in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to §17.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in §17.10 if a state process provides a state process recommendation to the Department through a single point of contact.

§17.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) *Simplify* means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) *Consolidate* means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) *Substitute* means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not consistent with law, a state may decide to try to simplify, consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet Federal requirements.

§17.13 May the Secretary waive any provision of these regulations?

In an emergency, the Secretary may waive any provision of these regulations.

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

Subpart A—General

GENERAL PROVISIONS

PARTIES AND REPRESENTATIVES

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DISCLOSURE AND DISCOVERY

Subpart B—Rules of Evidence

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

SOURCE: 48 FR 32538, July 15, 1983, unless otherwise noted.

Subpart A—General

SOURCE: 80 FR 28785, May 19, 2015, unless otherwise noted.

GENERAL PROVISIONS

§ 18.10 Scope and purpose.

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

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

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

§ 18.11 Definitions.

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

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

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

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

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

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

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

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

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

§ 18.12 Proceedings before administrative law judge.

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

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

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

(2) Administer oaths and affirmations and examine witnesses;

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

(4) Issue subpoenas authorized by law;

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

(6) Dispose of procedural requests and similar matters;

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

(8) Issue decisions and orders;

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

(10) Where applicable take any appropriate action authorized by the FRCP.

§ 18.13 Settlement judge procedure.

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

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

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

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

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

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

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

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

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

§ 18.14 Ex parte communication.

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

§ 18.15 Substitution of administrative law judge.

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

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

§ 18.16 Disqualification.

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

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

§ 18.17 Legal assistance.

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

PARTIES AND REPRESENTATIVES

§ 18.20 Parties to a proceeding.

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

§ 18.21 Party appearance and participation.

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

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

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

§ 18.22 Representatives.

(a) *Notice of appearance.* When first making an appearance, each representative must file a notice of appearance that indicates on whose behalf the appearance is made and the proceeding name and docket number. Any attorney representative must include in the notice of appearance the license registration number(s) assigned to the attorney.

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

(i) *Attorney in good standing.* An attorney who is in good standing in his or

her licensing jurisdiction may represent a party or subpoenaed witness before the Office of Administrative Law Judges. The filing of the Notice of Appearance required in paragraph (a) of this section constitutes an attestation that:

(A) The attorney is a member of a bar in good standing of the highest court of a State, Commonwealth, or Territory of the United States, or the District of Columbia where the attorney has been licensed to practice law; and

(B) No disciplinary proceeding is pending against the attorney in any jurisdiction where the attorney is licensed to practice law.

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

(iii) *Disclosure of discipline.* An attorney representative must promptly disclose to the judge any action suspending, enjoining, restraining, disbarring, or otherwise currently restricting the attorney in the practice of law in any jurisdiction where the attorney is licensed to practice law.

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

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

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

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

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

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

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

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

§ 18.23 Disqualification of representatives.

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

(i) Suspension of a license to practice law or disbarment from the practice of law by any court or agency of the United States, highest court of a State,

Commonwealth, or Territory of the United States, or the District of Columbia;

(ii) Disbarment from the practice of law on consent or resignation from the bar of a court or agency while an investigation into an allegation of misconduct is pending; or

(iii) Committing an act, omission, or contumacious conduct that violates these rules, an applicable statute, an applicable regulation, or the judge's order(s).

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

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

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

§ 18.24 Briefs from amicus curiae.

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

SERVICE, FORMAT, AND TIMING OF FILINGS AND OTHER PAPERS

§ 18.30 Service and filing.

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

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

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

(A) Handing it to the person;

(B) Leaving it;

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

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

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

(D) Leaving it with the docket clerk if the person has no known address;

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

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

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

(i) The title of the document;

(ii) The name and address of each person or representative being served;

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

(iv) The date of service; and

(v) How the paper was served.

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

(i) Notices of deposition,

(ii) Depositions,

(iii) Interrogatories,

(iv) Requests for documents or tangible things or to permit entry onto land;

(v) Requests for admission, and

(vi) The notice (and the related copy of the subpoena) that must be served on the parties under rule 18.56(b)(1) before a ''documents only'' subpoena may be served on the person commended to produce the material.

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

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

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

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

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

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

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

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

§18.31 Privacy protection for filings and exhibits.

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

(1) The last four digits of the social-security number and taxpayer-identification number;

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

(3) The minor's initials; and

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

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

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

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

(3) The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; and

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

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

reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

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

(e) *Protection of material.* For good cause, the judge may order protection of material pursuant to §§18.85 and 18.52.

§ 18.32 Computing and extending time.

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

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

(i) Exclude the day of the event that triggers the period;

(ii) Count every day, including intermediate Saturdays, Sundays, and legal holidays; and

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

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

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

(4) *''Legal holiday'' defined.* ''Legal holiday'' means the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and any day on which the district office in which the document is to be filed is closed or otherwise inaccessible.

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

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

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

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

[80 FR 28785, May 19, 2015, as amended at 80 FR 37539, July 1, 2015]

§ 18.33 Motions and other papers.

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

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

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

(3) State the relief sought;

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

(5) If required by paragraph (c)(4) of this section, include a memorandum of points and authority supporting the movant's position.

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

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

(i) When the motion may be heard ex parte;

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

(iii) When an order sets a different time.

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

(3) A written motion before hearing must state that counsel conferred, or attempted to confer, with opposing counsel in a good faith effort to resolve the motion's subject matter, and

whether the motion is opposed or unopposed. A statement of consultation is not required with pro se litigants or with the following motions:

(i) To dismiss;

(ii) For summary decision; and

(iii) Any motion filed as ''joint,'' ''agreed,'' or ''unopposed.''

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

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

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

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

(1) The earlier motion(s),

(2) When the respective motion was made,

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

(4) The earlier ruling(s), and

(5) The basis for the current motion.

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

[80 FR 28785, May 19, 2015, as amended at 80 FR 37539, July 1, 2015]

§ 18.34 Format of papers filed.

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

(a) The parties' names,

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

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

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

(a) *Date and signature.* Every written motion and other paper filed with OALJ must be dated and signed by at least one representative of record in the representative's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, telephone number, facsimile number and email address, if any. The judge must strike an unsigned paper unless the omission is promptly corrected after being called to the representative's or party's attention.

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

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

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

(3) The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity

for further investigation or discovery; and

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

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

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

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

(4) *Nature of a sanction.* A sanction imposed under this section may include, but is not limited to, striking part or all of the offending document, forbidding the filing of any further documents, excluding related evidence, admonishment, referral of counsel misconduct to the appropriate licensing authority, and including the sanctioned activity in assessing the quality of representation when determining an appropriate hourly rate and billable hours when adjudicating attorney fees.

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

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

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

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

Prehearing Procedure

§18.40 Notice of hearing.

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

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

§18.41 Continuances and changes in place of hearing.

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

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

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

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

§18.42 Expedited proceedings.

A party may move to expedite the proceeding. The motion must demonstrate the specific harm that would result if the proceeding is not expedited. If the motion is granted, the formal hearing ordinarily will not be

scheduled with less than 7 days notice to the parties, unless all parties consent to an earlier hearing.

§ 18.43 Consolidation; separate hearings.

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

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

(2) Consolidate the proceedings; or

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

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

§ 18.44 Prehearing conference.

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

(1) Expediting disposition of the proceeding;

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

(3) Discouraging wasteful prehearing activities;

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

(5) Facilitating settlement.

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

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

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

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

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

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

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

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

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

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

(8) Referring matters to a special master;

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

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

(11) Disposing of pending motions;

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

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

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

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

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

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

DISCLOSURE AND DISCOVERY

§ 18.50 General provisions governing disclosure and discovery.

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

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

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

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

(i) Methods of discovery may be used in any sequence; and

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

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

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

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

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

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

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

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

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

(vi) Any other orders that the judge should issue under § 18.52 or § 18.44.

(c) *Required disclosures*—(1) *Initial disclosure*—(i) *In general*. Except as exempted by paragraph (c)(1)(ii) of this section or otherwise ordered by the judge, a party must, without awaiting a discovery request, provide to the other parties:

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

(B) A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its

claims or defenses, unless the use would be solely for impeachment; and

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

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

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

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

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

(D) A rulemaking proceeding under the Occupational Safety and Health Act of 1970; and

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

(iii) *Parties exempt from initial disclosure.* The following parties are exempt from initial disclosure:

(A) In a Black Lung benefits proceeding under 30 U.S.C. 901 *et seq.*, the representative of the Office of Workers' Compensation Programs of the Department of Labor, if an employer has been identified as the Responsible Operator and is a party to the proceeding, *see* 20 CFR 725.418(d); and

(B) In a proceeding under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–950, or an associated statute such as the Defense Base Act, 42 U.S.C. 1651–1654, the representative of the Office of Workers' Compensation Programs of the Department of Labor, unless the Solicitor of Labor or the Solicitor's designee has elected to participate in the proceeding under 20 CFR 702.333(b), or unless an employer or carrier has applied for relief under the special fund, as defined in 33 U.S.C. 908(f).

