

§ 20.606

33 CFR Ch. I (7-1-08 Edition)

persons shall testify as to matters reasonably known to them.

(e) Each witness deposed shall be placed under oath or affirmation, and the other parties shall have the right to cross-examine.

(f) The witness being deposed may have counsel or another representative present during the deposition.

(g) Except as provided in paragraph (n) of this section, depositions shall be stenographically recorded and transcribed at the expense of the party requesting the deposition. Unless waived by the deponent, the transcription must be read by or read to the deponent, subscribed by the deponent, and certified by the person before whom the deposition was taken.

(h) Subject to objections to the questions and responses that were noted at the taking of the deposition and that would have been sustained if the witness had been personally present and testifying at a hearing, a deposition may be offered into evidence by the party taking it against any party who was present or represented at the taking of the deposition or who had notice of the deposition.

(i) The party requesting the deposition shall make appropriate arrangements for necessary facilities and personnel.

(j) During the taking of a deposition, a party or the witness may request suspension of the deposition on the grounds of bad faith in the conduct of the examination, oppression of the witness or party, or improper questioning or conduct. Upon request for suspension, the deposition will be adjourned. The objecting party or witness must immediately move the ALJ for a ruling on the objection(s). The ALJ may then limit the scope or manner of the taking of the deposition.

(k) When a deposition is taken in a foreign country, it may be taken before a person having power to administer oaths in that location, or before a secretary of an embassy or legation, consul general, consul, vice consul or consular agent of the United States, or before such other person or officer as may be agreed upon by the parties by written stipulation filed with the ALJ.

(l) Objection to taking a deposition because of the disqualification of the

officer before whom it is to be taken is waived unless made before the taking of the deposition begins, or as soon as the disqualification becomes known or could have been discovered with reasonable diligence.

(m) A deposition may be taken by telephone conference call upon such terms, conditions, and arrangements as are prescribed in the order of the ALJ.

(n) The testimony at a deposition hearing may be recorded on videotape, upon such terms, conditions and arrangements as are prescribed in the order of the ALJ, at the expense of the party requesting the recording. The video recording may be in conjunction with an oral examination by telephone conference held pursuant to paragraph (m) of this section. After the deposition has been taken, and copies of the video recording are provided to parties requesting them, the person recording the deposition shall immediately place the videotape in a sealed envelope or a sealed videotape container, attaching to it a statement identifying the proceeding and the deponent and certifying as to the authenticity of the video recording, and return the videotape by accountable means to the ALJ. The deposition becomes a part of the record of the proceedings in the same manner as a transcribed deposition. The videotape, if admitted into evidence, will be played during the hearing and transcribed into the record by the reporter.

§ 20.606 Protective orders.

(a) In considering a motion for an order of discovery—or a motion, by a party or other person from whom discovery is sought, to reconsider or amend an order of discovery—the ALJ may enter any order that justice requires, to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. This order may—

(1) Confine discovery to specific terms and conditions, such as a particular time and place;

(2) Confine discovery to a method other than that selected by the party seeking it;

(3) Preclude inquiry into certain matters;

(4) Direct that discovery occur with no one present except persons designated by the ALJ;

(5) Preclude the disclosure of a trade secret or other proprietary information, or allow its disclosure only in a designated way or only to designated persons; or

(6) Require that the person from whom discovery is sought file specific documents or information under seal for opening at the direction of the ALJ.

(b) When a person from whom discovery is sought seeks a protective order, the ALJ may let him or her make all or part of the showing of good cause *in camera*. The ALJ shall record any proceedings *in camera*. If he or she enters a protective order, he or she shall seal any proceedings so recorded. These shall be releasable only as required by law.

(c) Upon motion by a person from whom discovery is sought, the ALJ may—

(1) Restrict or defer disclosure by a party either of the name of a witness or, if the witness comes from the Coast Guard, of any prior statement of the witness; and

(2) Prescribe other appropriate measures to protect a witness.

(d) The ALJ will give any party an adequate opportunity to prepare for cross-examination or other presentation concerning witnesses and statement subject to protective orders.

§ 20.607 Sanctions for failure to comply.

If a party fails to provide or permit discovery, the ALJ may take such action as is just. This may include the following:

(a) Infer that the testimony, document, or other evidence would have been adverse to the party.

(b) Order that, for the purposes of the proceeding, designated facts are established.

(c) Order that the party not introduce into evidence—or otherwise rely upon, in support of any claim or defense—the evidence that was withheld.

(d) Order that the party not introduce into evidence, or otherwise use in the hearing, information obtained in discovery.

(e) Allow the use of secondary evidence to show what the evidence withheld would have shown.

§ 20.608 Subpoenas.

(a) Any party may request the ALJ to issue a subpoena for the attendance of a person, the giving of testimony, or the production of books, papers, documents, or any other relevant evidence during discovery or for any hearing. Any party seeking a subpoena from the ALJ shall request its issuance by motion.

(b) An ALJ may, for good cause shown, apply to the United States District Court for the issuance of an order compelling the appearance and testimony of a witness or the production of evidence.

(c) A person serving a subpoena shall prepare a written statement setting forth either the date, time, and manner of service or the reason for failure of service. He or she shall swear to or affirm the statement, attach it to a copy of the subpoena, and return it to the ALJ who issued the subpoena.

(d) Coast Guard investigating officers have separate subpoena power in S&R proceedings under 46 CFR 5.301.

§ 20.609 Motions to quash or modify.

(a) A person to whom a subpoena is directed may, by motion with notice to the party requesting the subpoena, ask the ALJ to quash or modify the subpoena.

(b) Except when made at a hearing, the motion must be filed:

(1) 10 days or less after service of a subpoena compelling the appearance and testimony of a witness or the production of evidence or

(2) At or before the time specified in the subpoena for compliance, whichever is earlier.

(c) If the subpoena is served at a hearing, the person to whom it is directed may, in person at the hearing or in writing within a reasonable time fixed by the ALJ, ask the ALJ to quash or modify it.

(d) The ALJ may quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue.