.S.C. 908(f).

(D) *Time for initial disclosures—in general.* A party must make the initial disclosures required by paragraph (c)(1)(A) of this section within 21 days after an initial notice or order is entered acknowledging that the proceeding has been docketed at the OALJ unless (i) a different time is set by stipulation or a judge's order, or (ii) a party objects during the conference that initial disclosures are not appropriate in the proceeding and states the objection in the proposed discovery plan. In ruling on the objection, the judge must determine what disclosures, if any, are to be made and must set the time for disclosure.

(E) *Time for initial disclosures—for parties served or joined later.* A party that is first served or otherwise joined later in the proceeding must make the initial disclosures within 21 days after being served or joined, unless a different time is set by stipulation or the judge's order.

(F) *Basis for initial disclosure; unacceptable excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of expert testimony.*

(A) *In general.* A party must disclose to the other parties the identity of any witness who may testify at hearing, either live or by deposition. The judge should set the time for the disclosure by prehearing order.

(B) *Witnesses who must provide a written report.* Unless otherwise stipulated or ordered by the judge, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial, a hearing, or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses who do not provide a written report.* Unless otherwise stipulated or ordered by the judge that the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present expert opinion evidence; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Supplementing the disclosure.* The parties must supplement these disclosures when required under § 18.53.

(3) *Prehearing disclosures.* In addition to the disclosures required by paragraphs (c)(1) and (2) of this section, a party must provide to the other parties and promptly file the prehearing disclosures described in § 18.80.

(4) *Form of disclosures.* Unless the judge orders otherwise, all disclosures under paragraph (c) under this section must be in writing, signed, and served.

(d) *Signing disclosures and discovery requests, responses, and objections.*

(1) *Signature required; effect of signature.* Every disclosure under paragraph (c) of this section and every discovery request, response, or objection must be signed by at least one of the party's representatives in the representative's own name, or by the party personally if unrepresented, and must state the signer's address, telephone number, facsimile number, and email address, if any. By signing, a representative or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the judge must strike it unless a signature is promptly supplied after the omission is called to the representative's or party's attention.

(3) *Sanction for improper certification.* If a certification violates this section without substantial justification, the judge, on motion or on his or her own, must impose an appropriate sanction, as provided in § 18.57, on the signer, the party on whose behalf the signer was acting, or both.

§ 18.51 Discovery scope and limits.

(a) *Scope in general.* Unless otherwise limited by a judge's order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding. Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by paragraph (b)(4) of this section.

(b) *Limitations on frequency and extent.*

(1) *When permitted.* By order, the judge may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under § 18.64. The judge's order may also limit the number of requests under § 18.63.

(2) *Specific limitations on electronically stored information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not

reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of paragraph (b)(4) of this section. The judge may specify conditions for the discovery.

(3) By requesting electronically stored information, a party consents to the application of Federal Rule of Evidence 502 with regard to inadvertently disclosed privileged or protected information.

(4) *When required.* On motion or on his or her own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules when:

(A) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(c) *Hearing preparation: materials.*

(1) *Documents and tangible things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for hearing by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to paragraph (d) of this section, those materials may be discovered if:

(A) they are otherwise discoverable under paragraph (a) of this section; and

(B) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(2) *Protection against disclosure.* A judge who orders discovery of those materials must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's representative concerning the litigation.

(3) *Previous statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a judge's order. A previous statement is either:

(A) a written statement that the person has signed or otherwise adopted or approved; or

(B) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(d) *Hearing preparation: experts.*

(1) *Deposition of an expert who may testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If § 18.50(c)(2)(B) requires a report from the expert the deposition may be conducted only after the report is provided, unless the parties stipulate otherwise.

(2) *Hearing-preparation protection for draft reports or disclosures.* Paragraphs (c)(1) and (2) of this section protect drafts of any report or disclosure required under § 18.50(c)(2), regardless of the form in which the draft is recorded.

(3) *Hearing-preparation protection for communications between a party's representative and expert witnesses.* Paragraphs (c)(1) and (2) under this section protect communications between the party's representative and any witness required to provide a report under § 18.50(c)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(A) relate to compensation for the expert's study or testimony;

(B) identify facts or data that the party's representative provided and that the expert considered in forming the opinions to be expressed; or

(C) identify assumptions that the party's representative provided and that the expert relied on in forming the opinions to be expressed.

