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- (1) Present its case-in-chief and/or case-in-rebuttal and/or
- (2) Cross-examine an opponent's case-in-chief and/or a case-in-rebuttal.
- (c) A party is not entitled to take testimony to present a case-in-chief unless:
 - (1) The administrative patent judge orders the taking of testimony under § 1.639(c);
 - (2) The party alleges in its preliminary statement a date of invention prior to the effective filing date of the senior party;
 - (3) A testimony period has been set to permit an opponent to prove a date of invention prior to the effective filing date of the party and the party has filed a preliminary statement alleging a date of invention prior to that date; or
 - (4) A motion (§ 1.635) is filed showing good cause why a testimony period should be set.

(d) Testimony, including any testimony to be taken in a place outside the United States, shall be taken and completed during the testimony periods set under paragraph (a) of this section. A party seeking to extend the period for taking testimony must comply with §§ 1.635 and 1.645(a).

[49 FR 48416, Dec. 12, 1984, added effective Feb. 11, 1985; paras. (a) and (d), 56 FR 42528, Aug. 28, 1991, effective Sept. 27, 1991; 56 FR 46823, Sept. 16, 1991; paras. (a) (c)(1)-(c)(3) & (d) revised, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.652 Judgment for failure to take testimony or file record.

If a junior party fails to timely take testimony authorized under § 1.651, or file a record under § 1.653(c), an administrative patent judge, with or without a motion (§ 1.635) by another party, may issue an order to show cause why judgment should not be entered against the junior party. When an order is issued under this section, the Board shall enter judgment in accordance with the order unless, within 15 days after the date of the order, the junior party files a paper which shows good cause why judgment should not be entered in accordance with the order. Any other party may file a response to the paper within 15 days of the date of service of the paper. If the party against whom the order was issued fails to show good cause, the Board shall enter judgment against the party.

[49 FR 48416, Dec. 12, 1984, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.653 Record and exhibits.

(a) Testimony shall consist of affidavits under §w 1.672(b), (c) and (g), 1.682(c), 1.683(b) and 1.688(b), transcripts of depositions under §§ 1.671(g) and 1.672(a) when a deposition is authorized by an administrative patent judge, transcripts of depositions under §w 1.672(d), 1.682(d), 1.683(c) and 1.688(c), agreed statements under § 1.672(h), transcripts of interrogatories, cross-interrogatories, and recorded answers and copies of written interrogatories and answers and written requests for admissions and answers under § 1.688(a).

(b) An affidavit shall be filed as set forth in § 1.677. A certified transcript of a deposition, including a deposition cross-examining an affiant, shall be filed as set forth in §§ 1.676, 1.677 and 1.678. An original agreed statement shall be filed as set forth in § 1.672(h).

(c) In addition to the items specified in paragraph (b) of this section and within a time set by an administrative patent judge, each party shall file three copies and serve one copy of a record consisting of:

- (1) An index of the names of the witnesses for the party, giving the pages of the record where the direct testimony and cross-examination of each witness begins.
- (2) An index of exhibits briefly describing the nature of each exhibit and giving the page of the record where each exhibit is first identified and offered into evidence.
- (3) The count or counts.
- (4) Each affidavit by a witness for the party, transcript, including transcripts of cross-

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examination of any affiant who testified for the party and transcripts of compelled deposition testimony by a witness for the party, agreed statement relied upon by the party, and transcript of interrogatories, cross-interrogatories and recorded answers.

- (5) [Reserved]
- (6) Any evidence from another interference, proceeding, or action relied upon by the party under § 1.683.
- (7) Each request for an admission and the admission and each written interrogatory and the answer upon which a party intends to rely under § 1.688.
- (d) The pages of the record shall be consecutively numbered to the extent possible.
- (e) The name of each witness shall appear at the top of each page of each affidavit or transcript.
- (f) [Reserved]
- (g) The record may be produced by standard typographical printing or by any other process capable of producing a clear black permanent image. All printed matter except on covers must appear in at least 11 point type on opaque, unglazed paper. Footnotes may not be printed in type smaller than 9 point. The page size shall be 21.8 by 27.9 cm. (8 by 11 inches) (letter size) with printed matter 16.5 by 24.1 cm. (6 by 9 inches). The record shall be bound with covers at their left edges in such manner as to lie flat when open to any page and in one or more volumes of convenient size (approximately 100 pages per volume is suggested). When there is more than one volume, the numbers of the pages contained in each volume shall appear at the top of the cover for each volume.
- (h) [Reserved]
- (i) Each party shall file its exhibits with the record specified in paragraph (c) of this section. Exhibits include documents and things identified in affidavits or on the record during the taking of oral depositions as well as official records and publications filed by the party under § 1.682(a). One copy of each documentary exhibit shall be served. Documentary exhibits shall be filed in an envelope or folder and shall not be bound as part of the record. Physical exhibits, if not filed by an officer under § 1.676(d), shall be filed with the record. Each exhibit shall contain a label which identifies the party submitting the exhibit and an exhibit number, the style of the interference (e.g., Jones v. Smith), and the interference number. Where possible, the label should appear at the bottom right-hand corner of each documentary exhibit. Upon termination of an interference, an administrative patent judge may return an exhibit to the party filing the exhibit. When any exhibit is returned, an order shall be entered indicating that the exhibit has been returned.
- (j) Any testimony, record, or exhibit which does not comply with this section may be returned under § 1.618(a).

[49 FR 48466, Dec. 12, 1984, added effective Feb. 11, 1985; paras. (a), (b), (c), (c)(1), (c)(4), (d), (g), & (i) revised, paras. (c)(5) (f) & (h) removed, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.654 Final hearing.

(a) At an appropriate stage of the interference, the parties will be given an opportunity to appear before the Board to present oral argument at a final hearing. An administrative patent judge may set a date and time for final hearing. Unless otherwise ordered by an administrative patent judge or the Board, each party will be entitled to no more than 30 minutes of oral argument at final hearing. A party who does not file a brief for final hearing (§ 1.656(a)) shall not be entitled to appear at final hearing.

