New SOAH Procedural Rules;  
Alternative Dispute Resolution Opportunities at SOAH

Sarah G. Ramos  
Senior Administrative Law Judge  
Deputy Division Director  
Central Hearings Panel

Nancy N. Lynch  
Administrative Law Judge/  
Alternative Dispute Resolution Coordinator

State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

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New SOAH Procedural Rules; ADR Opportunities at SOAH

I. Why Were the Procedural Rules Adopted and How They Were Developed?

A. Legislative Mandate.

Pursuant to 1997 legislative acts, the State Office of Administrative Hearings (SOAH) adopted major revisions to Chapter 155 of its procedural rules. The acts authorized Administrative Law Judges (ALJs) to impose sanctions and required the Chief ALJ to adopt procedural rules relating to SOAH hearings.

B. Development.

The rules were developed in two phases; the sanction rule became effective September 8, 1997, and other procedural rules were effective January 2, 1998. Working in committees, SOAH ALJs drafted rules which were reviewed by the Chief ALJ. Nineteen entities filed written comments to the proposed rules. In response to the comments and to statements made at a November 1997 public hearing, the proposed rules were amended and finally adopted.

In developing the rules, the ALJs drew from the Texas Rules of Civil Procedure (TRCP), previous SOAH rules, and referring agencies rules. Commenting agencies views differed as to whether proposed procedures were authorized by law and would promote more efficient and fair hearings. For example, parties and witnesses in hearings conducted for the Texas Workers' Compensation Commission had frequently participated by telephone, but such participation was not generally allowed in hearings for other agencies. Also, many referring agencies authorized discovery through requests for admission and interrogatories, while others considered Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 1998) (APA), discovery procedures to be exclusive.

Because SOAH hears cases from such a variety of referring agencies, one new SOAH rule specifically allows ALJs to modify the rules to promote fair and efficient handling of a case and to facilitate resolution of issues, as long as a party's rights are not prejudiced and no statute is contravened. §155.3.

II. How Do The Rules Complement Referring Agencies' Rules and Their Governing Statutes?

A. Applicability of Referring Agencies' Rules.

After SOAH's adoption of procedural rules, the referring agencies' procedural rules do not apply in SOAH hearings unless they were adopted by the Chief ALJ or unless SOAH's rules do not address the procedural issue. TEX. GOV'T CODE ANN. §2003.050(b) (Vernon 1998).

1. Adoption by Reference §155.1.

The Chief ALJ adopted by reference the Public Utilities Commission's (PUC) and Texas Natural Resource Conservation Commission's (TNRCC) procedural rules that were effective on January 1, 1998. However, the adoption did not include those agencies' rules pertaining to Alternative Dispute Resolution (ADR).

2. Time During Which SOAH Rules Apply §155.7.

SOAH's procedural rules apply to all cases after they have been docketed at SOAH. Even though the SOAH rules apply to hearings docketed after January 2, 1998, by agreement or request, the rules could be applied to hearings docketed before that date.

After a proposal for decision is issued, the referring agencies' rules govern deadlines for exceptions and replies. Also, the agency's rules govern issuance of subpoenas, apportioning of transcript costs, and other issues not addressed by SOAH's rules. See Section V.

B. Memorandums of Understanding and Contracts.

SOAH and referring agencies traditionally had addressed procedural issues in contracts or memorandums of understanding. Some referring agencies


2 Rules governing Administrative License Suspension cases initiated by the Department of Public Safety are governed by Chapter 159 of SOAH's Rules and are not addressed in this paper. Alternate Dispute Resolution Rules are discussed in Section VI.

even adopted the memorandums of understanding as rules. However, the 1998 rules supersede those documents and rules to the extent their procedural requirements are inconsistent with the rules.

C. Role of Agency Policy and Texas Rules of Civil Procedure §§155.3(c) and 155.53.

When SOAH's rules and the APA do not resolve a procedural issue, ALJs may look to agency policy documented in the record, the TRCP, and other persuasive authority. §155.53. Unless agency policy has been adopted as a rule, the party seeking to establish policy must offer evidentiary proof. The ALJ will decide whether to apply the policy depending on several factors, including notice to the other parties and the stability and duration of the policy. Usually, parties establish policy by introducing prior agency orders addressing the subject matter raised in the hearing.

