

# DISCOVERY IN AGENCY ADJUDICATION†

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## INTRODUCTION

In 1962 the temporary Administrative Conference of the United States<sup>1</sup> adopted Recommendation No. 30,<sup>2</sup> approving in principle the application of discovery rules to adjudicatory proceedings before federal administrative agencies and recommending that each agency adopt rules providing for discovery "to the extent and in the manner appropriate to its proceedings."<sup>3</sup> The Report of the Conference's Committee on Compliance and Enforcement Proceedings accompanying the Recommendation<sup>4</sup> discussed the advantages of broadened discovery in adjudicatory proceedings and urged agencies to adopt as much of the discovery practice provided for the judiciary in the Federal Rules of Civil Procedure<sup>5</sup> as was appropriate. The Report contended that the adoption of discovery rules would reduce delays and promote fairness without prejudicing an agency's execution of its statutory responsibilities.<sup>6</sup> The recommendation.

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† This article is based on a report made by the author as a consultant to the Administrative Conference of the United States. The report was made to the Conference in March, 1970, in support of the Discovery Recommendations made by the Conference's Committee on Compliance and Enforcement Proceedings. The views expressed in the report and in this article are those of the author and have not been approved by the Committee or the Conference. The author obtained much of the information on agency practice for this article through personal interviews with agency staff and private practitioners. Those interviews took place during the latter part of 1969, and the information obtained therefore reflects agency practice at that time.

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1. The temporary Administrative Conference was an experimental effort in improving the procedures of administrative agencies. The Conference was asked to make recommendations that would help to alleviate procedural shortcomings in the administrative process. Its success led to The Administrative Conference Act, 5 U.S.C. §§ 571-76 (1964), which established the permanent Conference to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies . . . and make recommendations to administrative agencies . . . in connection therewith." *Id.* § 574(2).

2. Recommendation No. 30, S. Doc. No. 24, 88th Cong., 1st Sess. 37 (1963).

3. *Id.*

4. Report of the Committee on Compliance and Enforcement Proceedings in support of Recommendation No. 30, *id.* at 115.

5. FED. R. CIV. P. 26-37. On March 30, 1970, the Supreme Court approved a major revision of the civil procedure rules pertaining to discovery which went into effect July 1, 1970. 17 FED. CODE ANN. 909-992 (1970). All references in this article are to the new rules unless otherwise specified.

6. Discovery would not, of course, require disclosure of any material recognized as privileged by law. Recommendation No. 30, *supra.* note 2, at 138.

produced mixed responses from the agencies. The Federal Trade Commission, the Federal Maritime Commission, and the Federal Communications Commission have adopted discovery rules closely modeled on the Federal Rules of Civil Procedure;<sup>7</sup> these are the only major federal agencies whose rules authorize broad discovery in adjudicatory proceedings. The remaining agencies have taken only modest steps to implement Recommendation No. 30 or have done nothing at all to change their procedures to permit more discovery.

In June, 1970, the Conference adopted *Recommendation 21: Discovery in Agency Adjudication*.<sup>8</sup> Where Recommendation No. 30 spoke in general terms and urged agencies to make appropriate provisions for discovery, Recommendation 21 outlines as specifically as possible the type of discovery which is appropriate in adjudicatory proceedings. The recommendation covers six separate discovery tools and designates minimum standards for their use in adjudicatory proceedings. Since there is great diversity in adjudicatory proceedings the Discovery Recommendation must recognize that the detailed recommendations which it contains may not be suitable for certain types of proceedings. Individual agencies may therefore

[t]ailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought.<sup>9</sup>

*Summary of Discovery Recommendations.* Recommendations 1, 2, 4, 5, and 6 cover, respectively, Prehearing Conferences, Depositions, Written Interrogatories to Parties, Requests for Admissions, and Production of Documents and Tangible Things.<sup>10</sup> Each of these recommendations thus adapts to administrative

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7. See 16 C.F.R. §§ 3.31-37 (1970) (FTC); 46 C.F.R. §§ 502.201-211 (1970) (FMC); 47 C.F.R. §§ 1.311-325 (1970) (FCC).

8. The complete text of the recommendation can be found in the Appendix accompanying this article.

9. Introductory paragraph of Recommendation. The Conference amended the Committee's original recommendation by adding the cited provision permitting departures from these minimum standings when the protection measures are inadequate. Conference members feared that in some proceedings witnesses could not otherwise be adequately protected.

10. Recommendation 21 contained nine separate recommendations dealing with various aspects of discovery. References in this article to Recommendations 1-9 are thus meant to refer to one of the steps suggested in Recommendation 21. Earlier drafts of the recommendations prepared by the author contained a provision dealing with the discovery of exculpatory material. This provision was not adopted by the Committee or the Conference. The text of this provision is included in the Appendix.

adjudications a particular discovery provision of the Federal Rules of Civil Procedure.<sup>11</sup> The Discovery Recommendations, however, do not simply propose adoption of the federal discovery practice; they also contain important modifications to meet the special needs of administrative proceedings.<sup>12</sup> These recommendations, therefore, rely heavily on the successful experience of the judicial model but often depart from that model because of the unique nature of the administrative process.

The Federal Rules describe in considerable detail how the mechanics of the various discovery tools operate.<sup>13</sup> The Discovery Recommendations do not purport to treat these mechanical provisions regulating the discovery process in any comprehensive fashion. Provisions of this type will vary between agencies because each agency must structure its discovery rules to meet the peculiar nature of its own proceedings. While these recommendations allow the individual agencies to fill in the details of discovery, they contemplate that agencies will generally follow federal law on the proper use and scope of these discovery tools unless the recommendations propose modifications of that law.<sup>14</sup>

Recommendation 3 on Witnesses differs from the other recommendations in that it is derived primarily from federal criminal practice rather than from the Federal Rules of Civil Procedure. This recommendation is a limited extension of the so-called *Jencks* rule<sup>15</sup> requiring disclosure by the agency of prior statements of its witnesses; the recommendation also provides for the prehearing production by all parties of summaries of the testimony of their witnesses. Recommendations 7, 8, and 9 contain general provisions essential to

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11. FED. R. CIV. P. 16 (pre-trial conferences), 30-31 (depositions), 33 (interrogatories to parties), 34 (production of documents and things), 36 (requests for admission).

12. For example, the administrative process must remain less expensive and speedier than the judiciary. As a result, more emphasis is placed on exchanges of evidence than on the more expensive deposition procedure. See notes 111-12 *infra* and accompanying text.

13. Rule 30 contains elaborate provisions on the procedures for the taking of a deposition on oral examination; Rule 33 establishes a precise time schedule for serving and answering interrogatories.

14. Agencies, for example, should look to the Federal Rules and judicial decisions interpreting them for guidance in resolving such issues as the privileges available to litigants, the sufficiency of answers to interrogatories, and the permissible use of depositions at the hearing itself. It was not felt necessary to refer to these matters in the text of the recommendations because the recommendations concentrate on the modifications which the agencies must make in the judicial model.

15. The *Jencks* rule is derived from *Jencks v. United States*, 353 U.S. 657 (1957), and 18 U.S.C. § 3500 (1964) (*Jencks Act*). See notes 79-105 *infra* and accompanying text.

the effective functioning of the discovery process in adjudicatory proceedings. Recommendation 7 strengthens the role of the presiding officer by authorizing him to impose time limitations on discovery and by restricting interlocutory appeals from his rulings on discovery matters. Protective orders are provided for by Recommendation 8. While generally adopting the approach of the Federal Rules, that recommendation contains additional provisions dealing with the protection of witnesses in the peculiar circumstances of administrative adjudications. Recommendation 9 is a recognition of the necessity of subpoenas for the enforcement of discovery requests and reaffirms the principle that agencies which conduct adjudicatory proceedings should have the power to issue subpoenas.<sup>16</sup>

*Coverage of Discovery Recommendations.* All nine recommendations are limited to adjudicatory proceedings subject to sections 5, 7, and 8 of the Administrative Procedure Act.<sup>17</sup> The type of proceedings covered by the recommendations would therefore include enforcement and disciplinary actions, licensing, and reparations cases. The recommendations do not extend to informal adjudications but only to those adjudications in which sections 5, 7, and 8 of the APA require a formal hearing. The existing formal adjudicatory procedure should readily adjust to the addition of discovery, while

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16. The basic approach of these recommendations is to expand the availability of discovery in adjudicatory proceedings as far as is compatible with the effective dispatch of agency business. The American Bar Association's Project on Minimum Standards for Criminal Justice adopts a similar approach to discovery in criminal prosecutions. The Project's tentative report outlines procedures for discovery in criminal cases which broadly provide for discovery in areas in which it has not previously been available in either state or federal courts. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft, 1970) [hereinafter cited as ABA DISCOVERY STANDARDS]. While the standards proposed by the ABA often vary from those of these Discovery Recommendations because of the differences between the criminal and administrative processes, the two recommendations are strikingly similar in many important respects and are based on similar premises. Compare the Preamble of Recommendation 21 with the Project's proposed Standard 1.2. Both the ABA Standards and the Discovery Recommendations emphasize the importance of pre-trial hearings and pre-trial disclosure by the government of the names and prior statements of its witnesses. This latter emphasis on "witness discovery" is consistent with the major recent advances in favor of witness discovery in state criminal prosecutions. A growing number of states, most notably California and New Jersey, permit the criminal defendant to discover not only the prosecutor's witness list but also the prior statements of prosecution witnesses. The Discovery Recommendations also assign a secondary role to depositions, while the ABA Standards do not provide for depositions at all. These similarities stem from a widespread feeling that discovery may be the key to ending many inequities and shortcomings currently existing in both the judicial and administrative processes.

17. 5 U.S.C. §§ 554, 556 & 557 (Supp. V, 1970) [hereinafter cited as APA].

formal discovery rules of this type may often deprive informal adjudications of the advantages that flow from informality. While agencies which conduct adjudicatory proceedings that are not covered by sections 5, 7, and 8 of the APA are not within the letter of the recommendations, such agencies should consider whether the spirit of these recommendations extends to their proceedings. Often the basis for the agency's exemption from these sections of the APA is technical or unrelated to the preservation of the informal nature of the proceedings. The need for adequate discovery may be just as great in these proceedings as in proceedings formally within sections 5, 7, and 8. Recommendation No. 30<sup>18</sup> acknowledged this fact by recommending discovery in *all* adjudicatory proceedings. Recommendation 21 does not depart from that principle but suggests discovery rules that are more appropriate for formal adjudicatory proceedings.

Rule-making proceedings are also excluded from the coverage of the recommendations. These recommendations assume at least limited agency experience with discovery; however, formal discovery rules have apparently never been tested in administrative rule making. In addition, rule-making proceedings, even those subject to sections 7 and 8 of the APA, involve different considerations which require different procedures for discovery. Rule making frequently involves large numbers of parties and a wide range of issues, including basic issues of national policy. These features make impracticable the wholesale application of these Discovery Recommendations to rule making.

*Implementation of the Discovery Recommendations.* The implementation of these recommendations normally should not require an agency to seek enabling legislation from Congress.<sup>19</sup> Normally, the congressional delegation to the agency of general rule-making power or of power to conduct its own proceedings in the public interest should be sufficient authorization for the agency to adopt procedural rules on discovery. In *FCC v. Schreiber*,<sup>20</sup> the Supreme Court upheld a Federal Communication Commission rule on disclosure of information on the ground that Congress had left

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18. Recommendation No. 30, *supra* note 2, at 37.

19. The exception to this is Recommendation 9 dealing with the power to issue subpoenas. Those few remaining agencies which do not possess the subpoena power must obtain it from Congress. Recommendation 9 on subpoenas recognizes this problem. See notes 172-75 *infra* and accompanying text.

20. 381 U.S. 279 (1965).

largely to the agency's judgment the determination of the manner of conducting its proceedings. This delegation of authority was found in section 4(j) of the Communications Act of 1934,<sup>21</sup> empowering the FCC to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The Court interpreted this section as a grant of power to resolve "subordinate questions of procedure."<sup>22</sup> Most agencies have comparable grants of authority and should be able to enact procedural discovery rules on their own initiative.<sup>23</sup>

A potential obstacle to this exercise of agency initiative is the Ninth Circuit Court of Appeals' ruling in *FMC v. Anglo-Canadian Shipping Co.*,<sup>24</sup> that Congress did not authorize the Federal Maritime Commission to adopt a discovery rule for the production of documents when it gave the Commission general rule-making power. That decision has been sharply criticized<sup>25</sup> and has not inspired any progeny. The opinions in the case, particularly the concurring opinion of Judge Pope,<sup>26</sup> reflected a negative attitude toward the desirability of discovery in administrative proceedings which influenced the judges in their determination that the FMC had exceeded its statutory authority. In dictum, the majority opinion acknowledged that Congress had delegated discovery powers to at least three other agencies.<sup>27</sup> Following this decision the FMC obtained from Congress legislation specifically authorizing it to adopt discovery rules roughly similar to those in the Federal Rules of Civil Procedure.<sup>28</sup> *Anglo-Canadian Shipping* has not affected the operation of the FTC's discovery rules, which do not have explicit congressional sanction, nor did it deter the FCC from adopting liberal discovery rules without specific Congressional approval.<sup>29</sup> The decision's impact has therefore been slight; further, its authority has been severely undermined by *Schreiber*.

