February 4, 2013

Mr. Todd Smyth
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW
Suite 400-North
Washington, DC 20001-8002

RE: Comments On Rules Of Practice And Procedure For Hearings Before The Office Of Administrative Law Judges (Document ID DOL-2012-0007-0001)

Dear Mr. Smyth:

The National Employment Lawyers Association (NELA) appreciates the opportunity to submit the following comments in response to the U.S. Department of Labor's (DOL) proposed Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges (OALJ). 77 Fed. Reg. 233 (December 4, 2012) (Document ID DOL-2012-0007-0001). NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court, other federal appellate courts as well as before the DOL's Administrative Review Board (ARB) regarding the proper interpretation of federal civil rights and worker protection laws, in addition to undertaking other advocacy actions on behalf of workers throughout the United States. Among the employees NELA members represent are whistleblowers in administrative, state, and federal proceedings, including in matters before the OALJ and the ARB.

NELA generally supports the DOL's overall proposal to update the OALJ Rules of Practice and Procedure, and agrees with many of the proposed revisions appearing in the Notice. We commend DOL in its efforts to provide a fair and just forum for whistleblowers, who often risk their jobs and the well-being of their families and themselves in reporting wrongdoing to authorities. NELA supports OALJ Rules that allow for both a fair process and one that is affordable for the employee whistleblowers. Administrative proceedings, conducted fairly and efficiently, provide whistleblowers with a cost-effective venue for a just hearing and adjudication of their claims.

We write, in part, to note that while the Federal Rules of Civil Procedure are a practical resource, these rules should not be rigorously adopted or followed by the OALJ, particularly when the

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result is to make administrative proceedings unduly expensive and burdensome or to disregard the special expertise of the OALJ. As stated in the Notice of Proposed Rule Making, "administrative adjudications do not take place in a court." See 77 Fed. Reg. 72148. For this reason, we believe that it is unnecessary for the OALJ to emulate strictly what whistleblowers would experience in court.

The main thrust of whistleblower protection laws is their remedial purpose, which "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990). Because a substantial number of whistleblower litigants are *pro se* or are represented by counsel who only appear before the OALJ infrequently, it is vitally important that the OALJ Rules clearly reflect Congress' intent that decisions be reached on the merits of the employees' claims, not on closely-parsed or restrictive procedural rulings that deprive whistleblowers of their "day in court."

Below are some areas in which we believe the proposed Rules can be improved for the benefit of all parties and in the interest of a fair and just adjudication of the matters before the OALJ.

1. **The OALJ's Rules Of Practice And Procedure Should Encourage Early Exchange Of Discoverable Documents And Information, Prompt Resolution Of Discovery Disputes, And Broad Discovery Of Probative Information.**

In the vast majority of whistleblower cases, most evidence, including documents and witnesses, will be controlled by the employer and in its possession. Such information asymmetry is common across cases involving the workplace. This is in contrast to most business-to-business litigation, where each side to the controversy has relevant discovery. Discovery is often the key to finding patterns that point to unlawful motive and discriminatory intent in workplace disputes. Limits on discovery are, by the nature of these cases, imposed almost exclusively upon the employees. Great care must be taken to ensure that employers are not able to evade liability through presumptive limits or via delays in production of vital information. Prompt resolution of discovery disputes, if not pre-emptive guidelines for the litigants, are essential to cost-effective administrative proceedings and, ultimately, to the fairness of the proceeding.

The Secretary of Labor has stated that parties to DOL whistleblower proceedings should have "all the discovery mechanisms of the Rules of Practice" available to them to assist in preparing for a hearing. *Malpass v. General Electric Co.*, 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). In *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994), the ALJ ruled that "the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted." *Id.*, slip op. at 6; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (extensive discovery in employment discrimination cases is necessary and the refusal to adhere to the "liberal spirit" of discovery would be an abuse of discretion); *Duke v. University of Texas at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) ("procedural technicalities" to impede liberal discovery are improper).