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

(v) *Time for initial disclosures—for parties served or joined later.* A party that is first served or otherwise joined later in the proceeding must make the initial disclosures within 21 days after being served or joined, unless a different time is set by stipulation or the judge's order. Copies of all prior disclosures must be served on a newly served or joined party within 21 days of the service or joinder.

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

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

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

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

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

(C) Any exhibits that will be used to summarize or support them;

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

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

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

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

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

(B) A summary of the facts and opinions to which the witness is expected to testify.

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

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

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

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

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

(ii) With respect to a discovery request, response, or objection, it is:

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

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

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

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

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

§18.51 Discovery scope and limits.

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

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

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

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

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

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

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

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

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

(i) They are otherwise discoverable under paragraph (a) of this section; and

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

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

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

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

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

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

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

(3) *Hearing-preparation protection for communications between a party's representative and expert witnesses.* Paragraphs (c)(1) and (2) under this section protect communications between the party's representative and any witness required to provide a report under

§ 18.50(c)(2)(ii), regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

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

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

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

(i) As provided in § 18.62(c); or

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

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

(i) Expressly make the claim; and

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

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

[80 FR 28785, May 19, 2015, as amended at 80 FR 37539, July 1, 2015]

§ 18.52 Protective orders.

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

(1) Forbidding the disclosure or discovery;

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

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

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

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

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

(7) Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way;

and

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

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

§ 18.53 Supplementing disclosures and responses.

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

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

(2) As ordered by the judge.

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

[80 FR 28785, May 19, 2015, as amended at 80 FR 37540, July 1, 2015]

§ 18.54 Stipulations about discovery procedure.

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

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

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

§ 18.55 Using depositions at hearings.

(a) *Using depositions*—(1) *In general.* If there is no objection, all or part of a deposition may be used at a hearing to the extent it would be admissible under the applicable rules of evidence as if the deponent were present and testifying.

(2) *Over objection.* Notwithstanding any objection, all or part of a deposition may be used at a hearing against a party on these conditions:

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

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

(iii) The use is allowed by paragraphs (a)(3) through (9) of this section.

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

(4) *Deposition of party, agent, or designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under § 18.64(b)(6) or § 18.65(a)(4).

(5) *Deposition of expert, treating physician, or examining physician.* A party may use for any purpose the deposition of an expert witness, treating physician or examining physician.

(6) *Unavailable witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the judge finds:

(i) That the witness is dead;

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

(iii) That the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(iv) That the party offering the deposition could not procure the witness's attendance by subpoena; or

(v) on motion and notice, that exceptional circumstances make it desirable—in the interests of justice and with due regard to the importance of live testimony in an open hearing—to permit the deposition to be used.

(7) *Limitations on use*—(i) *Deposition taken on short notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a

protective order under §18.52(a)(2) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(ii) *Unavailable deponent; party could not obtain a representative.* A deposition taken without leave of the judge under the unavailability provision of §18.64(a)(2)(i)(C) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain a representative to represent it at the deposition.

(8) *Using part of a deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(9) *Deposition taken in an earlier action.* A deposition lawfully taken may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the applicable rules of evidence.

(b) *Objections to admissibility.* Subject to paragraph (d)(3) of this section, an objection may be made at a hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of presentation.* Unless the judge orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but the judge may receive the testimony in nontranscript form as well.

(d) *Waiver of objections*—(1) *To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the officer's qualification.* An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(i) Before the deposition begins; or

(ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition*—(i) *Objection to competence, relevance, or materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(A) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(B) It is not timely made during the deposition.

(iii) *Objection to a written question.* An objection to the form of a written question under §18.65 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To completing and returning the deposition.* An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

§18.56 Subpoena.

(a) *In general.* (1) Upon written application of a party the judge may issue a subpoena authorized by statute or law that requires a witness to attend and to produce relevant papers, books, documents, or tangible things in the witness' possession or under the witness' control.

(2) *Form and contents*—(i) *Requirements—in general.* Every subpoena must:

(A) State the title of the matter and show the case number assigned by the Office of Administrative Law Judges or the Office of Worker's Compensation Programs. In the event that the case

number is an individual's Social Security number only the last four numbers may be used. *See* §18.31(a)(1);

(B) Bear the signature of the issuing judge;

(C) Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(D) Set out the text of paragraphs (c) and (d) of this section.

(ii) *Command to attend a deposition—notice of the recording method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(iii) *Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition or hearing, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(iv) *Command to produce; included obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(b) *Service*—(1) *By whom; tendering fees; serving a copy of certain subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering with it the fees for 1 day's attendance and the mileage allowed by law. Service may also be made by certified mail with return receipt. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before the formal hearing, then before it is served on the person to whom it is directed, a notice and copy of the subpoena must be served on each party.

(2) *Service in the United States.* Subject to paragraph (c)(3)(i)(B) of this section, a subpoena may be served at any place within a State, Commonwealth, or Territory of the United States, or the District of Columbia.

(3) *Service in a foreign country.* 28 U.S.C. 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of service.* Proving service, when necessary, requires filing with the judge a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) *Protecting a person subject to a subpoena*—(1) *Avoiding undue burden; sanctions.* A party or representative responsible for requesting, issuing, or serving a subpoena must take reasonable steps to avoid imposing undue burden on a person subject to the subpoena. The judge must enforce this duty and impose an appropriate sanction.

(2) *Command to produce materials or permit inspection*—(i) *Appearance not required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition or hearing.

(ii) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or representative designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(A) At any time, on notice to the commanded person, the serving party

may move the judge for an order compelling production or inspection.

(B) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or modifying a subpoena*—(i) *When required.* On timely motion, the judge must quash or modify a subpoena that:

(A) Fails to allow a reasonable time to comply;

(B) Requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to paragraph (c)(3)(ii)(C) of this section, the person may be commanded to attend the formal hearing;

(C) Requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(D) Subjects a person to undue burden.

(ii) *When permitted.* To protect a person subject to or otherwise affected by a subpoena, the judge may, on motion, quash or modify the subpoena if it requires:

(A) Disclosing a trade secret or other confidential research, development, or commercial information;

(B) Disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(C) A person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend the formal hearing.

(iii) *Specifying conditions as an alternative.* In the circumstances described in paragraph (c)(3)(ii) of this section, the judge may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(A) Shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(B) Ensures that the subpoenaed person will be reasonably compensated.

(d) *Duties in responding to a subpoena*—(1) *Producing documents or electronically stored information.* These procedures apply to producing documents or electronically stored information:

(i) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(ii) *Form for producing electronically stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(iii) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(iv) *Inaccessible electronically stored information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the judge may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of §18.51(b)(4)(iii). The judge may specify conditions for the discovery.

(2) *Claiming privilege or protection*—(i) *Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as hearing-preparation material must:

(A) Expressly make the claim; and

(B) Describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(ii) *Information produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as hearing-preparation material, the person making the claim

may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the judge *in camera* for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Failure to obey.* When a person fails to obey a subpoena, the party adversely affected by the failure may, when authorized by statute or by law, apply to the appropriate district court to enforce the subpoena.

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

(a) *Motion for an order compelling disclosure or discovery*—(1) *In general.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge's action.

(2) *Specific motions*—(i) *To compel disclosure.* If a party fails to make a disclosure required by §18.50(c), any other party may move to compel disclosure and for appropriate sanctions.

(ii) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(A) A deponent fails to answer a question asked under §§18.64 and 18.65;

(B) A corporation or other entity fails to make a designation under §§18.64(b)(6) and 18.65(a)(4);

(C) A party fails to answer an interrogatory submitted under §18.60; or

(D) A party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under §18.61.

(iii) *Related to a deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of paragraph (a) of this section, an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(b) *Failure to comply with a judge's order*—(1) *For not obeying a discovery order.* If a party or a party's officer, director, or managing agent—or a witness designated under §§18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under §18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following:

(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

(ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) Striking claims or defenses in whole or in part;

(iv) Staying further proceedings until the order is obeyed;

(v) Dismissing the proceeding in whole or in part; or

(vi) Rendering a default decision and order against the disobedient party;

(2) *For not producing a person for examination.* If a party fails to comply with an order under §18.62 requiring it to produce another person for examination, the judge may issue any of the orders listed in paragraph (b)(1) of this section, unless the disobedient party shows that it cannot produce the other person.

