

CONDUCTING EFFECTIVE DISCOVERY

Christine H. Siegel, Supervisory AJ
EEOC, Los Angeles
Jeffery Weiser, Kator, Parks & Weiser
Dennis McGuire, Dept. of Veterans Affairs

DEFINITION

- Discovery: The process through which the parties obtain and develop evidence regarding any matter relevant to the subject matter of the pending action, whether it relates to claims or defenses of the party seeking discovery or claims or defenses of the other party.

DISCOVERY

- Acknowledgement and Order grants authority to commence—within 20 days of date of receipt of Order (presumed 5 days)
 - Will grant Motion to extend with explanation
- Generally will be 90 days
- AJ has discretion to limit or preclude
- Should proceed with minimal intervention of AJ
- EEO MDD 110, 7-16
- Generally, each party bears cost of its own discovery
- Not served on AJ, unless necessary in Motion to Compel

<p>DISCOVERY Types</p>
<ul style="list-style-type: none"> <input type="checkbox"/> Witness Interviews <input type="checkbox"/> Depositions <input type="checkbox"/> Document Requests <input type="checkbox"/> Requests for Admission <input type="checkbox"/> Interrogatories <input type="checkbox"/> Medical Examination

<p>WITNESSES</p>
<ul style="list-style-type: none"> <input type="checkbox"/> Informal Interviews or Telephone Calls with Witnesses Fine <input type="checkbox"/> Except attorney not supposed to communicate with adverse party (agency=managers and supervisors, i.e., make decision binding agency as to disposition of case) <input type="checkbox"/> Give Opposing Party Notice <input type="checkbox"/> Except agency investigation of employees represented by unions <input type="checkbox"/> Might be allowed union representation under 5 USC § 7114(A)(2) <input type="checkbox"/> Can Tape Record or prepare written statement

<p>DEPOSITIONS</p>
<ul style="list-style-type: none"> <input type="checkbox"/> Under oath with Court Reporter – Transcript Prepared <input type="checkbox"/> More Formal <input type="checkbox"/> Reasons to Consider Taking Witness' Deposition: <ul style="list-style-type: none"> ■ Witness Retiring or leaving federal government ■ AJ does not have subpoena power ■ Witness Will Not Consent to Interview ■ Preserve testimony closer to event ■ To Support or Oppose Motion for Decision without Hearing ■ To authenticate documents - especially where dispute and witness hostile

<p style="text-align: center;">Reasons Not to Take Deposition</p> <hr/> <ul style="list-style-type: none"> <input type="checkbox"/> Cost <input type="checkbox"/> Interview would work <input type="checkbox"/> Witness stationed in remote or distant location <input type="checkbox"/> Don't Give witness chance to explain bad testimony <input type="checkbox"/> Cost

<p style="text-align: center;">DEPOSITIONS</p> <p style="text-align: center;">Use at Hearing Stage</p> <hr/> <ul style="list-style-type: none"> <input type="checkbox"/> <u>Motion for Summary Judgment</u> <input type="checkbox"/> Testimony supports Motion or Opposition <ul style="list-style-type: none"> ■ <u>Do not</u> submit whole deposition transcript ■ Photocopy first page, witness oath page, and relevant pages of testimony ■ Attach to motion or opposition ■ Refer specifically to testimony in argument <input type="checkbox"/> <u>Hearing</u> <ul style="list-style-type: none"> ■ To refresh witness(es)' recollection ■ To impeach witness(es)' testimony

<p style="text-align: center;">USE OF DEPOSITION TESTIMONY AT HEARING (Cont.)</p> <hr/> <ul style="list-style-type: none"> <input type="checkbox"/> DO NOT JUST MOVE TO ADMIT ALL TRANSCRIPTS OF DEPOSITIONS INTO RECORD <input type="checkbox"/> Use for specific purpose <input type="checkbox"/> Draw AJ's attention to testimony which conflicts or supports argument <input type="checkbox"/> AJ will not have time to read testimony of witnesses contained in deposition testimony

INTERROGATORIES
<ul style="list-style-type: none"><input type="checkbox"/> A written question to which a written response is required<input type="checkbox"/> MD-110 provides that a party may propound “not more than one set of interrogatories and a set of interrogatories shall not exceed thirty (30) in number <u>including discrete subparts.</u>”<input type="checkbox"/> Administrative Judge can expand at his or her discretion

INTERROGATORIES
<ul style="list-style-type: none"><input type="checkbox"/> May be used to obtain both factual information and a party’s legal contentions<input type="checkbox"/> Complainants can be queried about the legal theories on which they plan to proceed<input type="checkbox"/> Agencies can be asked about the defenses they intend to assert

INTERROGATORIES
<ul style="list-style-type: none"><input type="checkbox"/> Under the Federal Rules, interrogatories may only be served upon parties to the litigation.<input type="checkbox"/> It is the agency that is the party to an EEO complaint and not any particular individual manager or supervisor employed by the agency.<input type="checkbox"/> A technical reading of the rule means that interrogatories cannot be directed to particular individuals within the agency. It is the agency that gets to choose who responds to the interrogatory.