(b) The opening argument of a junior party shall include a fair statement of the junior party's case and the junior party's position with respect to the case presented on behalf of any other party. A junior party may reserve a portion of its time for rebuttal.

(c) A party shall not be entitled to argue that an opponent abandoned, suppressed, or concealed an actual reduction to practice unless a notice under § 1.632 was timely filed.

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(d) After final hearing, the interference shall be taken under advisement by the Board. No further paper shall be filed except under § 1.658(b) or as authorized by an administrative patent judge or the Board. No additional oral argument shall be had unless ordered by the Board.

[49 FR 48466, Dec. 12, 1984, added effective Feb. 11, 1985; paras. (a) & (d) revised, 60 FR 14488, Mar 17, 1995, effective April 21, 1995]

37 CFR 1.655 Matters considered in rendering a final decision.

(a) In rendering a final decision, the Board may consider any properly raised issue, including priority of invention, derivation by an opponent from a party who filed a preliminary statement under § 1.625, patentability of the invention, admissibility of evidence, any interlocutory matter deferred to final hearing, and any other matter necessary to resolve the interference. The Board may also consider whether entry of any interlocutory order was an abuse of discretion. All interlocutory orders shall be presumed to have been correct, and the burden of showing an abuse of discretion shall be on the party attacking the order. When two or more interlocutory orders involve the same issue, the last entered order shall be presumed to have been correct.

(b) A party shall not be entitled to raise for consideration at final hearing any matter which properly could have been raised by a motion under §§ 1.633 or 1.634 unless the matter was properly raised in a motion that was timely filed by the party under §§ 1.633 or 1.634 and the motion was denied or deferred to final hearing, the matter was properly raised by the party in a timely filed opposition to a motion under §§ 1.633 or 1.634 and the motion was granted over the opposition or deferred to final hearing, or the party shows good cause why the issue was not properly raised by a timely filed motion or opposition. A party that fails to contest, by way of a timely filed preliminary motion under § 1.633(c), the designation of a claim as corresponding to a count, or fails to timely argue the separate patentability of a particular claim when the ground for unpatentability is first raised, may not subsequently argue to an administrative patent judge or the Board the separate patentability of claims designated to correspond to the count with respect to that ground.

(c) In the interest of justice, the Board may exercise its discretion to consider an issue even though it would not otherwise be entitled to consideration under this section.

[49 FR 48466, Dec. 12, 1984, added effective Feb. 11, 1985; para. (a) revised, 58 FR 49432, Sept. 23, 1993, effective Oct. 25, 1993; revised 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.656 Briefs for final hearing.

(a) Each party shall be entitled to file briefs for final hearing. The administrative patent judge shall determine the briefs needed and shall set the time and order for filing briefs.

(b) The opening brief of a junior party shall contain under appropriate headings and in the order indicated:

- (1) A statement of interest indicating the full name of every party represented by the attorney in the interference and the name of the real party in interest if the party named in the caption is not the real party in interest.
- (2) A statement of related cases indicating whether the interference was previously before the Board for final hearing and the name and number of any related appeal or interference which is pending before, or which has been decided by, the Board, or which is pending before, or which has been decided by, the U.S. Court of Appeals for the Federal Circuit or a district court in a proceeding under 35 U.S.C. 146. A related appeal or interference is one which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending interference.
- (3) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.
- (4) A statement of the issues presented for decision in the interference.
- (5) A statement of the facts, in numbered paragraphs, relevant to the issues presented for decision with appropriate references to the record.

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- (6) An argument, which may be preceded by a summary, which shall contain the contentions of the party with respect to the issues it is raising for consideration at final hearing, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on.
 - (7) A short conclusion stating the precise relief requested.
 - (8) An appendix containing a copy of the counts.
- (c) The opening brief of the senior party shall conform to the requirements of paragraph (b) of this section except:
- (1) A statement of the issues and of the facts need not be made unless the party is dissatisfied with the statement in the opening brief of the junior party and
 - (2) An appendix containing a copy of the counts need not be included if the copy of the counts in the opening brief of the junior party is correct.
- (d) Unless ordered otherwise by an administrative patent judge, briefs shall be double-spaced (except for footnotes, which may be single-spaced) and shall comply with the requirements of § 1.653(g) for records except the requirement for binding.
- (e) An original and four copies of each brief must be filed.
- (f) Any brief which does not comply with the requirements of this section may be returned under § 1.618(a).
- (g) Any party, separate from its opening brief, but filed concurrently therewith, may file an original and four copies of concise proposed findings of fact and conclusions of law. Any proposed findings of fact shall be in numbered paragraphs and shall be supported by specific references to the record. Any proposed conclusions of law shall be in numbered paragraphs and shall be supported by citation of cases, statutes, or other authority. Any opponent, separate from its opening or reply brief, but filed concurrently therewith, may file a paper accepting or objecting to any proposed findings of fact or conclusions of law; when objecting, a reason must be given. The Board may adopt the proposed findings of fact and conclusions of law in whole or in part.
- (h) If a party wants the Board in rendering its final decision to rule on the admissibility of any evidence, the party shall file with its opening brief an original and four copies of a motion (§ 1.635) to suppress the evidence. The provisions of § 1.637(b) do not apply to a motion to suppress under this paragraph. Any objection previously made to the admissibility of the evidence of an opponent is waived unless the motion required by this paragraph is filed. A party that failed to challenge the admissibility of the evidence of an opponent on a ground that could have been raised in a timely objection under § 1.672(c), 1.682(c), 1.683(b) or 1.688(b) may not move under this paragraph to suppress the evidence on that ground at final hearing. An original and four copies of an opposition to the motion may be filed with an opponent's opening brief or reply brief as may be appropriate.
- (i) When a junior party fails to timely file an opening brief, an order may issue requiring the junior party to show cause why the Board should not treat failure to file the brief as a concession of priority. If the junior party fails to show good cause within a time period set in the order, judgment may be entered against the junior party.