(c) *Failure to disclose, to supplement an earlier response, or to admit.* If a party fails to provide information or identify a witness as required by §§18.50(c) and 18.53, or if a party fails to admit what is requested under §18.63(a) and the requesting party later proves a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the

failure was substantially justified or is harmless. In addition to or instead of this sanction, the judge, on motion and after giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

(d) *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection*—(1) *In general*—(i) *Motion; grounds for sanctions.* The judge may, on motion, order sanctions if:

(A) A party or a party's officer, director, or managing agent—or a person designated under §§18.64(b)(6) and 18.65(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(B) A party, after being properly served with interrogatories under §18.60 or a request for inspection under §18.61, fails to serve its answers, objections, or written response.

(ii) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.

(2) *Unacceptable excuse for failing to act.* A failure described in paragraph (d)(1)(i) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under §18.52(a).

(3) *Types of sanctions.* Sanctions may include any of the orders listed in paragraph (b)(1) of this section.

(e) *Failure to provide electronically stored information.* Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) *Procedure.* A judge may impose sanctions under this section upon:

(1) A separately filed motion; or

(2) Notice from the judge followed by a reasonable opportunity to be heard.

TYPES OF DISCOVERY

§ 18.60 Interrogatories to parties.

(a) *In general*—(1) *Number.* Unless otherwise stipulated or ordered by the judge, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with §18.51.

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under §18.51. An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the judge may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) *Answers and objections*—(1) *Responding party.* The interrogatories must be answered:

(i) By the party to whom they are directed; or

(ii) If that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) *Time to respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under §18.54 or be ordered by the judge.

(3) *Answering each interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the judge, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney or non-attorney representative who objects must sign any objections.

(c) *Use.* An answer to an interrogatory may be used to the extent allowed by the applicable rules of evidence.

(d) *Option to produce business records.* If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) Specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) Giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

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

(a) *In general.* A party may serve on any other party a request within the scope of § 18.51:

(1) To produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(i) Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(ii) Any designated tangible things; or

(2) To permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) *Procedure*—(1) *Contents of the request.* The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected;

(ii) Must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(iii) May specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and objections*—(i) *Time to respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under § 18.54 or be ordered by the judge.

(ii) *Responding to each item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(iii) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(iv) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(v) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the judge, these procedures apply to producing documents or electronically stored information:

(A) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(B) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(C) A party need not produce the same electronically stored information in more than one form.

(c) *Nonparties.* As provided in § 18.56, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

§ 18.62 Physical and mental examinations.

(a) *Examination by notice*—(1) *In general.* A party may serve upon another

party whose mental or physical condition is in controversy a notice to attend and submit to an examination by a suitably licensed or certified examiner.

(2) *Contents of the notice.* The notice must specify:

(i) The legal basis for the examination;

(ii) The time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it; and

(iii) How the reasonable transportation expenses were calculated.

(3) *Service of notice.* Unless otherwise agreed by the parties, the notice must be served no fewer than 30 days before the examination date.

(4) *Objection.* The person to be examined must serve any objection to the notice no later than 14 days after the notice is served. The objection must be stated with particularity.

(b) *Examination by motion.* Upon objection by the person to be examined the requesting party may file a motion to compel a physical or mental examination. The motion must include the elements required by paragraph (a)(2) of this section.

(c) *Examiner's report*—(1) *Delivery of the report.* The party who initiated the examination must deliver a complete copy of the examination report to the party examined no later than seven days after it receives the report, together with like reports of all earlier examinations of the same condition.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

§ 18.63 Requests for admission.

(a) *Scope and procedure*—(1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 18.51 relating to:

(i) Facts, the application of law to fact, or opinions about either; and

(ii) The genuineness of any described documents.

(2) *Form; copy of a document.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under § 18.54 or be ordered by the judge.

(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) *Motion regarding the sufficiency of an answer or objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless the judge finds an objection justified, the judge must order that an answer be served. On finding that an answer does not comply with this section, the judge may order either that the matter is admitted or that an amended answer be served. The judge may defer final decision until a prehearing conference or a specified time before the hearing.

(b) *Effect of an admission; withdrawing or amending it.* A matter admitted under this section is conclusively established unless the judge, on motion, permits the admission to be withdrawn or amended. The judge may permit withdrawal or amendment if it would promote the presentation of the merits

of the action and if the judge is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

§ 18.64 Depositions by oral examination.

(a) *When a deposition may be taken*—(1) *Without leave.* A party may, by oral questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under § 18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with § 18.51(b):

(i) If the parties have not stipulated to the deposition and:

(A) The deposition would result in more than 10 depositions being taken under this section or § 18.65 by one of the parties;

(B) The deponent has already been deposed in the case; or

(C) The party seeks to take the deposition before the time specified in § 18.50(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(ii) If the deponent is confined in prison.

(b) *Notice of the deposition; other formal requirements*—(1) *Notice in general.* Except as stipulated or otherwise ordered by the judge, a party who wants to depose a person by oral questions must give reasonable written notice to every other party of no fewer than 14 days. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. If the notice to a party deponent is accompanied by a request for production under § 18.61, the notice must comply with the requirements of § 18.61(b).

(3) *Method of recording*—(i) *Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(ii) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the judge orders otherwise.

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

(5) *Deposition officer's duties*—(i) *Before the deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before a person having power to administer oaths. The officer must begin the deposition with an on-the-record statement that includes:

(A) The officer's name and business address;

(B) The date, time, and place of the deposition;

(C) The deponent's name;

(D) The officer's administration of the oath or affirmation to the deponent;

(E) The identity of all persons present; and

(F) The date and method of service of the notice of deposition.

(ii) *Conducting the deposition; avoiding distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in paragraphs (b)(5)(i)(A) and (B) of this section at the beginning of each unit of the recording medium. The deponent's and

attorneys' appearance or demeanor must not be distorted through recording techniques.

(iii) *After the deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

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

(c) *Examination and cross-examination; record of the examination; objections; written questions*—(1) *Examination and cross-examination.* The examination and cross-examination of a deponent proceed as they would at the hearing under the applicable rules of evidence. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under paragraph (b)(3)(i) of this section. The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

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

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

(d) *Duration; sanction; motion to terminate or limit*—(1) *Duration.* Unless otherwise stipulated or ordered by the judge, a deposition is limited to 1 day of 7 hours. The judge must allow additional time consistent with §18.51(b) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The judge may impose an appropriate sanction, in accordance with §18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to terminate or limit*—(i) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(ii) *Order.* The judge may order that the deposition be terminated or may limit its scope and manner as provided in §18.52. If terminated, the deposition may be resumed only by the judge's order.

(e) *Review by the witness; changes*—(1) *Review; statement of changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing

the changes and the reasons for making them.

(2) *Changes indicated in the officer's certificate.* The officer must note in the certificate prescribed by paragraph (f)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) *Certification and delivery; exhibits; copies of the transcript or recording; filing*—(1) *Certification and delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the judge orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name]'' and must promptly send it to the party or the party's representative who arranged for the transcript or recording. The party or the party's representative must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things*—(i) *Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(ii) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the proceeding.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the judge, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) *Failure to attend a deposition or serve a subpoena.* A judge may order sanctions, in accordance with §18.57, if a party who, expecting a deposition to be taken, attends in person or by an attorney, and the noticing party failed to:

(1) Attend and proceed with the deposition; or

(2) Serve a subpoena on a nonparty deponent, who consequently did not attend.

§ 18.65 Depositions by written questions.

(a) *When a deposition may be taken*—(1) *Without leave.* A party may, by written questions, depose any person, including a party, without leave of the judge except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under §18.56.

(2) *With leave.* A party must obtain leave of the judge, and the judge must grant leave to the extent consistent with §18.51(b):

(i) If the parties have not stipulated to the deposition and:

(A) The deposition would result in more than 10 depositions being taken under this section or §18.64 by a party;

(B) The deponent has already been deposed in the case; or

(C) The party seeks to take a deposition before the time specified in §18.50(a); or

(ii) If the deponent is confined in prison.

(3) *Service; required notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions directed to an organization*. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with §18.64(b)(6).

(5) *Questions from other parties*. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The judge may, for good cause, extend or shorten these times.

(b) *Delivery to the deposition officer; officer's duties*. Unless a different procedure is ordered by the judge, the party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in §18.64(c), (e), and (f) to:

(1) Take the deponent's testimony in response to the questions;

(2) Prepare and certify the deposition; and

(3) Send it to the party, attaching a copy of the questions and of the notice.

(c) *Notice of completion or filing*—(1) *Completion*. The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing*. A party who files the deposition must promptly notify all other parties of the filing.

DISPOSITION WITHOUT HEARING

§18.70 Motions for dispositive action.

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

(b) *Motion to remand*. A party may move to remand the matter to the referring agency. A remand order must include any terms or conditions and should state the reason for the remand.

(c) *Motion to dismiss*. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed.

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

§18.71 Approval of settlement or consent findings.

(a) *Motion for approval of settlement agreement*. When the applicable statute or regulation requires it, the parties must submit a settlement agreement for the judge's review and approval.

(b) *Motion for consent findings and order*. Parties may file a motion to accept and adopt consent findings. Any agreement that contains consent findings and an order that disposes of all or part of a matter must include:

(1) A statement that the order has the same effect as one made after a full hearing;

(2) A statement that the order is based on a record that consists of the paper that began the proceeding (such as a complaint, order of reference, or notice of administrative determination), as it may have been amended, and the agreement;

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

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

§18.72 Summary decision.

(a) *Motion for summary decision or partial summary decision*. A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.

(b) *Time to file a motion*. Unless the judge orders otherwise, a party may

file a motion for summary decision at any time until 30 days before the date fixed for the formal hearing.

(c) *Procedures*—(1) *Supporting factual positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection that a fact is not supported by admissible evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials not cited.* The judge need consider only the cited materials, but the judge may consider other materials in the record.

(4) *Affidavits or declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) *When facts are unavailable to the nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may:

(1) Defer considering the motion or deny it;

(2) Allow time to obtain affidavits or declarations or to take discovery; or

(3) Issue any other appropriate order.

(e) *Failing to properly support or address a fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c) of this section, the judge may:

(1) Give an opportunity to properly support or address the fact;

(2) Consider the fact undisputed for purposes of the motion;

(3) Grant summary decision if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) Issue any other appropriate order.

(f) *Decision independent of the motion.* After giving notice and a reasonable time to respond, the judge may:

(1) Grant summary decision for a nonmovant;

(2) Grant the motion on grounds not raised by a party; or

(3) Consider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute.

(g) *Failing to grant all the requested relief.* If the judge does not grant all the relief requested by the motion, the judge may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) *Affidavit or declaration submitted in bad faith.* If satisfied that an affidavit or declaration under this section is submitted in bad faith or solely for delay, the judge—after notice and a reasonable time to respond—may order sanctions or other relief as authorized by law.

HEARING

§ 18.80 Prehearing statement.

(a) *Time for filing.* Unless the judge orders otherwise, at least 21 days before the hearing, each participating party must file a prehearing statement.

(b) *Required conference.* Before filing a prehearing statement, the party must confer with all other parties in good faith to:

(1) Stipulate to the facts to the fullest extent possible; and

(2) Revise exhibit lists, eliminate duplicative exhibits, prepare joint exhibits, and attempt to resolve any objections to exhibits.

(c) *Contents.* Unless ordered otherwise, the prehearing statement must state:

(1) The party's name;

(2) The issues of law to be determined with reference to the appropriate statute, regulation, or case law;

(3) A precise statement of the relief sought;
(4) The stipulated facts that require no proof;
(5) The facts disputed by the parties;
(6) A list of witnesses the party expects to call;
(7) A list of the joint exhibits;
(8) A list of the party's exhibits;
(9) An estimate of the time required for the party to present its case-in-chief; and
(10) Any additional information that may aid the parties' preparation for the hearing or the disposition of the proceeding, such as the need for specialized equipment at the hearing.

(d) *Joint prehearing statement.* The judge may require the parties to file a joint prehearing statement rather than individual prehearing statements.

(e) *Signature.* The prehearing statement must be in writing and signed. By signing, an attorney, representative, or party makes the certifications described in §18.50(d).

§ 18.81 Formal hearing.

(a) *Public.* Hearings are open to the public. But, when authorized by law and only to the minimum extent necessary, the judge may order a hearing or any part of a hearing closed to the public, including anticipated witnesses. The order closing all or part of the hearing must state findings and explain why the reasons for closure outweigh the presumption of public access. The order and any objection must be part of the record.

(b) *Taking testimony.* Unless a closure order is issued under paragraph (a) of this section, the witnesses' testimony must be taken in an open hearing. For good cause and with appropriate safeguards, the judge may permit testimony in an open hearing by contemporaneous transmission from a different location.

(c) *Party participation.* For good cause and with appropriate safeguards, the judge may permit a party to participate in an open hearing by contemporaneous transmission from a different location.

§ 18.82 Exhibits.

(a) *Identification.* All exhibits offered in evidence must be marked with a designation identifying the party offering the exhibit and must be numbered and paginated as the judge orders.

(b) *Electronic data.* By order the judge may prescribe the format for the submission of data that is in electronic form.

(c) *Exchange of exhibits.* When written exhibits are offered in evidence, one copy must be furnished to the judge and to each of the parties at the hearing, unless copies were previously furnished with the list of proposed exhibits or the judge directs otherwise. If the judge does not fix a date for the exchange of exhibits, the parties must exchange copies of exhibits at the earliest practicable time before the hearing begins.

(d) *Authenticity.* The authenticity of a document identified in a pre-hearing exhibit list is admitted unless a party files a written objection to authenticity at least 7 days before the hearing. The judge may permit a party to challenge a document's authenticity if the party establishes good cause for its failure to file a timely written objection.

(e) *Substitution of copies for original exhibits.* The judge may permit a party to withdraw original documents offered in evidence and substitute accurate copies of the originals.

(f) *Designation of parts of documents.* When only a portion of a document contains relevant matter, the offering party must exclude the irrelevant parts to the greatest extent practicable.

(g) *Records in other proceedings.* Portions of the record of other administrative proceedings, civil actions or criminal prosecutions may be received in evidence, when the offering party shows the copies are accurate.

§ 18.83 Stipulations.

(a) The parties may stipulate to any facts in writing at any stage of the proceeding or orally on the record at a deposition or at a hearing. These stipulations bind the parties unless the judge disapproves them.

(b) Every stipulation that requests or requires a judge's action must be written and signed by all affected parties or their representatives. Any stipulation to extend time must state the reason for the date change.

(c) A proposed form of order may be submitted with the stipulation; it may consist of an endorsement on the stipulation of the words, ''Pursuant to stipulation, it is so ordered,'' with spaces designated for the date and the signature of the judge.

§ 18.84 Official notice.

On motion of a party or on the judge's own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.

§ 18.85 Privileged, sensitive, or classified material.

(a) *Exclusion.* On motion of any interested person or the judge's own, the judge may limit the introduction of material into the record or issue orders to protect against undue disclosure of privileged communications, or sensitive or classified matters. The judge may admit into the record a summary or extract that omits the privileged, sensitive or classified material.

(b) *Sealing the record.* (1) On motion of any interested person or the judge's own, the judge may order any material that is in the record to be sealed from public access. The motion must propose the fewest redactions possible that will protect the interest offered as the basis for the motion. A redacted copy or summary of any material sealed must be made part of the public record unless the necessary redactions would be so extensive that the public version would be meaningless, or making even a redacted version or summary available would defeat the reason the original is sealed.

(2) An order that seals material must state findings and explain why the reasons to seal adjudicatory records outweigh the presumption of public access. Sealed materials must be placed in a clearly marked, separate part of the record. Notwithstanding the judge's order, all parts of the record remain subject to statutes and regulations pertaining to public access to agency records.

§ 18.86 Hearing room conduct.

Participants must conduct themselves in an orderly manner. The consumption of food or beverage, and rearranging courtroom furniture are prohibited, unless specifically authorized by the judge. Electronic devices must be silenced and must not disrupt the proceedings. Parties, witnesses and spectators are prohibited from using video or audio recording devices to record hearings.

§ 18.87 Standards of conduct.

(a) *In general.* All persons appearing in proceedings must act with integrity and in an ethical manner.

(b) *Exclusion for misconduct.* During the course of a proceeding, the judge may exclude any person—including a party or a party's attorney or non-attorney representative—for contumacious conduct such as refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly or ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. The judge must state the basis for the exclusion.

(c) *Review of representative's exclusion.* Any representative excluded from a proceeding may appeal to the Chief Judge for reinstatement within 7 days of the exclusion. The exclusion order is reviewed for abuse of discretion. The proceeding from which the representative was excluded will not be delayed or suspended pending review by the Chief Judge, except for a reasonable delay to enable the party to obtain another representative.

§ 18.88 Transcript of proceedings.

(a) *Hearing transcript.* All hearings must be recorded and transcribed. The parties and the public may obtain copies of the transcript from the official reporter at rates not to exceed the applicable rates fixed by the contract with the reporter.

(b) *Corrections to the transcript.* A party may file a motion to correct the official transcript. Motions for correction must be filed within 14 days of the receipt of the transcript unless the judge permits additional time. The judge may grant the motion in whole

or part if the corrections involve substantive errors. At any time before issuing a decision and upon notice to the parties, the judge may correct errors in the transcript.

POST HEARING

§ 18.90 Closing the record; subsequent motions.

(a) *In general.* The record of a hearing closes when the hearing concludes, unless the judge directs otherwise. If any party waives a hearing, the record closes on the date the judge sets for the filing of the parties' submissions.

(b) *Motion to reopen the record.* (1) A motion to reopen the record must be made promptly after the additional evidence is discovered. No additional evidence may be admitted unless the offering party shows that new and material evidence has become available that could not have been discovered with reasonable diligence before the record closed. Each new item must be designated as an exhibit under §18.82(a) and accompanied by proof that copies have been served on all parties.

(2) If the record is reopened, the other parties must have an opportunity to offer responsive evidence, and a new evidentiary hearing may be set.

(c) *Motions after the decision.* After the decision and order is issued, the judge retains jurisdiction to dispose of appropriate motions, such as a motion to award attorney's fees and expenses, a motion to correct the transcript, or a motion for reconsideration.

§ 18.91 Post-hearing brief.

The judge may grant a party time to file a post-hearing brief with proposed findings of fact, conclusions of law, and the specific relief sought. The brief must refer to all portions of the record and authorities relied upon in support of each assertion.

§ 18.92 Decision and order.

At the conclusion of the proceeding, the judge must issue a written decision and order.

§ 18.93 Motion for reconsideration.

A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.

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

(a) *Relief pending review.* If a timely motion is made for relief that the judge lacks authority to grant because a petition for review has been docketed and is pending, the judge may:

(1) Defer considering the motion;

(2) Deny the motion; or

(3) State either that the judge would grant the motion if the reviewing body remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to reviewing body.* The movant must promptly notify the clerk of the reviewing body if the judge states that he or she would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* The judge may decide the motion if the reviewing body remands for that purpose.

§ 18.95 Review of decision and review by the Secretary.

(a) *Review.* The statute or regulation that conferred hearing jurisdiction provides the procedure for review of a judge's decision. If the statute or regulation does not provide a procedure, the judge's decision becomes the Secretary's final administrative decision, except as provided in paragraph (b) of this section.

(b) *Finality.* A decision of the Board of Alien Labor Certification Appeals (BALCA) shall constitute the Secretary's final administrative decision except in those cases over which the Secretary has, in accordance with this paragraph (b) and paragraph (c) of this section, assumed jurisdiction:

(1) In any case for which administrative review is sought or handled in accordance with 20 CFR 655.171(a) or 20 CFR 655.461, at any point from when the BALCA receives a request for review until the passage of 10 business days after the date on which BALCA has issued its decision.

(2) In any case for which a de novo hearing is sought or handled under 20 CFR 655.171(b), at any point within 15 business days after the date on which the BALCA has issued its decision.

(3) In any case for which review is sought or handled in accordance with 20 CFR 656.26 and 20 CFR 656.27, at any point from when the BALCA receives a request for review until the passage of 30 business days after the BALCA has issued its decision.

(c) *Review by the Secretary*—(1) *Transmission of information.* (i) Whenever the BALCA receives a request for review, it shall immediately transmit a copy of such request to the Deputy Secretary.

(ii) Within 3 business days of when the BALCA issues a decision, the Chair of the BALCA, or his or her designee, shall transmit to the Deputy Secretary a copy of the decision and a concise recommendation as to whether the decision involves an issue or issues of such exceptional importance that review by the Secretary is warranted.

(2) *Review.* (i) The Secretary may, at any point within the time periods provided for in paragraph (b) of this section, and in his or her sole discretion, assume jurisdiction to review the decision or determination of the Certifying Officer, the Office of Foreign Labor Certification Administrator, the National Prevailing Wage Center Director, or the BALCA, as the case may be.

(ii) When the Secretary assumes jurisdiction over a case, the Secretary shall promptly notify the BALCA. The BALCA shall promptly notify the parties to the case of such action and shall submit the Appeal File and any briefs filed to the Secretary.

(iii) In any case the Secretary decides, the Secretary's decision shall be stated in writing and transmitted to the BALCA, which shall promptly publish the decision and transmit it to the parties to the case. Such decision shall constitute final action by the Department and shall serve as binding precedent on all Department employees and in all Department proceedings involving the same issue or issues.

(iv) The Solicitor of Labor, or his or her designee, shall have the responsibility for providing legal advice to the Secretary with respect to the Secretary's exercise of review under this section, except that no individual involved in the investigation or prosecution of a case shall advise the Secretary on the exercise of review with respect to such case or a case involving a common nucleus of operative fact.

[85 FR 30617, May 20, 2020]

Subpart B—Rules of Evidence

SOURCE: 55 FR 13219, Apr. 9, 1990, unless otherwise noted.

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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

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.

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.

§ 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.

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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 18.407 Subsequent remedial measures.

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.

§ 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.

§ 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.

§ 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.

§ 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.

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.

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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 18.606 [Reserved]

§ 18.607 Who may impeach.

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

§ 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.

§ 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.

[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.

§ 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.

§ 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.

§ 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).

§ 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.

§ 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.

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.

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

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.

§ 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.

§ 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]

§ 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.

§ 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.

§ 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.

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.

§ 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]

§ 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.

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]

§ 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.

§ 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.

§ 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]

§ 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.

§ 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.

§ 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.

§ 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.

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.

§18.1102 [Reserved]

§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).

§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.

APPENDIX TO SUBPART B OF PART 18—REPORTER'S NOTES

Reporter's Introductory Note

The Rules of Evidence for the United States Department of Labor modify the Federal Rules of Evidence for application in formal adversarial adjudications conducted by the United States Department of Labor. The civil nonjury nature of the hearings and the broad underlying values and goals of the administrative process are given recognition in these rules.

REPORTER'S NOTE TO §18.102

In all formal adversarial adjudications of the United States Department of Labor governed by these rules, and in particular such adjudications in which a party appears without the benefit of counsel, the judge is required to construe these rules and to exercise discretion as provided in the rules, see,

e.g., §18.403, to secure fairness in administration and elimination of unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined, §18.102. The judge shall also 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, §18.611(a).

REPORTER'S NOTE TO §18.103

Section 18.103(a) provides that error is not harmless, i.e., a substantial right is affected, unless on review it is determined that it is more probably true than not true that the error did not materially contribute to the decision or order of the court. The more probably true than not true test is the most liberal harmless error standard. See *Haddad* v. *Lockheed California Corp.*, 720 F.2d 1454, 1458–59 (9th Cir. 1983):

The purpose of a harmless error standard is to enable an appellate court to gauge the probability that the trier of fact was affected by the error. See R. Traynor, [The Riddle of Harmless Error] at 29–30. Perhaps the most important factor to consider in fashioning such a standard is the nature of the particular fact-finding process to which the standard is to be applied. Accordingly, a crucial first step in determining how we should gauge the probability that an error was harmless is recognizing the distinction between civil and criminal trials. See *Kotteakos* v. *United States,* 328 U.S. 750, 763, 66 S.Ct. 1239, 1247, 90 L.Ed. 1557 (1946); *Valle-Valdez,* 544 F.2d at 914–15. This distinction has two facets, each of which reflects the differing burdens of proof in civil and criminal cases. First, the lower burden of proof in civil cases implies a larger margin of error. The danger of the harmless error doctrine is that an appellate court may usurp the jury's function, by merely deleting improper evidence from the record and assessing the sufficiency of the evidence to support the verdict below. See *Kotteakos,* 328 U.S. at 764–65, 66 S.Ct. at 1247–48; R. Traynor, *supra,* at 18–22. This danger has less practical importance where, as in most civil cases, the jury verdict merely rests on a more probable than not standard of proof.

The second facet of the distinction between errors in civil and criminal trials involves the differing degrees of certainty owed to civil and criminal litigants. Whereas a criminal defendant must be found guilty beyond a reasonable doubt, a civil litigant merely has a right to a jury verdict that more probably than not corresponds to the truth.