III. New Opportunities.

For most cases, authority conferred by the 1997 legislation and by the new rules is broader than under previous law. Parties may find the procedures promote more efficient hearings and also allow case development at a lower cost. For example, ALJs can impose sanctions for groundless pleadings or harassing motions.

Also, parties may use more "paper" discovery and are not limited to depositions as a primary means of ascertaining facts. A party’s witnesses may testify by telephone, thus obviating the need to pay travel costs, or a hearing may be held in a location outside of Austin under certain circumstances.

A. Discovery §155.31.

Discovery may commence as soon as a case is docketed, but absent a good cause showing, may not be sought after the hearing is convened. For cases not adjudicated under the APA, the ALJ will order the means of discovery. In cases adjudicated under the APA, oral and written depositions; written interrogatories; requests for admission of facts and genuineness or identity of documents or things; motions for production, examination, and copying documents and other tangible materials; and motions for entry upon and examination of real property are allowed. Physical examination of individuals is not authorized by the rules.

B. Serving Parties by E-Mail §155.25.

In addition to service by hand-delivery; by regular, certified, or registered mail; or facsimile transmission, a party may serve other parties by electronic mail, upon agreement of the parties; however, the sender has the burden of proving electronic receipt. A certificate of service is required for all types of service, and the presumptive date receipt is based on the type of service.

C. Sanctions §155.15.

After notice and opportunity for hearing, ALJs may disallow further discovery, charge discovery expenses against a party, hold designated facts admitted, refuse a party from supporting or opposing a designated claim or defense, disallow requests for relief and exclude evidence in support of those requests, and strike pleadings or testimony. Conduct inviting such sanctions includes filing a pleading that is groundless and brought in bad faith, for the purpose of harassment or for any other improper purpose; abuse of discovery; and failure to obey an ALJ's or a state agency's order.

D. Stipulations §155.39.

The parties may stipulate to any factual matters (in writing or on the record), and subject to ALJ's approval, agree to hearing procedures.

E. Telephone Participation §155.45.

A party or witness may participate by phone provided good cause is demonstrated and the request is filed in a timely manner. It is best to file the request at least seven days before the hearing. Documents a party will offer through the telephone participant must be filed three days before the telephone hearing. Practice tip: Unless all parties agree, the requesting party must demonstrate the integrity of the testimony will be preserved when a witness or party cannot be observed.

Often, parties file general statements when requesting telephone participation; e.g., the witness cannot travel to Austin. Instead, the specific reasons why the person should be allowed to testify by telephone must be stated, e.g. "the witness had knee replacement surgery last week, and as the attached doctor's orders indicate, is physically unable to travel to Austin until after the scheduled hearing date."

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| 4 | Each party is limited to two sets of interrogatories to any other party and the questions may not require more than 30 answers. |
F. Tape Recordings and Transcripts §155.43.

Previously, state agencies were responsible for recording hearings. Under the new rules, the ALJs must make recordings for hearings set to last one day or less. (The ALJ has discretion whether or not to record a prehearing conference.) For proceedings set to last longer than a day, the referring agency must arrange for a court reporter or give notice that it prefers another means of making the recording.

A party may arrange for a stenographic recording or videotaping, but notice must be given. The ALJ may designate that record as the official record.

IV. What Parties Overlook.

These procedural rules also present opportunities, but a party unfamiliar with the requirements slows the hearing process and often prejudices its case.

A. Venue § 155.13.

Generally, hearings are conducted at SOAH offices in Austin. A different venue may be ordered if a statute requires a different location, or if all parties agree to change venue. If all parties do not agree, the ALJ will change venue only after considering legislative restrictions on travel, the amount in controversy, estimated length of the hearing, availability of facilities, cost to private parties and referring agencies, and location of witnesses.

Particularly because of legislative restrictions on travel, it is important for parties to state facts supporting the request to change venue. Stating a respondent's business is located in Harris County is insufficient. A request demonstrating how travel costs will be conserved if a case is heard in Harris County will more likely be granted.

