



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

IN RE:

CONVENTIONAL CASES ASSIGNED  
TO JUDGE JOHN B. GATTO

STANDING ORDER

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**I. Applicability; Purpose; Definitions**

**A. Applicability.**

This Standing Order applies to all Conventional Cases assigned to Judge John B. Gatto.

**B. Purpose.**

The purpose of this Order is to inform Counsel and their Counsel of the Court’s policies, practices, and procedures. This Order, in combination with the Commission’s Rules, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, shall govern in these cases.

**C. Definitions.**

**Days.** Unless otherwise indicated, any reference in this Standing Order to “days” shall include intermediate Saturdays, Sundays, and legal holidays, 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. *Whenever Counsel are required to file a submission with the Court and the submission is filed by mail, it must be mailed early enough so it will be received by the Court on or before the deadline stated.*

**Close of Discovery.** Any reference in this Standing Order to the “close of discovery” shall mean the date established by the expiration of the original or extended discovery period or the date established by written notice of all Counsel filed with the Court, indicating that discovery was completed earlier.

**Counsel.** Any reference in this Standing Order to “Counsel” shall mean “attorney,” “non-attorney representatives,” and unless otherwise indicated, an unrepresented party.

## **II. Consent to Electronic Filing**

At the commencement of the case, Counsel will confer and hopefully agree to electronically file and serve all pleadings and documents using Judge Gatto’s [Consent to Electronic Filing form](#), available in Adobe Portable Document Format (PDF) and in MS Word format under Judge Gatto’s section of the [Administrative Law Judge Practices](#) link on the Commission’s web page (<http://oshrc.gov/ALJP/index.html>). When Counsel do not consent to electronically file and serve pleadings and documents, refer to Section IV ([Non-Electronically Filed Submissions](#)) of this Standing Order for additional requirements.

## **III. Electronically Filed Submissions**

When Counsel agree to electronically file and serve all pleadings and documents, pleadings and documents must be electronically submitted in accordance with the Commission’s Instructions for electronic filing by sending an e-mail with the attached pleading(s) or document(s) in searchable Adobe Portable Document Format (PDF) to: [atlantaoshrcjudges@oshrc.gov](mailto:atlantaoshrcjudges@oshrc.gov) with “JUDGE GATTO – E-FILING (and with the parties’ names and the docket number)” in the subject line. The Commission’s E-File Rules can be found on the Commission’s website at: [http://www.oshrc.gov/publications/instructions\\_elecfileing.html](http://www.oshrc.gov/publications/instructions_elecfileing.html). See also Commission Rule 8(g) (<http://oshrc.gov/procrules/2200suba.html>), which sets out the applicable electronic filing requirements. 29 C.F.R. § 2200.8(g).

## **IV. Non-Electronically Filed Submissions**

Except for an unrepresented party, when Counsel do not agree to electronically file and serve all pleadings and documents, in addition to traditional paper filing, each party is **required** to provide a courtesy electronic copy to the Court of all submissions in Adobe Portable Document (searchable) format (.pdf) by email attachment to at [atlantaoshrcjudges@oshrc.gov](mailto:atlantaoshrcjudges@oshrc.gov), with “JUDGE

GATTO - COURTESY COPY (and with the parties’ names and the docket number)” in the subject line. The party submitting the electronic courtesy copy shall copy the opposing party on the email.

Each party is required to utilize the following guidelines for non-electronically filed submissions:

- (A) Print on only one side of the paper.
- (B) Secure pages with binder clips or other fasteners that do not puncture the pages (instead of staples or permanent binding).
- (C) Exhibits attached to pleadings or motions shall be separated by a tab properly labeled with the exhibit number.
- (D) Exhibits shall *not* include *alphabetical or numerical subparts* (e.g., A, B, C, I, ii, iii etc.); rather, if subparts are necessary, separate exhibits must be used in lieu thereof.

V. **Ex Parte Communications; Legal Advice**

A. **Ex Parte Communications.**

Rule 105(a) of the Commission’s Rules, titled “Ex parte communication,” states in pertinent part:

There shall be no ex parte communication **with respect to the merits of any case not concluded**, between any Commissioner, Judge, employee or agent of the Commission who is employed in the decisional process and any of the parties or intervenors, representatives or other interested parties.

29 C.F.R. § 2200.105(a) (emphasis added). Therefore, Counsel are prohibited from speaking with the Court or any Court personnel without the presence of all Counsel *with respect to the merits of any pending case*.