[49 FR 48466, Dec. 12, 1984, added effective Feb. 11, 1985; amended 60 FR 14488-536, Mar 17, 1995; paras. (a), (b)(1)-(b)(8), (d), (e), (g), (h), & (i) revised, 60 FR 14488, Mar. 17, 1995; effective Apr., 21, 1995]

37 CFR 1.657 Burden of proof as to date of invention.

- (a) A rebuttable presumption shall exist that, as to each count, the inventors made their invention in the chronological order of their effective filing dates. The burden of proof shall be upon a party who contends otherwise.
- (b) In an interference involving copending applications or involving a patent and an application having an effective filing date on or before the date the patent issued, a junior party shall have the burden of establishing priority by a preponderance of the evidence.
- (c) In an interference involving an application and a patent and where the effective filing date

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of the application is after the date the patent issued, a junior party shall have the burden of establishing priority by clear and convincing evidence.

[49 FR 48466, Dec. 12, 1984, added effective Feb. 11, 1985; amended 60 FR 14488-536, Mar 17, 1995; revised, 60 FR 14488, Mar. 17, 1995; effective Apr. 21, 1995]

37 CFR 1.658 Final decision.

(a) After final hearing, the Board shall enter a decision resolving the issues raised at final hearing. The decision may enter judgment, in whole or in part, remand the interference to an administrative patent judge for further proceedings, or take further action not inconsistent with law. A judgment as to a count shall state whether or not each party is entitled to a patent containing the claims in the party's patent or application which correspond to the count. When the Board enters a decision awarding judgment as to all counts, the decision shall be regarded as a final decision for the purpose of judicial review (35 U.S.C. 141-144, 146) unless a request for reconsideration under paragraph (b) of this section is timely filed.

(b) Any request for reconsideration of a decision under paragraph (a) of this section shall be filed within one month after the date of the decision. The request for reconsideration shall specify with particularity the points believed to have been misapprehended or overlooked in rendering the decision. Any opposition to a request for reconsideration shall be filed within 14 days of the date of service of the request for reconsideration. Service of the request for reconsideration shall be by hand or Express Mail. The Board shall enter a decision on the request for reconsideration. If the Board shall be of the opinion that the decision on the request for reconsideration significantly modifies its original decision under paragraph (a) of this section, the Board may designate the decision on the request for reconsideration as a new decision. A decision on reconsideration is a final decision for the purpose of judicial review (35 U.S.C. 141-144, 146).

(c) A judgment in an interference settles all issues which

- (1) were raised and decided in the interference,
- (2) could have been properly raised and decided in the interference by a motion under § 1.633 (a) through (d) and (f) through (j) or § 1.634 and
- (3) could have been properly raised and decided in an additional interference with a motion under § 1.633(e).

A losing party who could have properly moved, but failed to move, under §w 1.633 or 1.634, shall be estopped to take ex parte or inter partes action in the Patent and Trademark Office after the interference which is inconsistent with that party's failure to properly move, except that a losing party shall not be estopped with respect to any claims which correspond, or properly could have corresponded, to a count as to which that party was awarded a favorable judgment.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985; para. (b), 54 FR 29553, July 13, 1989, effective Aug. 20, 1989; paras. (a) & (b) revised, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.659 Recommendation.

(a) Should the Board have knowledge of any ground for rejecting any application claim not involved in the judgment of the interference, it may include in its decision a recommended rejection of the claim. Upon resumption of ex parte prosecution of the application, the examiner shall be bound by the recommendation and shall enter and maintain the recommended rejection unless an amendment or showing of facts not previously of record is filed which, in the opinion of the examiner, overcomes the recommended rejection.

(b) Should the Board have knowledge of any ground for reexamination of a patent involved in the interference as to a patent claim not involved in the judgment of the interference, it may include in its decision a recommendation to the Commissioner that the patent be reexamined. The Commissioner will determine whether reexamination will be ordered.

(c) The Board may make any other recommendation to the examiner or the Commissioner as may be appropriate.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985]

*Patent Laws and Regulations***37 CFR 1.660 Notice of reexamination, reissue, protest, or litigation.**

(a) When a request for reexamination of a patent involved in an interference is filed, the patent owner shall notify the Board within 10 days of receiving notice that the request was filed.

(b) When an application for reissue is filed by a patentee involved in an interference, the patentee shall

notify the Board within 10 days of the day the application for reissue is filed.

(c) When a protest under § 1.291 is filed against an application involved in an interference, the applicant shall notify the Board within 10 days of receiving notice that the protest was filed.

(d) A party in an interference shall notify the Board promptly of any litigation related to any patent or application involved in an interference, including any civil action commenced under 35 U.S.C. 146.

(e) The notice required by this section is designed to assist the administrative patent judge and the Board in efficiently handling interference cases. Failure of a party to comply with the provisions of this section may result in sanctions under § 1.616. Knowledge by, or notice to, an employee of the Office other than an employee of the Board, of the existence of the reexamination, application for reissue, protest, or litigation shall not be sufficient. The notice contemplated by this section is notice addressed to the administrative patent judge in charge of the interference in which the application or patent is involved.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985; para. (e) added, 60 FR 14488, Mar. 17, 1995, effective Apr. 21, 1995]

37 CFR 1.661 Termination of interference after judgment.

After a final decision is entered by the Board, an interference is considered terminated when no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985]

37 CFR 1.662 Request for entry of adverse judgment; reissue filed by patentee.

(a) A party may, at any time during an interference, request and agree to entry of an adverse judgment. The filing by a party of a written disclaimer of the invention defined by a count, concession of priority or unpatentability of the subject matter of a count, abandonment of the invention defined by a count, or abandonment of the contest as to a count will be treated as a request for entry of an adverse judgment against the applicant or patentee as to all claims which correspond to the count. Abandonment of an application, other than an application for reissue having a claim of the patent sought to be reissued involved in the interference, will be treated as a request for entry of an adverse judgment against the applicant as to all claims corresponding to all counts. Upon the filing by a party of a request for entry of an adverse judgment, the Board may enter judgment against the party.