One member of the ARB explained:

> The courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 295 (D.Del. 1975) (citations omitted)." The plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D. Mo. 1995) (citations omitted). *Accord Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (vacating protective order which limited discovery in part because "imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same). Consistent with this body of case law, the Secretary of Labor and the ALJs have recognized the broad scope of discovery to be afforded parties in whistleblower cases. *See*, *e.g.*, *Malpass v. General Electric Co.*, Case Nos. 85-ERA-38/39, Sec'y Dec., Mar. 1, 1994, slip op. at 12; *Holub v. Nash, Babcock, et al.*, Case No. 93-ERA-25, ALJ Disc. Ord., Mar. 2, 1994, slip op. at 6. *See generally Timmons v. Mattingly Testing Services, Inc.*, ALJ Case No. 95-ERA-40, ARB Dec. & Ord. of Rem., June 21, 1996, slip op. at 4-6 (discussing the "full and fair presentation" of a whistleblower case by the parties).

Khandelwal v. Southern California Edison, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), concurring opinion of E. Cooper Brown. It is important that the OALJ's Rules provide a clear signal to the parties that discovery is to be promptly provided and that gamesmanship aimed at evading production of relevant and probative materials will not be tolerated.

NELA recommends that the OALJ consider adopting early discovery protocols similar to the *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action* currently being implemented in federal district courts around the country. *See*, *generally*, *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action*, Federal Judicial Center (November 2011), available at: http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf. NELA worked collaboratively with management attorneys and the Advisory Committee on Civil Rules to develop these Initial Discovery Protocols for certain types of employment litigation in the federal courts and would endorse the adoption of similar procedures for matters before the OALJ. The intent of the Protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." *Id.* at 1. This early round of discovery is meant to be "provided automatically by both sides within 30 days of the defendant's responsive pleading or motion." *Id.* at 2. The Advisory Committee is careful to note that "[w]hile the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship." *Id.* The practical result of such discovery protocols is to eliminate the tactical motions and discovery disputes that commonly arise in employment litigation and bog down and delay the proceedings.

2. Summary Adjudications Should Be The Exception Not The Rule.

NELA believes that the use of summary adjudications is inconsistent with the goal of fair administrative proceedings for whistleblowers and should be rarely, if ever, used. Summary decisions based on written submissions favor employers over employees and increase costs (including by requiring the retention of experts, production of expert reports, taking of depositions, and purchase of deposition transcripts). Summary decisions deprive the ALJ of the opportunity to determine credibility of the witnesses, which is important in cases such as these where motive and intent are critical issues, neither of which are typically revealed adequately on paper. NELA recommends that summary judgment generally be considered inappropriate in administrative proceedings and suggests that the Rules so state. *Cf.* proposed Rule 18.72. The proposed Rule also will impose difficult to meet time constraints on the limited bar of practitioners willing to take on these whistleblower clients.

Summary adjudications strongly favor employers and are in conflict with Congress' desire that whistleblowers' claims be promptly and fairly adjudicated in order to protect the whistleblower and the public interest, and to encourage honest people to report financial fraud and abuse, unhealthful conditions, unsafe aircraft, and government contractor fraud, among other matters. There has been no outcry that federal courts have been guilty of denying summary judgment in cases where it should have been granted, particularly in employment matters. To the contrary, the empirical evidence is otherwise. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (2009) ("Clermont & Schwab"), available at http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf. This study reveals that employment discrimination cases are far less likely to succeed at pretrial, trial and appeal than other types of cases. "The most significant observation about the district courts' adjudication of these cases is the long-run lack of success for employment discrimination plaintiffs relative to other plaintiffs. Over the period of 1979-2006 in federal court, the plaintiff win rate for jobs cases (15%) was lower than that for nonjobs cases (51%)." *Id.* at 30. "The gap in win rates between employment discrimination plaintiffs and other plaintiffs appears, for example, in pretrial adjudication. . . . Over the period of 1979-2006 in federal court, employment discrimination plaintiffs have won 3.59% of their pretrial adjudications, while other plaintiffs have won 21.05% of their pretrial adjudications." *Id.* at 31. *See also* Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007) (available at http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (study of federal court cases found that employment discrimination plaintiffs lost 73-75% of summary judgment motions, vs. a 60% rate for all cases, in 2006); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 709 n.22 (2007); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 205-06 (1993) (arguing that "the increased inappropriate use of summary judgment" has "silently curtail[ed] workers' civil rights claims" and that the "misapplication of civil procedural rules to employment discrimination cases threatens substantive antidiscrimination law"); Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions—Ten Years Later*, 64 S.C. L. Rev., Book 1. Accordingly, OALJ should seek to distinguish the administrative process as one in which whistleblowers receive a fair opportunity to present their claims before an impartial judge and

seek to limit the use of summary adjudications.