B. **Legal Advice.**

The Court and Court personnel are prohibited from giving any legal advice on any case.

## **VI. Disclosure of Corporate Parents, Subsidiaries, and Affiliates**

Commission Rule 35 mandates:

(a) General. All answers, petitions for modification of abatement period, or other initial pleadings filed under these rules by a corporation shall be accompanied by a **separate** declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable.

(b) Failure to disclose. The Commission or Judge in its discretion may refuse to accept for filing an answer or other initial pleading that lacks the disclosure declaration required by this paragraph. A party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should not be held in default.

(c) Continuing duty to disclose. A party subject to the disclosure requirement of this paragraph has a continuing duty to notify the Commission or the Judge of any change in the information on the disclosure declaration until the Commission issues a final order disposing of the proceeding.

## **VII. Settlement Policy**

Counsel are required to provide notice to the Court at least three (3) business days in advance of the first day of trial if the case has settled. If the case has settled, but the Court was not timely informed as required herein and the Court is already in travel status, Counsel must appear at the trial location, unless otherwise ordered, to provide an on-the-record explanation of the steps taken by Counsel to attempt to comply with the timeframe in these Settlement Practices, *and* to memorialize the settlement on the record. Settlement announcements must be made in writing to: [atlantaoshrcjudges@oshrc.gov](mailto:atlantaoshrcjudges@oshrc.gov) with “JUDGE GATTO – SETTLEMENT (and with the parties’ names and the docket number)” in the subject line.

### **VIII. Leave of Absence of Counsel**

When Counsel wishes to be relieved from a trial, deposition or other proceedings due to a previously planned vacation or other commitment, an applications for leave of absence shall be made with the Court by motion and shall be filed *separately in each* individual case where an absence is requested, designating the period of absence and the reason for the absence.<sup>1</sup> A proposed order for the Court shall also be attached. Only *lead* Counsel need apply to the Court for leave of absence. A leave of absence does *not* extend previously set filing deadlines nor relieve Counsel from other previously imposed deadline requirements. *Postponements will not ordinarily be granted when an application for leave of absence was required and was not timely filed, or due to the absence or unavailability of non-lead Counsel.* All leaves of absence shall be subject to the approval of the Court. When leave is granted, it shall relieve Counsel from all trials, depositions and other proceedings in that matter.

### **IX. Withdrawal of Counsel**

Commission Rule 23(b) mandates “Any counsel or representative of record desiring to withdraw his appearance, or any party desiring to withdraw the appearance of counsel or representative of record for him, must file a motion with the . . . Judge requesting leave therefor, and showing that prior notice of the motion has been given by him to his client or counsel or representative, as the case may be.” 29 C.F.R. § 2200.23(b). Rule 23(b) further mandates “The motion of counsel or representative to withdraw may, in the discretion of the . . . Judge, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party or intervenor.” *Id.*

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<sup>1</sup> See Rule 83(b) of the Federal Rules of Civil Procedure, which provides the procedure when there is no controlling law. More specifically, Rule 83(b) provides “A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§2072 and 2075, and the [Commission’s] rules.” Fed. R. Civ. P. Rule 83(b).

**X. Case Administration**

The Court does not have permanently assigned Legal Assistants. Therefore, Communication with the Court, *including all announcements of settlement, requests for subpoenas, and motions to postpone, etc.*, should be made by e-mail at [atlantaoshrcjudges@oshrc.gov](mailto:atlantaoshrcjudges@oshrc.gov), with “JUDGE GATTO (and with the parties’ names and the docket number)” in the subject line. Counsel must copy opposing Counsel in all email correspondence to the Court, except in requests for subpoenas, which may be made *ex parte*. When necessary, Court staff can be reached at (404) 562-1640 or by fax at (404) 562-1650. Mailed, couriered, and hand-delivered communications should be addressed as follows:

**U.S. Occupational Safety and Health Review Commission**  
Atlanta Federal Center  
100 Alabama Street, S.W.  
1924 Building – Room 2R90  
Atlanta, Georgia 30303

**XI. Exhibit and Witness Lists**

At least **14 days** before the scheduled trial date, Counsel must file with the Court and deliver to opposing Counsel, separate lists of exhibits and witnesses, except those offered solely for impeachment.<sup>2</sup> All of the other parties may rely upon a representation by a designated party that a witness will be present unless the witness list indicates to the contrary.

*At the initiation of the Secretary’s Counsel*, Counsel shall consolidate duplicate exhibits using a joint common numbering system for such exhibits to the extent feasible. Learned treatises

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<sup>2</sup> Each party shall submit to the court reporter and the judge a separate, typed, serially numbered exhibit list of each party’s documentary and physical evidence using the following format (*and with the first three columns completed*):

\_\_\_\_\_’S EXHIBITS LIST

EXHIBIT NUMBER	DESCRIPTION	BATES STAMP PAGES	TENDERED	WITHDRAWN	ADMITTED	REJECTED	COMMENTS
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which Counsel expect to use at trial shall not be admitted as exhibits, but must be separately listed on the party's exhibit list.

Prior to trial, each party shall number their exhibits serially, beginning with 1, *and without the inclusion of any alphabetical or numerical subparts*. Adequate space must be left on the left margin of each party's exhibit list for court stamping purposes. At trial, a copy of each party's list must be submitted to the Court *and* to the court reporter.

Each page of each exhibit shall be sequentially numbered (preferably using a Bate stamp). The pre-numbered exhibits must be securely placed in a three-ring binder notebook and each exhibit shall be separated by a tab properly labeled with the exhibit number.

Specific objections to another party's exhibits must be typed on a separate page and must be attached to the exhibit list of the party against whom the objections are raised.

Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by Counsel and shall be admitted at trial without further proof of authenticity.

Unless otherwise noted, copies rather than originals of documentary evidence may be used at trial. Documentary or physical exhibits may not be submitted by Counsel after filing of the pretrial order, except upon consent of all Counsel or permission of the court. Exhibits so admitted must be numbered, inspected by Counsel, and marked with stickers prior to trial.

Counsel shall familiarize themselves with all exhibits (and the numbering thereof) prior to trial. Counsel will *not* be afforded time during trial to examine exhibits that are or should have been listed.

**A. Exchanging Exhibits**

All exhibits that a party intends to offer at trial, except those offered solely for impeachment, must be exchanged with opposing Counsel at least **14 days** before the first day of trial. Documentary and physical exhibits may not be submitted by Counsel after filing of the joint proposed pretrial order, except upon consent of all Counsel or permission of the Court.

**B. Objections to Trial Exhibits**

Any objection that may be made to the admissibility of any exhibit that the opposing party has identified that it expects to offer at trial and those it may offer if the need arises, together with the grounds for it, shall be separately filed no later than **14 days** after service of the identification. The objections shall also be attached in the proposed consolidated pretrial order to the exhibit list of the party against whom the objections are raised. Objections as to authenticity, privilege, competency, and, to the extent possible, relevancy of the exhibits shall be included. Any listed document to which an objection is not raised shall be deemed to have been stipulated as to authenticity by Counsel. Objections shall also include a statement of any objections to the use at trial of copies of documentary evidence. *Any witness statements identified as an exhibit must be typed, dated, and signed; hand-written copies will not be accepted by the Court at trial. If the witness is not on a witness list and is not called to testify, the admissibility of a witness statement shall be subject to hearsay objects, which if made will be sustained unless the proffering Counsel properly establishes a hearsay exception.*

**C. Personally Identifiable Information**

Any document or pleading filed with the Court or tendered as an exhibit at trial containing Personally Identifiable Information (PII) **shall** be redacted by Counsel in compliance with Commission Rule 8(g), which sets out the redaction procedures for applicable types of PII and

medical records. *See* 29 C.F.R. § 2200.8(g). Counsel shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case. *The responsibility for omitting or redacting these personal identifiers rests with the submitting Counsel.*

**D. Submission of Official Exhibits to Court Reporter**

At the commencement of the trial, Counsel shall submit to the court reporter their original exhibit books. Sufficient copies of each exhibit book shall also be made available at trial by Counsel so as to provide a copy to the witnesses testifying, all parties, and the Court. At the commencement of the trial, Counsel shall also submit to the court reporter **an electronic version** of their exhibits. The electronic version of each exhibit shall be saved as a separate file in Adobe Portable Document (searchable) format (.pdf) and collectively the electronic exhibits shall be presented on a “write-once” CD or “not rewritable” DVD and any exhibits offered in .mp3 (audio) or .mp4 (video) format. **The “official” exhibits shall be the pdf, mp3 and mp4 versions contained on the CD or DVD.** Because documents scanned in color or containing a graphic take much longer to upload, parties **must** configure their scanners to scan exhibits at 200 dpi and in black and white rather than in color unless a color exhibits is critical to the case. Exhibits admitted into evidence may not be marked on or altered. However a party may mark or alter a copy thereof and offer it as a sub-exhibit (e.g., Ex. C-1a), which shall only become a part of the official record if Counsel has submitted to the court reporter an electronic version within **1** business day after the conclusion of the trial.