The term *materially contribute* was chosen as the most appropriate in preference to *substantially swayed, Kotteakos* v. *United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946) or *material effect. Holloway* v. *Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The word *contribute* was employed in *Schneble* v. *Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) and *United States* v. *Hastings,* 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

Error will not be considered in determining whether a substantial right of a party was affected if the evidence was admitted in error following a properly made objection, §18.103(a)(1), and the judge explicitly states that he or she does not rely on such evidence in support of the decision or order. The judge must explicitly decline to rely upon the improperly admitted evidence. The alternative of simply assuming nonreliance unless the judge explicitly states reliance, goes too far toward emasculating the benefits flowing from rules of evidence.

The question addressed in *Richardson* v. *Perales,* 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) of whether *substantial evidence* as specified in §556(d) of the Administrative Procedure Act requires that there be a residuum of legally admissible evidence to support an agency determination is of no concern with respect to these rules; only properly admitted evidence is to be considered in determining whether the *substantial evidence* requirement has been satisfied.

REPORTER'S NOTE TO §18.104

As to the standard on review with respect to questions of admissibility generally, section 18.104(a), *see In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238, 265–66 (3d Cir. 1983) (''The scope of review of the trial court's trustworthiness determination depends on the basis for the ruling. When the trial court makes §18.104(a) findings of historical fact about the manner in which a report containing findings was compiled we review by the clearly erroneous standard of Fed.R.Civ.P. 52. But a determination of untrustworthiness, if predicated on factors properly extraneous to such a determination, would be an error of law * * * * There is no discretion to rely on improper factors. Such an error of law might, of course, in a given instance be harmless within the meaning of Fed.R.Civ.P. 61. In weighing factors which we consider proper, the trial court exercises discretion and we review for abuse of discretion. Giving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant, for example, might be an abuse of discretion.''). Accord, *United States* v. *Wilson,* 798 F.2d 509 (1st Cir. 1986).

As to the standard on review with respect to relevancy, conditional relevancy and the exercise of discretion, see, e.g., *United States* v. *Abel,* 469 U.S. 45, 54, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984) (''A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal

Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counselling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.''); *Alford* v. *United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed 624 (1931) (''The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.''); *Hill* v. *Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 825 (10th Cir. 1986) (''We recognize that a trial court has broad discretion to determine whether evidence is relevant, and its decision will not be reversed on appeal absent a showing of clear abuse of that discretion. *Beacham* v. *Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983). The same standard of review applies to a trial court's determination, under Fed.R.Evid. 403, that the probative value of the evidence is outweighed by its potential to prejudice or confuse the jury, or to lead to undue delay. *Id.*'').

REPORTER'S NOTE TO §18.201

A.P.A. section 556(e) provides that ''when an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.'' No definition of ''official notice'' is provided. An administrative agency may take official notice of any adjudicative fact that could be judicially noticed by a court. In addition ''the rule is now clearly emerging that an administrative agency may take official notice of any generally recognized technical or scientific facts within the agency's specialized knowledge, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof. To satisfy this requirement, it is necessary that a statement of the facts noticed must be incorporated into the record. The source material on which the agency relies should, on request, be made available to the parties for their examination.'' 1 Cooper, State Administrative Law 412–13 (1965). Accord, Uniform Law Commissioners' Model State Administrative Procedure Act section 10(4) (1961) (''Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.''); Schwartz, Administrative Law §7.16 at 375 (2d ed. 1984) (''Clearly an agency may take notice of the same kinds of fact of which a court takes judicial notice. It has, however, been recognized that the differences between agencies and courts * * * may justify a broader approach. Under it, an agency may be permitted to take 'official notice' not only of facts that are obvious and notorious to the average man but also of those that are obvious and notorious to an expert in the given field.'' ''A commission that regulates gas companies may take notice of the fact that a well-managed gas company loses no more than 7 percent of its gas through leakage, condensation, expansion, or contraction, where its regulation of gas companies, over the years has made the amount of 'unaccounted for gas' without negligence obvious and notorious to it as the expert in gas regulation. A workers' compensation commission may similarly reject a claim that an inguinal hernia was traumatic in origin where the employee gave no indication of pain and continued work for a month after the alleged accident. The agency had dealt with numerous hernia cases and was as expert in diagnosing them as any doctor would be. Its experience taught it that where a hernia was traumatic in origin, there was immediate discomfort, outward evidences of pain observable to fellow employees, and at least temporary suspension from work. The agency could notice this fact based upon its knowledge as an expert and reject uncontradicted opinion testimony that its own expertise renders unpersuasive.''). Compare Uniform Law Commissioners' Model State Administrative Procedure Act section 4–212(f) (1981) (''Official notice may be taken of (i) any fact that could be judicially noticed in the courts of this State, (ii) the record of other proceedings before the agency, (iii) technical or scientific matters within the agency's specialized knowledge, and (iv) codes or standards that have been adopted by an agency of the United States, of this State or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or materials noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or materials so noticed.''). Contra Davis, Official Notice, 62 Harv. L. Rev. 537, 539 (1949) (''To limit official notice to facts which are beyond the realm of dispute would virtually emasculate the administrative process. The

problem of official notice should not be one of drawing lines between disputable and indisputable facts. Nor should it even be one of weighing the importance of basing decisions upon all available information against the importance of providing full and fair hearings in the sense of permitting parties to meet all materials that influence decision. The problem is the intensely practical one of devising a procedure which will provide both informed decisions and fair hearings without undue inconvenience or expense.'').

Section 18.201 adopts the philosophy of Federal Rule of Evidence 201. The Advisory Committee's Note to Fed.R.Evid. 201 (b) states:

With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

''The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.'' A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.,* 94. Section 18.201 of the Federal Rules of Evidence incorporated the Morgan position on judicial notice. The contrary position, expressed by Wigmore and Thayer, and advocated by Davis, was rejected. See McNaughton, Judicial Notice-Excerpts Relating to the Morgan-Wigmore Controversy, 14 Vand. L. Rev. 779 (1961) (''They do not differ with respect to the application of the doctrine to 'law'. Nor do they reveal a difference with respect to so-called 'jury notice.' Their difference relates to judicial notice of 'facts.' Here Wigmore, following Thayer, insists that judicial notice is solely to save time where dispute is unlikely and that a matter judicially noticed is therefore only 'prima facie,' or rebuttable, if the opponent elects to dispute it. It is expressed in Thayer and implicit in Wigmore that (perhaps because the matter is rebuttable) judicial notice may be applied not only to indisputable matters but also to matters of lesser certainty. Morgan on the other hand defines judicial notice more narrowly, and his consequences follow from his definition. He limits judicial notice of fact to matters patently indisputable. And his position is that matters judicially noticed are not rebuttable. He asserts that it is wasteful to permit patently indisputable matters to be litigated by way of formal proof and furthermore that it would be absurd to permit a party to woo a jury to an obviously erroneous finding contrary to the noticed fact. Also, he objects to the Wigmorean conception on the ground that it is really a 'presumption' of sorts attempting to pass under a misleading name. It is, according to Morgan, a presumption with no recognized rules as to how the presumption works, what activates it, and who has the burden of doing how much to rebut it.'').

Accordingly, notice that items (ii) and (iv) of the Uniform Law Commissioners' Model State Administrative Procedure Act quoted above are not included as separate items in §18.201. However codes and standards, (iv), to the extent not subject to reasonable question fall within §18.201(b)(2). To the extent such codes and standards do not so fall, proof should be required. Official notice of records of other proceedings before the agency would ''permit an agency to notice facts contained in its files, such as the revenue statistics contained in the reports submitted to it by a regulated company.'' Schwartz, *supra* at 377. Once again, to the extent such information is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, §18.201(b)(2), proof should be required.

REPORTER'S NOTE TO §18.301

Section 18.301 does not prevent an administrative agency by either rule, regulation, or common law development from allocating burdens of production and burdens of persuasion in an otherwise permissible manner. See *N.L.R.B.* v. *Transportation Management Corp.,* 462 U.S. 400, 403 n.7, 103 S.Ct. 2469, 2475 n.7, 76 L.Ed.2d 667 (1983) (''Respondent contends that Federal Rule of Evidence 301 requires that the burden of persuasion rest on the General Counsel. Rule 301 provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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.

The Rule merely defines the term 'presumption.' It in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible. Indeed, were respondent correct, we could not have assigned to the defendant the burden of persuasion on one issue in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).'').

REPORTER'S NOTE TO §18.302

The Advisory Committee's Note to Federal Rule of Evidence 302, 56 F.R.D. 118, 211 states:

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer* v. *Hoffman*, 318 U.S. 477, 87 L.Ed. 645 (1943), and *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchaser, contributory negligence, and nonaccidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. ''tactical'' presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as ''diversity cases.'' The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity.