B. Filing Deadlines §155.29.


The first day a designated period of time is to run is not counted, but the last day is counted unless it is a Saturday, a Sunday, or an official State holiday. In such instances, the time period ends on the first day the office is open. Calendar days, rather than business days are counted unless the period to act is five days or less; then the intervening non-business days are not counted.

2. Amended Pleadings.

Pleadings may be amended at such time as not to operate as a surprise. If an amendment will substantially affect the scope of the hearing, it may not be filed later than seven days before the hearing, unless the parties agree and the ALJ consents.

3. Pleadings and Motions.

a. Written Motions Required.

Except during the course of a prehearing conference or a hearing, parties may request procedural relief only through written motion. Ex parte contact is prohibited.

Motions should be filed no later than seven days before the hearing unless good cause for late filing can be demonstrated. Responses are due five days after the motion is received, or for motions served less than five days before hearing, responses may be made at the hearing.

Motions for continuance may be filed no later than five days before hearing, unless good cause is demonstrated. Assertions of good cause for late filing must be supported by affidavit or other proof. Responses are due three days after receipt, or for motions filed fewer than three days before the hearing, responses may be made at the hearing.

A party should state in the motion whether all parties have been contacted and whether they agree with the request to continue. Otherwise, the ALJ must wait for the response time to pass before ruling on the motion.

b. Ruling Required.

Parties must obtain a ruling before assuming the relief sought has been granted. For example, an ALJ will generally convene the hearing if a motion for continuance has not been granted by written order.

4. Discovery Responses §155.31.

Unless the ALJ sets other deadlines for responding to discovery requests, responses must be filed within twenty days after receipt. Practice tip: Objections to discovery, including requests for in camera inspection must be filed ten days after receipt. Also, the party seeking discovery must file a motion to compel within ten days of receipt of objections and must include a certificate of conference.

C. Filing and Serving Documents §155.23.
1. **Central Hearings Panel Cases.**

The ALJs are sometimes deluged with copies of documents; it is unnecessary to file a separate copy when a document has been sent by facsimile. Documents containing 20 or fewer pages may be filed with SOAH or served on the ALJ by facsimile transmission if specified requirements are met. Neither discovery requests nor responses should be filed with SOAH unless certain portions are needed to support a request to resolve a discovery dispute or unless documents will be used at a prehearing conference or hearing.

After a case is docketed and until ALJ has issued a proposal for decision or decision, original documents should be filed with SOAH's docketing division. If a case will be heard by a field office ALJ, the original should be filed in Austin and a copy sent to field office ALJ.

2. **PUC and TNRCC Cases.**

For PUC and TNRCC cases, the original should be filed with the referring agency's clerk and a copy should be filed with the ALJ.

3. **Confidential Documents.**

Confidential documents must be filed in an enclosed, sealed, and labeled container with an explanatory cover letter. Mark the envelope, "CONFIDENTIAL AND UNDER SEAL" in bold, one-inch letters. If a privilege is claimed, each page must be marked and other identifying requirements must be met.

D. **Exhibits § 155.51.**

Any exhibit in excess of 50 pages must be accompanied by a table of contents or index.

E. **Default and Summary Disposition §§155.55 and 155.57.**

1. **Adequate Notice is Required.**
   a. **Assure Delivery.**

   Adequate time must be allowed for mail to be delivered to an appropriate address. Introducing the return receipt card is helpful.

   b. **Include Warning §155.55.**

   Disclose in 10-point bold face type that failure to appear will result in the allegations being admitted as true and the relief sought being granted.

   c. **Check Pleadings.**

   Facts must be adequately pled so that they will support a final order. General allegations will not suffice. *Geoke V. Houston Life and Power*, 797 S.W.2d 12 (Tex. 1990).

2. **Referring Agency May Informally Dispose of Case §155.57(4).**

Through its own rules, an agency may establish a default procedure for use when a respondent fails to file a responsive pleading or request for hearing. The agency also may request abatement or continuance of the proceeding to pursue informal disposition at the referring agency if a party does not appear for hearing. §5 (An ALJ also may be authorized to informally dispose of a case when an appealing party who carries the burden of proof fails to appear. The more common practice has been to issue a proposal for decision when a referring agency’s rules or statute do not clearly delegate final decision-making authority to an ALJ, including when dismissal would be for failure to prosecute.)