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21. 47 U.S.C. § 154(j) (1964).

22. 381 U.S. at 289.

23. See, e.g., Securities Act of 1933, 15 U.S.C. § 77s (1964) (SEC); Federal Trade Commission Act, *id.* § 46 (FTC); Federal Aviation Act of 1958, 49 U.S.C. § 1354 (1964) (FAA).

24. 335 F.2d 255 (9th Cir. 1964).

25. Galland, *A Note on Maritime Discovery*, 19 AD. L. REV. 119 (1966).

26. 335 F.2d at 261.

27. *Id.* n.9. The three agencies mentioned were the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Power Commission.

28. Shipping Act, 46 U.S.C. § 826 (Supp. V, 1970).

29. See note 7 *supra*.

## DISCOVERY RECOMMENDATION 1—PREHEARING CONFERENCES

Prehearing conferences have become commonplace in agency adjudication, and most agencies have recognized them as effective devices for encouraging the settlement of cases and for shortening the time necessary for the hearing. Settlement talk quite naturally follows from bringing the parties together at the conference to exchange information and to discuss the case. When settlement is not possible, the hearing may still be shortened if the presiding officer and the parties work together to simplify the issues and to obtain stipulations of facts and of the authenticity of documents. Recommendation 1 is not directly concerned with these functions of the prehearing conference but concentrates on the value of the conference as a means of providing the parties with discovery.

Present agency rules authorizing prehearing conferences<sup>30</sup> are generally modeled on rule 16 of the Federal Rules of Civil Procedure. That rule makes the pre-trial conference optional with the district court or presiding judge. Agency rules must also leave the scheduling and structure of conferences largely to the discretion of the presiding officer because of the great variety of cases handled by a given agency. Complex cases may require a series of prehearing conferences, some of them quite informal and off the record. On the other hand, many cases do not justify the trouble and expense of bringing the parties together at the prehearing stage.<sup>31</sup> Practical considerations may also make a prehearing conference inappropriate in some instances. While Recommendation 1 therefore leaves the holding of prehearing conferences to the discretion of the presiding officer in all cases, it does provide some general guidelines on the types of cases where prehearing conferences are desirable. Under these guidelines, the presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time.

*The Prehearing Conference as a Discovery Device.* The prehearing conference becomes a discovery device when the presiding officer at the conference requires the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Such arrangements can

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30. See, e.g., 16 C.F.R. § 3.21 (1970) (FTC); 17 C.F.R. § 201.8 (1970) (SEC); 46 C.F.R. § 502.94 (1970) (FMC).

31. For example, many proceedings brought by the Coast Guard (Department of Transportation) to revoke or suspend a seaman's license involve such a simple issue as whether the seaman had narcotics in his possession. 46 U.S.C. §§ 239(a), 239(b) (1964).

properly be characterized as discovery because each party to the proceeding becomes more aware of his opponent's case and can thus better prepare for the hearing without fear of surprise. This development is one of the more striking recent advances in administrative procedure, and for once places the agencies ahead of the courts in allowing discovery. The use of the prehearing conference as a discovery device is commonplace at a number of agencies, even where there is no specific rule providing that the conference be used for discovery.

For example, the FTC's rule provides that the trial examiner at the conference should consider directing the parties to exchange their witness lists and physical evidence.<sup>32</sup> Such exchanges are particularly advantageous in complex merger cases where statistical reports play an important role. This may be the first opportunity for a respondent to learn the basis of the case against him, for complaints in these cases are often framed in very general terms. The SEC has a similar rule allowing the presiding officer to order exchanges of evidence at the prehearing conference,<sup>33</sup> a power widely used in disciplinary proceedings against broker-dealers.<sup>34</sup> The FMC's rule<sup>35</sup> has been particularly useful in investigations of practices of conferences of carriers. The FCC's rule<sup>36</sup> is phrased slightly differently, but the effect is the same. While the rule does not mention exchanges between the parties, hearing examiners have required parties to exchange, and thus "freeze," their entire cases and to produce documents at the conference stage.<sup>37</sup> The Department of Labor's rule on prehearing conferences in contract debarment cases under the Walsh-Healy Act<sup>38</sup> authorizes the consideration at the prehearing conference of "the propriety of mutual exchange among parties of prepared testimony or exhibits."<sup>39</sup> In practice, this has meant that a contractor has been

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32. 16 C.F.R. § 3.21(a)(6) (1970).

33. 17 C.F.R. § 201.8(d) (1970).

34. The Division of Trading and Markets is also willing to exchange witness lists except in cases where it is convinced that it must keep the identity of its witnesses secret in order to protect them.

35. 46 C.F.R. § 502.94 (a)(2) (1970).

36. 47 C.F.R. § 1.248 (1969).

37. Hearing examiners in the Department of Agriculture have also required parties in disciplinary and reparation proceedings to exchange exhibits at the prehearing conference although the applicable rules on prehearing conferences make no mention to this procedure. 7 C.F.R. §§ 47.14, 47.36 (1970); 9 C.F.R. §§ 202.15 & 202.47 (1970).

38. 41 U.S.C. §§ 35-45 (1964). The Act generally provides that the Secretary of Labor shall have the power to insure that private employers working on government contracts shall pay their employees the area wage rate for the type of work being done.

39. 41 C.F.R. § 50-203.7 (1970).



charged in general terms that he has underpaid his employees and then is furnished particulars at the prehearing conference. Normally this is done by supplying the contractor with the individual forms filled out by the Wages and Hours Inspector for each underpaid employee; these forms are then admitted into evidence at the hearing as part of the Department's case against the contractor.<sup>40</sup> The most extensive use of the prehearing conference as a discovery device occurs at the CAB. Rule 23 of the CAB's Rules of Practice states in part that the purpose of the prehearing conference is

"to define and simplify the issues and the scope of the proceeding, to secure statements of the positions of the parties with respect thereto . . . [and] to schedule the exchange of exhibits before the date set for hearing. . . ."<sup>41</sup>

In addition, the rule authorizes the examiner to compel a party by subpoena to produce documents requested by another party at the conference and to direct a party to prepare and submit further exhibits. The operation of this rule alone is sufficient to insure adequate discovery before the CAB.<sup>42</sup>

*Effect of Discovery Recommendation 1.* Recommendation 1 builds on the experience of those agencies which have recognized the effectiveness of the prehearing conference as a discovery device. The recommendation should have the dual effect of spurring other agencies to adopt comparable procedures and of strengthening those procedures at agencies which already use them.

Some agencies have experienced difficulty with prehearing procedure when one or more parties to the proceeding refuse to cooperate in the exchange of exhibits and information. Often respondents feel that discovery is a one-way street and that they need not disclose their case to the agency prior to the hearing. The solution to this problem is to upgrade the role of the presiding officer. Under Recommendation 1, he has the power, which he does not possess under the existing rules of many agencies, both to call a prehearing conference and to there direct that the parties exchange their evidentiary exhibits and witness lists prior to the hearing. The

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40. The Department's Rules of Practice, 29 C.F.R. § 6.7 (1970), for enforcement proceedings under the new Service Contract Act, 41 U.S.C. §§ 351-57 (Supp. V, 1970), do not mention any exchange of exhibits at the prehearing conference, but the examiners, who also hear Walsh-Healy Act cases, have followed the same practice in the growing number of wage and hours cases arising under the Service Contract Act.

41. 14 C.F.R. § 302.23 (1970).

42. See Maurer, *Use of Discovery Procedures Before the CAB*, 18 AD. L. REV. 157 (1966).

recommendation thus contemplates that the presiding officer will assume the role of "governor of the law suit" and not simply be an "umpire."<sup>43</sup>

While Judge Murrah coined these phrases with federal district judges in mind, they are equally applicable to presiding officers in administrative adjudications. The effective conduct of an agency hearing is dependent on the presiding officer's diligence and on his ability to control the proceeding.<sup>44</sup> The examiner should not be forced to leave the exchange of exhibits and witness lists for the parties to work out themselves but should be able to take affirmative action to make sure they do so. Sound judgment and considerable skill on his part will be necessary to insure the smooth and expeditious exchange of cases between the parties. In complex cases, for example, an examiner may need to hold a series of prehearing conferences where the parties first make very tentative exchanges and statements of the issues and subsequently add to their exchanges and finalize their cases. If a party is in doubt on whether he plans to use a particular exhibit at the hearing, the examiner should order him to exchange it with the other parties since all parties are free at the hearing stage not to rely on an exchanged exhibit. In the meantime, the other parties have received the benefit of discovery. Recommendation 1 leaves the scheduling of the exchange of evidentiary exhibits and witness lists to the discretion of the presiding officer. Detailed procedures have not been specified in the recommendation because it is important that the presiding officer retain flexibility in scheduling the exchange.<sup>45</sup> The one limitation in Recommendation 1 on the presiding officer's discretion to schedule the exchange is that the exchange should be

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43. Judge Alfred P. Murrah, *Seminar of Procedures Prior to Trial*, Ninth Circuit Judicial Conference, 20 F.R.D. 485, 491 (1957).

44. Nicholson, *Discovery is Not a Game*, 21 AD. L. REV. 441, 446 (1969). The FTC has repeatedly stressed that at the prehearing conference the examiner should not leave the identification of the issues to the parties but should take "affirmative action" himself to clarify and simplify the issues. See *Topps Chewing Gum, Inc.*, 63 F.T.C. 2196 (1963).

45. In the great majority of cases the exchange should not take place until after the initial prehearing conference because it is not realistic to expect the parties to disclose their cases at an earlier stage. Furthermore, in enforcement and disciplinary proceedings the agency should normally produce its exhibits and witness list first because it is not fair to expect the respondent to commit himself on his own case before he knows the agency's case against him. The presiding officer may nevertheless find it appropriate in a particular proceeding or class of proceedings where the issues are straightforward to require a simultaneous exchange or an exchange at the close of the first—and only—prehearing conference. The simultaneous exchange of evidentiary exhibits is customary in CAB route proceedings. See note 41, *supra*, and accompanying text.

completed "prior to the hearing." Deferral of discovery until the hearing itself generally disrupts and prolongs the hearing.<sup>46</sup>

Recommendation 1 specifically permits a party to amend at any time, by deletion or supplementation, his evidentiary exhibits and witness lists, providing he has good cause to do so. A party may uncover additional exhibits or witnesses prior to the hearing whose existence or relevance were understandably not known to him at the time of the exchange. Respondent's counsel, for example, may not realize the need for additional exhibits or witnesses until after the agency presents its case at the hearing. Agency counsel also cannot be expected to know fully what rebuttal evidence is necessary until he has heard the respondent's case at the hearing. For these reasons amendments to evidentiary exhibits and witness lists should be allowed for good cause at any time. Good cause is required because the parties are expected to prepare their cases as fully as possible at the prehearing stage and to commit themselves on the issues and on their factual contentions at that time. It is implicit in the concept of good cause that a party must amend his exhibits and witness lists as soon as he has reason to do so. If a party learns of the existence of a new witness or document prior to the hearing, he should amend his list at that time rather than await the commencement of the hearing. A party who has good cause must act promptly and not seek to surprise the other parties by introducing the new matter for the first time at the hearing.

The "evidentiary exhibits" which the parties must exchange at the prehearing stage under this recommendation include documents and other matters of which a party wants the presiding officer to take official notice. This approach conforms with section 7(e) of the APA<sup>47</sup> which grants a party the opportunity to contest a presiding officer's

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46. There may be particular types of proceedings where an agency determines that the respondent's disclosure of his witness lists and exhibits may properly be deferred until after the agency presents its affirmative case. This deferred disclosure should be reserved for exceptional cases, but it may in some instances serve to expedite matters by making it easier for the respondent to comply with the order to exchange his evidence since he has a more exact knowledge of which evidence he will rely on. Recommendation 1 does not preclude an agency from authorizing its presiding officers to adopt such a special procedure in proceedings where it is appropriate and where it accomplishes the basic discovery objectives of the recommendation. These objectives are satisfied where the agency affords the respondent full discovery prior to the hearing and where the agency's broad investigatory powers and the nature of the issues in the case combine to make it unnecessary for the agency to know the identity of the respondent's witnesses and exhibits before it presents its own affirmative case.

47. 5 U.S.C. § 556(e) (1964).

official notice of a material fact. For that opportunity to be a meaningful one, it must be offered to the party at the earliest possible stage of the proceeding.<sup>48</sup> A party should therefore know at the time of discovery whether his opponent's case depends on official notice so that at the hearing he will be able to challenge the use of that doctrine.

