TITLE 29 -- LABOR;
REVISED AS OF JULY 1, 1993
SUBTITLE A -- OFFICE OF THE SECRETARY OF LABOR

PART 18 -- RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES
SUBPART A -- GENERAL

§ 18.1 Scope of rules.

(a) General application. These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor. Such proceedings shall be conducted expeditiously and the parties shall make every effort at each stage of a proceeding to avoid delay. To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling. 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.

(b) Waiver, modification, or suspension. Upon notice to all parties, the administrative law judge may, with respect to matters pending before him or her, modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby. These rules may, from time to time, be suspended, modified or revoked in whole or part.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.2 Definitions.

For purposes of these rules:

(a) Adjudicatory proceeding means a judicial-type proceeding leading to the formulation of a final order;

(b) Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105 (provisions of the rules in this part which refer to administrative law judges may be applicable to other Presiding Officers as well);

(c) Administrative Procedure Act means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559;

(d) Complaint means any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise;

(e) Hearing means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(f) Order means the whole or any part of a final procedural or substantive disposition of a matter by the administrative law judge in a matter other than rulemaking;

(g) Party includes a person or agency named or admitted as a party to a proceeding;

(h) Person includes an individual, partnership, corporation, association, exchange or other entity or organization;

(i) Pleading means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(j) Respondent means a party to an adjudicatory proceeding against whom findings may be made or who may be required to provide relief or take remedial action;

(k) Secretary means the Secretary of Labor and includes any administrator, commissioner, appellate body, board, or other official thereunder for purposes of appeal of recommended or final decisions of administrative law judges;

(l) Complainant means a person who is seeking relief from any act or omission in violation of a statute, executive order or regulation;

(m) The term petition means a written request, made by a person or party, for some affirmative action;

(n) The term Consent Agreement means any written document containing a specified proposed remedy or other relief acceptable to all parties;

(o) Commencement of Proceeding is the filing of a request for hearing, order of reference, or referral of a claim for hearing.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.3 Service and filing of documents.

(a) *Generally*. Except as otherwise provided in this part, copies of all documents shall be served on all parties of record. All documents should clearly designate the docket number, if any, and short title of the matter. If the matter involves a program administered by the Office of Workers' Compensation Programs (OWCP), the document should contain the OWCP number in addition to the docket number. All documents to be filed shall be delivered or mailed to the Chief Docket Clerk,

Office of Administrative Law Judges, 800 K Street, NW. Suite 400 Washington DC 20001-8002, or to the OALJ Regional Office to which the proceeding may have been transferred for hearing. Each document filed shall be clear and legible.

(b) *How made; by parties*. All documents shall be filed with the Office of Administrative Law Judges, except that notices of deposition, depositions, interrogatories, requests for admissions, and answers and responses thereto, shall not be so filed unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission. Whenever under this part service by a party is required to be made upon a party represented by an attorney or other representative the service shall be made upon the attorney or other representative unless service upon the party is ordered by the presiding administrative law judge. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The person serving the document shall certify to the manner and date of service.

(c) *By the Office of Administrative Law Judges*. Service of notices, orders, decisions and all other documents, except complaints, shall be made by regular mail to the last known address.

(d) *Service of complaints*. Service of complaints or charges in enforcement proceedings shall be made either:

(1) By delivering a copy to the individual, partner, officer of a corporation, or attorney of record;

(2) by leaving a copy at the principal office, place of business, or residence;

(3) by mailing to the last known address of such individual, partner, officer or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

(e) *Form of pleadings*.

(1) Every pleading shall contain a caption setting forth the name of the agency under which the proceeding is instituted, the title of the proceeding, the docket number assigned by the Office of Administrative Law Judges, and a designation of the type of pleading or paper (e.g., complaint, motion to dismiss, etc.). The pleading or papers shall be signed and shall contain the address and telephone number of the party or person representing the party. Although there are no formal specifications for documents, they should be typewritten when possible on standards size (8 1/2 x 11) paper legal size (8 1/2 x 14) paper will not be accepted after July 31, 1983.

(2) Illegible documents, whether handwritten, typewritten, photocopied, or otherwise will not be accepted. Papers may be reproduced by any duplicating process, provided all copies are clear and legible.

(f) *Filing and service by facsimile*.

(1) *Filing by a party*; *when permitted*. Filings by a party may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when directed or permitted by the administrative law judge assigned to the case. If prior permission to file by facsimile cannot be obtained because the presiding administrative law judge is not available, a party may file by facsimile and attach a statement of the circumstances requiring that the document be filed by facsimile rather than by regular mail. That statement does not ensure that the filing will be accepted, but will be considered by the presiding judge in determining whether the facsimile will be accepeted *nunc pro tunc* as a filing.

(2) *Service by facsimile; when permitted.* Service upon a party by another party or by the administrative law judge may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when the receiving party consents to service by facsimile.

(3) *Service sheet and proof of service*. Documents filed or served by facsimile (fax) shall include a service sheet which states the means by which filing and/or service was made. A facsimile transmission report generated by the sender's facsimile equipment and which indicates that the transmission was successful shall be presumed adequate proof of filing or service.

(4) *Cover sheet*. Filings or service by facsimile (fax) shall include a cover sheet that identifies the sender, the total number of pages transmitted, and the caption and docket number of the case, if known.

(5) Originals. Documents filed or served by facsimile (fax) shall be presumed to be accurate reproductions of the original document until proven otherwise. The party proferring the document shall retain the original in the event of a dispute over authenticity or the accuracy of the transmission. The original document need not be submitted unless so ordered by the presiding judge, or unless an original signature is required by statute or regulation. If an original signature is required to be filed, the date of the facsimile transmission shall govern the effective date of the filing provided that the document containing the original signature is filed within ten calendar days of the facsimile transmission.

(6) *Length of document*. Documents filed by facsimile (fax) should not exceed 12 pages including the cover sheet, the service sheet and all accompanying exhibits or appendices, except that this page limitation may be exceeded if prior permission is granted by the presiding judge or if the document's length cannot be conformed because of statutory or regulatory requirements.

(7) *Hours for filing by facsimile*. Filings by facsimile (fax) should normally be made between 8:00 am and 5:00 pm, local time at the receiving location.

(g) *Filing and service by courier service*. Documents transmitted by courier service shall be deemed transmitted by regular mail in proceedings before the Office of Administrative Law Judges.

SOURCE: 48 FR 32538, July 15, 1983, as amended at 56 FR 54708, Oct. 22, 1991; 59 FR 41876, Aug. 15, 1994; 60 FR 26970, May 19, 1995.

§ 18.4 Time computations.

(a) *Generally*. In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

(b) *Date of entry of orders*. In computing any period of time involving the date of the entry of an order, the date of entry shall be the date the order is served by the Chief Docket Clerk.