(4) *Expert employed only for hearing preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for hearing and whose testimony is not anticipated to be used at the hearing. But a party may do so only:

(A) as provided in § 18.62(b); or

(B) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(e) *Claiming privilege or protecting hearing-preparation materials.*

(1) *Information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as hearing-preparation material, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(2) *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as hearing-preparation material, the party making the claim must notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge for an *in camera* determination of the claim. The producing party must preserve the information until the claim is resolved.

§ 18.52 Protective orders.

(a) *In general.* A party or any person from whom discovery is sought may file a written motion for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without the judge's action. The judge may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) forbidding the disclosure or discovery;

(2) specifying terms, including time and place, for the disclosure or discovery;

(3) prescribing a discovery method other than the one selected by the party seeking discovery;

(4) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(5) designating the persons who may be present while the discovery is conducted;

(6) requiring that a deposition be sealed and opened only on the judge's order;

(7) requiring that a trade secret or other confidential research, development, or commercial

information not be revealed or be revealed only in a specified way; and

(8) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the judge directs.

(b) *Ordering discovery.* If a motion for a protective order is wholly or partly denied, the judge may, on just terms, order that any party or person provide or permit discovery.

§ 18.53 Supplementing disclosures and responses.

(a) *In general.* A party who has made a disclosure under § 18.50(c)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(1) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(2) as ordered by the judge.

(b) *Expert witness.* For an expert whose report must be disclosed under § 18.50(c)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's prehearing disclosures under § 18.50(c)(3) are due.

§ 18.54 Stipulations about discovery procedure.

Unless the judge orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have the judge's approval if it would interfere with the time set for completing discovery, for hearing a motion, or for hearing.

§ 18.55 Using depositions at hearings.

(a) *Using depositions.*

(1) *In general.* At a hearing, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the applicable rules of evidence if the deponent were present and testifying; and

(C) the use is allowed by paragraphs (a)(2) through (8) of this section.

(2) *Impeachment and other uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the applicable rules of evidence.

(3) *Deposition of party, agent, or designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under § 18.64(b)(6) or § 18.65(a)(4).

(4) *Deposition of expert, treating physician, or examining physician.* A party may use for any purpose the deposition of an expert witness, treating physician or examining physician.

(5) *Unavailable witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the judge finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of live testimony in an open hearing—to permit the deposition to be used.

(6) *Limitations on use.*

(A) *Deposition taken on short notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under § 18.52(a)(2) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable deponent; party could not obtain a representative.* A deposition taken without leave of the judge under the unavailability provision of § 18.64(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain a representative to represent it at the deposition.

(7) *Using part of a deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(8) *Deposition taken in an earlier action.* A deposition lawfully taken may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the applicable rules of evidence.

(b) *Objections to admissibility.* Subject to paragraph (d)(3) of this section, an objection may be made at a hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of presentation.* Unless the judge orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but the judge may receive the testimony in nontranscript form as well.

(d) *Waiver of objections.*

(1) *To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the officer's qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition.*

(A) *Objection to competence, relevance, or materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) *Objection to a written question.* An objection to the form of a written question under § 18.65 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To completing and returning the deposition.* An objection to how the officer transcribed the testimony—or

prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

§ 18.56 Subpoena.

(a) *In general.*

(1) Upon written application of a party the judge may issue a subpoena authorized by statute or law that requires a witness to attend and to produce relevant papers, books, documents, or tangible things in the witness' possession or under the witness' control.

(2) *Form and contents.*

(A) *Requirements—in general.* Every subpoena must:

(i) state the title of the matter and show the case number assigned by the Office of Administrative Law Judges or the Office of Worker's Compensation Programs. In the event that the case number is an individual's Social Security number only the last four numbers may be used. *See* § 18.31(a)(1);

(ii) bear either the signature of the issuing judge or the signature of an attorney authorized to issue the subpoena under paragraph (a)(3) of this section;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of paragraphs (c) and (d) of this section.

(B) *Command to attend a deposition—notice of the recording method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition or hearing, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to produce; included obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(3) The judge may, by order in a specific proceeding, authorize an attorney representative to issue and sign a subpoena.

(b) *Service.*

(1) *By whom; tendering fees; serving a copy of certain subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering with it the fees for 1 day's attendance and the mileage allowed by law. Service may also be made by certified mail with return receipt. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served, a notice must be served on each party.

(2) *Service in the United States.* Subject to paragraph (c)(3)(A)(ii) of this section, a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(3) *Service in a foreign country.* 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of service.* Proving service, when necessary, requires filing with the judge a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) *Protecting a person subject to a subpoena.*

(1) *Avoiding undue burden; sanctions.* A party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and impose an appropriate sanction.