*Witness Lists.* The exchange of witness lists at the prehearing stage of the proceeding raises special problems. Such an exchange furthers the objectives of discovery by contributing to the fund of information on which each party builds his case. Direct benefits from the exchange include the avoidance of surprise witnesses at the hearing and unnecessary trial preparation to meet the testimony of witnesses who will not be called. There is a danger, however, that other parties will attempt to intimidate a prospective witness or to influence his testimony. This danger is particularly apparent in an enforcement proceeding in which the agency plans to call witnesses who are employees of the respondent or who are otherwise dependent upon him. Because of this danger, many agencies are wary of prehearing disclosure of witness lists.<sup>49</sup>

The dangers posed to prospective witnesses by the disclosure of witness lists should not be exaggerated. To date, the limited experience with this type of discovery in criminal and enforcement proceedings should encourage agencies to provide for the prehearing exchange of witness lists. A surprising number of states — approximately 22 in number — already require by statute or rule that the accused in a criminal prosecution be notified prior to trial of the witnesses to be called against him.<sup>50</sup> The experience in these states has been that the fear that the defendant would tamper with the witnesses if he knew their names prior to trial was justified in only a minority of cases and should be dealt with by protective orders in particular cases, rather than serve as a barrier to discovery in all cases.<sup>51</sup> Similarly, the Department of Labor, which enforces the Fair Labor Standards Act<sup>52</sup>

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48. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE ¶ 15.10 (1958).

49. Among agencies with adjudicatory responsibilities, only the FTC routinely discloses its witness list prior to the hearing. The General Counsel's Office of the NLRB is willing at the prehearing stage of an unfair labor practice case to make available to the respondent any documents it plans to introduce into evidence but uniformly refuses to disclose the names of its witnesses. While the SEC's Division of Trading and Markets often does disclose its witness list prior to the hearing in disciplinary proceedings, the SEC has ruled that the respondent is not entitled to the list as a matter of right. *Keystone State Investment Securities, Inc., Securities Exchange Act Release No. 8662*, at 12 (Aug. 6, 1969). At least one court has agreed. *Armstrong, Jones, & Co. v. SEC*, 421 F.2d 359 (6th Cir. 1970).

50. ABA DISCOVERY STANDARDS 56-57.

51. *Id.* at 2-3.

52. 29 U.S.C. §§ 201-19 (1964).

through civil actions in the federal district courts, complies with local court rules on the exchange of witness lists. The Department's position is that it will not disclose the names of its witnesses as part of the initial discovery process but will disclose their names at a prehearing conference or at some other date reasonably close to the trial.<sup>53</sup>

The disclosure of the witnesses' names may in some instances actually protect them in the same way that the disclosure of the name of the charging party in an NLRB unfair labor practice case protects that party. Since the National Labor Relations Act makes it an unfair labor practice for an employer or a union to discharge or otherwise discriminate against an employee because he has filed charges under the Act,<sup>54</sup> the respondent employer or union knows that his treatment of the charging party will be closely scrutinized to insure that there is no discrimination against him for filing the charge. The respondent's awareness of this scrutiny deters him from seeking reprisals against the charging party. The disclosure of the charging party's name thus works on balance to protect him from reprisals. Likewise, the Board should be able to protect its witness and prospective witnesses. The statute also makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he has "given testimony" in an NLRB proceeding.<sup>55</sup> While there has not yet been any occasion to test this point, the designation of an employee on a witness list should constitute "giving testimony" by the employee. Courts have already ruled that giving an affidavit in the course of a Board proceeding is equivalent to giving testimony.<sup>56</sup> In light of the policies involved,<sup>57</sup> it should not be difficult to extend this definition of "giving testimony" to designation on a witness list.

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53. *Wirtz v. Continental Finance & Loan Co.*, 326 F.2d 561 (5th Cir. 1964); *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 937 (5th Cir. 1964). It should be noted that the Department of Labor in these cases deals with employee witnesses subject to the same pressures as employee witnesses in NLRB proceedings.

54. 29 U.S.C. § 158(a)(4) (1964). There are, of course, many subtle forms of discrimination which are difficult to prove and remedy. However, the Board's long years of experience in this area should be sufficient to overcome this problem. In addition, the congressional intent in forbidding discrimination for going to the Board was to prevent the Board's channels of information from being dried up by the intimidation of complainants and witnesses. To implement this intent the Board has broad powers to prevent all forms of discrimination that affect its investigatory processes. *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483 (D.C. Cir. 1951).

55. 29 U.S.C. § 158(a)(4) (1964).

56. *NLRB v. Southland Paint Co.*, 394 F.2d 717, 721 (5th Cir. 1968).

57. See note 54 *supra*.

Witnesses in proceedings before most other agencies are not nearly as vulnerable to intimidation as employee witnesses in unfair labor practice and wage and hours cases. Therefore, any danger to the witness because of disclosure of the parties' witness lists is likely to be an unusual situation. When this danger does arise, protective orders are available under Recommendation 8(b) to protect the witness. That recommendation authorizes the presiding officer, upon a showing of good cause, "to restrict or defer disclosure by a party of the name of a witness . . . and to prescribe other appropriate measures to protect a witness." The party seeking this exemption from disclosure must produce substantial evidence, not just unverifiable fears, that disclosure would endanger the witness.<sup>58</sup> Thus, agencies can develop, under Recommendation 8, procedures to handle those few cases where there is good cause for protecting a witness by keeping his identity secret.

Even in cases where the agency staff does not obtain a protective order, the identity of sensitive agency witnesses need not be disclosed prematurely. Recommendation 1 presupposes that the presiding officer will only require disclosure at some reasonable time prior to the hearing. Thus, the agency staff can retain considerable flexibility on the timing of disclosure and can protect a prospective witness from needless exposure by delaying disclosure until after settlement negotiations have failed and until it is clear that the witness' testimony will be necessary at the hearing. Such a procedure may be appropriate in some types of proceedings to insure that a person in a vulnerable position will not be placed on a witness list until there is some certainty that he will be called to testify at the hearing.

The provision in Recommendation 1 on the exchange of witness lists goes further than the general discovery practice under the Federal Rules of Civil Procedure. Generally, a party in a civil case need not disclose the names of his trial witnesses.<sup>59</sup> Furthermore, Federal Rule

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58. A similar procedure has developed in California where the prosecutor in criminal cases must normally disclose the names of his witnesses prior to trial. In *People v. Lopez*, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), the Supreme Court of California held that the prosecutor properly refused to disclose the names prior to trial of two key witnesses for the State when two police officers had testified at an open hearing on the violent disposition of the defendant and the genuine fears of the witnesses. The court affirmed the trial judge's order deferring the disclosure of the witnesses' names until twenty-four hours prior to the time they were to take the stand.

59. See, e.g., *Wirtz v. Continental Finance and Loan Co.*, 326 F.2d 561 (5th Cir. 1964); *United States v. Proctor & Gamble Co.*, 25 F.R.D. 252 (D.N.J. 1960). See also 4 J. MOORE, FEDERAL PRACTICE ¶ 26.57(4) (2d ed. 1970).

16, dealing with pre-trial procedure, does not expressly authorize an exchange of witness lists at a pre-trial conference. That rule simply enumerates five non-discovery functions of the pre-trial conference and then adds that the trial judge and the parties should consider "such other matters as may aid in the disposition of the action." However, under this last provision many federal district courts require parties to disclose the names of their witnesses at pre-trial.<sup>60</sup> This practice is consistent with modern notions of discovery, for "[t]he sporting theory of litigation thrives on surprise—including surprise witnesses. Elimination of this sort of tactic is a legitimate purpose of the discovery rules, especially when considered in connection with Rule 16 on pre-trial proceedings."<sup>61</sup> This comment is just as applicable to administrative adjudications as it is to civil trials. The thrust of Recommendation 1 is to build the prehearing conference into a significant discovery device for the full exchange of information and thus to reduce the need for more expensive and dilatory means of discovery.

#### DISCOVERY RECOMMENDATION 2—DEPOSITIONS

Depositions, particularly those taken on oral examination, have proved to be the most useful and most widely used of the discovery tools in the Federal Rules of Civil Procedure. They are also the most expensive and slowest. Depositions are nevertheless vital in court cases whose outcome may turn on a witness' remembrance or perception of past events. So far they have been little used in agency adjudication. While the great majority of agencies do have rules providing for the taking of depositions, these rules generally do not authorize discovery depositions but provide only for depositions to preserve the testimony of a witness who is near death, about to leave the country, or for some other reason unlikely to testify at the hearing. The experience of those agencies which have provided for discovery depositions has been inconclusive.<sup>62</sup>

Recommendation 2 provides for the limited use of discovery depositions in agency adjudications. The recommendation allows

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60. See, e.g., *United States v. 216 Bottles*, 36 F.R.D. 695 (E.D.N.Y. 1965); *United States v. Shubert*, 11 F.R.D. 528 (S.D.N.Y. 1951); *Kling v. Southern Bell Tel. & Tel. Co.*, 9 F.R.D. 604 (S.D. Fla. 1949).

61. 4 J. MOORE, *supra* note 59, ¶ 26.57(4), at 26-212.

62. A growing number of agencies permit depositions for discovery purposes. See e.g., 14 C.F.R. § 13.53 (1969) (FAA); 16 C.F.R. § 3.33 (1970) (FTC); 46 C.F.R. §§ 502.201-205 (1970) (FMC); 47 C.F.R. §§ 1.315-316 (1970) (FCC).

depositions to be taken by oral examination or written questions for purposes of discovering relevant, unprivileged information; if the situation requires it, a recalcitrant deponent may be compelled to testify through the issuance by the agency of a subpoena ad testificandum. By placing six major conditions on the taking of depositions, this recommendation takes into account the fact that depositions are a new tool in administrative adjudications and recognizes that their overuse may result in serious delays. These conditions reflect the basic assumption that in many adjudicatory proceedings the parties can obtain adequate discovery through the prehearing conference and through orders for the production of documents without any need for taking depositions.<sup>63</sup> Taking depositions in these instances will only make the administrative process slower and more expensive than it already is.

While Recommendation 2 thus places significant limitations on the taking of depositions, it recognizes that fairness requires that parties to adjudicatory proceedings be able to take depositions. Most agencies do encounter cases where there are factual conflicts which must be resolved by testimony of witnesses. Surprise should play no part in these proceedings, and the parties should be able to find out before the hearing what testimony to expect from the principal witnesses against them. Depositions allow a party to do this and also are necessary to permit the parties to the proceeding—particularly private parties—to obtain full knowledge of the relevant facts. Often counsel for a private party will encounter a recalcitrant individual who refuses to cooperate and disclose the evidence and leads of which he has knowledge. In this situation, agency counsel normally has the power to issue an investigatory subpoena and compel cooperation.<sup>64</sup> Recommendation 2 is largely premised on the fact that fairness requires that respondent's counsel also have the power to compel the disclosure of all relevant, unprivileged information by obtaining a subpoena to take the deposition of the witness.<sup>65</sup>

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63. The CAB has found that depositions for purposes of discovery are rarely necessary where other discovery techniques, such as the prehearing conference and ready access to agency files, are widely used. CAB proceedings, however, primarily involve applications for new or amended route operating authority where the facts are rarely in dispute and much of the testimony of witnesses is required to be reduced to written form. Maurer, *supra* note 42.

64. See, e.g., 14 C.F.R. § 13.3 (1969) (FAA); 16 C.F.R. § 2.7 (1970) (FTC).

65. This problem is particularly severe in unfair labor practice cases before the NLRB where respondents encounter uncooperative witnesses when they interview their own employees or union members. In these cases there is the complicating factor that employees may well feel



*Conditions on the Taking of Depositions.* Recommendation 2 places six conditions on the taking of depositions in agency adjudications. The first condition provides that the taking of depositions should normally be deferred until there has been at least one prehearing conference.<sup>66</sup> Discovery by deposition in administrative adjudications should come only after the prehearing conference, since the conference should serve as the preeminent discovery device. If the conference functions smoothly, there may be little need for further discovery. At the prehearing conference there should be a narrowing of the issues and a determination of what discovery is really necessary. Once the issues have been narrowed, much of the information the parties anticipated obtaining through discovery may no longer be relevant. Furthermore, once the respondent learns at the prehearing conference what evidence the agency plans to introduce against him, he may decide that it is no longer necessary to have as much formal discovery as he had anticipated.<sup>67</sup> Normally the presiding officer should deny an application to take a deposition if he has not yet held a prehearing

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pressured by the inquiries of their employer or union. Under present law, it is proper for a respondent employer to interview his employees about matters alleged in an unfair labor practice complaint as long as he does not inquire about the contents of any statements they have made to the NLRB or ask them for copies thereof. *Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 133-34 (5th Cir. 1964). However, employees often refuse to cooperate in these interviews. Counsel may seek relief by demanding that the Board allow him to take the employees' depositions, but the General Counsel's Office takes the position that the applicable statute, 29 U.S.C. §§ 151-165 (1964), and regulations, 29 C.F.R. § 102.30 (1970), do not provide for depositions or other prehearing discovery in such cases. *See, e.g., NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748 (9th Cir. 1951). *Contra, NLRB v. Safeway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967). Some courts, however, have interpreted section 10(b) of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 160(b) (1964), which requires that unfair labor practice proceedings shall "so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States," to authorize prehearing discovery and have indicated that the Board should provide discovery in appropriate cases. *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244 (4th Cir. 1965); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961).