<h2>INTERROGATORIES</h2>	
<ul style="list-style-type: none"><input type="checkbox"/> To verify or not to verify?<input type="checkbox"/> Commission provides no requirement<ul style="list-style-type: none">■ Good practice to require■ Who is answering the interrogatories?<input type="checkbox"/> Under the Federal Rules, party giving the answers must sign the answers and the attorney representing the party must sign with respect to any objections. A representative who signs in lieu of the party in making interrogatory responses runs the risk of putting his or her own credibility at issue and possible disqualification as a representative	

<h2>INTERROGATORIES</h2>	
<ul style="list-style-type: none"><input type="checkbox"/> Rule gives party option of producing business records when<ul style="list-style-type: none">■ information sought can be obtained by review of those records and■ burden would be same on the requesting party as for the responding party.<input type="checkbox"/> Rather than simply refusing to respond to interrogatory that requires lengthy response and appearing uncooperative, producing the appropriate records gives responding party an alternative that is less likely to be viewed as an obstructionist tactic by the administrative judge	

<h2>DOCUMENT REQUESTS</h2>	
<ul style="list-style-type: none"><input type="checkbox"/> ROI in evidence<input type="checkbox"/> Subject to evidentiary objections (authentication, etc.)<input type="checkbox"/> Limited to 30<ul style="list-style-type: none">■ Including subparts<input type="checkbox"/> AJ has discretion to increase<ul style="list-style-type: none">■ Not often granted	

DOCUMENT REQUESTS
<p>What should COMPLAINANT Request</p> <ul style="list-style-type: none"> <input type="checkbox"/> Comparative Information <input type="checkbox"/> Rules/Procedures/Regulations <input type="checkbox"/> Notes, Memos, etc. made by RMOs or other agency personnel, including e-mails <input type="checkbox"/> Written reports or investigations <input type="checkbox"/> Documents contained in OPF or Supervisor Files <input type="checkbox"/> Statements/Declarations obtained by agency representative

DOCUMENT REQUESTS
<p>What Should AGENCY Request?</p> <p>Materials in control of complainant or complainant's counsel</p> <ul style="list-style-type: none"> <input type="checkbox"/> Doctor's Reports <input type="checkbox"/> W-2s, 1099s (Not Tax Returns) <input type="checkbox"/> Logs, notes, diaries, kept by complainant; e-mails <input type="checkbox"/> Statements obtained by complainant or complainant's representatives

IMPROPER DOCUMENT REQUESTS
<ul style="list-style-type: none"> <input type="checkbox"/> Tax Returns <ul style="list-style-type: none"> ■ <i>Ulloa v. U.S. Postal Service</i>, EEOC Appeal No. 04A10032, 2001 WL 1650749 at *2-3 (Dec. 12, 2001). Must show compelling need and information not available through less intrusive means <input type="checkbox"/> Medical Reports <ul style="list-style-type: none"> ■ Except narrowly tailored to issue in case <ul style="list-style-type: none"> <input type="checkbox"/> Not required to go and get them; must produce only what party has or is within his/her control (i.e. attorney has it) ■ Protective Order re comparative employees

<div style="border-bottom: 1px solid black; margin-bottom: 5px;"></div> <h2 style="margin: 0;">CRAFTING DOCUMENT REQUESTS</h2>
<ul style="list-style-type: none"> <input type="checkbox"/> Request specific documents if you know what they are <input type="checkbox"/> E.g, all leave requests (SF-71) filed by complainant during specific period) <input type="checkbox"/> Request generic documents to cover bases <ul style="list-style-type: none"> ■ e.g., Provide all applications for the pipefitter position ■ Provide all documents created in connection with the selection decision ■ Provide all documents sent or received by selecting official in connection with the selection decision

<div style="border-bottom: 1px solid black; margin-bottom: 5px;"></div> <h2 style="margin: 0;">OBJECTIONS TO DISCOVERY REQUEST</h2>
<ul style="list-style-type: none"> <input type="checkbox"/> Party may object to discovery request as <ul style="list-style-type: none"> ■ Irrelevant ■ Overly Burdensome ■ Repetitious ■ Seeking Privileged Material <input type="checkbox"/> EEO <u>MD-110</u>, ch.7, para. IV.D.5.a. <input type="checkbox"/> <u>However</u>, if a party has failed to timely respond, s/he or it may be held to have waived the right to object