(2) *Command to produce materials or permit inspection.*

(A) *Appearance not required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or hearing.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or representative designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the judge for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or modifying a subpoena.*

(A) *When required.* On timely motion, the judge must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to paragraph (c)(3)(B)(iii) of this section, the person may be commanded to attend the formal hearing;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When permitted.* To protect a person subject to or otherwise affected by a subpoena, the judge may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend the formal hearing.

(C) *Specifying conditions as an alternative.* In the circumstances described in paragraph (c)(3)(B) of this section, the judge may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be

otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) *Duties in responding to a subpoena.*

(1) *Producing documents or electronically stored information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for producing electronically stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible electronically stored information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of § 18.51(b)(4)(C). The judge may specify conditions for the discovery.

(2) *Claiming privilege or protection.*

(A) *Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as hearing-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as hearing-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge *in camera* for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Failure to obey.* When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena.

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

(a) *Motion for an order compelling disclosure or discovery.*

(1) *In general.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge's action.

(2) *Specific motions.*

(A) *To compel disclosure.* If a party fails to make a disclosure required by § 18.50(c), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under §§ 18.64 and 18.65;

(ii) a corporation or other entity fails to make a designation under §§ 18.64(d) and 18.65(a)(4);

(iii) a party fails to answer an interrogatory submitted under § 18.60; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under § 18.61.

(C) *Related to a deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of paragraph (a) of this section, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(b) *Failure to comply with a judge's order.*

(1) *For not obeying a discovery order.* If a party or a party's officer, director, or managing agent—or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under § 18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:

(A) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(B) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(C) striking claims or defenses in whole or in part;

(D) staying further proceedings until the order is obeyed;

(E) dismissing the proceeding in whole or in part; or

(F) rendering a default decision and order against the disobedient party;

(2) *For not producing a person for examination.* If a party fails to comply with an order under § 18.62 requiring it to produce another person for examination, the judge may issue any of the orders listed in paragraph (b)(1) of this section, unless the disobedient party shows that it cannot produce the other person.

(c) *Failure to disclose, to supplement an earlier response, or to admit.* If a party fails to provide information or identify a witness as required by §§ 18.50(c) and 18.53, or if a party fails to admit what is requested under § 18.63(a) and the requesting party later proves a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the judge, on motion and after giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

(d) *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.*

(1) *In general.*

(A) *Motion; grounds for sanctions.* The judge may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.61, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.

(2) *Unacceptable excuse for failing to act.* A failure described in paragraph (d)(1)(A) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a).

(3) *Types of sanctions.* Sanctions may include any of the orders listed in paragraph (b)(1) of this section.

(e) *Failure to provide electronically stored information.* Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) *Procedure.* A judge may impose sanctions under this section upon:

(1) a separately filed motion; or

(2) notice from the judge followed by a reasonable opportunity to be heard.

Types of Discovery

§ 18.60 Interrogatories to parties.

(a) *In general.*

(1) *Number.* Unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with § 18.51.

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under § 18.51. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the judge may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) *Answers and objections.*

(1) *Responding party.* The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(3) *Answering each interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney or non-attorney representative who objects must sign any objections.

(c) *Use.* An answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence.

(d) *Option to produce business records.* If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

§ 18.61 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(a) *In general.* A party may serve on any other party a request within the scope of § 18.51:

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) *Procedure.*

(1) *Contents of the request.* The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and objections.*

(A) *Time to respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(B) *Responding to each item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the judge, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) *Nonparties.* As provided in § 18.56, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

§ 18.62 Physical and mental examinations.

(a) *Examination by notice.*

(1) *In general.* A party may serve upon another party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitably licensed or certified examiner.

(2) *Contents of the notice.* The notice must specify:

(A) the legal basis for the examination;

(B) the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and

(C) how the reasonable transportation expenses were calculated.

(3) *Service of notice.* Unless otherwise agreed by the parties, the notice must be served no fewer than 14 days before the examination date.

(4) *Objection.* The person to be examined must serve any objection to the notice no later than 7 days after the notice is served. The objection must be stated with particularity.

(b) *Examination by motion.*

Upon objection by the person to be examined the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by paragraph (a)(2) of this section.

(c) *Examiner's report.*

(1) *Delivery of the report.* The party who initiated the examination must, deliver a complete copy of the examination report to the party examined, together with like reports of all earlier examinations of the same condition.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

§ 18.63 Requests for admission.