The General Counsel's Office does have a genuine concern that the use of prehearing depositions will lead to delay. However, this interest must be balanced against the fact that taking depositions insures that all parties to the proceeding have full knowledge of the relevant facts. In addition the employee will have committed himself by testifying under oath and will be protected under 29 U.S.C. § 158(a)(4) (1964) from discharge or other discrimination because of his testimony. *See notes 54-57 supra* and accompanying text.

66. In civil litigation in the federal courts the pre-trial conference normally occurs only after the parties have completed their discovery through depositions and interrogatories and when the trial date is rapidly approaching. 3 MOORE, *supra* note 59, at ¶ 16.08.

67. Lewis, *Discovery Techniques and the Protection of Confidential Data in FTC Proceedings*, 21 AD. L. REV. 457, 460-64 (1969).

conference with the parties. However, cases may arise which are too straight-forward to justify calling a prehearing conference, and where a party may have good cause for taking one or two depositions. The presiding officer should have authority in cases such as these to order the taking of the depositions without first holding a prehearing conference.<sup>68</sup>

Federal judges have adopted a similar procedure to handle protracted cases. That procedure recognizes that the judge in the "big" case must maintain firm control over the discovery proceedings and must hold pre-trial conferences at an early stage to define the issues and place reasonable bounds on discovery.<sup>69</sup> Discovery must follow a similar course in routine administrative adjudications if the administrative process is to survive as a quick, inexpensive way to adjudicate controversies. Litigants in the federal courts often can afford to spend several years on discovery because congested court calendars do not permit a speedy trial; agencies cannot afford such delays if they are to enforce the law and uphold the public interest. It is important, therefore, that the presiding officer restrict the number and timing of depositions by holding a prehearing conference as early as possible in the proceeding.

The second condition on the taking of depositions requires that the party seeking a deposition apply to the presiding officer for an order to do so. Under the Federal Rules of Civil Procedure a party may take the deposition of a witness upon notice to the other parties and without any need for a court order or showing of good cause.<sup>70</sup> Recommendation 2 does not adopt this practice but instead provides

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68. The FCC's limited experience with its new discovery rules demonstrates the soundness of holding a prehearing conference before the parties are allowed to take depositions or pursue other means of discovery. The FCC discovery rules follow the normal federal practice and provide that the taking of depositions and the serving of written interrogatories "shall be completed prior to the initial prehearing conference" unless the presiding officer orders otherwise. 47 C.F.R. § 1.311(c) (1970). FCC hearing examiners have on the whole reacted unfavorably to that agency's new discovery rules because the rules have placed discovery too early in the process and have upset what had been a smoothly functioning prehearing procedure in which the examiners had required the parties to exchange their evidentiary exhibits and generally to disclose their cases.

69. JUDICIAL CONFERENCE OF THE UNITED STATES, HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351, 385-98 (1960). Similar procedures are necessary for the protracted administrative case. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, COMMITTEE ON INFORMATION AND EDUCATION, RECOMMENDED PROCEDURES FOR PROTRACTED HEARINGS BEFORE ADMINISTRATIVE AGENCIES 10-21 (Second Draft 1963).

70. FED. R. CIV. P. 30(a).

that the presiding officer must issue an order for the taking of a deposition; this gives him firm control over the discovery stage of the proceeding. The next three conditions require that the other parties to the proceeding receive notice of the application to take the deposition and have, along with the deponent, an opportunity to contest the issuance of an order. The presiding officer should not issue the order if he finds that the taking of the deposition would result in undue delay; if there will be no undue delay, the presiding officer should issue the order unless he finds that there is not good cause for taking the deposition.

Since an order will issue unless there is a finding that "good cause" does not exist, this provision shifts the burden of persuasion on this issue from the applicant to the party or person opposing the deposition.<sup>71</sup> The applicant therefore does not need to disclose in his application why he wants to depose a particular witness. "Good cause" cannot be defined in the abstract but would normally involve some need on the part of the applicant to obtain information from the deponent. The presiding officer, however, should not deny reasonable requests for depositions simply because he is unsure what information would be uncovered. On the other hand, "good cause" may not exist where the applicant seeks to depose a prospective witness and where the opposing party has complied with Recommendation 3 by furnishing a narrative summary of the witness' expected testimony and, in the case of an agency witness, any prior statements of the witness relevant to the expected testimony. Unless the applicant demonstrates that the witness' credibility or perception of disputed events is a significant part of his expected testimony, the applicant does not have good cause to depose him since the deposition would not furnish the applicant with any additional relevant information.

The sixth and final condition in Recommendation 2 limits the deposing of agency employees. Agencies generally resist the application of this form of discovery against themselves.<sup>72</sup> Basic fairness, however, requires that a private party to an agency adjudication be able to subpoena an agency employee to testify at the hearing regarding at least his first-hand knowledge of the case.<sup>73</sup>

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71. Nothing in Recommendation 2 prohibits the presiding officer from finding on his own initiative that good cause does not exist even though no one opposes the taking of the deposition. Such occurrences, however, should prove rare.

72. Only the FMC allows a private party routinely to take a deposition of an agency employee. 46 C.F.R. § 502.209 (1970).

73. See, e.g., *NLRB v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961).

Otherwise the private party will be foreclosed from fully presenting his side of the case, and the presiding officer will decide the case on less than all the available facts. If the purposes behind discovery are to be fully carried out, the private party should be able to take the employee's deposition to learn, prior to the hearing, the facts of which he has knowledge and about which he would testify. There is a danger, however, that private parties will abuse this right. Employees of already understaffed agencies will have to spend a day or so being deposed when their time could be much better spent in the public service. Furthermore, interrogatories directed to the agency may supply the private party with all the information he needs.<sup>74</sup> Recommendation 2(6) provides a fair and workable compromise on this issue which relieves the agency staff of the burden of depositions in routine cases while allowing a private party to take the deposition of an agency employee in the unusual case where there is a real need to do so. The presiding officer, who is more familiar with the case than the agency head or members, must initially decide whether the party applying to take the desposition is seeking "significant, unprivileged information not discoverable by alternative means." Any order of the presiding officer granting an application to depose an agency employee is subject to an interlocutory appeal to the agency.<sup>75</sup>

Recommendation 2(6) does place those agencies with adjudicatory powers at an advantage over those agencies which must enforce the law through civil actions in the federal district courts. The latter agencies are subject to the deposition provisions of the Federal Rules of Civil Procedure, which make no exception for agency personnel.<sup>76</sup> The taking of these depositions does not seem to hinder the work of the agencies involved or hurt their performance. While depositions of agency personnel are thus relatively common in the federal courts, some courts seem to feel that written interrogatories are the preferred method for obtaining discovery from an agency.<sup>77</sup>

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74. These points evidently influenced the FCC to prohibit the deposing of FCC personnel "except on special order of the Commission." 47 C.F.R. § 1.311(b)(2) (1970).

75. Depositions of agency members are not covered by Recommendation 2. Since agency members function primarily as judges, only in rare instances should they be subpoenaed to testify at the prehearing stage or at the hearing itself. *San Francisco Mining Exch.*, 41 S.E.C. 860 (1964), *aff'd*, 378 F.2d 162 (9th Cir. 1967). *See also* note 112 *infra* and accompanying text.

76. FED. R. CIV. P. 26-32. FDA laboratory personnel and consultants are frequently deposed in seizure and injunction actions brought against mislabeled or adulterated food and drugs. To a lesser extent, Wage and Hours Inspectors in the Department of Labor have their depositions taken by employers defending cases brought under the Fair Labor Standards Act.

77. *Southern Bell Tel. & Tel. Co. v. EEOC*, 24 AD. L.2d 1099 (E.D. La. 1969).

## DISCOVERY RECOMMENDATION 3: WITNESSES

Recommendation 3(a) requires the agency to produce prior to the hearing any prior "statements"—as defined in the recommendation—of agency witnesses which are in the possession of the agency or obtainable by it from any other federal agency and which relate to the subject matter of the expected testimony. The recommendation only applies to adjudications where the agency staff participates as a party. Recommendation 3(b), on the other hand, requires all parties to an adjudicatory proceeding to produce prior to the hearing the names of the witnesses they expect to call and narrative summaries of their expected testimony. Both recommendations are flexible on matters of timing and only require the production of the statements and summaries at a prehearing conference or at some other "reasonable time" prior to the hearing. The recommendation assumes that the parties will normally resolve among themselves scheduling problems which arise. The presiding officer, of course, retains ultimate control over the discovery process and should resolve any disputes between the parties. In cases where the presiding officer holds a prehearing conference under Recommendation 1,<sup>78</sup> he should arrange at that time for the production of the statements and summaries. This production could be contemporaneous with or subsequent to the exchange of witness lists contemplated by Recommendation 1. The dual purposes behind Recommendations 3(a) and 3(b) are to insure full discovery—particularly to private parties to the proceedings—and to obviate the need for extensive, time-consuming depositions of prospective witnesses. To understand the effect of these recommendations it is first necessary to consider the development of the *Jencks* rule and existing agency practices with respect to witness testimony.

In *Jencks v. United States*<sup>79</sup> the Supreme Court formulated a general rule of evidence that a defendant in a federal criminal case is entitled to all prior statements by prosecution witnesses in the possession of the prosecution which concern the same events and activities as the witnesses' testimony. Following the decisions in

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78. Recommendations 3(a) and 3(b) require production by the parties whether or not there is a prehearing conference. The successful operation of these recommendations, however, may often depend on the presiding officer holding a prehearing conference and asserting his control over the discovery process.

79. 353 U.S. 657 (1957).

*Communist Party v. Subversive Activities Control Board*<sup>80</sup> and *NLRB v. Adhesive Products Corp.*,<sup>81</sup> the application of the *Jencks* rule to administrative adjudications and to agency enforcement actions brought in the courts has been uniformly accepted. The basis for the rule is that the government, in enforcing the law, must "play fair" with the defendant or respondent. Agency rules and decisions generally reflect or copy the *Jencks* Act,<sup>82</sup> in which Congress codified and restricted the *Jencks* decision. Under that statute a defendant in a federal criminal prosecution is entitled to any prior "statement" by a government witness which relates to the subject matter of the testimony after that witness has testified on direct examination. Pre-trial production of such statements is not authorized.<sup>83</sup> "Statement" is narrowly defined to include only a signed or adopted written statement or a recording or transcription which is substantially a verbatim recital of an oral statement.<sup>84</sup> Both the *Jencks* decision and *Jencks* Act make clear that the reason for requiring production of prior statements is to permit defense counsel to impeach or otherwise discredit the government's witnesses at trial.

In administering the *Jencks* rule agencies have generally followed the definition of "statement" in the *Jencks* Act and have delayed the production of prior statements until after the witness has completed his direct testimony.<sup>85</sup> Agencies have resisted the prehearing disclosure of a witness' prior statements on the grounds that they deserve confidential treatment as part of the agency's investigatory files and work product. Agencies have also invoked the informer's privilege to prevent the prehearing disclosure of the statements of witnesses.<sup>86</sup> Of

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80. 254 F.2d 314 (D.C. Cir. 1958).

81. 258 F.2d 403 (2d Cir. 1958).

82. 18 U.S.C. § 3500 (1964). The *Jencks* Act by its terms applies only to federal criminal prosecutions and not to agency adjudications.

83. *Palermo v. United States*, 360 U.S. 343, 349 (1959).

84. The term "statement" . . . means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a . . . recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. 18 U.S.C. § 3500(e) (1964).

85. 29 C.F.R. § 102.118(b) (1970) (NLRB).

86. Both the Wage and Hours Administration in the Department of Labor and the NLRB have strongly resisted the pre-trial disclosure of informer's statements, or even of the fact that a person supplied information. Despite broad provisions for discovery in the Federal Rules of Civil Procedure court decisions in enforcement actions under the Fair Labor Standards Act have

course, the informer's statements themselves are producible under the *Jencks* rule once the informer takes the witness stand. At that point the respondent or defendant learns for the first time whether the witness served as an informer and gave a prior statement.

