

DISCOVERY

How to Use it
And
How to Respond to it

OBJECTIVES

- Purpose of Discovery
- Types of Discovery
 - Fashioning Good Discovery Requests
 - Depositions
- Grounds for Objections
- Motion Practice
 - Motions to Compel
 - Motions for Sanctions
 - Motion for Medical Examination

PURPOSE OF DISCOVERY

- To acquire information/evidence necessary to evaluate the case
- To fill evidentiary gaps in the case necessary to prove/disprove the claim(s)
- Is **NOT** simply to burden the opposing party

Good Reasons to Conduct Discovery

- Offer of settlement
- Evaluate whether to proceed to hearing
- For Motion for Summary Judgment (full or partial)
- For Motion to Dismiss (full or partial)
- For Examination and Impeachment of witnesses at hearing

TYPES OF DISCOVERY REQUESTS

- Request for Admissions (RFAs)
- Request for Production of Documents (RPDs)
- Interrogatories
- Depositions

Request for Admissions

- Request for Admissions are a set of written statements about the facts at issue in the case.
- Opposing party has a limited period of time to agree or disagree with each statement. The response must be formal and in writing.
- The party denying the affirmation of the statement of fact must explain why the fact is denied.
- If a response is not made within the time frame designated by Rule 36 (or the Acknowledgement Order), the statement is deemed admitted.
- MOST UNDERUSED TYPE OF DISCOVERY

Request for Admissions Why Use Them?

- Narrow Issues of Fact
- Streamlines Issues in Dispute
- Dispose of Issues that are otherwise difficult/expensive to establish
- Focus the Case on Issues Genuinely in Controversy
- Establish Strengths/Weaknesses of Case

Request for Admissions Tips

- Tailor them to your case
- Make sure they comprehensively cover ALL facts – material and minor
- Each single RFA should ask for an admission of ONE FACT only
- Tailor them to your case

INTERROGATORIES

- Written answers to written questions answered under oath
- Questions are normally prepared by party's attorney
- Questions are normally answered with review by the answering party's attorney for explanation of the question, wording, and objections
- Number of questions is limited to prevent oppressive requests

Interrogatory Problems

- Number One Problem: Questions are written in a confusing manner
 - Question appears to ask for irrelevant information based upon the wording of the question
 - Question asks multiple items and uses bad grammar in doing so

Interrogatory Problems Con't.

- Example:

“List chronologically, in exhaustive detail, every fact that supports the agency’s contention that my supervisor is not incompetent.”

- Confusingly written – contains the double negative “not incompetent” = competent
- Makes requirements for the response that are NOT provided for under the rules
- Appears to ask for irrelevant information – supervisor’s competence is not necessarily at issue

Responding Helpfully

- The agency objects to this interrogatory on the grounds that it is overly broad and neither relevant nor calculated to lead to the discovery of admissible evidence. Notwithstanding this objection, the agency states that the supervisor's performance has consistently been rated as satisfactory
- Why respond helpfully?
 - Demonstrates good faith
 - Provides information that does no harm to your case
 - Information might be useful later

Interrogatory Tips

- Tailor them to your case.
- Keep them simple.
- Examples:

Good interrogatory: Explain why the selecting official selected the selectee in preference to the complainant.

Bad interrogatory: Describe each and every crime or offense, including traffic offenses, with which my supervisor has ever been charged, including the date of the alleged offense, the outcome, and the penalty or sentence, if any.

PRODUCTION OF DOCUMENTS

- Should be comprehensive requests for all types of relevant documentation
- Tailor requests to the case
- Cover all elements of the claim(s), and all elements of the defenses to the claim
- Cover ALL DAMAGES
- Provide detailed instructions for responding

RPD Types of Requests

- Training and Instruction Manuals
- Organizational Charts
- Incident Reports
- Internal Investigation Documents
- Statements of Witnesses, Parties, etc.
- Notes – Personal and Otherwise
- Prior Lawsuits/Complaints
- Correspondence
- Electronic Documents
- Recordings (Tape, Video, DVD, etc.)