(b) If a patentee involved in an interference files an application for reissue during the interference and the reissue application does not include a claim that corresponds to a count, judgment may be entered against the patentee. A patentee who files an application for reissue which includes a claim that corresponds to a count shall, in addition to complying with the provisions of § 1.660(b), timely file a preliminary motion under § 1.633(h) or show good cause why the motion could not have been timely filed or would not be appropriate.

(c) The filing of a statutory disclaimer under 35 U.S.C. 253 by a patentee will delete any statutorily disclaimed claims from being involved in the interference. A statutory disclaimer will not be treated as a request for entry of an adverse judgment against the patentee unless it results in the deletion of all patent claims corresponding to a count.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985; para. (b) amended 53 FR 23735, June 23, 1988, effective Sept. 12, 1988; paras. (a) 7 (e) revised, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

*Patent Laws and Regulations***37 CFR 1.663 Status of claim of defeated applicant after interference.**

Whenever an adverse judgment is entered as to a count against an applicant from which no appeal (35 U.S.C. 141) or other review (35 U.S.C. 146) has been or can be taken or had, the claims of the application corresponding to the count stand finally disposed of without further action by the examiner. Such claims are not open to further ex parte prosecution.

[49 FR 48467, Dec. 12, 1984, added effective Feb. 11, 1985]

37 CFR 1.664 Action after interference.

(a) After termination of an interference, the examiner will promptly take such action in any application previously involved in the interference as may be necessary. Unless entered by order of an administrative patent judge, amendments presented during the interference shall not be entered, but may be subsequently presented by the applicant subject to the provisions of this subpart provided prosecution of the application is not otherwise closed.

(b) After judgment, the application of any party may be held subject to further examination, including an interference with another application.

[49 FR 48467, Dec. 12, 1984, 50 FR 23124, May 31, 1985, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995; effective Apr. 21, 1995]

37 CFR 1.665 Second interference.

A second interference between the same parties will not be declared upon an application not involved in an earlier interference for an invention defined by a count of the earlier interference. See § 1.658(c).

[49 FR 48468, Dec. 12, 1984, added effective Feb. 11, 1985]

37 CFR 1.666 Filing of interference settlement agreements.

(a) Any agreement or understanding between parties to an interference, including any collateral agreements referred to therein, made in connection with or in contemplation of the termination of the interference, must be in writing and a true copy thereof must be filed before the termination of the interference (§ 1.661) as between the parties to the agreement or understanding.

(b) If any party filing the agreement or understanding under paragraph (a) of this section so requests, the copy will be kept separate from the file of the interference, and made available only to Government agencies on written request, or to any person upon petition accompanied by the fee set forth in § 1.17(i) and on a showing of good cause.

(c) Failure to file the copy of the agreement or understanding under paragraph (a) of this section will render permanently unenforceable such agreement or understanding and any patent of the parties involved in the interference or any patent subsequently issued on any application of the parties so involved. The Commissioner may, however, upon petition accompanied by the fee set forth in § 1.17(h) and on a showing of good cause for failure to file within the time prescribed, permit the filing of the agreement or understanding during the six month period subsequent to the termination of the interference as between the parties to the agreement or understanding.

[49 FR 48468, Dec. 12, 1984, added effective Feb. 11, 1985; 50 FR 23124, May 31, 1985; para. (b), 54 FR 6893, Feb. 15, 1989, effective Apr. 17, 1989; amended 60 FR 14488-536, Mar 17, 1995; amended 60 FR 14488-536, Mar 17, 1995; para. (a) amended, 60 FR 20195, Apr. 25, 1995, effective June 8, 1995; para. (b) amended, 60 FR 20195, Apr. 25, 1995, effective June 8, 1995]

37 CFR 1.671 Evidence must comply with rules.

(a) Evidence consists of testimony and referenced exhibits, official records and publications filed under § 1.682, testimony and referenced exhibits from another interference, proceeding, or action filed under § 1.683, discovery relied upon under § 1.688, and the specification (including claims) and drawings of any application or patent:

- (1) Involved in the interference.

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- (2) To which a party has been accorded benefit in the notice declaring the interference or by a preliminary motion granted under § 1.633.
 - (3) For which a party has sought, but has been denied, benefit by a preliminary motion under § 1.633.
 - (4) For which benefit was rescinded by a preliminary motion granted under § 1.633.
- (b) Except as otherwise provided in this subpart, the Federal Rules of Evidence shall apply to interference proceedings. Those portions of the Federal Rules of Evidence relating to criminal actions, juries, and other matters not relevant to interferences shall not apply.
- (c) Unless the context is otherwise clear, the following terms of the Federal Rules of Evidence shall be construed as follows:
- (1) Courts of the United States, U.S. Magistrate, court, trial court, or trier of fact means administrative patent judge or Board as may be appropriate.
 - (2) Judge means administrative patent judge.
 - (3) Judicial notice means official notice.
 - (4) Civil action, civil proceeding, action, or trial mean interference.
 - (5) Appellate court means United States Court of Appeals for the Federal Circuit or a United States district court when judicial review is under 35 U.S.C. 146.
 - (6) Before the hearing in Rule 703 of the Federal Rules of Evidence means before giving testimony by affidavit or oral deposition.
 - (7) The trial or hearing in Rules 803(24) and 804(5) of the Federal Rules of Evidence means the taking of testimony by affidavit or oral deposition.
- (d) Certification is not necessary as a condition to admissibility when the record is a record of the Patent and Trademark Office to which all parties have access.
- (e) A party may not rely on an affidavit (including any exhibits), patent or printed publication previously submitted by the party under § 1.639(b) unless a copy of the affidavit, patent or printed publication has been served and a written notice is filed prior to the close of the party's relevant testimony period stating that the party intends to rely on the affidavit, patent or printed publication. When proper notice is given under this paragraph, the affidavit, patent or printed publication shall be deemed as filed under §§ 1.640(b), 1.640(e)(3), 1.672(b) or 1.682(a), as appropriate.
- (f) The significance of documentary and other exhibits identified by a witness in an affidavit or during oral deposition shall be discussed with particularity by a witness.
- (g) A party must file a motion (§ 1.635) seeking permission from an administrative patent judge prior to compelling testimony or production of documents or things under 35 U.S.C. 24 or from an opposing party. The motion shall describe the general nature and the relevance of the testimony, document, or thing. If permission is granted, the party shall notice a deposition under § 1.673 and may proceed to take testimony.
- (h) A party must file a motion (§ 1.635) seeking permission from an administrative patent judge prior to compelling testimony or production of documents or things in a foreign country.
- (1) In the case of testimony, the motion shall:
 - (i) Describe the general nature and relevance of the testimony;
 - (ii) Identify the witness by name or title;
 - (iii) Identify the foreign country and explain why the party believes the witness can be compelled to testify in the foreign country, including a description of the procedures that will be used to compel the testimony in the foreign country and an estimate of the time it is expected to take to obtain the testimony; and
 - (iv) Demonstrate that the party has made reasonable efforts to secure the agreement of the witness to testify in the United States but has

