

# **JUDGE BRIAN A. DUNCAN**

*The following are examples of standard initial orders and practice guides issued by Judge Duncan in most cases. The first example illustrates Judge Duncan's standard practices in Conventional Proceedings. The second example illustrates Judge Duncan's standard practices in Simplified Proceedings. The parties should always comply with specific orders issued in individual cases, as the circumstances of a case may require deviation from these:*

## **1. Conventional Proceeding Cases:**

### **ORDER TO CONFER AND SUBMIT PROPOSED PRE-TRIAL SCHEDULE**

The parties are ORDERED to confer, either in person or by telephone, **within thirty (30) days of this Order**, regarding:

1. Settlement of this case. Specific offers and counter-offers are encouraged; and
2. A proposed pre-trial schedule. The parties are ORDERED to jointly file, **within forty-five (45) days of this Order**, a *Joint Proposed Pre-Trial Schedule* containing the following:
  - a. Proposed trial date and location (the Court prefers proposed dates approximately six months from the date of this Order for routine cases);
  - b. Anticipated number of days required for trial;
  - c. Proposed deadline for completion of all discovery (the Court prefers thirty days prior to trial);
  - d. Proposed deadline to file motions to amend complaint and/or answer (the Court prefers sixty days prior to trial);
  - e. A statement of whether the parties anticipate expert testimony in this case, and if so, the proposed deadline by which the parties shall identify their respective expert

witnesses and exchange written expert reports (the Court prefers simultaneous exchange of expert information sixty days prior to trial);

- f. Proposed deadline to file dispositive, or partially dispositive, motions (the Court prefers forty-five days prior to trial);
- g. Proposed deadline to file *Pre-Trial Statements* (the Court prefers ten calendar days prior to trial);
- h. Any other proposed deadlines the parties believe are necessary for the efficient management, preparation, and trial of this case.

3. If the parties are unable to agree on dates or deadlines for their *Joint Proposed Pre-Trial Schedule*, the parties shall include their respective positions on each issue, including an explanation of why agreement could not be reached.

### **PRACTICE GUIDE FOR APPEARANCES BEFORE JUDGE DUNCAN**

#### **Initial procedures:**

Upon assignment of a case, Judge Duncan requires the parties to promptly confer regarding settlement, a proposed trial date, and various pre-trial deadlines. After considering the parties' proposals, Judge Duncan will issue an order establishing a trial date and pre-trial deadlines.

#### **Extensions of Time and Continuances:**

Requests for extensions of time and/or continuances must be made by written motion and shall include: (1) the specific grounds for the request, (2) the date on which the parties conferred regarding the request, (3) a statement of whether the request is opposed or unopposed, and (4) a new proposed deadline or trial date. Extensions of discovery deadlines, if agreed upon by the parties in writing, do not require Court approval so long as they do not interfere with any party's ability to comply with other established Court deadlines.

### **Communication with the Court:**

All pre-trial motions and other requests to the Court shall be in writing and filed pursuant to the Commission's procedural rules. *Ex-parte* communication with the Court, or Court staff, concerning the substantive issues involved in this case is not allowed. Court staff will not provide legal advice or give any indication of anticipated rulings by the Court. If you have a question about a minor, routine, non-substantive issue, contact Judge Duncan's Legal Assistant by telephone for assistance (303-844-3409).

### **Applicable rules:**

All parties and party representatives in a conventional case must comply with:

1. Commission Rules of Procedure <https://www.oshrc.gov/rules/> ;
2. Federal Rules of Civil Procedure (see Commission Rule 2(b));
3. Federal Rules of Evidence (see Commission Rule 71); and
4. the *OSHRC E-Filing Instructions and User Guide*  
<https://www.oshrc.gov/publications/instructions-for-electronic-filing/> ; and
5. The provisions of this Practice Guide.

All attorneys appearing before the Court must also comply with applicable ethics rules and codes of professional responsibility.

### **Electronic filing:**

Effective October 15, 2020, **electronic filing** of case-related documents in the Commission's E-File System is **mandatory** for all parties, representatives, and intervenors. If you are not registered as an electronic filer on this specific case, you must register at [www.oshrc.gov](http://www.oshrc.gov) [click on the blue box in the upper right corner of the home page entitled "OSHRC E-Filing System (Register as an e-filer and file documents)"]. Additional information concerning e-filing procedures can be

obtained by reviewing OSHRC Rule 8(c), as well as the OSHRC *E-Filing Instructions and User Guide*, both accessible at [www.oshrc.gov](http://www.oshrc.gov).