Vestal, *Erie R. R.* v. *Tompkins: A Projection*, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, *The Federal Courts and the Federal System*, 697 (1953); 1A Moore Federal Practice p. 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217–218 (1963). Hence the rule employs, as appropriately descriptive, the phrase ''as to which state law supplies the rule of decision.'' See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, 2344(c), p. 40, P.F.D. No. 1 (1965).

It is anticipated that §18.302 will very rarely come into play.

REPORTER'S NOTE TO §18.403

Rule 403 of the Federal Rules of Evidence provides for the exclusion of relevant evidence on the grounds of unfair prejudice. Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: An undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror. Unfair prejudice is not, however, a proper ground for the exclusive of relevant evidence under these rules. Judges have shown over the years the ability to resist deciding matters on such an improper basis. Accord *Gulf States Utilities Co.* v. *Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981). (''The exclusion of this evidence under Rule 403's weighing of probative value against prejudice was improper. This portion of Rule 403 has no logical application to bench trials. Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.'')

While §18.403, like Rule 403 of the Federal Rules of Evidence, does speak in terms of both confusion of the issues and misleading of the trier of fact, the distinction between such terms is unclear in the literature and in the cases. McCormick, Evidence section 185 at 546 (3d ed. 1984), refers to the probability that certain proof and the answering evidence that it provokes might unduly distract the trier of fact from the main issues. 2 Wigmore, Evidence section 443 at 528–29 (Chadbourn rev. 1979), describes the concept as follows:

In attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy.

Both commentators are clearly describing the notion of confusion of the issues. The notion of confusion of the issues of course applies as well to a reviewing body considering

a record in such condition. While a trier of fact or reviewing body confused in the foregoing manner can also be said to have been misled, it is suggested that the concept of misleading refers primarily to the possibility of the trier of fact overvaluing the probative value of a particular item of evidence for any reason other than the emotional reaction associated with unfair prejudice. To illustrate, evidence of the results of a lie detector, even where an attempt is made to explain fully the significance of the results, is likely to be overvalued by the trier of fact. Similarly, the test of *Frye* v. *United States*, 293 F.1013, 1014 (D.C. Cir. 1923), imposing the requirement with respect to the admissibility of scientific evidence that the particular technique be shown to have gained ''general acceptance in the particular field in which it belongs,'' is an attempt to prevent decision makers from being unduly swayed by unreliable scientific evidence. Demonstrative evidence in the form of a photograph, map, model, drawing or chart which varies substantially from the fact of consequence sought to be illustrated similarly may mislead. Finally, any trier of fact may be misled by the sheer amount of time spent upon a question into believing the issue to be of major importance and accordingly into attaching too much significance to it in its determination of the factual issues involved. While clearly of less import where the judge is the trier of fact and with respect to the state of the record on review, the danger of confusion of the issues or misleading the judge as trier of fact, together with such risks on review, are each of sufficient moment especially when considered in connection with needless consumption of time to warrant inclusion in §18.403.

Occasionally evidence is excluded not because distracting side issues will be created but rather because an unsuitable amount of time would be consumed in clarifying the situation. Concerns associated with the proper use of trial time also arise where the evidence being offered is relevant to a fact as to which substantial other evidence has already been introduced, including evidence bearing on the question of credibility, where the evidence itself possesses only minimal probative value, such as evidence admitted as background, or where evidence is thought by the court to be collateral. In recognition of the legitimate concern of the court with expenditures of time, §18.403 provides for exclusion of evidence where its incremental probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Roughly speaking undue delay can be argued to refer to delay caused by the failure of the party to be able to produce the given evidence at the appropriate time at trial but only at some later time. Waste of time may be taken to refer to the fact that the evidence possesses inadequate incremental probative value in light of the time its total exploration will consume. Cumulative refers to multiple sources of different evidence establishing the same fact of consequence as well as multiple same sources, such as ten witnesses all testifying to the same speed of the car or the same character of a witness.

REPORTER'S NOTE TO §18.501

The Conference Report to Federal Rule of Evidence 501, 1975 U.S. Code Cong. & Ad. News 7098, 7100 states:

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. 1332 or 28 U.S.C. 1335, or between citizens of different States and removed under 28 U.S.C. 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law.

As Justice Jackson has said:

A federal court sitting in a nondiversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C.A. Wright, Federal Courts 251–252 (2d ed. 1970); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *DeSylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedures §2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

It is anticipated that the proviso in §18.501 will very rarely come into play.

REPORTER'S NOTE TO §18.601

The Conference Report to Federal Rule of Evidence 601, 1975 U.S. Code Cong. & Ad. News 7051, 7059 states:

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies ''to an element of a claim or defense as to which State law supplies the rule of decision.'' The Senate bill provides that ''in civil actions and proceedings arising under 28 U.S.C. 1332 or 28 U.S.C. 1335, or between citizens of different States and removed under 28 U.S.C. 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.''

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to ''an element of a claim or defense.'' If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

It is anticipated that the proviso to §18.601 will very rarely come into play.

REPORTER'S NOTE TO §18.609

Consistent with the position taken in §18.403, unfair prejudice is not felt to be a proper reason of the exclusion of relevant evidence in a hearing where the judge is the trier of fact. Sections 18.609 (a) and (b) provide for the use of every prior conviction punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and every prior conviction involving dishonesty or false statement, regardless of punishment, provided not more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date. Convictions more than ten years old are felt to be too stale to be admitted to impeach the credibility of a witness testifying in any hearing to which these rules apply.

REPORTER'S NOTE TO §18.801

Rule 801(d)(1)(A) of the Federal Rules of Evidence has been revised in §18.801(d)(1)(A) to permit the substantive admissibility of all prior inconsistent statements. The added protection of certainty of making and circumstances conducive to trustworthiness provided by the restriction that the prior inconsistent statement be ''given under oath subject to the penalty of perjury at a trial, hearing, in other proceeding, or in a deposition'' were added by Congress to Federal Rule of Evidence 801(d)(1)(A) for the benefit of the criminal defendant. See Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A)*, 613 and 607, 75 Mich L. Rev. 565 (1977).

REPORTER'S NOTE TO §18.802

An ''administrative file'' is admissible as such to the extent so provided by rule or regulation of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress. If a program provides for the creation of an ''administrative file'' and for the submission of an ''administrative file'' to the judge presiding at a formal adversarial adjudication governed by these rules, see section 18.1101, the ''administrative file'' would fall outside the bar of the hearsay rule. Similarly, such ''administrative file'' is self-authenticating, section 18.902(10).

REPORTER'S NOTE TO §18.803

Section 18.803(24) provides that the ''equivalent circumstantial guarantees of trustworthiness'' required to satisfy the ''other [reliable] hearsay'' exception is that possessed solely by the ''aforementioned hearsay exceptions,'' i.e., §§18.803(1)–18.803(24). The hearsay exceptions which follow, i.e., §§18.803(25)–18.803(30), rely too greatly upon necessity and convenience to serve as a basis to judge ''equivalent circumstantial guarantees of trustworthiness.''

Section 18.803(25) provides a hearsay exception for the self-authenticating aspect of documents and other items as provided in §18.902. Out of court statements admitted under §18.902 for the purpose of establishing that the document or other item offered into evidence is as purported to be are received in evidence to establish the truth of the matter stated, §§18.801(a)–(c). Section 18.802 provides that ''hearsay is not admissible except as provided by these rules * * *'' Section 18.902 thus operates as a hearsay exception on the limited question of authenticity. Section 18.902 does not, however, purport to create a hearsay exception for matters asserted to be true in the self-authenticated exhibit itself. As a matter of drafting consistency, it is preferable to have a specific hearsay exception in §18.803 for statements of self-authentication under §18.902 than to have a hearsay exception exist in these rules not bearing an 18.800 number.

Sections 18.803(26) and 18.803(27) are derived from Rules 4(e) and (f) of the Arizona Uniform Rules of Procedure for Arbitration. Section 18.803(26)(f) is derived from Illinois Supreme Court Rule 90(c)(4).

Sections 18.803(27) and 18.803(28) maintain the common law distinction between a treating physician, i.e., medical treatment, and an examining or nontreating physician, i.e., medical diagnosis. A treating physician provides or acts with a view toward providing medical treatment. An examining physician is one hired with a view toward testifying on behalf of a party and not toward treating a patient. As such, written reports of the examining physician are not felt to be sufficiently trustworthy to be given the preferred treatment of §18.803(27). Thus a report of a physician made for the purpose of medical treatment, i.e., treating physician, is admissible if the requirements of §18.803(27) are satisfied. A report of physician prepared with a view toward litigation, i.e., examining physician, satisfying the requirements of §18.802(28) is also admissible. The reports of a given physician may, of course, fall within either or both categories. Reports of any medical surveillance test the purpose of which is to detect actual or potential impairment of health or functional capacity and autopsy reports fall within §18.803(28).