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been unsuccessful in obtaining the agreement, even though the party has offered to pay the expenses of the witness to travel to and testify in the United States.

- (2) In the case of production of a document or thing, the motion shall:
- (i) Describe the general nature and relevance of the document or thing;
 - (ii) Identify the foreign country and explain why the party believes production of the document or thing can be compelled in the foreign country, including a description of the procedures that will be used to compel production of the document or thing in the foreign country and an estimate of the time it is expected to take to obtain production of the document or thing; and
 - (iii) Demonstrate that the party has made reasonable efforts to obtain the agreement of the individual or entity having possession, custody, or control of the document to produce the document or thing in the United States but has been unsuccessful in obtaining that agreement, even though the party has offered to pay the expenses of producing the document or thing in the United States.

(i) Evidence which is not taken or sought and filed in accordance with this subpart shall not be admissible.

(j) The weight to be given deposition testimony taken in a foreign country will be determined in view of all the circumstances, including the laws of the foreign country governing the testimony. Little, if any, weight may be given to deposition testimony taken in a foreign country unless the party taking the testimony proves by clear and convincing evidence, as a matter of fact, that knowingly giving false testimony in that country in connection with an interference proceeding in the United States Patent and Trademark Office is punishable under the laws of that country and that the punishment in that country for such false testimony is comparable to or greater than the punishment for perjury committed in the United States. The administrative patent judge and the Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.

[49 FR 48468, Dec. 12, 1984, added effective Feb. 11, 1985; 50 FR 23124, May 31, 1985; paras. (a), (c)(1), (c)(2), (c)(6), (c)(7), (e)-(j) revised, 60 FR 14488, Mar. 17, 1995; effective Apr. 21, 1995]

37 CFR 1.672 Manner of taking testimony.

(a) Unless testimony must be compelled under 35 U.S.C. 24, compelled from a party, or compelled in a foreign country, testimony of a witness shall be taken by affidavit in accordance with this subpart. Testimony which must be compelled under 35 U.S.C. 24, compelled from a party, or compelled in a foreign country shall be taken by oral deposition.

(b) A party presenting testimony of a witness by affidavit shall, within the time set by the administrative patent judge for serving affidavits, file a copy of the affidavit or, if appropriate, notice under § 1.671(e). If the affidavit relates to a party's case-in-chief, it shall be filed or noticed no later than the date set by an administrative patent judge for the party to file affidavits for its case-in-chief. If the affidavit relates to a party's case-in-rebuttal, it shall be filed or noticed no later than the date set by an administrative patent judge for the party to file affidavits for its case-in-rebuttal. A party shall not be entitled to rely on any document referred to in the affidavit unless a copy of the document is filed with the affidavit. A party shall not be entitled to rely on any thing mentioned in the affidavit unless the opponent is given reasonable access to the thing. A thing is something other than a document. The pages of affidavits filed under this paragraph and of any other testimony filed therewith under §§ 1.683(a) and 1.688(a) shall, to the extent possible, be given sequential numbers which shall also serve as the record page numbers for the affidavits and other testimony in the party's record to be filed under § 1.653. Exhibits identified in the affidavits or in any other testimony filed under §§ 1.683(a) and 1.688(a) and any official records and printed publications filed under § 1.682(a) shall, to the extent possible, be given sequential exhibit numbers, which shall also serve as the exhibit numbers when the exhibits are filed with the party's record. The affidavits, testimony filed under §§ 1.683(a) and

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1.688(a) and exhibits shall be accompanied by an index of the names of the witnesses, giving the number of the page where the testimony of each witness begins, and by an index of the exhibits briefly describing the nature of each exhibit and giving the number of the page where each exhibit is first identified and offered into evidence.

(c) If an opponent objects to the admissibility of any evidence contained in or submitted with an affidavit filed under paragraph (b) of this section, the opponent must, no later than the date set by the administrative patent judge for filing objections under this paragraph, file objections stating with particularity the nature of each objection. An opponent that fails to object to the admissibility of the evidence contained in or submitted with an affidavit on a ground that could have been raised in a timely objection under this paragraph will not be entitled to move under § 1.656(h) to suppress the evidence on that ground. If an opponent timely files objections, the party may, within 20 days of the due date for filing objections, file one or more supplemental affidavits, official records or printed publications to overcome the objections. No objection to the admissibility of the supplemental evidence shall be made, except as provided by § 1.656(h). The pages of supplemental affidavits filed under this paragraph shall, to the extent possible, be sequentially numbered beginning with the number following the last page number of the party's testimony submitted under paragraph (b) of this section. The page numbers assigned to the supplemental affidavits shall also serve as the record page numbers for the supplemental affidavits in the party's record filed under § 1.653. Additional exhibits identified in supplemental affidavits and any supplemental official records and printed publications shall, to the extent possible, be given sequential numbers beginning with the number following the last number of the exhibits submitted under paragraph (b) of this section. The exhibit numbers shall also serve as the exhibit numbers when the exhibits are filed with the party's record. The supplemental affidavits shall be accompanied by an index of the names of the witnesses and an index of exhibits of the type specified in paragraph (b) of this section.