(c) *Computation of time for delivery by mail*.
(1) Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period.
(2) Service of all documents other than complaints is deemed effected at the time of mailing.
(3) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

(d) *Filing or service by facsimile.* Filing or service by facsimile (fax) is effective upon receipt of the entire document by the receiving facsimile machine. For purposes of filing by facsimile the time printed on the transmission by the facsimile equipment constitutes the date stamp of the Chief Docket Clerk.

SOURCE: 48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994.

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 551-553.

§ 18.5 Responsive pleadings--answer and request for hearing.

(a) Time for answer. Within thirty (30) days after the service of a complaint, each respondent shall file an answer.

(b) Default. Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the administrative law judge to find the facts as alleged in the complaint and to enter an initial or final decision containing such findings, appropriate conclusions, and order.

(c) Signature required. Every answer filed pursuant to these rules shall be signed by the party filing it or by at least one attorney, in his or her individual name, representing such party. The signature constitutes a certificate by the signer that he or she has read the answer; that to the best of his or her knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

(d) Content of answer--

(1) Orders to show cause. Any person to whom an order to show cause has been directed and served shall respond to the same by filing an answer in writing. Arguments opposing the proposed sanction should be supported by reference to specific circumstances or facts surrounding the basis for the order to show cause.

(2) Complaints. Any respondent contesting any material fact alleged in a complaint, or contending that the amount of a proposed penalty or award is excessive or inappropriate or contending that he or she is entitled to judgment as a matter of law, shall file an answer in writing. An answer shall include:

(i) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted;

(ii) A statement of the facts supporting each affirmative defense.

(e) Amendments and supplemental pleadings. If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.6 Motions and requests.

(a) Generally. Any application for an order or any other request shall be made by motion which, unless made during a hearing or trial, shall be made in writing unless good cause is established to preclude such submission, shall state with particularity the grounds therefor, and shall

set forth the relief or order sought. Motions or requests made during the course of any hearing or appearance before an administrative law judge shall be stated orally and made part of the transcript. Whether made orally or in writing, all parties shall be given reasonable opportunity to state an objection to the motion or request.

(b) Answers to motions. Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon. Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.

(c) Oral arguments or briefs. No oral argument will be heard on motions unless the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(d) Motion for order compelling answer: sanctions.

(1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;

(ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be

stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.7 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the administrative law judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the administrative law judge:

(1) Issues involved in the proceeding;

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusion to be drawn;

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case;

(8) Any appropriate comments, suggestions or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.8 Prehearing conferences.

(a) Purpose and scope.

(1) Upon motion of a party or upon the administrative law judge's own motion, the judge may direct the parties or their counsel to participate in a conference at any reasonable time, prior to or during the course of the hearing, when the administrative law judge finds that the proceeding would be expedited by a prehearing conference. Such conferences normally shall be conducted by conference telephonic communication unless, in the opinion of the administrative law judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place and manner of the conference shall be given.

(2) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The necessity of amendments to pleadings;

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

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

(v) Negotiation, compromise, or settlement of issues;

(vi) The exchange of copies of proposed exhibits;

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

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

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

(b) Reporting. A prehearing conference will be stenographically reported, unless otherwise directed by the administrative law judge.

(c) Order. Actions taken as a result of a conference shall be reduced to a written order, unless the administrative law judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the administrative law judge elects to make a statement on the record at the hearing summarizing the actions taken.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.9 Consent order or settlement; settlement judge procedure.

(a) *Generally*. At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.

(b) *Content*. Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint, order of reference or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge; and

(4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

(c) *Submission*. On or before the expiration of the time granted for negotiations, the parties or their authorized representative or their counsel may:

(1) Submit the proposed agreement containing consent findings and an order for consideration by the administrative law judge, or

(2) Notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action, or

(3) Inform the administrative law judge that agreement cannot be reached.

(d) Disposition. In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

(e)(1) *Settlement judge procedure; purpose.* This paragraph establishes a voluntary process whereby the parties may use a settlement judge to mediate settlement negotiations. A settlement judge is an active or retired administrative law judge who convenes and presides over settlement conferences and negotiations, confers with the parties jointly and/or individually, and seeks voluntary resolution of issues. Unlike a presiding judge, a settlement judge does not render a formal judgment or decision in the case; his or her role is solely to facilitate fair and equitable solutions and to provide an assessment of the relative merits of the respective positions of the parties.

(2) *How initiated*. A settlement judge may be appointed by the Chief Administrative Law judge upon a request by a party or the presiding administrative law judge. The Chief Administrative Law Judge has sole discretion to decide whether to appoint a settlement judge, except that a settlement judge shall not be appointed when–

(i) A party objects to referral of the matter to a settlement judge;

(ii) Such appointment is inconsistent with a statute, executive order, or regulation;

(iii) The proceeding arises pursuant to Title IV of the Federal Mine Safety and Health Act, 30 U.S.C. 901 et seq., also known as the Black Lung Benefits Act.

(3) *Selection of settlement judge*.

(i) The selection of a settlement judge is at the sole discretion of the Chief Administrative Law Judge, provided that the individual selected–

(A) is an active or retired administrative law judge, and

(B) is not the administrative law judge assigned to hear and decide the case.

(ii) The Settlement judge shall not be appointed to hear and decide the case.

(4) *Duration of proceeding*. Unless the Chief Administrative Law Judge directs otherwise, settlement negotiations under this section shall not exceed thirty days from the date of appointment of the settlement judge, except that with the consent of the parties, the settlement judge may request

an extension from the Chief Administrative Law Judge. The negotiations will be terminated immediately if a party unambiguously indicates that it no longer wishes to participate, or if in the judgment of the settlement judge, further negotiations would be fruitless or otherwise inappropriate.

(5) *General powers of the settlement judge*. The settlement judge has the power to convene settlement conferences; to require that parties, or representatives of the parties having the authority to settle, participate in conferences; and to impose other reasonable requirements on the parties expedite an amicable resolution of the case, provided that all such powers shall terminate immediately if negotiations are terminated pursuant to paragraph (e)(4).

(6) *Suspension of discovery*. Requests for suspension of discovery during the settlement negotiations shall be directed to the presiding administrative law judge who shall have sole discretion in granting or denying such requests.

(7) Settlement conference. In general the settlement judge should communicate with the parties by telephone conference call. The settlement judge may, however, schedule a personal conference with the parties when:

(i) The settlement judge is scheduled to preside in other proceedings in a place convenient to all parties and representatives involved;

(ii) The offices of the attorneys or other representatives of the parties and the settlement judge, are in the same metropolitan area; or

(iii) The settlement judge, with the concurrence of the Chief Administrative Law Judge, determines that a personal meeting is necessary for a resolution of substantial issues, and represents a prudent use of resources.