The FTC goes one step further by allowing its investigators to take down statements from informers who are prospective agency witnesses in a non-verbatim fashion with the result that they are not normally producible, even at the hearing itself, under the FTC's version of the *Jencks* rule.<sup>87</sup> The FTC maintains that these interview reports are generally not the "statement" of the witness but the subjective summary of the investigator and therefore should not be available to the respondent even for impeachment purposes.<sup>88</sup> This practice has been sharply criticized<sup>89</sup> since it deprives respondents of information which might prove useful on cross-examination. Exculpatory material may also remain buried in the files when the interview reports are not produced at the hearing after the witness testifies.<sup>90</sup> The practice almost uniformly followed by other agencies is for the interviewer to arrange for a verbatim transcription of the informer's oral statement or to have the informer sign or adopt a written statement. Such statements are of course producible under the *Jencks* rule when the informer testifies at the hearing and can prove quite valuable to respondent in cross-examination of the informer. The FTC itself follows this practice in cases where the staff determines

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generally upheld the Department of Labor's claim of the informer's privilege in refusing to disclose the identity of its informants and to produce their statements. *Wirtz v. B. A. C. Steel Products, Inc.*, 312 F.2d 14 (4th Cir. 1962); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959). *Contra*, *Wirtz v. Rosenthal*, 388 F.2d 290 (9th Cir. 1967). The Department's claim of privilege has even been upheld when it refused to disclose prior to trial whether a prospective witness was an informer who had given a prior statement. *Wirtz v. Robinson & Stephens, Inc.*, 368 F.2d 114 (5th Cir. 1966). The FTC has achieved the same result by claiming that informers' statements constitute part of the agency's work product and are not discoverable under the agency's rules for prehearing discovery. *Allied Chemical Corp.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,654, at 21,020 (FTC 1969).

87. *L.G. Balfour, Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,792 (FTC 1966); *Inter-State Builders, Inc.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,792 (FTC 1966).

88. *Inter-State Builders, Inc.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,792 (FTC 1966); *Star Office Supply Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,520, at 20,874 (FTC 1968) (Commissioner Elman dissented in both cases).

89. E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401, 428-33 (1968).

90. See note 9 *supra*.

that the strong testimony of witnesses will be needed to prove the agency's case.<sup>91</sup>

*Discovery Recommendation 3(a)*. Recommendation 3(a) transforms the *Jencks* rule from a rule of evidence into a rule of discovery. Since the prohibition of the Jencks Act on pre-trial discovery of prior statements and its restrictive definition of "statement" apply only to federal criminal prosecutions and not to agency adjudications,<sup>92</sup> administrative agencies are free to adopt more liberal policies on disclosure of an agency witness' prior statements. Recommendation 3(a) therefore broadens the definition of "statement" and proposes that the agency produce the prior statements of its witnesses at the prehearing stage, rather than at the completion of each witness' direct testimony.

Recommendation 3(a)'s definition of "statement" resembles the definition of "statement" in the Jencks Act<sup>93</sup> but is less complex and technical. The recommendation's definition includes any "written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government." Basically, the recommendation should encourage agencies to adopt a liberal policy on the production of statements and to produce any statements which accurately reflect the witness' own words. This definition omits any requirement, such as that found in the Jencks Act, that the recording of the oral statement must be a "contemporaneous" recording. The basis for this omission is that if the agency has a statement containing the actual words of the witness it should be willing to produce that statement and to hold the witness to his words. The fact that the statement was not recorded contemporaneously or that the original, contemporaneous recording has been destroyed or disappeared should not prevent the production of a subsequent recording. The agency normally has the means to insure that any subsequent recording or transcription of the recollections or report of a government interviewer is accurate and complete.<sup>94</sup>

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91. The SEC on the other hand follows this practice in all cases and applies a much more liberal *Jencks* rule than does the FTC. The SEC produces, often before a witness' direct testimony or even before the hearing itself, anything in its files which might be considered a prior statement.

92. See note 82 *supra*.

93. See note 84 *supra*.

94. The broadened definition of "statement," however, is not intended to cover efforts by the interviewer months or years after the interview to reconstruct from memory the contents of a



Both the Jencks Act and Recommendation 3(a) define "statement" in a way that limits the government's duty to produce recordings and transcriptions of oral statements to those recordings and transcriptions which are "substantially verbatim" recitals. The agency need not produce an interviewer's summary of or excerpts from the oral statement of a witness.<sup>95</sup> The American Bar Association's Advisory Committee on Pretrial Practices has rejected this limitation for criminal trials.<sup>96</sup> This view carries considerable force; a defendant should be permitted to know in advance the substance of the testimony against him. However, furnishing defense counsel with the work papers of the prosecutor, as the Committee recommends, is an awkward way to accomplish this goal. Not only does it tempt the prosecutor to destroy such papers or not to write anything down, it also constitutes an intrusion into the internal operation of the prosecutor's office. Recommendation 3(b) adopts a different approach to achieve in administrative proceedings the same goal of informing the charged party of the substance of the testimony against him without requiring production of agency work papers. If the agency staff does not have a "statement" of a witness covered by the definition of "statement" in Recommendation 3(a), it must still comply with Recommendation 3(b) by furnishing the other parties to the proceeding with a narrative summary of the witness' expected testimony. The staff will be identified as the author of the narrative summary which will not constitute a statement of the witness' for impeachment purposes. The respondent will have discovered the substance of the testimony against him without having unduly pried into the agency's investigatory files.

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witness' statement. The resulting product is unlikely to be "substantially verbatim" and may not fairly be characterized as a "recording" of the original statement.

95. See *Palermo v. United States*, 360 U.S. 343, 352-53 (1959).

96. ABA DISCOVERY STANDARDS 61-63. Standard 2.1(a)(i) proposed by the Committee simply requires the pretrial production of the "relevant written or recorded statements" of the government's witnesses. The Commentary accompanying this provision states that the "Advisory Committee intends that the term ["statement"] be given a broad meaning so as to include generally any utterances of the statement-giver which are recorded by any means in whole or in part, and regardless of to whom they were made . . ." *Id.* at 61-62. This Standard thus requires the production of all interview notes, even if the notes are only jottings to aid the investigator in later compiling his formal report. Production is not required, however, of those portions of an interview report which contain the investigator's impressions and summary. In the opinion of the Advisory Committee, "statements" of government witnesses that do not contain substantially verbatim the words of the statement-giver should still prove useful to defense counsel in preparation for plea or trial even though such statements should play a restricted role in the impeachment of the witness. *Id.* at 63.

Recommendation 3(a) also conforms with the Jencks Act in requiring the production of all prior written statements signed or adopted by a witness, regardless of to whom the statements were made, as well as of the recordings of all prior oral statements made by the witness to an agent of the federal government. The statements need only be relevant to the expected testimony and "in the possession of the agency or obtainable by it from any other Federal agency." Thus, the agency cannot refuse production of prior statements simply because the statements were given to another federal agency and repose in its files.<sup>97</sup> Agencies must seek to obtain such statements to insure that their own proceedings are fair. Federal agencies should cooperate and share the statements in their files with other agencies when the need arises. The Jencks Act itself demands no less; it requires the United States Attorney in a criminal prosecution to produce all relevant prior statements "in the possession of the United States. . . ."<sup>98</sup>

Prehearing production of the prior statements of agency witnesses should have a beneficial effect in speeding up the adjudicatory process. The respondent or other private party learns what the witnesses against him have to say and can determine prior to the hearing if further discovery is necessary to refute the testimony of such witnesses. The ABA had the same goal in mind in formulating a similar recommendation for criminal trials. The ABA's suggested Standard 2.1(a)(i)<sup>99</sup> provides that the prosecutor must produce, prior to trial, the relevant written and recorded statements of the witnesses he intends to call. The ABA Committee acknowledged that pre-trial disclosure of such statements is not the norm in the overwhelming majority of jurisdictions, but based its recommendation on four "fundamental principles":

- (1) fairness requires that the statements be disclosed during trial in any event;
- (2) if the disclosures are made prior to trial, the delays and attendant inconveniences occasioned by disclosure during trial will be avoided; (3) for adequate preparation and to minimize surprise, disclosures should be made prior to trial; and (4) any valid reason for denying or delaying a given disclosure can be taken account of by the trial judge [in formulating a protective order for a particular case].<sup>100</sup>

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97. Agency rules may not limit the availability of prior statements to those which are in the possession of the particular federal agency conducting the hearing. *Harvey Aluminum v. NLRB*, 335 F.2d 749, 754 (9th Cir. 1964).

98. 18 U.S.C. § 3500(b) (1964).

99. ABA DISCOVERY STANDARDS 13.

100. *Id.* at 57-58. The inconveniences associated with delaying the production of *Jencks* statements until the completion of a witness' direct testimony have already prompted many

These fundamental principles are equally applicable to administrative adjudications. The prehearing production of these statements should furnish the respondent or other private party with considerable discovery and significantly reduce his need to take depositions and pursue other formal means of discovery. This beneficial effect on the discovery process was of great importance in formulating both Recommendations 3(a) and 3(b).

Agencies should generously comply with Recommendation 3(a) and should not adopt investigatory practices which circumvent it. Investigators should be instructed to take the statement of a witness in such a way that the statement is producible under this recommendation. Personal observations and comments of the investigator should be reported separately and not included in the witness' statement. This is a sound way to take a statement; it separates the witness' words, which are producible, and the interviewer's reactions, which are not.<sup>101</sup> Agencies should also generously favor discovery in determining whether a particular statement is "substantially verbatim." The standard intended to be followed here is that applied by the federal courts under the Jencks Act and not some narrower standard formulated by an agency. For a statement to be producible it need not be precisely verbatim or contain the exact words and punctuation of the witness.<sup>102</sup> Indeed, under the judicial practice the defendant generally obtains any statements that record with substantial accuracy and completeness what the witness said.<sup>103</sup>

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federal trial judges, without clear authority to do so, to require the prosecution to produce the statements at an earlier stage. *Id.* at 58. See generally *United States v. Owens-Corning Fiberglass Corp.*, 271 F. Supp. 561, 570-71 (N.D. Cal. 1967); *Recommended Procedures in Criminal Pretrials*, 37 F.R.D. 45, 102 (1965); Kaufman, *The Apalachian Trial: Further Observations on Pre-Trial in Criminal Cases*, 44 J. AM. JUD. SOC. 53, 55 (1960).

101. The contrary practice of FTC investigators, notes 87-91 *supra*, who generally combine in their reports both the witness' statements and their own impressions, has come close to making the *Jencks* rule a "dead letter" at the FTC. *Interstate Builders, Inc.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,812 (FTC 1966) (Commissioner Elman dissenting).

102. *United States v. McKeever*, 271 F.2d 669, 675 (2d Cir. 1959).

103. Judicial standards should also govern situations where the investigator himself or some other agency employee becomes a witness for the agency in the proceeding. Reports that contain his reactions to—and recommendations on—the case and other internal working documents prepared by him are not "statements" under the *Jencks* Act. However, if the agency employee testifies concerning his knowledge of the facts or concerning an interview with a witness, his report on these factual matters are written "statements" that must be produced. *Karp v. United States*, 277 F.2d 843 (8th Cir. 1960).

Recommendation 3(a) does not upset the legitimate desire of agencies to protect the confidentiality of their informers. The *Jencks* rule already compels the agency to disclose at the time a witness testifies whether or not he was an informer who gave a prior statement. No one presently disputes this as a requirement of fair play. If the agency wants to keep its informer secret, it cannot call him as a witness. All that the recommendation requires is that the agency disclose at an earlier point that a witness it plans to call was an informer who gave a prior statement. The agency retains considerable flexibility in timing the disclosure, which may take place at a prehearing conference or at some other reasonable time prior to the hearing and may be either contemporaneous with or subsequent to the exchange of witness lists required by Recommendations 1 and 3(b). The present recommendation also should not handicap agencies in obtaining statements from informers because an agency can still promise its informers adequate confidentiality.<sup>104</sup>

The prehearing disclosure of the prior statements of agency witnesses should result in greater fairness in agency adjudication without any undue impingement on the confidential nature of investigatory files and "work product." While such a procedure may require the agency to disclose some of its work product, the *Jencks* rule already requires that, and to this extent is at odds with the protection afforded work product by *Hickman v. Taylor*.<sup>105</sup> When a government agency enforces the law, the demands of fair play may sometimes require that the agency not retain its work product but

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104. The NLRB provides a good case in point. Presently the NLRB promises informers that their identities and statements will be kept confidential until they are called to testify. Under this recommendation, NLRB investigators can still promise informers that their identities and statements will be kept confidential until a formal proceeding is instituted and they are designated as witnesses. It is hard to see how disclosing at the prehearing stage the fact that a witness was an informer and gave a statement will expose that witness to any greater reprisals than will disclosure at the hearing itself, as required by the present *Jencks* rule. See *NLRB v. Schill Steel Prods., Inc.*, 408 F.2d 803, 807 (5th Cir. 1969) (denying petition for rehearing). *Schill* was a contempt proceeding where the Fifth Circuit appointed a special master with authority to order that the agency permit the respondent to discover all statements made to the NLRB or its agents by witnesses whom the agency planned to call at the contempt hearing. The decision approved this form of discovery and distinguished it from the discovery denied in *NLRB v. Clement Bros.*, 407 F.2d 1027 (5th Cir. 1969), where the respondent in an unfair labor practice case demanded all informer's statements in the NLRB's possession and not just those of prospective witnesses. To require the production of all statements would in effect abolish the informer's privilege. The General Counsel's Office, however, does not acquiesce even in the *Schill* decision.