<div style="border-bottom: 1px solid black; margin-bottom: 5px;"></div> <h2 style="margin: 0;">UNHELPFUL OBJECTIONS (Which Probably Won't Hold Up)</h2>
<ul style="list-style-type: none"> <input type="checkbox"/> This is a fishing expedition <input type="checkbox"/> Vague and unduly burdensome (without further explanation) <input type="checkbox"/> Requests for identity of witnesses is premature; party will identify witnesses before the pre-hearing conference <input type="checkbox"/> Requests information protected by the Privacy Act

<h2 style="margin: 0;">Privacy Act</h2>
<p>Must show</p> <ul style="list-style-type: none"> ■ Documents contained in a Privacy Act System of Records (5 U.S.C. 552a (a)(5)) ■ 3 common: <ul style="list-style-type: none"> □ EEOC/GOVT-1, EEO in the Federal Government Complaint and Appeal Records, which includes EEO complaint files maintained by the agency where the complaint was filed □ OPM/GOVT-1, General Personnel Records, which includes general personnel records of federal employees □ OPM/GOVT-2, Employee Performance File System Records, which contains performance review and rating records ■ Otherwise documents not covered by Privacy Act

<h2 style="margin: 0;">Privacy Act</h2>
<ul style="list-style-type: none"> □ Routine Use Exceptions □ Discoverable in the EEO complaint adjudication process under any of the "routine use exceptions" listed in the applicable system notice. 5 U.S.C § 552a(b)(3) <ul style="list-style-type: none"> ■ EEOC/GOVT-1, OPM/GOVT-1, and OPM/GOVT-2 Systems of Records each have two routine uses that permit disclosure of records during discovery in an EEO hearing

<h2 style="margin: 0;">Privacy Act</h2>
<ul style="list-style-type: none"> □ Routine Use Exceptions (cont). □ 5 U.S.C. § 552a(a)(7) <ul style="list-style-type: none"> ■ One permits disclosure of information during discovery that is relevant to the subject matter involved in a pending judicial or administrative proceeding ■ Another in all three systems of records permits disclosure of information to another federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a federal agency, when the government is a party to the judicial or administrative proceeding.

Requests for Admission
<ul style="list-style-type: none">□ Requests for admissions consist of clear, concise and simple factual statements that the opposing party must either admit, deny or claim insufficient knowledge to form a belief after reasonable investigation□ Commission guidance is in MD-110, Ch. 7.

Requests for Admission
<ul style="list-style-type: none">□ The Commission limits each party to 30 requests for admissions.□ The limitation excludes requests to admit the authenticity or genuineness of documents.□ Administrative Judge can expand at his or her discretion

Requests for Admission
<ul style="list-style-type: none">□ A party is not required to provide a reason for a denial. To require a party to do so would be to turn each denial into an interrogatory. The primary purpose of requests for admission is to narrow down the legal and factual issues. AJ Handbook, ch. 4, para. II.D.

Requests for Admission
<ul style="list-style-type: none">□ An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

Requests for Admission
<ul style="list-style-type: none">□ If a responding party can neither admit nor deny a request for an admission, the party must provide an explanation.□ If a responding party believes a request for admission is only partially true, it must admit the part of the request that is true and deny or qualify its response to the remainder of the request.

Requests for Admission Effect of Failure to Respond
<ul style="list-style-type: none">□ Federal Rules provide that failure to respond to a request renders it deemed admitted□ Not deemed admitted before Commission. Commission will look at the circumstances of the case, particularly whether or not the complainant is represented by an attorney. <i>Bell v. Dep't of the Navy</i>, EEOC Appeal No. 01940852 (August 17, 1994).

QUESTIONS

MOTIONS TO COMPEL
<ul style="list-style-type: none"><input type="checkbox"/> Try to work out informally; MD-110 requires parties to meet and confer<input type="checkbox"/> Follow A/O or other Order of AJ carefully to preserve time frames<input type="checkbox"/> Send discovery request, response along with motion<input type="checkbox"/> Always serve the opposing party with everything you have sent to AJ

MOTION TO COMPEL
<ul style="list-style-type: none"><input type="checkbox"/> If total, unexplained, failure to respond, at a minimum party will have waived right to object<input type="checkbox"/> Party may be severely sanctioned, lose case entirely<input type="checkbox"/> Better procedure: respond to what you can, then ask for clarification