(a) *Scope and procedure.*

(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 18.51 relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) *Form; copy of a document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under § 18.54 or be ordered by the judge.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) *Motion regarding the sufficiency of an answer or objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the judge finds an objection justified, the judge must order that an answer be served. On finding that an answer does not comply with this section, the judge may order either that the matter is admitted or that an amended answer be served. The judge may defer final decision until a prehearing conference or a specified time before the hearing.

(b) *Effect of an admission; withdrawing or amending it.* A matter admitted under this section is conclusively established unless the judge, on motion, permits the admission to be withdrawn or amended. The judge may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

§ 18.64 Depositions by oral examination.

(a) *When a deposition may be taken.*

(1) *Without leave.* A party may, by oral questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under § 18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with § 18.51(b):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this section or § 18.65 by one of the parties;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in § 18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) *Notice of the deposition; other formal requirements.*

(1) *Notice in general.* Except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party deponent is accompanied by a request for production under § 18.61, the notice must comply with the requirements of § 18.61(b).

(3) *Method of recording.*

(A) *Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the judge orders otherwise.

(4) *By remote means.* The parties may stipulate—or the judge may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(5) *Officer's duties.*

(A) *Before the deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before a person having power to administer oaths. The officer must begin the deposition with an on-the-record statement that includes:

(i) The officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent;

(v) the identity of all persons present; and

(vi) the date and method of service of the notice of deposition.

(B) *Conducting the deposition; avoiding distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in paragraphs (b)(5)(A)(i)–(iii) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or subpoena directed to an organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) *Examination and cross-examination; record of the examination; objections; written questions.*

(1) *Examination and cross-examination.* The examination and cross-examination of a deponent proceed as they would at the hearing under the applicable rules of evidence. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under paragraph (b)(3)(A) of this section. The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the judge, or to present a motion under paragraph (d)(3) of this section.

(3) *Participating through written questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) *Duration; sanction; motion to terminate or limit.*

(1) *Duration.* Unless otherwise stipulated or ordered by the judge, a deposition is limited to 1 day of 7 hours. The judge must allow additional time consistent with § 18.51(b) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The judge may impose an appropriate sanction, in accordance with § 18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to terminate or limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The judge may order that the deposition be terminated or may limit its scope and manner as provided in § 18.52. If terminated, the deposition may be resumed only by the judge's order.

(e) *Review by the witness; changes.*

(1) *Review; statement of changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) To review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes indicated in the officer's certificate.* The officer must note in the certificate prescribed by paragraph (f)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) *Certification and delivery; exhibits; copies of the transcript or recording; filing.*

(1) *Certification and delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name]'' and must promptly send it to the party or the party's representative who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things.*

(A) *Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the proceeding.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to attend a deposition or serve a subpoena.* A judge may order sanctions, in accordance with § 18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to:

(1) Attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

§ 18.65 Depositions by written questions.

(a) *When a deposition may be taken.*

(1) *Without leave.* A party may, by written questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under § 18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with § 18.51(b):

(A) If the parties have not stipulated to the deposition and:

(i) The deposition would result in more than 10 depositions being taken under this section or § 18.64 by a party;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in § 18.50(a); or

(B) if the deponent is confined in prison.

(3) *Service; required notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions directed to an organization.* A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with § 18.64(b)(6).

(5) *Questions from other parties.* Any questions to the deponent from other parties must be served on all parties as follows: Cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The judge may, for good cause, extend or shorten these times.

(b) *Delivery to the officer; officer's duties.* Unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in § 18.64(c), (e), and (f) to:

(1) Take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) *Notice of completion or filing.*

(1) *Completion.* The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing.* A party who files the deposition must promptly notify all other parties of the filing.

Disposition Without Hearing

§ 18.70 Motions for dispositive action.

(a) *In general.* When consistent with statute, regulation or executive order, any party may move under § 18.33 for disposition of the pending proceeding. If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter.

(b) *Motion to remand.* A party may move to remand the matter to the referring agency. A remand order must include any terms or conditions and should state the reason for the remand.

(c) *Motion to dismiss.* A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

(d) *Motion for decision on the record.* When the parties agree that an evidentiary hearing is not needed, they may move for a decision based on stipulations of fact or a stipulated record.

§ 18.71 Approval of settlement or consent findings.

(a) *Motion for approval of settlement agreement.* When the applicable statute or regulation requires it, the parties must submit a settlement agreement for the judge's review and approval.