105. 329 U.S. 495 (1947). See Cleary, *Hickman v. Jencks*, 14 VAND. L. REV. 865 (1961).

make it available to the respondent or other private party to the proceeding. While this disclosure requirement normally should not apply to the work papers or subjective impressions of agency personnel, it should apply to the prior statements of witnesses obtained by the agency. These statements are not only useful to the respondent for impeachment purposes but are also useful at the discovery stage to help the respondent prepare for the hearing.

*Discovery Recommendation 3(b).* Recommendation 3(b) seeks to insure that a party to an adjudicatory proceeding obtains adequate discovery of the testimony of his adversary's witnesses without the need for the time-consuming and expensive process of taking their depositions. Recommendation 2 provides for depositions on oral examination and on written questions; a party may find it necessary, or be tempted for purposes of delay, to depose all the potential witnesses against him. A counsel for respondent or other private party who is interested in delay may even stage a "dry run" of the trial by deposing all the agency's witnesses. Recommendation 3(b) controls this practice by furnishing the party with narrative summaries of the witnesses' expected testimony; it thus becomes unnecessary in a great many instances to take depositions.<sup>106</sup>

Recommendation 3(b) suggests requiring all parties to the proceeding, and not just the agency, to furnish at some reasonable time prior to the hearing narrative summaries of the expected testimony of their witnesses. Recommendation 3(a), on the other hand, only requires the agency staff, and not private parties, to produce prior statements of witnesses. The fact that private parties need produce only narrative summaries and not the prior statements

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106. The FTC has had considerable experience with the problem of delay associated with attempts to depose agency witnesses. At one time it met the problem by taking the position that its Rule 3.33 on depositions, 16 C.F.R. § 3.33 (1970), did not permit the deposing of complaint counsel's witnesses on matters with regard to which they were expected to testify at the hearing. Associated Merchandising Corp., [1967-70 Transfer Binder] TRADE REG. REP. ¶ 18,102, at 20,547 (FTC 1967). The FTC has changed its position and now permits depositions for the purpose of discovering the testimony of prospective witnesses. Koppers Company, FTC Dkt. No. 8755 (July 2, 1968) (unreported). While the latter decision is more consistent with the purposes of discovery, the deposing of agency witnesses is expensive, time-consuming, may delay the hearing, and is not always really necessary. Some FTC examiners are now meeting this problem by requiring complaint counsel to furnish respondent with a narrative summary of the expected testimony of each agency witness. When the respondent learns the substance of the witnesses' testimony in this fashion, he often decides that there is no need to take the trouble of deposing them. If the respondent is not satisfied with the narration, he can ask that he be given a clarification or a further narrative statement. This procedure has worked well in a number of FTC cases to reduce significantly the number of depositions needed.

of their witnesses can be explained on several grounds: the *Jencks* rule, which has been transformed by Recommendation 3(a) into a rule of discovery, presently only applies to government witnesses; the government's superior ability in obtaining statements and its interest in uncovering the truth rather than in winning the case combine to subject to it more readily to the fairness requirement that it share its statements with the other parties; and the work-product rule and the attorney-client privilege more readily protect statements obtained by private parties and their privately retained attorneys than those obtained by government investigators. These considerations do not apply to the prehearing production of the narrative summary of a witness' expected testimony where the goal is to avoid surprise at the hearing by informing the other parties of the witness' position. The agency, too, should be protected against surprise at the hearing and should be permitted to know ahead of time the essential elements of the testimony against it.<sup>107</sup> Discovery must be a two-way street.

Agency counsel in an adjudicatory proceeding must comply with both Recommendation 3(b) on narrative summaries and Recommendation 3(a) on prior statements. This dual requirement should not prove too burdensome because in most cases agency counsel should be able to satisfy the requirement that he make available a narrative summary of the expected testimony of an agency witness by simply designating one or more of that witness' prior statements as a "narrative summary." Recommendation 3(b) specifically authorizes him to do that.<sup>108</sup> However, agency counsel retains the option of drafting his own narrative summary rather than relying on the witness' prior statements.

Recommendation 3(b) also requires the prehearing exchange between the parties of the names of their witnesses. If the parties must make available narrative summaries of the expected testimony of their witnesses, they are in effect disclosing their witness lists. This feature of Recommendation 3(b) supplements the provision in Recommendation 1 on the exchange of witness lists. The provision in Recommendation 1 on the exchange between the parties of evidentiary

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107. The "reasonable time prior to the hearing" for the respondent or other private party to produce the narrative summaries for his witnesses may be, for the great majority of cases, subsequent to the time the agency produces its narrative summaries. Fairness may require that the agency disclose its case first.

108. If agency counsel ascertains that the prior statements are incomplete summaries of the testimony he expects from the witness, he must supplement the statements with a narrative summary of the omitted areas of testimony.

exhibits and witness lists only applies if the presiding officer holds a prehearing conference and directs the parties to make the exchange. While that recommendation gives the presiding officer the authority to do both of those things, his decisions are largely discretionary and he may choose not to hold a prehearing conference or to hold a conference but not to direct the exchange. Recommendation 3(b) insures that there will be a mutual disclosure of witness lists and of narrative summaries prior to the hearing regardless of the action of the presiding officer. The mutual exchange of evidentiary exhibits, however, remains dependent on favorable action by the presiding officer under Recommendation 1. This difference in treatment between witness lists and evidentiary exhibits is sound because in a significant number of cases the disclosure of the names of witnesses is a simple matter which the parties can readily handle among themselves, while the exchange of exhibits may become quite complex and function smoothly only if the presiding officer asserts control over the process.

It must be acknowledged, however, that the preparation of witness lists and of narrative summaries of the witnesses' expected testimony imposes significant burdens on the parties and their counsel. Furthermore, the timing of the exchange and the adequacy of the narrative summaries may often raise questions requiring the intervention of the presiding officer, who may find it advisable to call a prehearing conference to resolve them. These disadvantages are more than offset by the advantages of the significant discovery afforded to the parties. Once the exchange has taken place the parties may also be able to agree among themselves to introduce at the hearing much of the witnesses' testimony in written form. Such agreements should greatly shorten the time required for the hearing.<sup>109</sup> Development of procedures allowing all testimony to be in writing and providing that the full texts of the testimony be exchanged prior to the hearing should be encouraged wherever appropriate because

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109. A number of agencies, most notably the ICC and the CAB, have in fact developed special procedures whereby the parties to a proceeding exchange prior to the hearing the complete narrative testimony of their witnesses. These procedures, which go beyond the minimum standards proposed by Recommendation 3(b), are particularly suitable for economic proceedings where the primary facts are not really in dispute. See also E. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1; E. Gellhorn & W. Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

these procedures serve the dual objectives of providing the parties with full discovery and of expediting the course of the hearing.<sup>110</sup>

*Limited Role of Depositions.* These discovery recommendations recognize that the most effective means of discovery in administrative adjudications is the mutual exchange of information between the parties, a process which functions best under the direction of the presiding officer at a prehearing conference. Other, more formal means of discovery, such as the taking of depositions, play a secondary role; they only provide a party with discovery of information that he was unable to obtain through mutual exchanges. A party who obtains an informative narrative summary of the expected testimony of his opponent's witness may conclude that he has no need to depose that witness. If the party seeks to depose the witness after receiving the summary, the presiding officer may find under Recommendation 2(5) that the party does not have good cause to take the deposition.<sup>111</sup> Recommendations 3(a) and 3(b) thus operate jointly to limit the respondent's need to depose agency witnesses. Only in a limited number of instances should the respondent have good cause for deposing an agency witness when he has already obtained a narrative summary of the witness' expected testimony and any prior statements of the witness relevant to the expected testimony.<sup>112</sup>

#### DISCOVERY RECOMMENDATION 4: WRITTEN INTERROGATORIES TO PARTIES

Interrogatories to parties, provided for in Rule 33 of the Federal Rules of Civil Procedure, have been widely employed in litigation in the federal courts. Once again there has been little experience with their use in administrative adjudications. Recommendation 4(a) is

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110. Where the parties exchange the complete testimony of their witnesses prior to the hearing, they naturally do not have to furnish narrative summaries also. The former procedure more generously provides for discovery than does the latter and is in full compliance with Recommendation 3(b).

111. If the witness' perception or observation of disputed facts is relevant, the deposition should be allowed because in this case the narrative summary does not adequately replace an oral examination for discovering the relevant facts. These instances should prove exceptional because a witness' personal observation of past events is only rarely as crucial in administrative adjudications as it is in personal injury and criminal cases.

112. The ABA Discovery Standards adopt a similar approach; they do not provide at all for depositions in criminal trials but rely on the prosecutor's production of the prior statements of the government's witnesses to afford the defendant adequate discovery of their expected testimony. Standard 2.1, ABA DISCOVERY STANDARDS 52-53.



premised on the fact that interrogatories to parties are an inexpensive discovery tool which should be available in adjudicatory proceedings before administrative agencies. Depositions are often not a reasonable alternative because of the expense involved. In addition, Recommendation 6 on the Production of Documents and Tangible Things requires the party who is seeking discovery to be fairly specific about the documents and things he wants. Interrogatories provide a much needed vehicle for inquiry about the existence and location of these documents and other relevant evidence.

Although a party seeking to take a deposition under Recommendation 2 must first apply to the presiding officer for an order to do so, Recommendation 4(a) does not place this limitation on the serving of interrogatories, primarily because the serving of interrogatories is a far simpler matter than the taking of a deposition. In addition, interrogatories affect only the parties to the proceedings; depositions generally involve non-parties. Because of this, the need for the presiding officer to retain firm control over their use is not as great for interrogatories as it is for depositions. Parties should therefore be able to serve interrogatories on each other without applying to the presiding officer for permission to do so. Further, in many simple cases the answers to the interrogatories may supply the parties with sufficient information to make a prehearing conference unnecessary. However, interrogatories may often require comprehensive and detailed responses which impose a real burden on the answering party. In such cases, the prehearing conference may provide a less onerous means for the parties to exchange information. The exchange of cases between the parties at the prehearing conference may supply much of the information sought by detailed or complex interrogatories. Furthermore, the presiding officer at the prehearing conference can arrange a mutual exchange, while the party answering interrogatories must disclose his case without the assurance of reciprocity.

Recommendation 4(a) recognizes these problems and meets them by providing that a party upon whom interrogatories have been served may postpone answering them by asking the presiding officer to hold a prehearing conference for the mutual exchange of evidentiary exhibits and other information. The presiding officer should normally grant the application if he has not yet held such a prehearing conference under Recommendation 1. Even if there has been such a prehearing conference, the presiding officer should hold additional

ones if the parties are encountering difficulties in completing the exchange of information on their cases. The presiding officer should conduct the conference to insure that the interrogating party obtains as much as possible of the requested information. Following the completion of the conference, the party served with the interrogatories must respond to all appropriate questions which have not yet been answered. Of course, the presiding officer need not grant a party's application for a prehearing conference if he has already held one and the parties have exchanged their cases. In these instances, the party served with interrogatories must answer them if the questions call for additional, relevant, and unprivileged information.

*Interrogatories Directed to the Agency.* Recommendation 4(a) provides that a party to a proceeding may direct interrogatories to "any other party." Since the agency or its staff is normally a party to adjudicatory proceedings, in that capacity it should stand on the same footing as any other party and be required to answer interrogatories as any other party would; this is the specific intent of the recommendation. Recommendation 4(b) handles the mechanics of interrogatories directed to an agency; it requires each agency to designate an agency "official on whom other parties to a proceeding may serve written interrogatories directed to the agency." That person then has responsibility for insuring that the appropriate agency personnel with knowledge of the facts answer and sign the interrogatories on behalf of the agency.<sup>113</sup> The answers to the interrogatories bind the agency in the same manner as the attorney representing the agency at the hearing binds it by signing pleadings, stipulating facts, or speaking in an open hearing. Recommendation 4(b) recognizes this important role of the agency attorney by authorizing him to make and sign objections to the interrogatories. The agency attorney may, of course, also pass on the accuracy and appropriateness of the answers to interrogatories furnished by other agency employees.

In the great majority of cases the information sought by interrogatories directed to the agency can be supplied by the agency staff; the agency employees with knowledge of the facts simply answer the interrogatories on behalf of the agency. Only in unusual cases will

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113. FCC rule 1.311(b)(2) presently contains a provision of this type: "Interrogatories shall be served on the appropriate Bureau Chief (see § 1.21(b)). They will be answered and signed by those personnel with knowledge of the facts. The answers will be served by the Secretary of the Commission upon parties to the proceeding." 47 C.F.R. § 1.311(b)(2) (1970).

an agency head or member, whose primary function is to judge, have relevant, unprivileged information not known to any other agency employee. The last sentence in Recommendation 4(b) deals with this unusual situation. Since it is inappropriate to authorize the presiding officer to order agency members to supply discovery, he may not order an agency head or member to answer an interrogatory; the party seeking the answer must obtain a special order from the agency itself. That order must be based on a finding that the interrogatory "seeks significant, unprivileged information not discoverable by alternative means."<sup>114</sup> This procedure safeguards the integrity of the judicial function performed by the agency members but still allows discovery from an agency head or member in cases of absolute necessity.