**XII. Proposed Trial Dates and Interpreter Services**

No later than **21 days** from the date of the Court’s *Initial Scheduling Order*, Counsel shall jointly file a stipulation, which shall include: (1) proposed trial date(s) (excluding Mondays or Fridays, except cases originating in Atlanta, Georgia or Florida) (include multiple weeks Counsel are available for trial); (2) the estimated total trial time; (3) each parties’ separately estimated number of days to present its evidence; and (4) any request for interpreter or hearing impairment services that will be needed (absent such a request, such services will not be ordered). *The proposed trial dates shall be no later than 90 days from the close of discovery.*

**XIII. Rule 26(f) Conference**

Prior to the filing of the joint stipulation, *and at the initiation of Complainant’s counsel*, lead Counsel for all parties are required to confer *in person* an effort to settle the case, discuss discovery, limit issues, and discuss proposed venue and trial dates and the total number of trial days anticipated to complete the case. The conference shall comply with the requirements of Fed. R. Civ. P. 26(f). Counsel are required to inform Counsel promptly of all offers of settlement.

**XIV. Discovery**

**A. General Principles**

*Actions are assigned to a discovery period concluding no later than four month after the filing of respondent’s answer.* Discovery must be initiated sufficiently early in the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. An extension of the deadline will not automatically be granted because of unanswered discovery requests and motions seeking an extension must be filed prior to the expiration of the existing discovery period. Discovery shall be in conformity with Commission Rule 52. *See* 29 C.F.R. § 2200.52.

Counsel may initiate all forms of discovery in conformity with the Commission’s Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. The Court will not enforce the private agreements between Counsel to conduct discovery beyond conclusion of the discovery period. The Court also will not compel responses to discovery requests that were not served in time for responses to be made before the discovery period ended. *The Court does not allow evidence at trial which was requested and not revealed during the discovery period.* In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure, except that the initial disclosure provisions of Federal Rule of Civil Procedure 26(a)(1) do not apply to Commission proceedings. In conformity with the Commission’s rules, Counsel may, without leave of the Court, obtain discovery by one or more of the following methods:

- (1) Production of documents or things or permission to enter upon land or other property for inspection and other purposes (29 CFR § 2200.53);
- (2) Requests for admission to the extent provided in 29 CFR § 2200.54;
- (3) Interrogatories to the extent provided in 29 CFR § 2200.55; and
- (4) Depositions to the extent provided in 29 CFR § 2200.56.<sup>3</sup>

### **B. Boilerplate and General Objections**

Boilerplate objections in response to discovery requests are strictly prohibited. Parties should not carelessly invoke the usual litany of rote objections; i.e., attorney-client privilege, work-product immunity from discovery, overly broad/unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence.

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<sup>3</sup> Rules 30 and 31 of the Federal Rules of Civil Procedure do not require leave of the Court for 10 or fewer depositions. Commission Rule 56 provides if Counsel have not stipulated to the deposition, depositions shall be allowed only on order of the Court. The Court finds good and just reasons consistent with Rule 26(b)(1) and (2) and hereby orders that leave of the Court is automatically granted for 10 or fewer depositions.

Moreover, general objections are prohibited; otherwise, it is impossible for the Court or the party upon whom the discovery response is served to know exactly what objections have been asserted to each individual request. For example, Counsel shall not include in a response to a discovery request a “Preamble” or a “General Objections” section stating an objection to the discovery request “to the extent that” it violates some rule pertaining to discovery; e.g., the attorney-client privilege, work product immunity from discovery, the requirement that discovery requests be reasonably calculated to lead to the discovery of admissible evidence, and the prohibition against discovery requests that are vague, ambiguous, overly broad, or unduly burdensome. All such general objections shall be disregarded by the Court. Instead, each individual discovery request must be met with every specific objection thereto – but only those objections that actually apply to that particular request.