**Notice of Settlement:**

If the parties successfully negotiate a full resolution of their dispute, the Court must be promptly notified in writing of the same. A simple, concise, written notice stating that full settlement has been reached is sufficient. The settlement report must be signed by at least one party representative and served on all parties. The Court will then issue an order setting a subsequent deadline for the filing of a more detailed *Joint Notification of Settlement*, pursuant to OSHRC Rule 100. Partial settlement agreements are encouraged, although they will not affect the scheduled trial date.

**Telephonic notification of settlement alone is not sufficient to cancel a scheduled trial date.**

**Courtroom procedures and demeanor:**

Professional courtesy and civility are expected during all court appearances, as well as during pre-trial interaction among the parties. Respect for the Court, respect for one another, respect for witnesses, and respect for the judicial process are paramount. All trial proceedings and other scheduled hearings will begin promptly at their scheduled times. There will be no visual or verbal gestures of approval or disapproval of any witness testimony, any comments by counsel, or any rulings by the Court. All mobile phones must be either turned off or placed in vibrate mode while in the courtroom.

**Trial Exhibits:**

Exhibits shall be sequentially numbered with a label placed in the lower right corner of each exhibit (and on each page thereafter, unless subsequent pages have clearly identified page numbers which can be referenced on the record). Each exhibit shall be numbered C-1, C-2, C-3, etc. for Complainant's exhibits, and R-1, R-2, R-3, etc. for Respondent's exhibits. If other parties have

been recognized in the case, they should follow a similar procedure (e.g. U-1, U-2, U-3 for exhibits offered by union representatives participating in the proceeding). The proposed, pre-numbered exhibits must be securely placed in a three-ring binder, along with an index page located in the front of the binder. Each party shall create a minimum of **four (4) copies of their respective exhibit notebooks**: (1) one copy for Judge Duncan (to be provided at trial), (2) one copy for the witness stand (which shall become the official Court copy), (3) one copy for each opposing party (which should be produced before trial pursuant to the Court's deadlines), and (4) a copy for the party offering the exhibits. **If the parties intend to offer duplicate exhibits, they should confer and agree on one copy of the exhibit**, rather than including duplicates in each of their respective exhibit lists/notebooks. In addition, **each party shall supply the Court and opposing party with a flash drive containing an electronic version of the scanned exhibits in .pdf format (for documents), and .jpeg format (for photographs).**

**Post-Trial Procedures:**

In conventional cases, Judge Duncan typically requires the parties to file a post-trial brief thirty days after the trial transcript is received from the court reporter. Post-trial briefs should contain each party's proposed factual findings, a discussion of whether the *prima facie* elements required to prove each alleged violation were established, a discussion of whether the *prima facie* elements required to prove each alleged affirmative defense were established, as well as a discussion of any other pertinent issues the parties believe the Court should address in its decision.

**All parties and party representatives must comply literally with the provisions of this Order and Practice Guide. Failure to comply may result in sanctions pursuant to Commission Rule 101.**

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**Judge Brian A. Duncan**  
U.S. Occupational Safety and Health Review Commission

Date:  
Denver, CO

## 2. Simplified Proceeding Cases:

### **ORDER TO CONFER AND APPEAR FOR SIMPLIFIED PROCEEDING CONFERENCE CALL**

The parties are ORDERED to confer, either in person or by telephone, **within thirty (30) days of the date of this Order**, regarding:

1. Settlement of this case. Specific offers and counter-offers are encouraged; and
2. Commission Rule 207(b) issues.

The parties are further ORDERED to appear by telephone for a conference call with the Court on **(Date) at 9:00 a.m. (Mountain)**. All parties shall dial-in to the conferencing service at **1-800-\_\_\_-\_\_\_\_\_**, and enter passcode \_\_\_\_\_#. The parties should be prepared to discuss the following:

- a. Proposed trial date and location (the Court prefers proposed dates approximately four to six months from the date of this Order);
- b. Factual and/or legal stipulations;
- c. Affirmative defenses asserted by Respondent. Only those defenses identified during the conference call will be considered at trial, absent extraordinary circumstances;
- d. Any other issues the parties believe the Court should address for efficient management, preparation, and trial of this case.

The parties are also reminded of their disclosure obligations in Commission Rules 206(a) and (b).

### **PRACTICE GUIDE FOR APPEARANCES BEFORE JUDGE DUNCAN IN SIMPLIFIED PROCEEDING CASES**

**Initial procedures:**

Upon assignment of a case, Judge Duncan requires the parties to promptly confer regarding settlement, a proposed trial date and location, stipulations, and to identify affirmative defenses.

**Extensions of Time and Continuances:**

Requests for extensions of time and/or continuances must be made by written motion and shall include: (1) the specific grounds for the request, (2) the date on which the parties conferred regarding the request, (3) a statement of whether the request is opposed or unopposed, and (4) a proposed new deadline or trial date.