Agencies have generally opposed subjecting their staffs to interrogatories. The usual bases for the opposition are the burden which interrogatories would impose on the agency staff and each agency's desire to protect from disclosure its internal investigatory and decisional processes.<sup>115</sup> The latter objection really pertains only to the scope of this form of discovery and not to its existence, and to that extent the objection is valid. Agency personnel should not be questioned concerning their thought processes, their subjective impressions, or their interoffice discussions and recommendations; to require disclosure of these matters would subvert the freedom of deliberation essential to fair administration and prevent open, frank discussions between staff members concerning administrative action.<sup>116</sup> Such matters should be treated as privileged in order to protect the agency's efficient functioning. This privilege, however, should not prevent the questioning of agency personnel about their knowledge of the facts, the existence and location of documents, or other relevant evidence. While Recommendation 4 does not specify in detail the appropriate scope for interrogatories directed to the agency, it does refer to agency personnel with "knowledge of the facts." An agency, therefore, remains free under this recommendation to limit the appropriate scope of written interrogatories to exclude purely

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114. Recommendation 2(6) uses the same standard for determining whether agency employees may be deposed. That recommendation, which does not contemplate the deposing of agency heads, permits the presiding officer to enter a special order requiring agency personnel to be deposed if this standard is met, but makes the order subject to an interlocutory appeal.

115. See, e.g., *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (Justice Reed).

116. *Id.* at 945-46.

internal matters from discovery.<sup>117</sup> This protection is not limited to the agency but extends to private parties as well. Interrogatories that are thus properly limited in scope should not impose an undue burden on the agency staff.

#### DISCOVERY RECOMMENDATION 5: REQUESTS FOR ADMISSIONS

A small number of agencies have adopted a rule on Requests for Admissions similar to Rule 36 of the Federal Rules of Civil Procedure.<sup>118</sup> Recommendation 5 provides that a rule of this type should be part of the discovery machinery of every agency. In all probability, however, such a rule will play a modest role in the overall scheme of discovery. Although the FTC has had such a rule<sup>119</sup> for nine years, it has been used very little because parties find it more advantageous to stipulate to facts and to the admissibility of evidence at a prehearing conference where the examiner presides over the mutual give and take. A written request for admission is a more cumbersome device and counsel for both sides have a tendency toward drafting technical, unhelpful responses. Nevertheless, a rule on requests for admissions is a standard discovery provision which should prove useful in many simple cases where no prehearing conference is necessary and in more complex cases where it is wasteful to call additional prehearing conferences merely because a party is interested in obtaining an admission. Recommendation 5(b) also contains special provisions on requests directed to the agency similar to those in Recommendation 4(b) on interrogatories directed to the agency.<sup>120</sup>

#### DISCOVERY RECOMMENDATION 6: PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

Agencies normally have broad investigatory powers to gather by compulsory process or voluntary cooperation all the documents and other tangible evidence they need. Judicial decisions have broadly

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117. See, e.g., 47 C.F.R. § 1.311(b) (1970) (FCC). This rule would be valid under Recommendation 4. This power of limitation is implicit in Recommendation 4 since normally a party's work product and decisional processes are protected from discovery under *Hickman v. Taylor*, 329 U.S. 495 (1947).

118. E.g., 16 C.F.R. § 3.31 (1970) (FTC); 46 C.F.R. § 502.208 (1970) (FMC); 47 C.F.R. § 1.246 (1970) (FCC).

119. 16 C.F.R. § 3.31 (1970).

120. See notes 113-17 *supra* and accompanying text.

sanctioned agency use of compulsory process in investigations of this type conducted by the agency staff.<sup>121</sup> Private parties to agency adjudications have no comparable investigatory machinery available to obtain such information and must rely on discovery if they are to be prepared fully prior to the hearing. At the discovery stage of the proceeding the respondent or other private party should therefore be able to inspect and obtain copies of all relevant, nonprivileged documents and tangible things. Such documents and things may either be in the possession of non-parties or of other parties to the proceeding, including the agency itself.

Recommendation 6(a) deals with items in the possession of non-parties by allowing a party to the proceeding to obtain a subpoena duces tecum directed to the non-party. This subpoena is returnable "at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer." Discovery between parties is covered by Recommendation 6(b). That recommendation resembles rule 34 of the Federal Rules of Civil Procedure<sup>122</sup> and authorizes the presiding officer to order a party to produce at "a prehearing conference or other specific time and place" designated documents and tangible things. These two provisions thus recognize that in administrative adjudications different procedures are suitable for discovery of documents and tangible things from non-parties than for similar discovery between parties. Recommendation 6(c) further recognizes that practical considerations dictate treating an agency that conducts an adjudicatory proceeding as a party to that proceeding regardless of whether the agency staff formally participates as a party.

These differences in procedure between Recommendations 6(a) and 6(b) should not obscure the basic point that the advantages of prehearing discovery of documents and tangible things are the same in both situations: the parties are able to obtain complete information on the relevant facts prior to the hearing. Private parties to adjudicatory proceedings are also able to prepare their cases using the broad investigatory powers possessed by the agencies. This form of prehearing discovery should also serve to expedite the hearing. Under current rules,<sup>123</sup> a party may secure production of the desired items at

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121. *Hannah v. Larche*, 363 U.S. 420 (1960); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946).

122. Recommendation 6 resembles Rule 34 before it was amended on July 1, 1970. See note 5 *supra*.

123. *E.g.*, 14 C.F.R. § 13.57(a) (1969) (FAA); 17 C.F.R. § 201.14(b) (1970) (SEC); 29 C.F.R. § 102.31(a) (1970) (NLRB).

the hearing itself by serving subpoenas on the person who has possession or control of them. Since this is usually the first time the party has seen these items, the usual result is a delay in the hearing. Much of the subpoenaed material may not even be put into evidence<sup>124</sup> even though it is almost surely admissible<sup>125</sup> and may be significant. The problem can be avoided if the items are available to all parties prior to the hearing. Informal exchanges between counsel already accomplish this purpose in many cases; Recommendation 6 simply insures that this will occur.

Both Recommendations 6(a) and 6(b) cover the production of "documents and tangible things." This phrase is used instead of the more extensive catalogue of items in rule 34 of the Federal Rules because it is both simple and comprehensive. There is no intent, however, to adopt a narrower scope for Recommendations 6(a) and 6(b) than that of the Federal Rules or to prevent individual agencies from itemizing in their own rules specific types of documents and things. A complicating factor at this point is that the statute authorizing the agency to issue subpoenas may be drawn only in terms of subpoenas for the production of "documentary evidence."<sup>126</sup> Whether this type of statute limits the power of an agency to issue subpoenas for tangible evidence other than documents is unclear.<sup>127</sup> Recommendation 6 does not attempt to resolve the theoretical problem of the type of evidence which is subject by statute to the compulsory process of an agency; instead, it selects the comprehensive phrase "documents and tangible things," as best describing the material which a party should be able to obtain through discovery.

*Discovery Recommendation 6(a).* The principal effect of this

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124. See the testimony of Admiral Harllee, then Chairman of the Federal Maritime Commission, before the House Subcommittee on Merchant Marine, in support of Public Law 90-177 (authorizing the Commission to enact discovery rules in complaint cases). *Hearings on H.R. 4231, S. 706, H.R. 4329, H.R. 9473 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 60 (1967).

125. Since the criteria for requiring production and admitting into evidence are so similar—relevance, lack of privilege, etc.—anything that can be produced is almost certainly admissible.

126. See, e.g., FTC Act § 9, 15 U.S.C. § 49 (1964).

127. While the FTC has statutory power to issue subpoenas for "documentary evidence," § 49 *id.*, the FTC Rules of Practice authorize subpoenas for the production of "specified documents, papers, books, or other *physical exhibits*." 16 C.F.R. § 3.34(b)(1) (1970) (emphasis added). The SEC has statutory authority to issue subpoenas for the production of "books, papers or other documents," 15 U.S.C. § 77(s)(b) (1964), while its rules authorize subpoenas "requiring the production of documentary or *other tangible evidence*." 17 C.F.R. § 201.14(b) (1970) (emphasis added).

recommendation is to make the subpoena duces tecum available to private parties as a discovery device. The current practice of many agencies is to make these subpoenas returnable only at the hearing itself.<sup>128</sup> Recommendation 6(a), however, permits parties to obtain relevant, unprivileged documents and tangible things at an early stage in the proceeding prior to the hearing and to use them in preparation for the hearing. Under this recommendation, a party can also avoid the possible surprise upon seeing a document for the first time at the hearing by securing a subpoena returnable at a prehearing conference or at the taking of a deposition. The return of subpoenaed documents at a prehearing conference seems particularly desirable because the parties can arrange at that time for the making of copies and for stipulations on authenticity. This use of the prehearing conference is a sensible way to handle instances where a party wants to obtain documents for discovery purposes but is not interested in deposing their possessor. In such cases it is less time consuming and cumbersome to arrange for the production of the documents at a prehearing conference than to schedule a deposition.<sup>129</sup> If there is no formal prehearing conference, the return of subpoenaed documents may be just as conveniently arranged at the presiding officer's office. Of course, nothing in Recommendation 6(a) prevents the informal return of subpoenaed documents directly to private counsel.

Discovery of documents and tangible things from non-parties should not pose serious difficulties in most agency adjudications. Only in a limited number of instances will a party to a proceeding want to obtain large quantities of documents from non-parties, and normally non-parties will not object to producing the documents at the discovery stage rather than at the hearing itself.<sup>130</sup> If non-parties do object, the presiding officer may alleviate the problem if at the prehearing conference he successfully narrows the issues or obtains

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<sup>128</sup> See, e.g., 7 C.F.R. § 47.34 (1970); 9 C.F.R. § 202.13 (1970) (Dept. of Agriculture disciplinary proceedings); 14 C.F.R. § 302.19(a) (1970) (CAB). Some agencies allow return at the prehearing stage. 16 C.F.R. § 3.34(b)(1) (1970) (FTC—prehearing conference or deposition); 47 C.F.R. § 1.333(e) (1970) (FCC—deposition).

<sup>129</sup> Kintner, *Recent Changes in Federal Trade Commission Discovery Practice*, 37 ANTITRUST L.J. 238, 241-42 (1968).

<sup>130</sup> Restraint of trade cases at the FTC are a major exception. Respondents in these cases often seek large quantities of documents on sales and market shares from their competitors, who are generally not parties to the proceeding. The competitors will usually apply for protective orders against disclosing what they believe is confidential business information. Serious delays may result, but it is still important that respondents obtain adequate discovery. See Project, *Federal Administrative Law Developments—1970, 1971* DUKE L.J. 251.

stipulations so as to make much of the requested discovery unnecessary. An alternative solution to this problem is to delay the respondent's discovery until an interval in the hearing between the presentation of the agency's case and that of the respondent.<sup>131</sup> This solution is premised on the fact that the respondent's need for discovery will be much less at this point because he will know what he must defend against. This proposed return to a trial by intervals is unsound because of the difficulty in separating the agency's case from the respondent's defense. The respondent needs full discovery in order to cross-examine the agency's witnesses effectively and challenge its documentary evidence. Furthermore, under Recommendation 1, the agency should normally disclose its affirmative case at the prehearing conference; this disclosure should enable the respondent and the presiding officer to determine what further discovery is necessary. Accordingly, Recommendation 6(a) does not provide for postponing discovery of documents and tangible things from non-parties until after the presentation of the agency's case.

*Availability to Private Parties of Subpoenas Duces Tecum.* Recommendation 6(a) provides that private parties should be able to obtain subpoenas duces tecum to enforce discovery requests directed to non-parties. This aspect of the recommendation raises the question of the appropriate procedure for making available to private parties the compulsory process of the agency.<sup>132</sup> Agencies which have the subpoena power have adopted one of three basic approaches. The usual approach is to require the party seeking the subpoenas to show the "general relevance and reasonable scope of the evidence

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131. A number of FTC hearing examiners have adopted this practice in restraint of trade cases when competitors of the respondent have objected to producing what they believe to be confidential information.