(8) *Confidentiality of settlement discussions*. All discussions between the parties and the settlement judge shall be off-the -record. No evidence regarding statements or conduct in the proceedings under this section is admissible in the instant proceeding or any subsequent administrative proceeding before the Department, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless obtained through appropriate discovery or subpoena. The settlement judge shall not discuss any aspect of the case with any administrative law judge or other person, nor be subpoenaed or called as a witness in any hearing of the case or any subsequent administrative proceedings before the Department with respect to any statement or conduct during the settlement discussions.

(9) *Contents of consent order or settlement agreement*. Any agreement disposing of all or part of the proceeding shall be written and signed by the parties. Such agreement shall conform to the requirements of paragraph (b) of this section.

(10) *Report of the settlement*. If a settlement is reached, the parties shall report to the presiding judge in writing within seven working days of the termination of negotiations. The report shall include a copy of the settlement agreement and/or proposed consent order. If a settlement is not reached, the parties shall report this to the presiding judge without further elaboration.

(11) *Review of agreement by presiding judge.* A settlement agreement arrived at with the help of a settlement judge shall be treated by the presiding judge as would be any other settlement agreement.

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

SOURCE: 48 FR 32538, July 15, 1983, as amended at 58 FR 38500, July 16, 1993; 64 FR 47089, Aug. 27, 1999.

§ 18.10 Parties, how designated.

(a) The term party whenever used in these rules shall include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or governmental agency. A party who seeks relief or other affirmative action shall be designated as plaintiff, complainant or claimant, as appropriate. A party against whom relief or other affirmative action is sought in any proceeding shall be designated as a defendant or respondent, as appropriate. When a party to the proceeding, the Department of Labor shall be either a party or party-in-interest.

(b) Other persons or organizations shall have the right to participate as parties if the administrative law judge determines that the final decision could directly and adversely affect them or the class they represent, and if they may contribute materially to the disposition of the proceedings and their interest is not adequately represented by existing parties.

(c) A person or organization wishing to participate as a party under this section shall submit a petition to the administrative law judge within fifteen (15) days after the person or organization has knowledge of or should have known about the proceeding. The petition shall be filed with the administrative law judge and served on each person or organization who has been made a party at the time of filing. Such petition shall concisely state:

(1) Petitioner's interest in the proceeding,

(2) how his or her participation as a party will contribute materially to the disposition of the proceeding,

(3) who will appear for petitioner,

(4) the issues on which petitioner wishes to participate, and

(5) whether petitioner intends to present witnesses.

(d) If objections to the petition are filed, the administrative law judge shall then determine whether petitioners have the requisite interest to be a party in the proceedings, as defined in paragraphs (a) and (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the administrative law judge may request all such petitioners to designate a single representative, or he

or she may recognize one or more of such petitioners. The administrative law judge shall give each such petitioner written notice of the decision on his or her petition. If the petition is denied, he or she shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The administrative law judge shall give written notice to each party of each petition granted.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.11 Consolidation of hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.12 Amicus curiae.

A brief of an amicus curiae may be filed only with the written consent of all parties, or by leave of the administrative law judge granted upon motion, or on the request of the administrative law judge, except that consent or leave shall not be required when the brief is presented by an officer of an agency of the United States, or by a state, territory or commonwealth. The amicus curiae shall not participate in any way in the conduct of the hearing, including the presentation of evidence and the examination of witnesses.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.13 Discovery methods.

Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; and requests for admission. Unless the administrative law judge orders otherwise, the frequency or sequence of these methods is not limited.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.14 Scope of discovery.

(a) Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

(b) It is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.15 Protective orders.

(a) Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) The discovery not be had;

(2) The discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) The discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) Certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters;

(5) Discovery be conducted with no one present except persons designated by the administrative law judge; or

(6) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.16 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(a) A party is under a duty to supplement timely his response with respect to any question directly addressed to:

(1) The identity and location of persons having knowledge of discoverable matters; and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he or she is expected to testify and the substance of his or her testimony.

(b) A party is under a duty to amend timely a prior response if he or she later obtains information upon the basis of which:

(1) He or she knows the response was incorrect when made; or

(2) He or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the administrative law judge or agreement of the parties.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.17 Stipulations regarding discovery.

Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Chief Administrative Law Judge or the administrative law judge assigned may: (a) Provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions, and (b) modify the procedures provided by these rules for other methods of discovery.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.18 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on all parties to the proceeding. Copies of interrogatories and responses thereto shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the documentation is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers and objections shall be signed by the person making them. The party upon whom the interrogatories were served shall serve a copy of the answer and objections upon all parties to the proceeding within thirty (30) days after service of the interrogatories, or within such shorter or longer period as the administrative law judge may allow.

(c) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

SOURCE: 48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994.

§ 18.19 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.

(a) Any party may serve on any other party a request to:
(1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served; or
(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, photographing, testing, or for other purposes as stated in paragraph (a)(1) of this section.
(3) Submit to a physical or mental examination by a physician.

(b) The request may be served on any party without leave of the administrative law judge.

(c) The request shall:
(1) Set forth the items to be inspected either by individual item or by category;
(2) Describe each item or category with reasonable particularity;
(3) Specify a reasonable time, place, and manner of making the inspection and performing the related acts;
(4) Specify the time, place, manner, conditions, and scope of the physical or mental examination and the person or persons by whom it is to be made. A report of examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure, title 28 U.S.C., as amended.

(d) The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after service of the request.

(e) The response shall state, with respect to each item or category:
(1) That inspection and related activities will be permitted as requested; or
(2) That objection is made in whole or in part, in which case the reasons for objection shall be stated.

(f) A copy of each request for production and each written response shall be served on all parties but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

SOURCE: 48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994.

§ 18.20 Admissions.

(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party:
(1) A written statement denying specifically the relevant matters of which an admission is requested;
(2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or
(3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(c) An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable the party to admit or deny.

(d) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the administrative law judge determines that an objection is justified, he or she shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he or she may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

(f) Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him or her for any other purpose nor may it be used against him or her in any other proceeding.

(g) A copy of each request for admission and each written response shall be served on all parties but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission..

SOURCE: 48 FR 32538, July 15, 1983, as amended at 59 FR 41877, Aug. 15, 1994.

§ 18.21 Motion to compel discovery.

(a) If a deponent fails to answer a question propounded or a party upon whom a request is made pursuant to §§ 18.18 through 18.20, or a party upon whom interrogatories are served fails to respond adequately or objects to the request, or any part thereof, or fails to permit inspection as requested, the discovering party may move the administrative law judge for an order compelling a response or inspection in accordance with the request.

(b) The motion shall set forth:
(1) The nature of the questions or request;
(2) The response or objections of the party upon whom the request was served; and
(3) Arguments in support of the motion.

(c) For purposes of this section, an evasive answer or incomplete answer or response shall be treated as a failure to answer or respond.

(d) In ruling on a motion made pursuant to this section, the administrative law judge may make and enter a protective order such as he or she is authorized to enter on a motion made pursuant to § 18.15(a).

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.22 Depositions.