V. **Agencies May Need to Adopt Rules.**

As mentioned in other sections, SOAH's procedural rules contemplate that certain procedures will be addressed by referring agencies. Clear policy or rules outlining these procedures would aid practitioners.

A. **Subpoenas §155.31.**

The referring agency issues subpoenas and commissions. The ALJ rules on motions to quash.

B. **Exceptions and Replies §155.59.**

In cases for which the ALJ is not the final decision maker, the referring agency sets deadlines for filing exceptions and replies and rules on those documents, as well as on motions to extend filing deadlines. §6 Correspondingly, the agency rules on motions

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5 See, e.g., 28 TEX. ADMIN. CODE §1.89.

6 Although the referring agency rules on the exceptions and replies, the ALJ may amend the proposal for decision in response to them without serving another proposal.
for rehearing when it is the final decision maker.

C. Interpreters §155.43.

The referring agency must pay for interpreters for deaf and hearing impaired persons and provide communication services for blind and sight impaired persons. However, the referring agency may assess language interpreter costs on one or more parties in accordance with its rules.

D. Transcript and Costs §155.43.

As the APA provides, a transcript will be prepared if requested by a party or the ALJ. The referring agency may pay the cost of the transcript or may assess the cost to one or more parties in accordance with its statute, rules, or policy. Parties may agree to share the transcript cost.

VI. Alternative Dispute Resolution Opportunities at SOAH.

A. Mediated Settlement Conferences (MSC).

In APA contested cases at SOAH, the mediated settlement conference is the most commonly used form of ADR. An MSC allows parties to explore settlement possibilities in a confidential setting with the assistance of a mediator ALJ who has no previous or subsequent responsibilities in the contested case.

1. Request for a Mediated Settlement Conference.

Any party in a contested case may, by motion, or during a prehearing conference, ask the presiding ALJ to refer the case to a mediated settlement conference. The ALJ will allow the other side the usual time to respond, and then determine whether to grant the request. An ALJ also has the discretion to refer a case for an MSC on his or her own initiative.

2. Authority.

SOAH ALJs were given the explicit authority to refer cases to ADR procedures by the 75th Legislature, TEX. GOV’T CODE §2003.042(a)(5). They were also authorized to serve as impartial third parties in cases referred by other ALJs (unless a party objects to a particular appointment), and to serve as an impartial third party in a dispute referred by a governmental agency. Id. (a)(7)(8). The act provides that an ALJ may not serve as an impartial third party for a dispute that he or she refers to ADR. Id. (b). These amendments became effective September 1, 1997. 7

The statutory authority of an ALJ to order referral of a case to a mediated settlement conference or other appropriate alternative dispute resolution procedures is mirrored in SOAH’s new Rule of Procedure §155.33(d). A party may object to a motion for MSC in the same manner as to other motions, §155.29(d). In addition, a party may ask the ADR Coordinator to review the case and give the presiding ALJ a written recommendation about whether the case is appropriate for ADR. During that review, the ADR Coordinator may consult confidentially with each party. §155.37(a).

3. Appointment of Mediator.

A presiding ALJ who has decided to send a case to ADR enters an order referring the case to the ADR Coordinator for appointment of a mediator. The ADR Coordinator, in conjunction with other division directors, determines who, of SOAH’s 20+ qualified mediators, is available and appropriate to serve as mediator in the case. 8 The ADR Coordinator then sends a letter to the parties announcing the appointment of the mediator(s), describing his or her qualifications, and giving the parties a short time to object to the mediator for good cause. That letter also usually gives the date, time, and place of the mediation, and requires the parties to provide certain information to the mediator.

Parties to a dispute at SOAH may retain a private mediator, who must be a qualified third-party neutral according to TEX. GOV’T CODE Chapter 154. If parties use a private mediator, the terms and method of compensation of the mediator are the responsibility of the parties. §155.37(a)(2)(B).

When mediation is determined to be appropriate in a Texas Natural Resource Conservation Commission case pending at SOAH, the case is sent to TNRCC’s ADR Director for disposition in accordance with

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7Prior to that time, contested cases at SOAH were routinely referred to MSCs if parties agreed to the process.