Most employment cases lack a smoking gun, and therefore are often based on circumstantial evidence of discriminatory intent. *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989); *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980). As one federal judge explained, "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. . . . It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action ranging from failure to hire to discharge*." Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006). In employment cases, counsel for plaintiffs often request the trier of fact to draw rational inferences from certain proven facts, and standard jury instructions allow jurors to draw such inferences. This task is very difficult without the benefit of hearing the witnesses' testimony orally.

In assessing a dispute about intent, courts must consider the totality of circumstances. *United States v. Arzivu*, 534 U.S. 266 (2002) (Rehnquist, C.J.) (admonishing lower courts for examining the facts surrounding the investigatory stop in isolation. Only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop.); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (Scalia, J.) ("[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.") This type of "totality of the circumstances" analysis recently led the ARB to reverse a post-hearing dismissal. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3, Order of Remand (ARB June 24, 2011).

Furthermore, motions for summary judgment allow cases to be framed by the party that does not have the burden of proof at trial, and even worse as the Rule is presently drafted, that party gets the last word. NELA members have expressed concern that they have been "sandbagged" by primary briefs which had provided abbreviated or unclear statements of facts or arguments, tactically written to prevent cogent or complete responses, with the Reply Brief clarifying or even adding arguments and providing additional authorities in support of those arguments. To deal with this problem, many circuits presently allow sur-reply briefs, or expressly limit reply briefs to the four corners of the arguments made by the non-moving party in opposition to summary judgment. NELA suggests that the tactical use of reply briefs should not be countenanced by the drafters. To prevent this tactic, the Rule should specifically allow provision for a sur-reply. In addition, the comments should make clear that both the reply and the sur-reply should be confined to responding to material in the opposing submission, and that all "new" material will be disregarded by the court.

The timing aspects of the new Rule will be troublesome for employees and their counsel. It bears noting at the outset that the vast majority of NELA members are sole practitioners or work in

offices with no more than three attorneys, generally without paralegal support. Therefore, the efficiency and cost of opposing motions for summary judgment is of paramount importance to our members. The new Rule proposes that 30 days before any hearing, a motion for summary decision may be filed and a response is due 14 days later. NELA is concerned that this puts claimants' attorneys in the position of both responding to a motion for summary judgment and preparing for an evidentiary hearing in the same time period. This is unfair to the claimant because the respondent's work is done with the filing of the motion, 30 days before trial and the respondent "goes second" at the hearing, thereby gaining additional time to prepare in the event that the summary motion is not successful. Further, this schedule does not allow the ALJ adequate time to decide the motion sufficiently in advance of the hearing so that the parties and the witnesses can avoid needless time-consuming work, or even travel, to prepare for the hearing.

In federal district court, motion deadlines for summary adjudications are set early in the process and are part of the pretrial or similar orders. The deadlines occur well in advance of the trial date so that the parties can avoid preparing for a trial without a ruling on critical motions. This allows the parties to conserve resources and time involved in preparing for a hearing.

It is very burdensome upon employees' counsel to have the court rule substantively just hours or days prior to the trial. Such rulings deprive the claimant of the right to trial, could greatly impact what evidence and claims will be presented, and may have other effects on how the hearing is conducted that may present logistical and practical difficulties. Because finding good counsel to represent employees can be a significant challenge, increasing the risk of a "courthouse steps" adverse ruling means that fewer competent counsel will be willing to take on such representation. To avoid these pitfalls, NELA recommends the following: 1) substantive summary motions aimed at eliminating claims or types of damages should be filed no later than 90 days prior to a hearing date; 2) counsel responding to such motions should have 21 to 30 days to file their responsive pleadings; and 3) all such motions should be resolved at least 30 days ***prior*** to a hearing date.[1]

3. OALJ Electronic Discovery Rules Need To Provide More Guidance To Parties And Reflect Practical Solutions.

The OALJ proposed rules need to clarify issues related to discovery of electronically stored information (ESI). Both sides should have access to discovery in electronic format, where appropriate and available, so that materials can be electronically searched and because electronic format is often cheaper for the employer. Courts that have considered the issue have held that production of electronic documents in their electronic form is proper. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), reversed on other grounds, 90 F.3d 553

[1] NELA agrees that motions that are more in the nature of motions in limine (e.g., restrict witnesses, limit number of witnesses, or exclude certain documentary evidence) would not be subject to such rules, but should be governed by pretrial procedures aimed at avoiding trial ambush tactics.