(a) *When, how, and by whom taken*. The deposition of any witness may be taken at any stage of the proceeding at reasonable times. Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.

(b) *Application*. Any party desiring to take the deposition of a witness shall indicate to the witness and all other parties the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each such witness is expected to testify.

(c) *Notice*. Notice shall be given for the taking of a deposition, which shall be not less than five (5) days written notice when the deposition is to be taken within the continental United States and not less than twenty (20) days written notice when the deposition is to be taken elsewhere. A copy of the Notice shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

(d) *Taking and receiving in evidence*. Each witness testifying upon deposition shall be sworn, and any other party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing; read by or to, and subscribed by the witness; and certified by the person administering the oath. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and which would have been valid if the witness were personally present and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

(e) *Motion to terminate or limit examination*. During the taking of a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the administrative law judge for a ruling on his or her objections to the deposition conduct or

proceedings. The administrative law judge may then limit the scope or manner of the taking of the deposition.

SOURCE: [48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984: 59 FR 41877, Aug. 15, 1994.]

§ 18.23 Use of depositions at hearings.

(a) Generally. At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of expert witnesses, particularly the deposition of physicians, may be used by any party for any purpose, unless the administrative law judge rules that such use would be unfair or a violation of due process.

(3) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds:

(i) That the witness is dead; or

(ii) That the witness is out of the United States or more than 100 miles from the place of hearing unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend to testify because of age, sickness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist at to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(5) If only part of a deposition is offered in evidence by a party, any other party may require him or her to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(6) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) Objections to admissibility. Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form or written interrogatories are waived unless served in writing upon the party propounding them.

(c) Effect of taking or using depositions. A party shall not be deemed to make a person his or her own witness for any purpose by taking his or her deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in paragraph (a)(2) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or her or by any other party.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.24 Subpoenas.

(a) Except as provided in paragraph (b) of this section, the Chief Administrative Law Judge or the presiding administrative law judge, as appropriate, may issue subpoenas as authorized by statute or law upon written application of a party requiring attendance of witnesses and production of relevant papers, books, documents, or tangible things in their possession and under their control. A subpoena may be served by certified mail or by any person who is not less than 18 years of age. A witness, other than a witness for the Federal Government, may not be required to attend a deposition or hearing unless the mileage and witness fee applicable to witnesses in courts of the United States for each date of attendance is paid in advance of the date of the proceeding.

(b) If a party's written application for subpoena is submitted three (3) working days or less before the hearing to which it relates, a subpoena shall issue at the discretion of the Chief Administrative Law Judge or presiding administrative law judge, as appropriate.

(c) Motion to quash or limit subpoena. Within ten (10) days of receipt of a subpoena but no later than the date of the hearing, the person against whom it is directed may file a motion to quash

or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should by limited in scope. Any such motion shall be answered within ten (10) days of service, and shall be ruled on immediately thereafter. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

(d) Failure to comply. Upon the failure of any person to comply with an order to testify or a subpoena, the party adversely affected by such failure to comply may, where authorized by statute or by law, apply to the appropriate district court for enforcement of the order or subpoena.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.25 Designation of administrative law judge.

Hearings shall be held before an administrative law judge appointed under 5 U.S.C. 3105 and assigned to the Department of Labor. The presiding judge shall be designated by the Chief Administrative Law Judge.

SOURCE: 48 FR 32538, July 15, 1983.

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 551-553.

§ 18.26 Conduct of hearings.

Unless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.27 Notice of hearing.

(a) Generally. Except when hearings are scheduled by calendar call, the administrative law judge to whom the matter is referred shall notify the parties by mail of a day, time, and place set for hearing thereon or for a prehearing conference, or both. No date earlier than fifteen (15) days after the date of such notice shall be set for such hearing or conference, except by agreement of the parties. Service of such notice shall be made by regular, first-class mail, unless under the circumstances it appears to the administrative law judge that certified mail, mailgram, telephone, or any combination of these methods should be used instead.

(b) Change of date, time and place. The Chief Administrative Law Judge or the administrative law judge assigned to the case may change the time, date and place of the hearing,

or temporarily adjourn a hearing, on his or her own motion or for good cause shown by a party. The parties shall be given not less than ten (10) days notice of the new hearing date, unless they agree to such change without such notice.

(c) Place of hearing. Unless otherwise required by statute or regulation, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.28 Continuances.

(a) When granted. Continuances will only by granted in cases of prior judicial commitments or undue hardship, or a showing of other good cause.

(b) Time limit for requesting. Except for good cause arising thereafter, requests for continuances must be filed within fourteen (14) days prior to the date set for hearing.

(c) How filed. Motions for continuances shall be in writing. At least 3"x3 1/2 " of blank space shall be provided on the last page of the motion to permit space for the entry of an order by the administrative law judge. Copies shall be served on all parties. Any motions for continuances made within ten (10) days of the date of the scheduled proceeding shall, in addition to the written request, be telephonically conveyed to the administrative law judge or a member of his or her staff and to all other parties. Motions for continuances, based on reasons not reasonably ascertainable prior thereto, may also be made on the record at calendar calls, prehearing conferences or hearings.

(d) Ruling. Time permitting, the administrative law judge shall issue a written order in advance of the scheduled proceeding date which either allows or denies the request. Otherwise the ruling may be made orally by telephonic communication to the party requesting same who shall be responsible for telephonically notifying all other parties. Oral orders shall be confirmed in writing.

SOURCE: [48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.29 Authority of administrative law judge.

(a) General powers. In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following:

(1) Conduct formal hearings in accordance with the provisions of this part;
(2) Administer oaths and examine witnesses;
(3) Compel the production of documents and appearance of witnesses in control of the parties;

(4) Compel the appearance of witnesses by the issuance of subpoenas as authorized by statute or law;
(5) Issue decisions and orders;
(6) Take any action authorized by the Administrative Procedure Act;
(7) Exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary of Labor as are necessary and appropriate therefor;
(8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, issued from time to time and amended pursuant to 28 U.S.C. 2072; and
(9) Do all other things necessary to enable him or her to discharge the duties of the office.

(b) Enforcement. If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.30 Unavailability of administrative law judge.

In the event the administrative law judge designated to conduct the hearing becomes unavailable, the Chief Administrative Law Judge may designate another administrative law judge for the purpose of further hearing or other appropriate action.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.31 Disqualification.

(a) When an administrative law judge deems himself or herself disqualified to preside in a particular proceeding, such judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Law Judge.

(b) Whenever any party shall deem the administrative law judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the administrative law judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The administrative law judge shall rule upon the motion.

(c) In the event of disqualification or recusal of an administrative law judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Law Judge shall refer the matter to another administrative law judge for further proceedings.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.32 Separation of functions.

No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the administrative law judge, except as a witness or counsel in the proceedings.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.33 Expedition.

Hearings shall proceed with all reasonable speed, insofar as practicable and with due regard to the convenience of the parties.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.34 Representation.