8SOAH uses co-mediators whenever possible. This provides an apprenticeship for newer mediators and acknowledges the wisdom of the old adage, “two heads are better than one.”

9Typically we ask for a brief description of the dispute, agreed and disputed facts, disputed legal issues, settlement offers, preferred outcomes, alternatives to an agreement, and a list of persons who will be attending the mediation. This material is confidential and is not shared with the other side nor retained by SOAH.
with that agency’s rules in 30 TEX. ADMIN. CODE, Chapter 40.


Communications in an MSC are confidential and may not be disclosed without the consent of the parties to the communication. Written materials containing confidential information are not retained by SOAH. Likewise, notes taken during an MSC are destroyed at the end of the mediation process.

The mediator ALJ will not communicate with the presiding ALJ except to report in writing that the MSC took place and whether the case settled. Other matters may be included in the report to the presiding ALJ if agreed to by the parties.

5. Agreements.

Agreements reached in mediation will be reduced to writing and signed by the participants before the end of the mediation. Whether final agreements signed by a state agency are confidential is determined by other law. Partial agreements that may affect the disposition of a contested case must be included in the record of the case. §155.37(a)(5).

6. Effect on Deadlines in Underlying Case.

Deadlines in the underlying case are not affected by a referral to mediation unless the order of the presiding ALJ indicates otherwise. A mediator ALJ has no authority to issue an order in a case referred for mediation. §155.37(a)(7).

7. Use of Mediated Settlement Conferences.

In the past year, SOAH has had requests for mediated settlement conferences in about 20 cases. This represents a gradual, steady increase over past years, with more requests coming in the past six months. The cases have involved a variety of agencies: the Board of Land Surveying, Workers’ Compensation Commission; Board of Dental Examiners; Alcoholic Beverage Commission, Department of Transportation, Securities Board, and the Public Utility Commission. The multi-party PUC mediation took considerably more time than all of the others, added together.

Many of these mediations resulted in parties reaching an agreement. Some did not. It is important for everyone thinking about trying mediation to remember that the parties are in control -- unless they can achieve a resolution that they believe meets their most important needs, there is no agreement. Parties can always pursue their other alternatives (such as contested case hearings) if agreement is not reached in mediation. However, agreed resolutions were achieved in several cases when the parties did not expect them. Participants’ evaluations repeatedly indicated that the ability of the third-party neutrals to keep the parties at the table and exploring options was instrumental in achieving positive results.

8. Evaluating Your Case.

Some cases are more suited for mediation than others. For example, an agency that wants to establish a precedent for a policy reason is probably not going to be interested in mediation. Conversely, if a respondent feels confident that he or she has a defense that requires a new legal interpretation of the statute -- he or she will not be able to get that from a mediated agreement. On the other hand, a respondent who convinces an agency that his or her novel interpretation of the statute could be adopted by a court may increase the incentives for the agency to reach an agreement and avoid having its interpretation tested.

Cases that are more fact-based are typically considered appropriate for mediation. Even in those cases, consider whether the proof to be offered is objective (supported by scientific data?) or subjective (based entirely on witnesses’ credibility?). A case based primarily on an ALJ believing one person’s version of events over another’s is particularly appropriate for mediation. The consequence of turning the decision over to a third-party neutral is high-risk for both parties.

Successful mediation depends largely on the parties’ being knowledgeable about the strengths and weaknesses of each side’s case and being creative in generating options that can meet all parties’ greatest needs. Resolution is sometimes frustrated because the
parties involved in a dispute can only see one “correct” solution. Remember, agreed settlements are not limited to the legal remedies that can be imposed by an agency decision-maker. If you can offer the other side something that they are unlikely to be able to get from an ALJ’s recommendation -- but something they really would like to have -- you have an increased likelihood of being successful in mediation.

Mediation is also an excellent way to resolve a dispute when the personalities of the people involved in the negotiations generates friction. By use of the caucus method, where parties are in separate rooms and the mediator shuttles back-and-forth between them, the focus can remain on the problem and possible resolutions to that problem.