(d) After the time expires for filing objections and supplemental affidavits, or earlier when appropriate, the administrative patent judge shall set a time within which any opponent may file a request to cross-examine an affiant on oral deposition. If any opponent requests cross-examination of an affiant, the party shall notice a deposition at a reasonable location within the United States under § 1.673(e) for the purpose of cross-examination by any opponent. Any redirect and recross shall take place at the deposition. At any deposition for the purpose of cross-examination of a witness, the party shall not be entitled to rely on any document or thing not mentioned in one or more of the affidavits filed under paragraphs (b) and (c) of this section, except to the extent necessary to conduct proper redirect. The party who gives notice of a deposition shall be responsible for providing a translator if the witness does not testify in English, for obtaining a court reporter, and for filing a certified transcript of the deposition as required by § 1.676. Within 45 days of the close of the period for taking cross-examination, the party shall serve (but not file) a copy of each transcript on each opponent together with copies of any additional documentary exhibits identified by the witness during the deposition. The pages of the transcripts served under this paragraph shall, to the extent possible, be sequentially numbered beginning with the number following the last page number of the party's supplemental affidavits submitted under paragraph (c) of this section. The numbers assigned to the transcript pages shall also serve as the record page numbers for the transcripts in the party's record filed under § 1.653. Additional exhibits identified in the transcripts, shall, to the extent possible, be given sequential numbers beginning with the number following the last number of the exhibits submitted under paragraphs (b) and (c) of this section. The exhibit numbers assigned to the additional exhibits shall also serve as the exhibit numbers when those exhibits are filed with the party's record. The deposition transcripts shall be accompanied by an index of the names of the witnesses, giving the number of the page where cross-examination, redirect and recross of each witness begins, and an index of exhibits of the type specified in paragraph (b) of this section.

(e) [Reserved]

(f) When a deposition is authorized to be taken within the United States under this subpart and if the parties agree in writing, the deposition may be taken in any place within the United States, before any person authorized to administer oaths, upon any notice, and in any manner, and when so taken may be used like other depositions.

(g) If the parties agree in writing, the affidavit testimony of any witness may be submitted without opportunity for cross-examination.

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(h) If the parties agree in writing, testimony may be submitted in the form of an agreed statement setting forth how a particular witness would testify, if called, or the facts in the case of one or more of the parties. The agreed statement shall be filed in the Patent and Trademark Office. See § 1.653(a).

(i) In an unusual circumstance and upon a showing that testimony cannot be taken in accordance with the provisions of this subpart, an administrative patent judge upon motion (§ 1.635) may authorize testimony to be taken in another manner.

[49 FR 48468, Dec. 12, 1984, added effective Feb. 11, 1985; 50 FR 23124, May 31, 1985; revised, 60 FR 14488, Mar. 17, 1995; effective Apr. 21, 1995]

37 CFR 1.673 Notice of examination of witness.

(a) A party authorized to take testimony of a witness by deposition shall, after complying with paragraphs (b) and (g) of this section, file and serve a single notice of deposition stating the time and place of each deposition to be taken. Depositions to be taken in the United States may be noticed for a reasonable time and place in the United States. A deposition may not be noticed for any other place without approval of an administrative patent judge. The notice shall specify the name and address of each witness and the general nature of the testimony to be given by the witness. If the name of a witness is not known, a general description sufficient to identify the witness or a particular class or group to which the witness belongs may be given instead.

(b) Unless the parties agree or an administrative patent judge or the Board determine otherwise, a party shall serve, but not file, at least three working days prior to the conference required by paragraph (g) of this section, if service is made by hand or Express Mail, or at least 14 days prior to the conference if service is made by any other means, the following:

- (1) A list and copy of each document in the party's possession, custody, or control and upon which the party intends to rely at any deposition and
- (2) A list of and a proffer of reasonable access to things in the party's possession, custody, or control and upon which the party intends to rely at any deposition.

(c) A party shall not be permitted to rely on any witness not listed in the notice, or any document not served or any thing not listed as required by paragraph (b) of this section:

- (1) Unless all opponents agree in writing or on the record to permit the party to rely on the witness, document or thing, or
- (2) Except upon a motion (§ 1.635) promptly filed which is accompanied by any proposed notice, additional documents, or lists and which shows good cause why the notice, documents, or lists were not served in accordance with this section.

(d) Each opponent shall have a full opportunity to attend a deposition and cross-examine.

(e) A party who has presented testimony by affidavit and is required to notice depositions for the purpose of cross-examination under § 1.672(b), shall, after complying with paragraph (g) of this section, file and serve a single notice of deposition stating the time and place of each cross-examination deposition to be taken.

(f) The parties shall not take depositions in more than one place at the same time or so nearly at the same time that reasonable opportunity to travel from one place of deposition to another cannot be had.

(g) Before serving a notice of deposition and after complying with paragraph (b) of this section, a party shall have an oral conference with all opponents to attempt to agree on a mutually acceptable time and place for conducting the deposition. A certificate shall appear in the notice stating that the oral conference took place or explaining why the conference could not be had. If the parties cannot agree to a mutually acceptable place and time for conducting the deposition at the conference, the parties shall contact an administrative patent judge who shall then designate the time and place for conducting the deposition.

(h) A copy of the notice of deposition shall be attached to the certified transcript of the deposition filed under § 1.676(a).

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[49 FR 48469, Dec. 12, 1984, added effective Feb. 11, 1985; paras. (a)-(e) & (g) revised, 60 FR 14488, Mar. 17, 1995; effective Apr. 21, 1995]

37 CFR 1.674 Persons before whom depositions may be taken.

(a) A deposition shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(b) Unless the parties agree in writing, the following persons shall not be competent to serve as an officer:

- (1) A relative or employee of a party,
- (2) a relative or employee of an attorney or agent of a party, or
- (3) a person interested, directly or indirectly, in the interference either as counsel, attorney, agent, or otherwise.

[49 FR 48469, Dec. 12, 1984, added effective Feb. 11, 1985; para. (a) revised, 60 FR 14488, Mar. 17, 1995; effective Apr. 21, 1995]

37 CFR 1.675 Examination of witness, reading and signing transcript of deposition.

(a) Each witness before giving an oral deposition shall be duly sworn according to law by the officer before whom the deposition is to be taken.