(a) Appearances. Any party shall have the right to appear at a hearing in person, by counsel, or by other representative, to examine and cross-examine witnesses, and to introduce into the record documentary or other relevant evidence, except that the participation of any intervenor shall be limited to the extent prescribed by the administrative law judge.

(b) Each attorney or other representative shall file a notice of appearance. Such notice shall indicate the name of the case or controversy, the docket number if assigned, and the party on whose behalf the appearance is made.

(c) Rights of parties. Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the rights to present evidence, to conduct such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, and argument.

(d) Rights of participants. Every participant shall have the right to make a written or oral statement of position. At the discretion of the administrative law judge, participants may file proposed findings of fact, conclusions of law and a post hearing brief.

(e) Rights of witnesses. Any person compelled to testify in a proceeding in response to a subpoena may be accompanied, represented, and advised by counsel or other representative, and may purchase a transcript of his or her testimony.

(f) Office of the Solicitor. The Department of Labor shall be represented by the Solicitor of Labor or his or her designee and shall participate to the degree deemed appropriate by the Solicitor.

(g) Qualifications--

(1) Attorneys. An attorney at law who is admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Office of Administrative Law Judges. An attorney's own representation that he or she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the administrative law judge. Any attorney of record must file prior notice in writing of intent to withdraw as counsel.

(2) Persons not attorneys. Any citizen of the United States who is not an attorney at law shall be admitted to appear in a representative capacity in an adjudicative proceeding. An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Chief Administrative Law Judge prior to the hearing in the proceedings or to the administrative law judge assigned at the commencement of the hearing. The application shall state generally the applicant's qualifications to appear in the proceedings. The administrative law judge may, at any time, inquire as to the qualification or ability of such person to render legal assistance.

(3) Denial of authority to appear. The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g. 5 U.S.C. 555, who he or she finds after notice of and opportunity for hearing in the matter does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. No provision hereof shall apply to any person who appears on his or her own behalf or on behalf of any corporation, partnership, or association of which the person is a partner, officer, or regular employee.

(h) Authority for representation. Any individual acting in a representative capacity in any adjudicative proceeding may be required by the administrative law judge to show his or her authority to act in such capacity. A regular employee of a party who appears on behalf of the party may be required by the administrative law judge to show his or her authority to so appear.

SOURCE: [48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.35 Legal assistance.

The Office of Administrative Law Judges does not have authority to appoint counsel, nor does it refer parties to attorneys.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.36 Standards of conduct.

(a) All persons appearing in proceedings before an administrative law judge are expected to act with integrity, and in an ethical manner.

(b) The administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The administrative law judge shall state in the record the cause for suspending or barring an attorney or other representative from participation in a particular proceeding. Any attorney or other representative so suspended or barred may appeal to the Chief Judge but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.37 Hearing room conduct.

Proceedings shall be conducted in an orderly manner. The consumption of food or beverage, smoking, or rearranging of courtroom furniture, unless specifically authorized by the administrative law judge, are prohibited.

SOURCE: [48 FR 32538, July 15, 1983; 49 FR 2739, Jan. 20, 1984]

§ 18.38 Ex parte communications.

(a) The administrative law judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. Communications by the Office of Administrative Law Judges, the assigned judge, or any party for the sole purpose of scheduling hearings or requesting extensions of time are not considered ex-parte communications, except that all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.

(b) Sanctions. A party or participant who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including, but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.39 Waiver of right to appear and failure to participate or to appear.

(a) Waiver of right to appear. If all parties waive their right to appear before the administrative law judge or to present evidence or argument personally or by representative, it shall not be necessary for the administrative law judge to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge. Where such a waiver has been filed by all parties and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case, and the decision shall be based on them.

(b) Dismissal--Abandonment by Party. A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear. A default decision, under § 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.40 Motion for summary decision.

(a) Any party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.

(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served on all parties.

(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.41 Summary decision.

(a) No genuine issue of material fact.
(1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.
(2) An initial decision and a final decision made under this paragraph shall include a statement of:
(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and
(ii) Any terms and conditions of the rule or order.
(3) A copy of any initial decision and final decision under this paragraph shall be served on each party.

(b) Hearings on issue of fact. Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.42 Expedited proceedings.

(a) When expedited proceedings are required by statute or regulation, or at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.

(b) Except when such proceedings are required or as otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;
(2) Describe the circumstances justifying advancement;
(3) Describe the irreparable harm that would result if the motion is not granted; and
(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery or by telephonic or telegraphic communication followed by mail. Service is complete upon personal delivery or mailing.

(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

(f) When expedited hearings are required by statute or regulation, such hearing shall be scheduled within sixty (60) days from the receipt of request for hearing or order of reference. The decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.43 Formal hearings.

(a) Public. Hearings shall be open to the public. However, in unusual circumstances, the administrative law judge may order a hearing or any part thereof closed, where to do so would be in the best interests of the parties, a witness, the public or other affected persons. Any order closing

the hearing shall set forth the reasons for the decision. Any objections thereto shall be made a part of the record.

(b) Jurisdiction. The administrative law judge shall have jurisdiction to decide all issues of fact and related issues of law.

(c) Amendments to conform to the evidence. When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.44 [Reserved]

[NO TEXT IN ORIGINAL]

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.45 Official notice.

Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.46 In camera and protective orders.

(a) Privileges. Upon application of any person the administrative law judge may limit discovery or introduction of evidence or issue such protective or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications.

(b) Classified or sensitive matter.

(1) Without limiting the discretion of the administrative law judge to give effect to any other applicable privilege, it shall be proper for the administrative law judge to limit discovery or

introduction of evidence or to issue such protective or other orders as in his or her judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. Where the administrative law judge determines that information in documents containing sensitive matter should be made available to a respondent, he or she may direct the party to prepare an unclassified or nonsensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.
(2) If the administrative law judge determines that this procedure is inadequate and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, he or she may advise the parties and provide opportunity for arrangements to permit a party or a representative to have access to such matter. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.47 Exhibits.

(a) Identification. All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) Exchange of exhibits. When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and one copy to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing, or at the latest at the commencement of the hearing.

(c) Substitution of copies for original exhibits. The administrative law judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.48 Records in other proceedings.

In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless the administrative law judge directs otherwise.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.49 Designation of parts of documents.

Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, the participant offering the same shall plainly designate the matter so offered, segregating and excluding insofar as practicable the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would necessarily encumber the record, such document will not be received in evidence, but may be marked for identification, and if properly authenticated, the relevant and material parts thereof may be read into the record, or if the administrative law judge so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit, and copies shall be delivered by the participant offering the same to the other parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.50 Authenticity.

The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such autheniticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.51 Stipulations.

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.52 Record of hearings.