Section 18.803(28) is derived from Rule 1613(b)(1) of the California Rules of Court. A summary of litigation experience of the expert is required to assist the evaluation of credibility.

Section 18.803(29) is derived from Rule 1613(b)(2) of the California Rules of Court.

Section 18.803(30) is derived from Rule 1613(b)(3) of the California Rules of Court.

Sections 18.803(26)–18.803(30) each provide that the adverse party may call the declarant of the hearsay statement, if available, as a witness and examine the witness as if under cross-examination. The proviso relating to the calling of witnesses is derived from Rule 1305(b) of the Pennsylvania Rules of Court Procedure Governing Compulsory Arbitration. See also §§18.902(12)–18.902(16) *infra*.

These rules take no position with respect to which party must initially bear the cost of lay witness and expert witness fees nor as to the ultimate disposition of such fees. Ordinarily, however, it is anticipated that the adverse party calling the witness should initially pay statutory witness fees, mileage, etc., and reasonable compensation to an expert witness in whatever sum and at such time as the judge may allow. Such witness fees, mileage, etc., and reasonable expert witness compensation should thereafter be charged to the same extent and in like manner as other such costs.

REPORTER'S NOTE TO §18.902

Section 18.902(11) is modeled upon Uniform Rule of Evidence 902(11). The requirement of a final certification with respect to a foreign record has been deleted as unnecessary in accordance with the position adopted in 18 U.S.C. 3505 which governs the self-authentication of a foreign record offered in a federal criminal proceeding. The ''Comment'' to Uniform Rule of Evidence 902(11) states:

Subsection 11 is new and embodies a revised version of the recently enacted federal statute dealing with foreign records of regularly conducted activity, 18 U.S.C. 3505. Under the federal statute, authentication by certification is limited to foreign business records and to use in criminal proceedings. This subsection broadens the federal provision so that it includes domestic as well as foreign records and is applicable in civil as well as criminal cases. Domestic records are presumably no less trustworthy and the certification of such records can more easily be challenged if the opponent of the evidence chooses to do so. As to the federal statute's limitation to criminal matters, ordinarily the rules are more strictly applied in such cases, and the rationale of trustworthiness is equally applicable in civil matters. Moreover, the absence of confrontation concerns in civil actions militates in favor of extending the rule to the civil side as well.

The rule requires that the certified record be made available for inspection by the adverse party sufficiently in advance of the offer to permit the opponent a fair opportunity to challenge it. A fair opportunity to challenge the offer may require that the proponent furnish the opponent with a copy of the record in advance of its introduction and that the opponent have an opportunity to examine, not only the record offered, but any other records or documents from which the offered record was procured or to which the offered record relates. That is a matter not addressed by the rule but left to the discretion of the trial judge.

Sections 18.902 (12) and (13) are derived from Rule 4 (e) and (f) of the Arizona Uniform Rules of Procedure for Arbitration. Section 18.902(12)(f) is derived from Illinois Supreme Court Rule 90(c)(4).

Section 18.902(14) is derived from Rule 1613(b)(1) of the California Rules of Court. A summary of litigation experience of the expert is required to assist the evaluation of credibility.

With respect to §§18.902(13) and 18.902(14) as applied to a treating or examining physician, see Reporter's Note to §§18.803(27) and 18.803(28) *supra*.

Section 18.902(15) is derived from Rule 1613(b)(2) of the California Rules of Court.

Section 18.902(16) is derived from Rule 1613(b)(3) of the California Rules of Court.

Sections 18.902 (12)–(16) each provide that the adverse party may call the declarant of the hearsay statement, if available, as a witness and examine the witness as if under cross-examination. The proviso relating to the calling of witnesses is derived from Rule 1305(b) of the Pennsylvania Rules of Civil Procedure Governing Compulsory Arbitration.

These rules take no position with respect to which party must initially bear the cost of lay witness and expert witness fees nor as to the ultimate disposition of such fees. Ordinarily, however, it is anticipated that the adverse party calling the witness should initially pay statutory witness fees, mileage, etc., and reasonable compensation to an expert witness in whatever sum and at such time as the judge may allow. Such witness fees, mileage, etc., and reasonable expert witness compensation should thereafter be charged to the same extent and in like manner as other such costs. See also §§18.803 (25)–(30) *supra*.

REPORTER'S NOTE TO §18.1001

Section 18.1001(3) excludes prints made from X-ray film from the definition of an original. A print made from X-ray film is not felt to be equivalent to the X-ray film itself when employed for purposes of medical treatment or diagnosis.

REPORTER'S NOTE TO §18.1101

Section 23(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, provides as follows:

In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

Other acts such as the Defense Base Act, 42 U.S.C. 1651, adopt section 23(a) of the Longshore and Harbor Workers' Compensation Act by reference. In addition 20 CFR 725.455(b) provides as follows with respect to the Black Lung Benefits Act, 30 U.S.C. 901:

Evidence. The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the deputy commissioner under §725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

Section 18.1101(c) provides that these rules do not apply to the extent inconsistent with, in conflict with, or to the extent a matter is otherwise specifically provided for 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. Whether section 23(a) and §725.455(b) are in fact incompatible with these rules, while unlikely for various reasons including their lack of specificity, is nevertheless arguable.

Without regard to section 23(a) and §725.455(b), various other considerations support the conclusion to exclude hearings under Longshore, Black Lung, and related acts from coverage of these rules at this time. Longshore, Black Lung, and related acts involve entitlements. Claimants in such hearings benefit from proceeding pursuant to the most liberal evidence rules that are consistent with the orderly administration of justice and the ascertainment of truth. Claimants in such hearings on occasion appear *pro se*. While the modifications made by these rules are clearly designed to further liberalize the already liberal Federal Rules of Evidence, it is nevertheless unclear at this time whether even conformity with minimal requirements with respect to the introduction of evidence would present a significant barrier to the successful prosecution of meritorious claims. Rather than speculate as to the impact adoption of these rules would have upon such entitlement programs, it was decided to exclude hearings involving such entitlement programs from coverage of these rules. It is anticipated that application of these rules to hearings involving such entitlement programs will be reconsidered in the

future following careful study. Notice that the inapplicability of these rules in such hearings at this time is specifically stated in §18.1101(b)(2) to be without prejudice to the continuation of current practice with respect to application of rules of evidence in such hearings.

[55 FR 13229, Apr. 9, 1990; 55 FR 24227, June 15, 1990]

PART 19—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
19.1 Definitions.
19.2 Purpose.
19.3 Authorization.
19.4 Contents of request.
19.5 Certification.

AUTHORITY: Sec. 1108, Right to Financial Privacy Act of 1978, 92 Stat. 3697 *et seq.*, 12 U.S.C. 3401 *et seq.*, (5 U.S.C. 301); and Reorganization Plan No. 6 of 1950.

SOURCE: 52 FR 48420, Dec. 22, 1987, unless otherwise noted.

§19.1 Definitions.

For purposes of this regulation, the term:

(a) *Financial institution* means any office of a bank, savings bank, card issuer as defined in section 103 of the Consumer Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, consumer financial institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

(b) *Financial record* means an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

(c) *Person* means an individual or a partnership of five or fewer individuals.

(d) *Customer* means any persons or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

(e) *Law enforcement inquiry* means a lawful investigation or official proceeding inquiring into a violation of or failure to comply with any criminal or civil statute or any regulation, rule, or order issued pursuant thereto.

(f) *Departmental unit* means those offices, divisions bureaus, or other components of the Department of Labor authorized to conduct law enforcement inquiries.

(g) *Act* means the Right to Financial Privacy Act of 1978.

§19.2 Purpose.

The purpose of these regulations is to authorize Departmental units to request financial records from a financial institution pursuant to the formal written request procedure authorized by section 1108 of the Act, and to set forth the conditions under which such requests may be made.

§19.3 Authorization.

Departmental units are hereby authorized to request financial records of any customer from a financial institution pursuant to a formal written request under the Act only if:

(a) No administrative summons or subpoena authority reasonably appears to be available to the Departmental unit to obtain financial records for the purpose for which the records are sought;

(b) There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and will further that inquiry;

(c) The request is issued by the Assistant Secretary or Deputy Under Secretary heading the Departmental unit requesting the records, or by a senior agency official designated by the head of the Departmental unit. Officials so designated shall not delegate this authority to others;

(d) The request adheres to the requirements set forth in §19.4; and

(e) The notice requirements set forth in section 1108(4) of the Act, or the requirements pertaining to delay of notice in section 1109 of the Act are satisfied, except in situations where no notice is required (e.g., section 1113(g)).