RPD Types of Requests Con't.

- Damages:
 - Monetary Losses
 - Non-Monetary Losses
 - Medical Records/Invoices
- Disabilities:
 - Medical Records
 - Functional Evaluations/Opinions

DEPOSITIONS

Purposes

- Evaluate the Witness/Party
 - Appearance
 - Credibility
 - Consistency
- Evaluate Strength of Claims
- Evaluate Opposing Counsel
- Develop Admissions/Inconsistencies for Impeachment
- Motion Practice
- Settlement Evaluation

Depositions Preparation Tips

- Review Entire Case in prep for each Depo
- Know the Etiquette for Depositions
- Read ALL Discovery Produced/Provided
- Exhibits
 - All marked prior
 - Necessary # of Copies ready
- Explore Every Topic Thoroughly
- Don't let the Witness off the hook, Ever
- Stay on the Record

Depositions

Preparation of Witness

- Explain the Depo Process
- Remind them to *Always Tell the Truth*
- Agree on a Verbal Signal for breaks
- Do a “mock” deposition with them
- Highlight the issues of greatest importance to the case
- **AVOID COACHING**

Depositions Objections - Tips

- Make Objections Brief and on the Record
- Use as a device to Bookmark Testimony
- Use to break up a “juggernaut” series of questions
- Use to evaluate opposing counsel

MEDICAL EXAMINATIONS (Rule 35 Examinations)

- Fed. R. Civ. P. 35 permits physical or mental examinations of a party in civil actions
- MD-110 (1999) authorizes AJs to order medical examinations upon motion by the Agency
- Agency's burden is to prove the examination is "reasonably necessary"

Medical Exams Cont'd

- Factors for Agency to show claim for damages places mental/physical condition in controversy:
 - Type/extent of harm claimed
 - Whether harm is ongoing or merely past harm with no current effect
 - Has Complainant offered/intent to offer expert testimony
 - Sufficient Causal nexus between substantive claim and claimed mental/physical condition

Medical Exams Cont'd

- Factors Considered by AJ in assessing “good cause” to order exam:
 - whether need for the evidence outweighs invasive nature of exam
 - Alternative methods of obtaining the same information
 - Independence of the medical examination
 - Availability of professional skilled to conduct exam

Medical Exams Cont'd

- Differences with other discovery tools:
 - Administrative Judge **MUST** be involved in this discovery request
 - **NO** requirement that the Motion for medical examination occur within the first 20 days of discovery
 - No requirement that Motion for medical exam occur within the discovery period (end of discovery period; after bifurcation of liability/damages)

DISCOVERY

Grounds for Objections

- Neither relevant nor reasonably calculated to lead to the discovery of admissible evidence
- Overly broad and unduly burdensome.
- Production would be in violation of the law, e.g., the Privacy Act
- The information requested is already in the possession of the other party
- The question is compound

DISCOVERY

Grounds for Objections Con't.

The fact that the agency does not want to provide something is **not** a recognized ground for an objection!

DISCOVERY

Solutions to Objections

- Protective order
- Production in chambers (for the judge's eyes)
- Reasonable alternative

MOTIONS TO COMPEL

Requirements

- Filed within 10 ten days of Response Period or 10 days after Inadequate Response was received
- Must contain copy of Discovery Request and proof of no response/inadequate response
- Must contain certification that moving party has conferred with responding party and cannot, in good faith, resolve the dispute.
- Proposed Order provided to the judge

MOTIONS TO COMPEL

Factors Judge's Consider

- Discovery calculated to lead to production of material evidence not already contained in record
- Does not concern privileged or restricted information
- Is not overly burdensome

SANCTIONS

- If Motion to Compel is Granted, Sanctions can also be requested
- Motion for Sanctions should specify the conduct giving rise to request for sanctions
- Motion should include the specific sanction requested

Possible Sanctions

- Adverse Inference
- Facts Deemed Admitted
- Exclusion of Evidence
- Decision in Favor of Requesting Party
- Money

QUESTIONS?