(D.C. Cir. 1996). *See also Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.) ("Production of materials in hard copy form does not preclude a party from receiving the same information in electronic form."); *Cobell v. Norton*, 2002 U.S. Dist. LEXIS 5291 (D.D.C.) (request for permission to produce emails on paper draws sanctions). When the Federal Rules of Civil Procedure were amended in 2006, the Advisory Committee noted "Rule 34(a) [Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes] is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents." Fed. R. Civ. P. 34, Advisory Committee's note (2006). Further, the Advisory Committee stated, "The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party…." and went on to note, "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." *Id.* NELA recommends that the OALJ adopt similar rules for the production of documents and electronically stored information.

4. OALJ Should Adopt Electronic Filing Procedures Similar To The Federal Courts, Easing The Exchange Of Documents And Reducing Expense For The Parties.

While the OALJ does not now have an electronic filing system for the submission of documents, NELA recommends that these amendments to the Rules begin a transition to electronic case filing. U.S. District Courts and Courts of Appeals each have their own systems, as do the Merit Systems Protection Board (MSPB) and the National Labor Relations Board (NLRB). OALJ should choose from among these systems the policies and procedures that best allow the parties to file, receive, and review filings transparently and without delay. Courts and agencies that have adopted electronic filing recognize the need to make exceptions when requiring electronic filing may present an undue hardship on a party; however, the courts and litigants realize many advantages from having electronic filing available to them. Issues regarding deadlines and service (and lack thereof) are greatly diminished. Individual claimants would have easier access to view filed documents and be less vulnerable to harm due to mailing address changes or postal service delays. In the interim, filings by facsimile with the OALJ should be liberally permitted. We recommend DOL remove the recommended cap on the number of pages that may be received by facsimile. Computers and electronic devices can be configured readily to receive facsimile transmissions, thus avoiding the need to be sure that facsimile machines are loaded with paper. Until such time as the OALJ develops an electronic filing system, ALJs should be given the discretion to permit filings by email in appropriate circumstances, and particularly where the parties consent by agreement.

5. The Filing Day Should Not End Before 11:59 P.M.

The proposed Rules define the end of the day on which a filing is due as 4:30 p.m. in whichever location the filing is being made. *See* proposed rule 29 CFR 18.32(a)(2). Most litigants would expect the filing day to end at 11:59 p.m. because this is the typical practice in other

administrative and judicial proceedings.

6. OALJ Should Clarify Certain Rules With Respect To *Amicus* Parties.

a. Adopt A Disclosure Requirement With Respect To Financial Ties Between Parties And *Amici*.

Proposed Rule 29 CFR 18.24 regarding *amicus* briefs should include a requirement of disclosure by non-governmental parties of any financial ties between the litigant and the *amicus* party. The *amicus* party and its attorney authors also should represent that they were not directly or indirectly paid by a party to research, author, or otherwise submit the brief, and that the content of the brief was not pre-determined by any party. As *amicus* briefing becomes more frequent, it is important that this does not become a method by which employers can unfairly tip the scales of justice. Such rules are increasingly common in the federal courts of appeal where *amicus* briefing is relatively frequent.

b. *Amicus Curiae* Briefs Should Not Be Due Until Post-Hearing Briefs Are Submitted For The Party Being Supported.

Proposed Rule 29 CFR 18.24 provides that, "Unless otherwise directed by the judge, an *amicus* brief must be filed by the close of the hearing." *Amicus* participation is more logically timed with the deadline for post-hearing briefs. NELA proposes that the proposed Rule be modified as follows:

> Unless otherwise directed by the judge, an *amicus* party must ~~be filed by the close of the hearing~~ file its brief no later than 7 days after the post-hearing brief of the party being supported is filed.

