

660:2-9-3. Prehearing proceedings and processes

(a) Scheduling. As soon as is practicable after the request for hearing is received, but in no event later than thirty (30) days after the request for hearing is received, the Administrator, or Hearing Officer, shall enter a scheduling order that is intended to expedite the disposition of the action and insure the fair, orderly and efficient conduct of the proceedings. The parties shall confer in person or by telephone and attempt to prepare a single agreed scheduling order to submit to the Administrator or the Hearing Officer. If the proposed scheduling order is acceptable to the Hearing Officer, no scheduling conference need be held. If the parties are unable to agree, the Hearing Officer shall issue an appropriate scheduling order or hold a scheduling conference in person or by telephone. The scheduling order should establish at least the following:

- (1) a schedule of discovery;
- (2) any limitations to be placed on discovery;
- (3) a preliminary list identifying all witnesses, documents and exhibits intended to be utilized at the hearing;
- (4) identification of any expert witness intended to be called;
- (5) the date for exchanging the documents and exhibits intended to be utilized at the hearing and the final list identifying all witnesses intended to be called at the hearing; and;
- (6) such other matters as may aid in the disposition of the matter.

(b) Discovery. Discovery may be obtained by one or both of the following methods:

(1) A party may serve a written request on any other party requiring the party to produce, within fifteen (15) days, for inspection and copying, any documents or tangible items that are in the possession, custody or control of the party and relevant to the subject matter of the individual proceeding and are not privileged. The number of requests to produce or permit inspection shall not exceed thirty (30) in number except by agreement of the party being required to produce or by order of the Administrator, or Hearing Officer; and/or

(2) A party may take the testimony of a witness by oral deposition at the expense of that party. A party desiring to take the deposition of another party, or an employee thereof, shall serve written notice to the witness, or his counsel. The notice shall state the time and place for taking the deposition and shall be served at least three (3) days before the person is required to appear. A party desiring to take the deposition of a non-party witness shall serve the witness with a subpoena in accordance with 660:2-9-4. A copy of the notice or subpoena shall be served on and all other parties to the proceeding by means specified in paragraph (h) below. Unless otherwise agreed by the parties or ordered by the Administrator or Hearing Officer, a deposition under this provision shall not last more than six (6) hours, exclusive of breaks, and shall be taken only between the hours of 8:00 a.m. and 5:00 p.m. on a day other than a Saturday or Sunday and on a day other than a legal holiday in accordance with 660:2-9-4. Such notice shall state the time and place for taking the deposition and shall be served in order to allow the adverse party sufficient time, by the usual route of travel, to attend, and three (3) days for preparation, exclusive of the date of service of the notice.

(c) Motions in general.

(1) Unless otherwise permitted by these rules or by the Administrator, or the Hearing Officer, motions shall:

- (A) be made in writing;
- (B) state concisely the question to be determined and be accompanied by any necessary supporting documentation; and
- (C) be served on all parties.

(2) A response to a written motion shall be filed within ten (10) days after receipt of the motion but no later than one day prior to the date and time of the hearing. A reply to a response to a written motion may be filed within five (5) days after receipt of the response but no later than the date and time of the hearing.

(3) The Administrator, or the Hearing Officer, may allow oral argument if it appears necessary to [the Administrator, or the Hearing Officer, for](#) a fuller understanding of the issues presented.

(4) The filing or pendency of a motion does not alter or extend any time period prescribed by this Subchapter or by an order of the Administrator or the Hearing Officer.

(d) Motions for summary decision. A party may move for summary decision as to any substantive issue in the case. The Administrator, or the Hearing Officer, may issue a summary decision if he finds that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.

(e) Prehearing conference.

(1) Upon the request of a party or when the Administrator, or the Hearing Officer, believes it necessary or appropriate, a prehearing conference shall be held, as close to the time of hearing as is reasonable under the circumstances, to address the following matters:

(A) simplification of issues;

(B) the final list of witnesses and exhibits to be utilized at the hearing;

(C) admissions and stipulations of fact;

(D) stipulations regarding admission and authenticity of documents;

(E) requests for official notice;

(F) discovery disputes;

(G) pending motions; and

(H) other matters that will promote the orderly and prompt conduct of the hearing.

(2) At the conclusion of the prehearing conference, a ruling or order shall be entered reciting the action taken. The order shall control the subsequent course of the action unless modified by a subsequent order. The order shall be modified only to prevent manifest injustice.

(f) Failure to appear or participate. ~~Failure~~ [A party's failure](#) to participate ~~and cooperate in good faith~~ in the preparation of a scheduling order or prehearing conference order; ~~failure to comply with a scheduling order or prehearing conference order;~~ [failure to comply with a written request for production or to appear to testify in a deposition under 660:2-9-3\(b\); or](#) failure to appear at ~~any hearing or conference~~, ~~failure to appear~~ [substantially prepared](#) ~~prepare~~, or ~~failure to~~ participate in good faith [in, any hearing or conference](#), may result in any of the following sanctions:

(1) striking of any pleading;

(2) a preclusion order;

(3) staying the proceeding;

(4) default judgment; or

(5) such other order as the Administrator, or the Hearing Officer, may deem just and appropriate.

(g) Post prehearing conference. If additional exhibits are discovered after the prehearing conference order is issued or after the date final documents and exhibits are exchanged, the party intending to use them shall immediately notify all other parties and furnish copies of the additional exhibits to such parties. If additional witnesses are discovered, all other parties shall be notified immediately and furnished the nature of the testimony along with the names and addresses of the witnesses. These additional exhibits or the testimony of the additional witnesses shall not be admitted at the hearing without the agreement of all parties or without a showing to the Administrator, or the Hearing Officer, that manifest injustice would be created if the exhibit or witness testimony were not permitted.

(h) Service and filing of papers. Service of papers upon a party shall be made by personal delivery, regular first class mail, facsimile transmission or electronic mail. All papers required to be served by a party shall be filed with the Administrator within the applicable time for service. When a Hearing Officer is appointed, a person making a filing with the Administrator shall promptly provide to the Hearing Officer a copy of such filing. Papers filed with the Administrator shall be accompanied by a certificate stating the name of the person or persons served, the

date of service, the method of service and the mailing address, facsimile telephone number or electronic mail address to which service was made, if not made in person.

(i) Signature and certification. Every filing of a party represented by counsel shall be signed by at least one counsel of record and shall state that counsel's business address and telephone number. A party who is not represented by counsel shall sign his individual name and state his address and telephone number on every filing. The signature of ~~a~~-counsel or a party shall constitute a certification that:

(1) the person signing the filing has read the filing;

(2) to the best of his knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of adjudication; and

(3) If a filing is not signed, the Administrator, or the Hearing Officer, shall strike the filing, unless it is signed promptly after the omission is called to the attention of the party making the filing.

(j) Computation of time. A paper is filed when it is received by the Administrator. Unless otherwise specifically provided by the Securities Act or this Subchapter, computation of any time period prescribed by this Subchapter, or by an order of the Administrator or the Hearing Officer, begins with the first day following the act or event that initiates the time period. The last day of the time period so computed is included unless it is a Saturday, Sunday, state holiday, or any other day when the Department's office is not open for public business, in which event the period runs until the end of the next business day. If a notice or other filing is served by mail and the party served is entitled or required to take some action within a prescribed time period after service, the date of mailing is the date of service, and three (3) days shall be added to the prescribed time period.