(b) *Motion for consent findings and order.* Parties may file a motion to accept and adopt consent findings. Any agreement that contains consent findings and an order that disposes of all or part of a matter must include:

(1) a statement that the order has the same effect as one made after a full hearing;

(2) a statement that the order is based on a record that consists of the paper that began the proceeding (such as a complaint, order of reference, or notice of administrative determination), as it may have been amended, and the agreement;

(3) a waiver of any further procedural steps before the judge; and

(4) a waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

§ 18.72 Summary decision.

(a) *Motion for summary decision or partial summary decision.* A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

(b) *Time to file a motion.* Unless the judge orders otherwise, a party may file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing.

(c) *Procedures.*

(1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection that a fact is not supported by admissible evidence.* A

party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The judge need consider only the cited materials, but the judge may consider other materials in the record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the judge may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) *Decision independent of the motion.* After giving notice and a reasonable time to respond, the judge may:

(1) grant summary decision for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to grant all the requested relief.* If the judge does not grant all the relief requested by the motion, the judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or declaration submitted in bad faith.* If satisfied that an affidavit or declaration under this section is submitted in bad faith or solely for delay, the judge—after notice and a reasonable time to respond—may order sanctions or other relief as authorized by law.

Hearing

§ 18.80 Prehearing statement.

(a) *Time for filing.* Unless the judge orders otherwise, at least 21 days before the hearing, each participating party must file a prehearing statement.

(b) *Required conference.* Before filing a prehearing statement, the party must confer with all other parties in good faith to:

(1) stipulate to the facts to the fullest extent possible; and

(2) revise exhibit lists, eliminate duplicative exhibits, prepare joint exhibits, and attempt to resolve any objections to exhibits.

(c) *Contents.* Unless ordered otherwise, the prehearing statement must state:

(1) the party's name;

(2) the issues of law to be determined with reference to the appropriate statute, regulation, or case law;

(3) a precise statement of the relief sought;

(4) the stipulated facts that require no proof;

(5) the facts disputed by the parties;

(6) a list of witnesses the party expects to call;

(7) a list of the joint exhibits;

(8) a list of the party's exhibits;

(9) an estimate of the time required for the party to present its case-in-chief; and

(10) any additional information that may aid the parties' preparation for the hearing or the disposition of the proceeding, such as the need for specialized equipment at the hearing.

(d) *Joint prehearing statement.* The judge may require the parties to file a joint prehearing statement rather than individual prehearing statements.

(e) *Signature.* The prehearing statement must be in writing and signed. By signing, an attorney, representative, or party makes the certifications described in § 18.50(d).

§ 18.81 Formal hearing.

(a) *Public.* Hearings are open to the public. But, when authorized by law and only to the minimum extent necessary, the judge may order a hearing or any part of a hearing closed to the public, including anticipated witnesses. The order closing all or part of the hearing must state findings and explain why the reasons for closure outweigh the presumption of public access. The order and any objection must be part of the record.

(b) *Taking testimony.* Unless a closure order is issued under paragraph (a) of this section, the witnesses' testimony must be taken in an open hearing. For good cause and with appropriate safeguards, the judge may permit testimony in an open hearing by contemporaneous transmission from a different location.

(c) *Party participation.* For good cause and with appropriate safeguards, the judge may permit a party to participate in an open hearing by contemporaneous transmission from a different location.

§ 18.82 Exhibits.

(a) *Identification.* All exhibits offered in evidence must be marked with a designation identifying the party offering the exhibit and must be numbered and paginated as the judge orders.

(b) *Electronic data.* By order the judge may prescribe the format for the submission of data that is in electronic form.

(c) *Exchange of exhibits.* When written exhibits are offered in evidence, one copy must be furnished to the judge and to each of the parties at the hearing, unless copies were previously furnished with the list of proposed exhibits or the judge directs otherwise. If the judge does not fix a date for the exchange of exhibits, the parties must exchange copies of exhibits at the earliest practicable time before the hearing begins.

(d) *Authenticity.* The authenticity of a document identified in a pre-hearing exhibit list is admitted unless a party files a written objection to authenticity at least 7 days before the hearing. The judge may permit a party to challenge a document's authenticity if the party establishes good cause for its failure to file a timely written objection.

(e) *Substitution of copies for original exhibits.* The judge may permit a party to withdraw original documents offered in evidence and substitute accurate copies of the originals.

(f) *Designation of parts of documents.* When only a portion of a document contains relevant matter, the offering party must exclude the irrelevant parts to the greatest extent practicable.