(a) All hearings shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All exhibits introduced as evidence shall be marked for identification and incorporated into the record. Transcripts may be obtained by the parties and the

public from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) Corrections. Corrections to the official transcript will be permitted upon motion. Motions for correction must be submitted within ten (10) days of the receipt of the transcript unless additional time is permitted by the administrative law judge. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the administrative law judge.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.53 Closing of hearings.

The administrative law judge may hear arguments of counsel and may limit the time of such arguments at his or her discretion, and may allow briefs to be filed on behalf of either party but shall closely limit the time within which the briefs for both parties shall be filed, so as to avoid unreasonable delay.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.54 Closing the record.

(a) When there is a hearing, the record shall be closed at the conclusion of the hearing unless the administrative law judge directs otherwise.

(b) If any party waives a hearing, the record shall be closed on the date set by the administrative law judge as the final date for the receipt of submissions of the parties to the matter.

(c) Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the administrative law judge shall make part of the record, any motions for attorney fees authorized by statutes, and any supporting documentation, any determinations thereon, and any approved correction to the transcript.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.55 Receipt of documents after hearing.

Documents submitted for the record after the close of the hearing will not be received in evidence except upon ruling of the administrative law judge. Such documents when submitted shall

be accompanied by proof that copies have been served upon all parties, who shall have an opportunity to comment thereon. Copies shall be received not later than twenty (20) days after the close of the hearing except for good cause shown, and not less than ten (10) days prior to the date set for filing briefs. Exhibit numbers should be assigned by counsel or the party.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.56 Restricted access.

On his or her own motion, or on the motion of any party, the administrative law judge may direct that there be a restricted access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. This portion of the record shall be place in a separate file and clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.57 Decision of the administrative law judge.

(a) Proposed findings of fact, conclusions, and order. Within twenty (20) days of filing of the transcript of the testimony or such additional time as the administrative law judge may allow, each party may file with the administrative law judge, subject to the judge's discretion under § 18.55, proposed findings of fact, conclusions of law, and order together with a supporting brief expressing the reasons for such proposals. Such proposals and brief shall be served on all parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

(b) Decision of the administrative law judge. Within a reasonable time after the time allowed for the filing of the proposed findings of fact, conclusions of law, and order, or within thirty (30) days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. It shall be supported by reliable and probative evidence. Such decision shall be in accordance with the regulations and rulings of the statute or regulation conferring jurisdiction.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.58 Appeals.

The procedures for appeals shall be as provided by the statute or regulation under which hearing jurisdiction is conferred. If no provision is made therefor, the decision of the administrative law judge shall become the final administrative decision of the Secretary.

SOURCE: 48 FR 32538, July 15, 1983.

§ 18.59 Certification of official record.

Upon timely receipt of either a notice or a petition, the Chief Administrative Law Judge shall promptly certify and file with the reviewing authority, appellate body, or appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

SOURCE: 48 FR 32538, July 15, 1983.

SUBPART B -- RULES OF EVIDENCE
GENERAL PROVISIONS

§ 18.101 Scope.

These rules govern formal adversarial adjudications of the United States Department of Labor conducted before a presiding officer.

(a) Which are required by Act of Congress to be determined on the record after opportunity for an administrative agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, or

(b) Which by United States Department of Labor regulation are conducted in conformance with the foregoing provisions, to the extent and with the exceptions stated in § 18.1101. Presiding officer, referred to in these rules as the judge, means an Administrative Law Judge, an agency head, or other officer who presides at the reception of evidence at a hearing in such an adjudication.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.102 Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.103 Rulings on evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. A substantial right of the party is affected unless it is more probably true than not true that the error did not materially contribute to the decision or order of the judge. Properly objected to evidence admitted in error does not affect a substantial right if explicitly not relied upon by the judge in support of the decision or order.

(b) Record of offer and ruling. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form.

(c) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.104 Preliminary questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of paragraph (b) of this section. In making such determination the judge is not bound by the rules of evidence except those with respect to privileges.

(b) Relevance conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Weight and credibility. This rule does not limit the right of a party to introduce evidence relevant to weight or credibility.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.105 Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.106 Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

SOURCE: 55 FR 13219, Apr. 9, 1990.

OFFICIAL NOTICE

§ 18.201 Official notice of adjudicative facts.

(a) Scope of rule. This rule governs only official notice of adjudicative facts.

(b) Kinds of facts. An officially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the local area,

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or

(3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

(c) When discretionary. A judge may take official notice, whether requested or not.

(d) When mandatory. A judge shall take official notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.

(f) Time of taking notice. Official notice may be taken at any stage of the proceeding.

(g) Effect of official notice. An officially noticed fact is accepted as conclusive.

SOURCE: 55 FR 13219, Apr. 9, 1990.

PRESUMPTIONS

§ 18.301 Presumptions in general.

Except as otherwise provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.302 Applicability of state law.

The effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

SOURCE: 55 FR 13219, Apr. 9, 1990.

RELEVANCY AND ITS LIMITS

§ 18.401 Definition of relevant evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.402 Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority. Evidence which is not relevant is not admissible.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.403 Exclusion of relevant evidence on grounds of confusion or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of issues, or misleading the judge as trier of fact, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.404 Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except evidence of the character of a witness, as provided in §§ 18.607, 18.608, and 18.609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.405 Methods of proving character.

(a) Reputation of opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a claim or defense, proof may also be made of specific instances of that person's conduct.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.406 Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.407 Subsequent remedial measurers.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.408 Compromise and offers to compromise.

Evidence of furnishing or offering or promising to furnish, or of accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negativing a contention of undue delay.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.409 Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.410 Inadmissibility of pleas, plea discussion, and related statements.

Except as otherwise provided in this rule, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(a) A plea of guilty which was later withdrawn;

(b) A plea of nolo contendere;

(c) Any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(d) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.411 Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

SOURCE: 55 FR 13219, Apr. 9, 1990.

PRIVILEGES

§ 18.501 General rule.

Except as otherwise required by the Constitution of the United States, or provided by Act of Congress, or by rules or regulations prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However with

respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

SOURCE: 55 FR 13219, Apr. 9, 1990.

WITNESSES

§ 18.601 General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules. However with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.602 Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of § 18.703, relating to opinion testimony by expert witnesses.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.603 Oath or affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.604 Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.605 Competency of judge as witness.

The judge presiding at the hearing may not testify in that hearing as a witness. No objection need be made in order to preserve the point.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.606 [Reserved]

[NO TEXT IN ORIGINAL]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.607 Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.608 Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness, and

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in § 18.609, may not be proved by extrinsic evidence. They may, however, in the discretion of the judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness, concerning the witness' character for truthfulness or untruthfulness, or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony by any witness does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.609 Impeachment by evidence of conviction of crime.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is not admissible under this rule.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

SOURCE: [55 FR 13219, Apr. 9, 1990; 55 FR 14033, Apr. 13, 1990]

§ 18.610 Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.611 Mode and order of interrogation and presentation.

(a) Control by judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.612 Writing used to refresh memory.