(b) The testimony shall be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer or by some other person, who shall be subject to the provisions of § 1.674(b), in the presence of the officer unless the presence of the officer is waived on the record by agreement of all parties.

(c) All objections made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, and any other objection to the proceeding shall be noted on the record by the officer. Evidence objected to shall be taken subject to any objection.

(d) Unless the parties agree in writing or waive reading and signature by the witness on the record at the deposition, when the testimony has been transcribed a transcript of the deposition shall, unless the witness refuses to read and/or sign the transcript of the deposition, be read by the witness and then signed by the witness in the form of:

- (1) An affidavit in the presence of any notary or
- (2) A declaration.

[49 FR 48469, Dec. 12, 1984, added effective Feb. 11, 1985; para. (d) revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

37 CFR 1.676 Certification and filing by officer, marking exhibits.

(a) The officer shall prepare a certified transcript of the deposition by attaching to a transcript of the deposition a copy of the notice of deposition, any exhibits to be annexed to the certified transcript, and a certificate signed and sealed by the officer and showing:

- (1) The witness was duly sworn by the officer before commencement of testimony by the witness.
- (2) The transcript is a true record of the testimony given by the witness.
- (3) The name of the person by whom the testimony was recorded and, if not recorded by the officer, whether the testimony was recorded in the presence of the officer.
- (4) The presence or absence of any opponent.
- (5) The place where the deposition was taken and the day and hour when the deposition began and ended.

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(6) The officer is not disqualified under § 1.674.

(b) If the parties waived any of the requirements of paragraph (a) of this section, the certificate shall so state.

(c) The officer shall note on the certificate the circumstances under which a witness refuses to sign a transcript.

(d) Unless the parties agree otherwise in writing or on the record at the deposition, the officer shall securely seal the certified transcript in an envelope endorsed with the style of the interference (e.g., *Smith v. Jones*), the interference number, the name of the witness, and the date of sealing and shall promptly forward the envelope to BOX INTERFERENCE, Commissioner of Patents and Trademarks, Washington, D.C. 20231. Documents and things produced for inspection during the examination of a witness, shall, upon request of a party, be marked for identification and annexed to the certified transcript, and may be inspected and copied by any party, except that if the person producing the documents and things desires to retain them, the person may:

- (1) offer copies to be marked for identification and annexed to the certified transcript and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals or
- (2) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the documents and things may be used in the same manner as if annexed to the certified transcript.

The exhibits shall then be filed as specified in § 1.653(i). If the weight or bulk of a document or thing shall reasonably prevent the document or thing from being annexed to the certified transcript, it shall, unless waived on the record at the deposition of all parties, be authenticated by the officer and forwarded to the Commissioner in a separate package marked and addressed as provided in this paragraph.

[49 FR 48469, Dec. 12, 1984, added effective Feb. 11, 1985; 50 FR 23124, May 31, 1985; para. (a)(40 revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

37 CFR 1.677 Form of an affidavit or a transcript of deposition.

(a) An affidavit or a transcript of a deposition must be on opaque, unglazed, durable paper approximately 21.8 by 27.9 cm. (8½ by 11 inches) in size (letter size). The printed matter shall be double-spaced on one side of the paper in not smaller than 11 point type with a margin of 3.8 cm. (1½ inches) on the left-hand side of the page. The pages of each transcript must be consecutively numbered and the name of the witness shall appear at the top of each page (§ 1.653(e)). In transcripts of depositions, the questions propounded to each witness must be consecutively numbered unless paper with numbered lines is used and each question must be followed by its answer.

(b) Exhibits must be numbered consecutively to the extent possible and each must be marked as required by § 1.653(i).

[49 FR 48470, Dec. 12, 1984, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

37 CFR 1.678 Time for filing transcript of deposition.

Unless otherwise ordered by an administrative patent judge, a certified transcript of a deposition must be filed in the Patent and Trademark Office within one month after the date of deposition. If a party refuses to file a certified transcript, the administrative patent judge or the Board may take appropriate action under § 1.616. If a party refuses to file a certified transcript, any opponent may move for leave to file the certified transcript and include a copy of the transcript as part of the opponent's record.

[49 FR 48470, Dec. 12, 1984, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

*Patent Laws and Regulations***37 CFR 1.679 Inspection of transcript.**

A certified transcript of a deposition filed in the Patent and Trademark Office may be inspected by any party. The certified transcript may not be removed from the Patent and Trademark Office unless authorized by an administrative patent judge upon such terms as may be appropriate.

[49 FR 48470, Dec. 12, 1984, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

37 CFR 1.682 Official records and printed publications.

(a) A party may introduce into evidence, if otherwise admissible, an official record or printed publication not identified in an affidavit or on the record during an oral deposition of a witness, by filing a copy of the official record or printed publication or, if appropriate, a notice under § 1.671(e). If the official record or printed publication relates to the party's case-in-chief, it shall be filed or noticed together with any affidavits filed by the party under § 1.672(b) for its case-in-chief or, if the party does not serve any affidavits under § 1.672(b) for its case-in-chief, no later than the date set by an administrative patent judge for the party to file affidavits under § 1.672(b) for its case-in-chief. If the official record or printed publication relates to rebuttal, it shall be filed or noticed together with any affidavits filed by the party under § 1.672(b) for its case-in-rebuttal or, if the party does not file any affidavits under § 1.672(b) for its case-in-rebuttal, no later than the date set by an administrative patent judge for the party to file affidavits under § 1.672(b) for its case-in-rebuttal. Official records and printed publications filed under this paragraph shall be assigned sequential exhibit numbers by the party in the manner set forth in § 1.672(b). The official record and printed publications shall be accompanied by a paper which shall:

- (1) Identify the official record or printed publication;
- (2) Identify the portion thereof to be introduced in evidence; and
- (3) Indicate generally the relevance of the portion sought to be introduced in evidence.