(g) *Records in other proceedings.* Portions of the record of other administrative proceedings, civil actions or criminal prosecutions may be received in evidence, when the offering party shows the copies are accurate.

§ 18.83 Stipulations.

(a) The parties may stipulate to any facts in writing at any stage of the proceeding or orally on the record at a deposition or at a hearing. These stipulations bind the parties unless the judge disapproves them.

(b) Every stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.

(c) A proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, ''Pursuant to stipulation, it is so ordered,'' with spaces designated for the date and the signature of the judge.

§ 18.84 Official notice.

On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

§ 18.85 Privileged, sensitive, or classified material.

(a) *Exclusion.* On motion of any interested person or the judge's own, the judge may limit the introduction of material into the record or issue orders to protect against undue disclosure of privileged communications, or sensitive or classified matters. The judge may admit into the record a summary or extract that omits the privileged, sensitive or classified material.

(b) *Sealing the record.*

(1) On motion of any interested person or the judge's own, the judge may order any material that is in the record to be sealed from public access. The motion must propose the fewest redactions possible that will protect the interest offered as the basis for the motion. A redacted copy or summary of any material sealed must be made part of the public record unless the necessary redactions would be so extensive that the public version would be meaningless, or making even a redacted version or summary available would defeat the reason the original is sealed.

(2) An order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access. Sealed materials must be placed in a clearly marked, separate part of the record. Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

§ 18.86 Hearing room conduct.

Participants must conduct themselves in an orderly manner. The consumption of food or beverage, and rearranging courtroom furniture are prohibited, unless specifically authorized by the judge. Electronic devices must be silenced and must not disrupt the proceedings. Parties, witnesses and spectators are prohibited from using video or audio recording devices to record hearings.

§ 18.87 Standards of conduct.

(a) *In general.* All persons appearing in proceedings must act with integrity and in an ethical manner.

(b) *Exclusion for misconduct.* During the course of a proceeding, the judge may exclude any person—including a party or a party's attorney or non-attorney representative—for contumacious conduct such as refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly or ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The judge must state the basis for the exclusion.

(c) *Review of representative's exclusion.* Any representative excluded from a proceeding may appeal to the Chief Judge for reinstatement within 7 days of the exclusion. The exclusion order is reviewed for abuse of discretion. The proceeding from which the representative was excluded will not be delayed or suspended pending review by the Chief Judge, except for a reasonable delay to enable the party to obtain another representative.

§ 18.88 Transcript of proceedings.

(a) *Hearing transcript.* All hearings must be recorded and transcribed. The parties and the public may obtain copies of the transcript from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) *Corrections to the transcript.* A party may file a motion to correct the official transcript. Motions for correction must be filed within 14 days of the receipt of the transcript unless the judge permits additional time. The judge may grant the motion in whole or part if the corrections involve substantive errors. At any time before issuing a decision and upon notice to the parties, the judge may correct errors in the transcript.

Post Hearing

§ 18.90 Closing the record; subsequent motions.

(a) *In general.* The record of a hearing closes when the hearing concludes, unless the judge directs otherwise. If any party waives a hearing, the record closes on the date the judge sets for the filing of the parties' submissions.

(b) *Motion to reopen the record.*

(1) A motion to reopen the record must be made promptly after the additional evidence is discovered. No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed. Each new item must be designated as an exhibit under § 18.82(a) and accompanied by proof that copies have been served on all parties.

(2) If the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

(c) *Motions after the decision.* After the decision and order is issued, the judge retains jurisdiction to dispose of appropriate motions, such as a motion to award attorney's fees and expenses, a motion to correct the transcript, or a motion for reconsideration.

§ 18.91 Post-hearing brief.

The judge may grant a party time to file a post-hearing brief with proposed findings of fact, conclusions of law, and the specific relief sought. The brief must refer to all portions of the record and authorities relied upon in support of each assertion.

§ 18.92 Decision and order.

At the conclusion of the proceeding, the judge must issue a written decision and order.

§ 18.93 Motion for reconsideration.

A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.

§ 18.94 Indicative ruling on a motion for relief that is barred by a pending petition for review.

(a) *Relief pending review.* If a timely motion is made for relief that the judge lacks authority to grant because a petition for review has been docketed and is pending, the judge may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that the judge would grant the motion if the reviewing body remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to reviewing body.* The movant must promptly notify the clerk of the reviewing body if the judge states that he or she would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* The judge may decide the motion if the reviewing body remands for that purpose.

§ 18.95 Review of decision.

The statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision.

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