If a witness uses a writing to refresh memory for the purpose of testifying, either while testifying, or before testifying if the judge in the judge's discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the judge shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available in the event of review. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.613 Prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in § 18.801(d)(2).

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.614 Calling and interrogation of witnesses by judge.

(a) Calling by the judge. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by the judge. The judge may interrogate witnesses, whether called by the judge or by a party.

(c) Objections. Objections to the calling of witnesses by the judge or to interrogation by the judge must be timely.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.615 Exclusion of witnesses.

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the judge may make the order of the judge's own motion. This rule does not authorize exclusion of a party who is a natural person, or an officer or employee of a party which is not a natural person designated as its representative by its attorney, or a person whose presence is shown by a party to be essential to the presentation of the party's cause.

SOURCE: 55 FR 13219, Apr. 9, 1990.

OPINIONS AND EXPERT TESTIMONY

§ 18.701 Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.702 Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.703 Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.704 Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the judge as trier of fact.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.705 Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.706 Judge appointed experts.

(a) Appointment. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of the judge's own selection. An expert witness shall not

be appointed by the judge unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in hearings involving just compensation under the fifth amendment. In other hearings the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs.

(c) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

SOURCE: 55 FR 13219, Apr. 9, 1990.

HEARSAY

§ 18.801 Definitions.

(a) Statement. A statement is (1) an oral or written assertion, or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the hearing and is subject to cross-examination concerning the statement, and the statement is--

(i) Inconsistent with the declarant's testimony, or

(ii) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(iii) One of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is--

(i) The party's own statement in either an individual or a representative capacity, or

(ii) A statement of which the party has manifested an adoption or belief in its truth, or

(iii) A statement by a person authorized by the party to make a statement concerning the subject, or
(iv) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
(v) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.802 Hearsay rule.

Hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.803 Hearsay exceptions; availability of declarant immaterial.

(a) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the

course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term business as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth--

(i) The activities of the office or agency, or

(ii) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or

(iii) Factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with § 18.902, or testimony, that diligent search failed to disclose the record, report, statement, or date compilation, or entry.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to

have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by official notice.
(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.
(21) Reputation as to character. Reputation of a person's character among associates or in the community.
(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. The pendency of an appeal may be shown but does not affect admissibility.
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.
(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness to the aforementioned hearsay exceptions, if the judge determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be

admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) Self-authentication. The self-authentication of documents and other items as provided in § 18.902.

(26) Bills, estimates and reports. In actions involving injury, illness, disease, death, disability, or physical or mental impairment, or damage to property, the following bills, estimates, and reports as relevant to prove the value and reasonableness of the charges for services, labor and materials stated therein and, where applicable, the necessity for furnishing the same, unless the sources of information or other circumstances indicate lack of trustworthiness, provided that a copy of said bill, estimate, or report has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it:

> (i) Hospital bills on the official letterhead or billhead of the hospital, when dated and itemized.
>
> (ii) Bills of doctors and dentists, when dated and containing a statement showing the date of each visit and the charge therefor.
>
> (iii) Bills of registered nurses, licensed practical nurses and physical therapists, or other licensed health care providers when dated and containing an itemized statement of the days and hours of service and charges therefor.
>
> (iv) Bills for medicine, eyeglasses, prosthetic device, medical belts or similar items, when dated and itemized.
>
> (v) Property repair bills or estimates, when dated and itemized, setting forth the charges for labor and material. In the case of an estimate, the party intending to offer the estimate shall forward with his notice to the adverse party, together with a copy of the estimate, a statement indicating whether or not the property was repaired, and, if so, whether the estimated repairs were made in full or in part and by whom, the cost thereof, together with a copy of the bill therefore.
>
> (vi) Reports of past earnings, or of the rate of earnings and time lost from work or lost compensation, prepared by an employer on official letterhead, when dated and itemized. The adverse party may not dispute the authenticity, the value or reasonableness of such charges, the necessity therefore or the accuracy of the report, unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds thereof, that the adverse party will make if the bill, estimate, or reports is offered at the time of the hearing. An adverse party may call the author of the bill, estimate, or report as a witness and examine the witness as if under cross-examination.

(27) Medical reports. In actions involving injury, illness, disease, death, disability, or physical or mental impairment, doctor, hospital, laboratory and other medical reports, made for purposes of medical treatment, unless the sources of information or other circumstances indicate lack of trustworthiness, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party

with a fair opportunity to prepare to object or meet it. The adverse party may not object to the admissibility of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the author of the medical report as a witness and examine the witness as if under cross-examination.

(28) Written reports of expert witnesses. Written reports of an expert witness prepared with a view toward litigation, including but not limited to a diagnostic report of a physician, including inferences and opinions, when on official letterhead, when dated, when including a statement of the expert's qualifications, when including a summary of experience as an expert witness in litigation, when including the basic facts, data, and opinions forming the basis of the inferences or opinions, and when including the reasons for or explanation of the inferences and opinions, so far as admissible under rules of evidence applied as though the witness was then present and testifying, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the admissibility of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the expert as a witness and examine the witness as if under cross-examination.

(29) Written statements of lay witnesses. Written statements of a lay witness made under oath or affirmation and subject to the penalty of perjury, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness provided that (i) a copy of the written statement has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it, and (ii) if the declarant is reasonably available as a witness, as determined by the judge, no adverse party has sufficiently in advance of the hearing filed and served upon the noticing party a written demand that the declarant be produced in person to testify at the hearing. An adverse party may call the declarant as a witness and examine the witness as if under cross-examination.

(30) Deposition testimony. Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided that a notice of intention to offer the deposition in evidence, together with a copy thereof if not otherwise previously provided, has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. An adverse party may call the deponent as a witness and examine the witness as if under cross-examination.

(b) [Reserved]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.804 Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant:

(1) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or
(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under paragraph (b) (2), (3), or (4) of this section, the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.
(4) Statement of personal or family history. (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the

other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.
(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness to the aforementioned hearsay exceptions, if the judge determines that--

(i) The statement is offered as evidence of a material fact;
(ii) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
(iii) The general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.805 Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.806 Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in § 18.801(d)(2), (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SOURCE: 55 FR 13219, Apr. 9, 1990.

AUTHENTICATION AND IDENTIFICATION

§ 18.901 Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of litigation.

(3) Comparison by judge or expert witness. Comparison by the judge as trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if--

(i) In the case of a person, circumstances, including self-identification, show the person answering to be the one called, or

(ii) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form,

(i) Is in such condition as to create no suspicion concerning its authenticity,

(ii) Was in a place where it, if authentic, would likely be, and

(iii) Has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress, or by rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.902 Self-authentication.