Finally, a party who objects to a discovery request but then responds to the request **must** indicate whether the response is complete; i.e., whether additional information or documents would have been provided but for the objection(s). For example, in response to an interrogatory, a party is not permitted to raise objections and then state, “Subject to these objections and without waiving them, the response is as follows . . .” unless the party expressly indicates whether additional information would have been included in the response but for the objection(s).

### **C. Discovery Disputes**

Prior to filing any motion related to discovery, including but not limited to a motion to compel discovery and a motion to quash a subpoena (except for unopposed, consent, or joint motions to extend the discovery period), the movant – after conferring with the opposing party in a good-faith effort to resolve the dispute by agreement – must notify the Court that there is a discovery dispute and the Court’s staff will then schedule a conference call in which the Court will

attempt to resolve the matter without the necessity of a formal motion. Each Counsel **must** submit a brief statement of the issues in advance of the conference.

In addition, if Counsel has a dispute with a non-party (e.g., regarding a subpoena), the party and the non-party must follow these instructions, Counsel must promptly inform the non-party of this discovery-dispute policy. If the non-party requires the Court's involvement in resolving the dispute, it should not file a motion, but rather, **must** follow the procedure detailed in this subparagraph.

#### **D. Motions to Compel**

Subject to the Court's discovery-dispute policy, and if the Court is unable to resolve the matter without the necessity of a formal motion, a formal motion to compel a disclosure or to compel a response to discovery may be filed no later than **14 days** after service of the disclosure or discovery response upon which the dispute is based, which shall:

- (1) Quote verbatim each disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which objection is taken;
  - (2) State the specific objection;
  - (3) State the grounds assigned for the objection (if not apparent from the objection);
- and
- (4) Cite authority and include a discussion of the reasons assigned as supporting the motion.

*Form of Motion.* The motion shall be arranged so that the objection, grounds, authority, and supporting reasons follow the verbatim statement of each specific disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which an objection is raised.

*Response.* A response to a motion to compel must be filed no later than 14 days after service of the motion to compel, which shall also be arranged so that the objection, grounds, authority, and supporting reasons follow the verbatim statement of each specific disclosure, interrogatory, deposition question, request for designation of deponent, or request for inspection to which an objection is raised.

### **E. Objections to Depositions**

Any objection to the use of a deposition designated by another party, together with the grounds for it, shall be filed no later than **14 days** after service of the designation.

### **F. Designating Deposition Excerpts**

Counsel must designate, in lists delivered to opposing Counsel and filed with the Court at least **14 days** before the scheduled trial date, the portions of any depositions to be offered at trial.

## **XV. Amended and Supplemental Pleadings**

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Fed. R. Civ. P. 15.

## **XVI. Summary Judgment**

### **A. Motions for Summary Judgment; Time to File**

Summary judgment motions may be filed no later than **30 days** after the close of discovery and shall be filed in accordance with the provisions of Fed. R. Civ. P. 56.

*Form of Motion.* A movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The Court will not consider any fact:

- (1) Not supported by a citation to evidence (including page or paragraph number);

- (2) Supported by a citation to a pleading rather than to evidence;
- (3) Stated as an issue or legal conclusion; or
- (4) Set out only in the brief and not in the movant’s statement of undisputed facts.

**B. Response; Time to Respond**

A party may file a response to a motion for summary judgment in accordance with the provisions of Fed. R. Civ. P. 56 no later than **21** days after service of the motion.

*Form of Response.*

(1) A response shall include with the responsive brief a response to each of the movant’s statements of undisputed facts, which shall contain individually numbered, concise, nonargumentative responses *corresponding to each of the movant’s numbered undisputed material facts*. The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Fed.R.Civ.P. 56(d).

The Court will deem each of the movant’s facts as admitted unless the responding party specifically informs the Court to the contrary in the response *and*:

(a) Directly refutes the movant’s fact with concise responses supported by specific citations to evidence (including page or paragraph number);

(b) States a valid objection to the admissibility of the movant’s fact; or

(c) Points out that the movant’s citation does not support the movant’s fact or that the movant’s fact is not material or otherwise has failed to comply with the “Form of Motion” requirements set out for the movant.

(2) A response shall also include with the responsive brief a statement of additional facts, if any, which the responding party contends are material and present a genuine issue for trial. Such

separate statement of material facts must meet the same requirements set out in the “Form of Motion” section for the movant.