This change would also allow the *amicus* to review the transcript, which is often not available for 60 days or more post-hearing, and ensure that the *amicus* party is "presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). This suggested modification recognizes that "an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend." *Neonatology Assocs. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.).

7. The Proposed Rule On Physical And Mental Examinations Raises Several Concerns Among NELA Members.

Proposed Rule 29 CFR 18.62, "Physical and Mental Examinations," has caused concern among NELA members with regard to the propriety of such examinations in employment litigation, and the proposed time for notice and objections.

a. Time For Notice And Objections.

Under the Rules currently in force, a party is required to provide 30 days notice of a physical or mental examination when sought. As revised, the new proposed Rule requires only 14 days' notice and mandates that objections be filed within 7 days of service of the notice. While we recognize the need to resolve objections quickly and expedite proceedings, we remain concerned that the new Rule is unduly restrictive. Though 14 days may be enough notice if the examination is anticipated, discussed among counsel, and arranged on a mutually convenient date and time, it is not sufficient time if the litigant's current employer requires more substantial notice to be absent from work, change travel plans, or make other similar arrangements, or if the employee whistleblower wishes to file an objection. Under the proposed new Rule, an objection must be filed within 7 days, which is not sufficient time for a party and counsel to decide about the propriety of the examination, confer with treating medical providers and adverse counsel, and file an informed, reasonable objection that states the objection "with particularity." NELA recommends that the 30-day notice period be maintained and that objections be filed within 14 days of receipt of the notice.

b. Propriety Of Physician And Mental Examinations.

NELA believes that claims of emotional distress damages (e.g., trouble sleeping, irritability, moodiness, and mild depression) should not ordinarily merit a physical or mental examination, particularly where the party is not calling an expert witness to corroborate the emotional distress testimony.

Mental and physical examinations present an opportunity for harassment and abuse, are expensive, and may involve privacy issues of non-litigants (e.g., unduly seeking information about the party's family or sex life). Mental examinations, in particular, are fraught with perils because counsel are not present traditionally during the examination to observe whether respondents made probative statements adverse to their claims (as the examiner may later report). This is very different from a physical examination in a benefits claim, for example, where the blood gas percentages or heartbeat rates during a stress test are far more objective and not readily subject to manipulation or misinterpretation.

Mental examinations can be very traumatic to whistleblowers, who tend to distrust examiners selected by the respondent. To eliminate some of the gamesmanship and disputes arising with regard to these examinations and to weigh the benefits against the intrusiveness of such examinations, NELA recommends that OALJ require the following with regard to mental and physical examinations:

1. The parties shall first attempt, including through counsel, to resolve any and all issues regarding a physical or mental examination prior to noticing the examination.

2. Prior to noticing the examination (unless an examination is agreed upon by the parties), respondent's counsel should request a telephonic or other conference with the ALJ and all counsel to discuss the need for the examination as well as any special procedures or

specific limitations that may be appropriate.

3. The respondent should be required, prior to the conference recommended in (b) above and/or in conjunction with a pretrial conference, to set forth the need for the examination with particularity, including why a deposition of the whistleblower is not sufficient to address the issues, and a description of what will occur in the examination. Such notices should be filed with the ALJ and served on all parties.

Requiring these steps should limit the need for intervention by the ALJ and allow the parties to understand and anticipate the need for such examinations.

8. The Time For Filing Motions For Reconsideration Should Be Consistent Across All Cases.

Proposed Rule 18.93 provides for filing of a Motion for Reconsideration within 10 days of an ALJ decision, *except* in Black Lung Benefits Act cases, where 20 C.F.R. 725.479(b) provides for 30 days. NELA proposes that all cases be allowed 30 days after the filing of the ALJ's decision in which to file a motion for reconsideration. First, this makes the procedure consistent for all cases. Second, it avoids the need for litigants to request extensions of time so as to allow sufficient time to file a quality motion for reconsideration. Third, it provides practitioners and their clients with sufficient time within which to make an informed determination about whether a motion to reconsider will be filed at all and upon which grounds, thereby avoiding broad motions aimed at all issues and reducing the resulting burden upon the ALJs.

Again, NELA appreciates the opportunity to comment on the proposed regulations, and wishes to thank the Department for its attention and consideration.

Sincerely yours,

Rebecca Hamburg Cappy
Program Director