(a) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (a)(1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position--

(i) Of the executing or attesting person, or

(ii) Of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a) (1), (2), or (3) of this section, with any Act of Congress, or with any rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
(10) Presumptions under Acts of Congress or administrative agency rules or regulations. Any signature, document, or other matter declared by Act of Congress or by rule or regulation prescribed by the administrative agency pursuant to statutory authority or pursuant to executive order to be presumptively or prima facie genuine or authentic.
(11) Certified records of regularly conducted activity. The original or a duplicate of a record of regularly conducted activity, within the scope of § 18.803(6), which the custodian thereof or another qualified individual certifies

(i) Was made, at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters,
(ii) Is kept in the course of the regularly conducted activity, and
(iii) Was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. A record so certified is not self-authenticating under this paragraph unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to object or meet it. As used in this subsection, certifies means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country.

(12) Bills, estimates, and reports. In actions involving injury, illness, disease, death, disability, or physical or mental impairment, or damage to property, the following bills, estimates, and reports provided that a copy of said bill, estimate, or report has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it:

(i) Hospital bills on the official letterhead or billhead of the hospital, when dated and itemized.
(ii) Bills of doctors and dentists, when dated and containing a statement showing the date of each visit and the charge therefor.
(iii) Bills of registered nurses, licensed practical nurses and physical therapists or other licensed health care providers, when dated and containing an itemized statement of the days and hours of service and the charges therefor.
(iv) Bills for medicine, eyeglasses, prosthetic devices, medical belts or similar items, when dated and itemized.
(v) Property repair bills or estimates, when dated and itemized, setting forth the charges for labor and material. In the case of an estimate, the party intending to offer

the estimate shall forward with his notice to the adverse party, together with a copy of the estimate, a statement indicating whether or not the property was repaired, and, if so, whether the estimated repairs were made in full or in part and by whom, the cost thereof, together with a copy of the bill therefor.

(vi) Reports of past earnings, or of the rate of earnings and time lost from work or lost compensation, prepared by an employer on official letterhead, when dated and itemized. The adverse party may not dispute the authenticity, therefor, unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, the adverse party will make if the bill, estimate, or report is offered at the time of the hearing. An adverse party may call the authors of the bill, estimate, or report as a witness and examine the witness as if under cross-examination.

(13) Medical reports. In actions involving injury, illness, disease, death, disability or physical or mental impairment, doctor, hospital, laboratory and other medical reports made for purposes of medical treatment, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the authenticity of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the author of the medical report as a witness and examine the witness as if under cross-examination.

(14) Written reports of expert witnesses. Written reports of an expert witness prepared with a view toward litigation including but not limited to a diagnostic report of a physician, including inferences and opinions, when on official letterhead, when dated, when including a statement of the experts qualifications, when including a summary of experience as an expert witness in litigation, when including the basic facts, data, and opinions forming the basis of the inferences or opinions, and when including the reasons for or explanation of the inferences or opinions, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, provided that a copy of the report has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. The adverse party may not object to the authenticity of the report unless the adverse party files and serves written objection thereto sufficiently in advance of the hearing stating the objections, and the grounds therefor, that the adverse party will make if the report is offered at the time of the hearing. An adverse party may call the expert as a witness and examine the witness as if under cross-examination.

(15) Written statements of lay witnesses. Written statements of a lay witness made under oath or affirmation and subject to the penalty of perjury, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, provided that:

(i) A copy of the written statement has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it, and

(ii) If the declarant is reasonably available as a witness, as determined by the judge, no adverse party has sufficiently in advance of the hearing filed and served upon the noticing party a written demand that the declarant be produced in person to testify at the hearing. An adverse party may call the declarant as a witness and examine the witness as if under cross-examination.

(16) Deposition testimony. Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided that a notice of intention to offer the deposition in evidence, together with a copy thereof if not otherwise previously provided, has been served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it. An adverse party may call the deponent as a witness and examine the witness as if under cross-examination.

(b) [Reserved]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.903 Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

SOURCE: 55 FR 13219, Apr. 9, 1990.

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

§ 18.1001 Definitions.

(a) For purposes of this article the following definitions are applicable:

(1) Writings and recordings. Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. Photographs include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or, other than with respect of X-ray films, any print

therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.
(4) Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

(b) [Reserved]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1002 Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, or by rule or regulation prescribed by the administrative agency pursuant to statutory authority, or pursuant to executive order, or by Act of Congress.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1003 Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the duplicate in lieu of the original.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1004 Admissibility of other evidence of contents.

(a) The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleading or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

(b) [Reserved]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1005 Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with § 18.902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1006 Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined at the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The judge may order that they be produced at the hearing.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1007 Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1008 Functions of the judge.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the

condition has been fulfilled is ordinarily for the judge to determine in accordance with the provisions of § 18.104(a). However, when an issue is raised whether the asserted writing ever existed; or whether another writing, recording, or photograph produced at the hearing is the original; or whether other evidence of contents correctly reflects the contents, the issue is for the judge as trier of fact to determine as in the case of other issues of fact.

SOURCE: 55 FR 13219, Apr. 9, 1990.

APPLICABILITY

§ 18.1101 Applicability of rules.

(a) General provision. These rules govern formal adversarial adjudications conducted by the United States Department of Labor before a presiding officer.

(1) Which are required by Act of Congress to be determined on the record after opportunity for an administrative agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, or

(2) Which by United States Department of Labor regulation are conducted in conformance with the foregoing provisions. Presiding officer, referred to in these rules as the judge, means an Administrative Law Judge, an agency head, or other officer who presides at the reception of evidence at a hearing in such an adjudication.

(b) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under § 18.104.

(2) Longshore, black lung, and related acts. Other than with respect to §§ 18.403, 18.611(a), 18.614 and without prejudice to current practice, hearings held pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901; the Federal Mine Safety and Health Act (formerly the Federal Coal Mine Health and Safety Act) as amended by the Black Lung Benefits Act, 30 U.S.C. 901; and acts such as the Defense Base Act, 42 U.S.C. 1651; the District of Columbia Workmen's Compensation Act, 36 DC Code 501; the Outer Continental Shelf Lands Act, 43 U.S.C. 1331; and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171, which incorporate section 23(a) of the Longshore and Harbor Workers' Compensation Act by reference.

(c) Rules inapplicable in part. These rules do not apply to the extent inconsistent with, in conflict with, or to the extent a matter is otherwise specifically provided by an Act of Congress, or by a rule or regulation of specific application prescribed by the United States Department of Labor pursuant to statutory authority, or pursuant to executive order.

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1102 [Reserved]

[NO TEXT IN ORIGINAL]

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1103 Title.

These rules may be known as the United States Department of Labor Rules of Evidence and cited as 29 CFR 18.---- (1989).

SOURCE: 55 FR 13219, Apr. 9, 1990.

§ 18.1104 Effective date.

These rules are effective thirty days after date of publication with respect to formal adversarial adjudications as specified in § 18.1101 except that with respect to hearings held following an investigation conducted by the United States Department of Labor, these rules shall be effective only where the investigation commenced thirty days after publication.

SOURCE: 55 FR 13219, Apr. 9, 1990.