(b) [Reserved]

(c) Unless otherwise ordered by an administrative patent judge, any written objection by an opponent to the paper or to the admissibility of the official record or printed publication shall be filed no later than the date set by the administrative patent judge for the opponent to file objections under § 1.672(c) to affidavits submitted by the party under § 1.672(b). An opponent who fails to object to the admissibility of the official record or printed publication on a ground that could have been raised in a timely objection under this paragraph will not be entitled to move under § 1.656(h) to suppress the evidence on that ground. If an opponent timely files an objection, the party may respond by filing one or more supplemental affidavits, official records or printed publications, which must be filed together with any supplemental evidence filed by the party under § 1.672(c) or, if the party does not file any supplemental evidence under § 1.672(c), no later than the date set by an administrative patent judge for the party to file supplemental affidavits under § 1.672(c). No objection to the admissibility of the supplemental evidence shall be made, except as provided by § 1.656(h). The pages of supplemental affidavits and the exhibits filed under this section shall be sequentially numbered by the party in the manner set forth in § 1.672(c). The supplemental affidavits and exhibits shall be accompanied by an index of witnesses and an index of exhibits of the type required by § 1.672(b).

(d) Any request by an opponent to cross-examine on oral deposition the affiant of a supplemental affidavit submitted under paragraph (c) of this section shall be filed no later than the date set by the administrative patent judge for the opponent to file a request to cross-examine an affiant with respect to an affidavit served by the party under § 1.672(b) or (c). If any opponent requests cross-examination of an affiant, the party shall file notice of a deposition for a reasonable location within the United States under § 1.673(e) for the purpose of cross-examination by any opponent. Any redirect and recross shall take place at the deposition. At any deposition for the purpose of cross-examination of a witness, the party shall not be entitled to rely on any document or thing not mentioned in one or more of the affidavits filed under this paragraph, except to the extent necessary to conduct proper redirect. The party who gives notice of a deposition shall be responsible for providing a translator if the witness does not testify in English, for obtaining a court reporter, and for filing a certified transcript of the deposition as required by § 1.676. Within 45 days of the

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close of the period for taking cross-examination, the party shall serve (but not file) a copy of each deposition transcript on each opponent together with copies of any additional documentary exhibits identified by the witness during the deposition. The pages of deposition transcripts and exhibits served under this paragraph shall be sequentially numbered by the party in the manner set forth in § 1.672(d). The deposition transcripts shall be accompanied by an index of the names of the witnesses, giving the number of the page where cross-examination, redirect and recross of each witness begins, and an index of exhibits of the type specified in § 1.672(b).

[49 FR 48470, Dec. 12, 1984, added effective Feb. 11, 1985; revised, 60 FR 14488, Mar 17, 1995, effective Apr. 21, 1995]

37 CFR 1.683 Testimony in another interference, proceeding, or action.

(a) A party may introduce into evidence, if otherwise admissible, testimony by affidavit or oral deposition and referenced exhibits from another interference, proceeding, or action involving the same parties by filing a copy of the affidavit or a copy of the transcript of the oral deposition and the referenced exhibits. If the testimony and referenced exhibits relate to the party's case-in-chief, they shall be filed together with any affidavits served by the party under § 1.672(b) for its case-in-chief or, if the party does not file any affidavits under § 1.672(b) for its case-in-chief, no later than the date set by an administrative patent judge for the party to file affidavits under § 1.672(b) for its case-in-chief. If the testimony and referenced exhibits relate to rebuttal, they shall be filed together with any affidavits served by the party under § 1.672(b) for its case-in-rebuttal or, if the party does not file any affidavits under § 1.672(b) for its case-in-rebuttal, no later than the date set by an administrative patent judge for the party to file affidavits under § 1.672(b) for its case-in-rebuttal. Pages of affidavits and deposition transcripts served under this paragraph and any new exhibits served therewith shall be assigned sequential numbers by the party in the manner set forth in § 1.672(b). The testimony shall be accompanied by a paper which specifies with particularity the exact testimony to be used and demonstrates its relevance.

(b) Unless otherwise ordered by an administrative patent judge, any written objection by an opponent to the paper or the admissibility of the testimony and referenced exhibits filed under this section shall be filed no later than the date set by the administrative patent judge for the opponent to file any objections under § 1.672(c) to affidavits submitted by the party under § 1.672(b). An opponent who fails to challenge the admissibility of the testimony or referenced exhibits on a ground that could have been raised in a timely objection under this paragraph will not be entitled to move under § 1.656(h) to suppress the evidence on that ground. If an opponent timely files an objection, the party may respond with one or more supplemental affidavits, official records or printed publications, which must be filed together with any supplemental evidence filed by the party under § 1.672(c) or, if the party does not file any supplemental evidence under § 1.672(c), no later than the date set by an administrative patent judge for the party to file supplemental evidence under § 1.672(c). No objection to the admissibility of the evidence contained in or submitted with a supplemental affidavit shall be made, except as provided by § 1.656(h). The pages of supplemental affidavits and the exhibits filed under this section shall be sequentially numbered by the party in the manner set forth in § 1.672(c). The supplemental affidavits and exhibits shall be accompanied by an index of witnesses and an index of exhibits of the type required by § 1.672(b).

(c) Any request by an opponent to cross-examine on oral deposition the affiant of an affidavit or supplemental affidavit submitted under paragraph (a) or (b) of this section shall be filed no later than the date set by the administrative patent judge for the opponent to file a request to cross-examine an affiant with respect to an affidavit filed by the party under § 1.672(b) or (c). If any opponent requests cross-examination of an affiant, the party shall file a notice of deposition for a reasonable location within the United States under § 1.673(e) for the purpose of cross-examination by any opponent. Any redirect and recross shall take place at the deposition. At any deposition for the purpose of cross-examination of a witness, the party shall not be entitled to rely on any document or thing not mentioned in one or more of the affidavits filed under this paragraph, except to the extent necessary to conduct proper redirect. The party who gives notice of a deposition shall be responsible for providing a translator if the witness does not testify in English, for obtaining a court reporter, and for filing a certified transcript of the deposition as required by § 1.676. Within 45 days of the close of the period for taking cross-examination, the party shall serve (but not file) a copy of each deposition transcript on each opponent together with copies of any additional documentary