**Communication with the Court:**

All pre-trial motions and other requests to the Court shall be in writing and filed pursuant to the Commission's procedural rules. *Ex-parte* communication with the Court, or Court staff, concerning the substantive issues involved in the case is not allowed. Court staff will not provide legal advice or give any indication of anticipated rulings by the Court. If you have a question about a minor, routine, non-substantive issue, contact Judge Duncan's Legal Assistant by telephone for assistance (303-844-3409).

**Applicable rules:**

All parties and party representatives in a simplified proceeding case must comply with:

1. Commission Rules of Procedure <https://www.oshrc.gov/rules/> (specifically Commission Rules 200 through 211 in Subpart M);
2. the *OSHRC E-Filing Instructions and User Guide* ; and
3. The provisions of this Practice Guide.

All attorneys appearing before the Court must also comply with applicable ethics rules and codes of professional responsibility.

**Electronic filing:**

Effective October 15, 2020, **electronic filing** of case-related documents in the Commission’s E-File System **is mandatory** for all parties, representatives, and intervenors. If you are not registered as an electronic filer on this specific case, you must register at [www.oshrc.gov](http://www.oshrc.gov) [click on the blue box in the upper right corner of the home page entitled “OSHRC E-Filing System (Register as an e-filer and file documents)”]. Additional information concerning e-filing procedures can be obtained by reviewing OSHRC Rule 8(c), as well as the OSHRC *E-Filing Instructions and User Guide*, both accessible at [www.oshrc.gov](http://www.oshrc.gov).

**Notice of Settlement:**

If the parties successfully negotiate a full resolution of their dispute, the Court must be promptly notified in writing of the same. A simple, concise, written notice stating that full settlement has been reached is sufficient. The settlement report must be signed by at least one party representative and served on all parties. The Court will then issue an order setting a subsequent deadline for the filing of a more detailed *Joint Notification of Settlement*, pursuant to OSHRC Rule 100. Partial settlement agreements are encouraged, although they will not affect the scheduled trial date.

**Telephonic notification of settlement alone is not sufficient to cancel a scheduled trial date.**

**Courtroom procedures and demeanor:**

Professional courtesy and civility are expected during all court appearances, as well as during pre-trial interaction among the parties. Respect for the Court, respect for one another, respect for witnesses, and respect for the judicial process are paramount. All trial proceedings and other hearings will begin promptly at their scheduled times. There will be no visual or verbal gestures of approval or disapproval of any witness testimony, any comments by counsel, or any rulings by



the Court. All mobile phones must be either turned off or placed in vibrate mode while in the courtroom.

**Trial Exhibits:**

Exhibits shall be sequentially numbered with a label placed in the lower right corner of each exhibit (and on each page thereafter, unless subsequent pages have clearly identified page numbers which can be referenced on the record). Each exhibit shall be numbered C-1, C-2, C-3, etc. for Complainant's exhibits, and R-1, R-2, R-3, etc. for Respondent's exhibits. If other parties have been recognized in the case, they should follow a similar procedure (*e.g.* U-1, U-2, U-3 for exhibits offered by union representatives participating in the proceeding). The proposed, pre-numbered exhibits must be securely placed in a three-ring binder, along with an index page located in the front of the binder. Each party shall create a minimum of **four (4) copies of their respective exhibit notebooks**: (1) one copy for Judge Duncan (to be provided at trial), (2) one copy for the witness stand (which shall become the official Court copy), (3) one copy for each opposing party (which should be produced before trial pursuant to the Court's deadlines), and (4) a copy for the party offering the exhibits. **If the parties intend to offer duplicate exhibits, they should confer and agree on one copy of the exhibit**, rather than including duplicates in each of their respective exhibit lists/notebooks. In addition, **each party shall supply the Court and opposing party with a flash drive containing an electronic version of the scanned exhibits in .pdf format (for documents), and .jpeg format (for photographs).**

**Post-Trial Procedures:**

In simplified proceedings, the parties will be provided an opportunity to either make closing argument on the record at the conclusion of trial or file a written post-trial brief. If a party elects to file a brief, it will typically be due thirty days after the trial transcript is received from the court

reporter. Post-trial briefs must contain each party's proposed factual findings, a discussion of whether the *prima facie* elements required to prove each alleged violation were established, a discussion of whether the *prima facie* elements required to prove each alleged affirmative defense were established, as well as a discussion of any other pertinent issues the parties believe the Court should address in its decision.

**All parties and party representatives must comply literally with the provisions of this Order and Practice Guide. Failure to comply may result in sanctions pursuant to Commission Rule 101.**

SO ORDERED.

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**Judge Brian A. Duncan**  
U.S. Occupational Safety and Health Review Commission

Date:  
Denver, CO