### **C. Movant’s Reply**

If the party filing a response also provides a statement of additional material facts, the movant shall file a reply to each of the responding party’s facts no later than **14** days after service of the response.

*Form of Reply.* The range of the movant’s acceptable replies is limited to:

(1) An objection to the admissibility of the evidence upon which the responding party relies;

(2) An objection pointing out that the responding party’s evidence does not support the responding party’s fact;

(3) An objection on the ground that the responding party’s fact is not material or does not otherwise comply with the “Form of Motion” requirements set out for the movant; and

(4) A concession that the Court can properly consider the responding party’s evidence for purposes of the summary judgment motion.

### **D. Supplemental Briefs**

Counsel shall *not* be permitted to file supplemental briefs and materials, with the exception of a reply by the movant, except upon motion and order of the Court.

### **XVII. Pretrial Order**

No later than **30 days** after the close of discovery, or entry of the Court’s ruling on any pending motions for summary judgment, whichever is later, *Complainant’s* Counsel shall file a **joint** proposed Pretrial Order, which shall be in a form substantially similar to the Court’s [Pretrial](#)

[Order form](#), which is available in Adobe Portable Document Format (PDF) and in MS Word format under Judge Gatto’s section of the Administrative Law Judge Practices link on the Commission’s web page (<http://oshrc.gov/ALJP/index.html>).

It shall be the responsibility of *Complainant’s counsel* to contact Respondent’s Counsel to arrange a date for the conference. If there are issues on which Counsel cannot agree, the areas of disagreement must be shown in the proposed pretrial order. If Counsel desire a pretrial conference, a request must be indicated on the proposed pretrial order immediately below the docket number. Counsel will be notified if the Judge determines that a pretrial conference is necessary.

### **XVIII. Expert Witnesses**

Within **14 days** after the Rule 26(f) conference has been held, unless a different time is set by stipulation, each Counsel must disclose to the opposing Counsel the identity of any witness it may use at trial who might express an opinion under Federal Rule of Evidence 702. Where such a disclosure has been made, Counsel must provide to the opposing Counsel a report from that witness no later than **90 days** before the date set for trial (or no later than **30 days** after the other party's disclosure if the expert report is intended solely to contradict or rebut evidence on the same subject matter identified in the other party's expert report).<sup>4</sup> *Opinion testimony shall not be*

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<sup>4</sup> Expert reports must be prepared and signed by the witness. If the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony, the report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

If the witness is not one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee does not regularly involve giving expert testimony, then the report shall contain (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

*permitted where there has been a failure to comply with these provisions, unless expressly authorized by the Court based upon a showing that the failure to comply was justified.*

#### **A. Motions to Exclude Expert Testimony**

Motions to exclude testimony of any witness who might express an opinion under Federal Rule of Evidence 702 shall be filed no later than **30 days** after the close of discovery, or entry of the Court’s ruling on any pending motions for summary judgment, whichever is later, except any party objecting to an expert’s testimony based upon *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) shall file a motion no later than the date that the proposed pretrial order is submitted. Otherwise, such objections will be waived, unless expressly authorized by Court order based upon a showing that the failure to comply was justified.

The Court reminds the parties that in *Kaspar Electroplating Corp.*, 16 BNA 1517, 1519 (No. 90–2866, 1993), the Commission held that “Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an expert in that area.” 16 BNA 1517, 1519. Further, in *Erickson Air-Crane, Inc.*, 2012 WL 762001, at \*5 n.7 (No. 07-0645, 2012), the Commission also held that the judge “was correct in refusing to allow [expert] testimony because it pertained only to legal conclusions.” *See also, J.C. Watson Co.*, 22 BNA OSHC 1235, 1238 n.3 (Nos. 05-175 & 05-0176, 2008) (determining the judge properly refused to permit expert testimony concerning conclusions of law).

#### **XIX. Proposed Findings of Fact and Conclusions of Law and Briefs**

Counsel shall file proposed findings of fact and conclusions of law and briefs **on the 30<sup>th</sup> day** after receipt of the trial transcript. *Reply briefs are not authorized without the approval of the Court.* In addition, not later than the opening of trial, either party may (but are not required) file

and serve pretrial briefs containing citations to legal authority on evidentiary questions and other legal issues.

**SO ORDERED.**

  

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**JOHN B. GATTO, Judge**