10.8 WRITTEN TESTIMONY

The APA makes no express provision for the receipt of written testimony.[1] However, under the OAH rules, the use of written testimony is acknowledged in two instances: (1) the familiar civil context of the deposition to preserve testimony, which may be taken before hearing on a showing of witness unavailability or other good cause,[2] and (2) prefiled testimony, which may be submitted where the ALJ determines, at the request of a party or on his or her own motion, that "the prefiling will expedite the conduct and disposition of the case without imposing an undue burden on any party . . . ."[3] While a deposition to preserve testimony is accompanied by the many procedural safeguards provided by the rules of civil procedure,[4] including the opportunity for the adverse party to be present during the examination, the OAH rules provide no specific procedural safeguards in the use of prefiled testimony.

Under the rules, the only limitation on the use of prefiled testimony, other than that it will help expedite the case, is that it not place an undue burden on any of the parties. In many contested cases, however, counsel may be reluctant to employ prefiled testimony because they do not want to provide opposing counsel a long period of time to study their case in chief.[5] There are, however, certain situations where strategic considerations are outweighed, particularly in the light of the availability of modern prehearing discovery practices, by the necessity for completing the hearing expeditiously.

In Minnesota contested case practice, the use of written, prefiled testimony is most frequently encountered in public utility, environmental, and other complex regulatory cases that are litigated as a "battle of the experts." Typically, the direct testimony of the expert witness (usually required to be in question and answer form) is filed in advance of the hearing along with any supporting exhibits. At the hearing, the witness is sworn, adopts the testimony, and is then cross-examined.

The prefiling of written testimony serves two important objectives. First, it saves actual hearing time that would otherwise be required for the direct examination of the expert. Second, it substantially avoids the need for pretrial depositions or other discovery, since the entire direct testimony of the witness is available to all parties before the hearing. Prefiled testimony may also foster administrative economy principles, both by forcing parties to better organize their evidence and by allowing the parties to more clearly focus on and narrow those issues that are truly in dispute before the commencement of the hearing.

While the use of written testimony may be a valuable tool in cases involving the opinion evidence of experts, can or should its use be extended to other types of contested cases? Should, for example, ALJs be permitted to receive affidavits or other forms of written testimony routinely, whether or not the opportunity to make evidentiary objections is

1 *See infra* § 10.8 note 4 - § 10.9 note 21 and accompanying text in those subchapters (explaining that the use of written testimony, as a substitute for oral testimony, raises serious questions concerning the denial of right to cross-examine).

2 MINN. R. 1400.6900 (2013) (stating that depositions to preserve testimony are to be taken in manner prescribed "by law" for civil actions.); *see* MINN. R. CIV. P. 27.

3 MINN. R. 1400.5500(L) (2013).

4 *See* MINN. R. CIV. P. 32.

5 In addition, preparation of prefiled testimony where there is a possibility of settlement before hearing may be a waste of a party's resources.

available? If other forms of written testimony are to be received, should that testimony be required to be pre-filed or to take a particular form? The answers to these questions are considered in the following section of this chapter.