Finally, even mediations that do not result in an agreed resolution to a dispute often serve useful purposes. Partial agreements can be reached to simplify the upcoming contested case hearing. Parties also usually come to a much greater understanding of one another’s real interests in the conflict. Sometimes, even when a dispute is not resolved during the mediation process itself, the groundwork is laid for a resolution before hearing.

B. Arbitration.

In January, 1996, SOAH adopted rules, as directed by the Texas Legislature, to implement an arbitration process as an alternative in certain nursing home enforcement cases brought by the Department of Human Services (DHS) (1 T EX. ADMIN. CODE, Chapter 163). Neither nursing homes nor DHS elected arbitration until a year-and-a-half after the rules became effective -- the summer of 1997. Since then, nursing homes have elected arbitration in 19 cases. Arbitrators were appointed beginning in November, 1997, and cases began to be heard in February, 1998.

This process was set up, in part, to expedite resolution of this kind of case, and the process is an accelerated one. The hearing is scheduled within 90 days from the day the arbitrator is appointed. §163.33. The parties are required to exchange certain information. Further discovery takes place between the date of appointment of the arbitrator and 30 days before the hearing date. §163.41. Preliminary conferences and orders regarding presentation of the case are used to streamline presentation of the case. The target date for issuance of the final order is 60 days from the close of the hearing. §163.61. The order includes rulings on disputed matters and gives reasons for those rulings, but does not include findings of fact and conclusions of law unless a party requests them.11 These orders are final and binding although there are some limited rights to appeal. §163.63.

As of early August, arbitration hearings have been concluded in 9 of these cases (the shortest was 1 day; the longest was 7 days; most were about 3 days). Final orders were issued in 6 cases between March 1, 1998, and July 31, 1998, with penalty assessments ranging from $0 - $40,000 plus attorneys’ fees. Four cases settled before they were submitted to the arbitrator. Three additional cases are under submission awaiting orders and an arbitrator was recently appointed in another case. Three new cases reached the ADR Coordinator as this paper was being finalized. The remainder have some procedural delay which has prevented the appointment of an arbitrator to date. However, in those cases with final orders issued, the orders were issued less than 6 months after the appointment of the arbitrator. Arbitration appears to be a very efficient way of resolving these disputes.

C. Other Forms of ADR Available at SOAH.

Other forms of ADR are available at SOAH. We have not yet, however, adopted rules specifically describing these processes. These are typically arranged by interagency contract between the interested state agency and SOAH.12 If you are interested in using SOAH for any of the processes listed below, or in creating a special process for a dispute or type of dispute you are involved in, call Nancy N. Lynch, ADR Coordinator, at (512)305-9387, or E-mail her at nancy.lynch@soah.state.tx.us for further information.13

1. Original Mediations.

SOAH ALJs are available to serve as mediators in original mediations in disputes that are not destined to become contested cases at SOAH. These could include civil disputes involving state agencies in which a court orders mediation,14 internal disputes such as

11 To date, no one has.

12 These are very straightforward, may cover one or more matters and usually may be completed within a very few days.

13 Visit SOAH’s web page at www.soah.state.tx.us for SOAH’s rules and for additional information about alternative dispute resolution at SOAH.

14 Texas Alternative Dispute Resolution Act, TEX.CIV.PRAC. & REM. CODE, Chapter 154.
employee grievances, and contract disputes. The process used is basically the same as that used for a mediated settlement conference.

2. **Negotiated Rule-making.**

SOAH ALJs are available to serve as conveners or facilitators in negotiated rule-making processes. This process attempts to bring representatives of the groups likely to be affected by the proposed rule to the table to engage in the rule drafting process. State agencies are explicitly authorized to engage in negotiated rule-making, Tex. Gov't Code, Chapter 2008, Acts 1997, 75th Leg., Ch. 1315, §1. If this process produces a draft rule, the agency must still follow the APA requirements for rule adoption.

3. **Collaborative Problem Solving.**

Collaborative problem-solving processes are similar to those used in negotiated rule-making. The parties likely to be affected are brought together to attempt to reach a consensus on a policy that will address a particular problem or set of problems. Such a process could be used, for example, by a task force reviewing an agency’s enforcement policies. As with negotiated rule-making, SOAH ALJs are available to serve as facilitators for these processes.