132. The APA has two provisions on the issuance of subpoenas by administrative agencies: section 6(c), 5 U.S.C. § 555(d) (Supp. V, 1970), generally provides for the issuance of subpoenas at the request of private parties; section 7(b)(2), 5 U.S.C. § 556(c)(2) (Supp. V, 1970), specifies the power of the presiding officer to issue subpoenas in a rule-making or adjudicatory proceeding subject to sections 7 and 8. Both of the provisions, however, first require that the issuance of subpoenas be otherwise "authorized by law." Congress must therefore delegate to individual agencies the power to issue subpoenas; once Congress has done so, section 7(b)(2) automatically vests subpoena power in the presiding officer in a rule-making or adjudicatory proceeding to the extent that such power has been given to the agency itself, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 74 (1947). Similarly, once Congress has authorized the agency to issue subpoenas, section 6(c) operates so that private parties to agency proceedings have the same access to subpoenas as do the representatives of the agency. SENATE REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, S. Doc. No. 248, 79th Cong., 2d Sess. 206, 265 (1946).



sought."<sup>133</sup> A second approach, adopted by only a small minority of agencies, is to issue subpoenas to parties upon request; questions of relevance and reasonable scope are only considered when the subpoenaed person moves to quash the subpoena.<sup>134</sup> The third, middle approach grants the presiding officer discretion to require a showing of general relevance and reasonable scope where the requested subpoenas appear to be unreasonable in scope.<sup>135</sup>

In choosing between these approaches there are a number of arguments to consider. On the one hand, judicial subpoenas are available on request and there is no reason to differentiate between judicial and administrative policy on the issuance of subpoenas. Further, subpoenas should be available on request because it is unfair to require a party to disclose to his adversaries the evidence he hopes to obtain by subpoena.<sup>136</sup> On the other hand, administrative process, unlike most judicial process, runs nationwide and is therefore much more subject to the danger of abusive, unreasonable requests for subpoenas. In addition, agency rules on the issuance of subpoenas either explicitly provide for *ex parte* applications or contain no requirement that the party seeking a subpoena give notice to the other parties. Thus, any disclosure which a party must make to show the general relevance and reasonable scope of the evidence sought by subpoena is made only to the impartial presiding officer and not to the party's adversaries.

In balancing these considerations, it does not seem desirable to allow private parties to obtain subpoenas on request. Perhaps the best approach is the middle one granting the presiding officer discretion to require a showing of general relevance and reasonable scope.<sup>137</sup> This

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133. See, e.g., 14 C.F.R. § 302.19(c) (1970) (CAB); 16 C.F.R. § 3.34(b)(1) (1970) (FTC); 18 C.F.R. § 1.23(a) (1970) (FPC); 47 C.F.R. § 1.333(c) (1970) (FCC); 49 C.F.R. § 1100.56(a) (1970) (ICC). Section 6(d) of the APA, 5 U.S.C. § 555(d) (Supp. V, 1970), expressly authorizes agencies to adopt rules of procedure requiring such a showing.

134. The NLRB is the only major regulatory agency which has explicitly adopted this policy. See 29 C.F.R. § 102.31 (1970). See also *General Eng'r, Inc. v. NLRB*, 341 F.2d 367, 375 n.15 (9th Cir. 1965).

135. See, e.g., 17 C.F.R. § 201.14(b)(1) (1970) (SEC); 46 C.F.R. § 502.131 (1970) (FMC).

136. The temporary Administrative Conference recommended in 1962 that agencies issue subpoenas upon request to parties to adjudicatory proceedings, and defended its position on exactly the grounds mentioned. Recommendation No. 13, S. Doc. No. 24, 88th Cong., 1st Sess. 207, 217-18 (1963). However, the committee report in support of the recommendation relied almost solely on the NLRB practice. See note 134 *supra*. This aspect of Recommendation No. 13 is questionable.

137. This approach also seems consistent with section 6(c) of the APA, 5 U.S.C. § 555(d) (Supp. V, 1970), which allows the agency to control the issuance of subpoenas but prevents it

approach does not burden the party applying for subpoenas with making a showing of relevance and scope in every case; only when the presiding officer finds the request unreasonable or oppressive on its face must the applicant make the required showing to obtain the subpoena.<sup>138</sup> Recommendation 6(a), however, is not intended to take a position on whether an agency should initially require a party seeking a subpoena to show the general relevance and reasonable scope of the evidence sought. The recommendation is solely designed to encourage discovery in administrative adjudications and is not directly concerned with whether an agency controls the issuance of its compulsory process by requiring a showing of the general relevance and reasonable scope of the evidence sought prior to the issuance of a subpoena or by deferring such questions to a ruling on a motion to quash.

*Discovery Recommendation 6(b).* Recommendation 6(b) provides for discovery between parties of documents and tangible things. The recommendation covers three distinct situations: a private party may seek such discovery from another private party; the agency staff participating in the proceeding as a party may seek such discovery from a private party; and a private party may seek such discovery from the agency. In all three situations the party seeking discovery must apply to the presiding officer for a production order. The application must designate the documents and things whose production is requested. Copies of the application must be served on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of their objections to the application. The presiding officer should then order the production of the designated items at a prehearing conference or at some other specific time and place "unless he finds that there is not good cause for doing so." The effect of this last clause is to require that there be

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from "requiring a detailed, unnecessary, and burdensome showing of evidence which might fall into the hands of the party's adversaries . . . (who in any event should not have access to such papers directly or indirectly)." SENATE REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 132, at 265.

138. Judicial decisions have recognized that even in the absence of a procedural rule requiring a showing of general relevance and reasonable scope, agencies have an inherent power to deny requests for subpoenas that seek irrelevant material or are unreasonable in scope. In *San Francisco Mining Exch. v. SEC*, 378 F.2d 162 (9th Cir. 1967), the court upheld the SEC's refusal to issue subpoenas *duces tecum* and *ad testificandum* directed to Commission members on the ground that the evidence sought was irrelevant, even though the SEC rule in effect at the time of the refusal appeared to make the issuance of subpoenas mandatory on request and did not require any showing of the general relevance and reasonable scope of the evidence sought. See also *Independent Directory Corp. v. FTC*, 188 F.2d 468, 471 (2d Cir. 1951).

“good cause” for the production of the designated documents and tangible things but to place the burden of persuasion on the issue of good cause on the party or parties opposing production and not on the applicant. Thus, the party seeking discovery need not “plead” good cause in his application for a production order.

The procedure for obtaining a production order is similar to the procedure in Recommendation 2(2)-(5) for obtaining an order to take a deposition. These requirements are intended to insure that the presiding officer retains firm control over the discovery process. In a number of ways this procedure differs from that under the new Rule 34 of the Federal Rules of Civil Procedure on the Production of Documents and Things. Rule 34 functions extrajudicially and eliminates the requirement of “good cause.”<sup>139</sup> Similarly, Recommendation 6(a) does not require notice to the other parties or a showing of good cause for the issuance of a subpoena duces tecum directed to a non-party.

These differences between Recommendations 6(a) and 6(b) should on the whole make it somewhat easier for a party to obtain a subpoena directed to a non-party than to obtain a production order directed to another party. This divergent treatment recognizes that the three situations covered by Recommendation 6(b) pose significantly different problems than does the discovery of documents and tangible things from non-parties covered by Recommendation 6(a). Where discovery between parties is involved, the presiding officer must maintain firmer control over the discovery process to prevent delays and other abuses. The quantity of material which a party to the proceeding seeks from a fellow party is likely to be greater than that sought from individual non-parties; claims that the material sought deserves “work product” protection are likely to be more frequent when discovery is sought from another party. The presiding officer in these situations should protect parties from abusive production requests and resolve all questions of privilege. Even more important, the parties to the proceeding should participate with the presiding officer in formulating a prehearing procedure designed to facilitate the exchange of information. The presiding officer should insure that production applications do not interfere with the smooth functioning of prehearing procedures and delay the course of the proceedings.

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139. The party seeking production must still show good cause if he is seeking discovery of trial preparation materials or of the opinions of experts under Rule 26(b).

Again, while it is the intention of these recommendations that the prehearing conference should be the primary discovery procedure, in many simple cases mutual applications for production orders and the resultant exchange of documents between the parties may obviate the need for a formal prehearing conference. However, in more complex cases, myriad requests for the production of documents may cause confusion and delay, especially if the parties have not yet attended a prehearing conference. The production order requested by one party may have the effect of requiring another party to disclose his evidentiary case prior to such disclosure by the applicant. In such cases the presiding officer may well determine that there is no "good cause" for ordering the one-sided disclosure of a party's case. The presiding officer should instead take control of the proceeding and schedule a prehearing conference where the parties will conduct a mutual exchange of their affirmative evidentiary cases. Of course, a party may wish to obtain discovery of documents and other tangible things in addition to those which another party plans to make part of its evidentiary case. At the close of the prehearing conference the presiding officer can determine what further discovery of this type is necessary and order the production of the documents and tangible things in question.<sup>140</sup> In most cases, the prehearing conference should be the source from which all discovery flows and should be the principal means by which the presiding officer can control the parties' discovery.

*Discovery Recommendation 6(c)*. In cases where a private party is seeking discovery of documents and tangible things from the agency, Recommendation 6(c) treats the agency conducting an adjudicatory proceeding as a party to that proceeding whether or not the agency

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140. A pattern similar to that described above has developed in complaint and investigation proceedings at the FMC. These proceedings often involve large numbers of private parties—individual carriers, conferences of carriers, shippers, and governmental agencies—and masses of documentary evidence. The Commission's new discovery rules, 46 C.F.R. § 502.207 (1970), contain a provision for production orders closely modeled on rule 34 of the Federal Rules of Civil Procedure before it was revised. In applying this rule hearing examiners generally postpone ordering a party to produce documents until there has been a prehearing conference; normally this conference takes place at an early stage in the proceeding. At the conference the parties are often able, with the guidance of the presiding officer, to arrange for the mutual production of relevant material. Discovery then proceeds on a voluntary basis. Only rarely is it necessary for the presiding officer to compel production through a formal order.

The Commission's Hearing Counsel, who is a party to all investigation proceedings, is often the chief beneficiary of this expanded discovery between parties. He uses the examiner's authority to order the production of relevant, unprivileged documents to gain access to the records of the other parties to the proceeding.

staff formally participates as a party. In the majority of adjudicatory proceedings the appropriate division of the agency does so participate. This is particularly true in disciplinary and enforcement cases. However, agencies often adjudicate controversies between private parties where the agency staff takes no position and does not intervene as a party.<sup>141</sup> Private parties to such proceedings may need access to documents and tangible things in the agency's possession whether or not the agency staff chooses to become a party to the proceeding. Agencies are adjudicating cases in their areas of regulatory responsibility, and their files often contain information relevant to the proceedings and useful to one or more of the private parties. A party's ability to obtain production of these items in the agency's files should not depend on the fortuitous circumstance of the agency staff joining the proceeding as a party. On the other hand, an agency adjudicating a controversy should never be treated as a non-party from whom a party can obtain discovery under Recommendation 6(a) by simply obtaining a subpoena duces tecum, particularly since the items sought will probably not be routinely available to the public. Recommendation 6(c) resolves this problem by treating the agency as a party to all adjudications conducted by it and thus requiring a party seeking discovery to obtain a production order under the procedures suggested by Recommendation 6(b).<sup>142</sup>

*Discovery Recommendations 6(b) and 6(c) and the Freedom of Information Act.* Discovery of documents from agency files has been greatly enhanced by the Freedom of Information Act of 1966 (FOIA).<sup>143</sup> That Act requires agencies to make available to any person upon request certain kinds of documents and identifiable agency records. However, the Act contains nine categories of exemptions; agency records falling within any one of these categories are not subject to the disclosure and public information requirements of the Act.<sup>144</sup> While some agencies have expended considerable effort to

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141. Comparative licensing hearings before the FCC where several applicants seek a single license are an example. Even in these proceedings the agency staff may participate as a party if it is interested in taking a position on a particular issue.

142. This practice is currently followed by at least three agencies. See 16 C.F.R. § 3.36 (1970) (FTC); 46 C.F.R. § 502.209 (1970) (FMC); 47 C.F.R. §§ 1.325 & 0.461(e)(1) (1970) (FCC).

143. 5 U.S.C. § 552 (Supp. V, 1970).

144. The nine exemptions include: internal personnel rules, material specifically exempted from disclosure by statute, trade secrets, financial information privileged or confidential, inter-agency or intra-agency memorandums which would not be available in litigation with the agency, personnel and medical files, investigatory files, and geological and geophysical information. 5 U.S.C. § 552(b) (Supp. V, 1970).

implement the Act and to foster a freer flow of administrative materials,<sup>145</sup> the exact scope of a number of the exempted categories is unclear, and the agencies have naturally tended to interpret the exemptions broadly.<sup>146</sup>

The passage of the FOIA does not eliminate the need to provide for discovery of documents and tangible things in agency files by a private party to an adjudicatory proceeding. Strictly speaking, the Act is independent of discovery in adjudicatory proceedings because it provides that an agency shall make available upon the request of *any* person identifiable records which do not fall within one of the specific exemptions, as long as the request is made in accordance with published agency rules establishing provisions on time, place, and fees.<sup>147</sup> Thus, a person does not have to be a party to an agency proceeding to take advantage of the FOIA. An inquisitive person who has no interest in obtaining agency records other than satisfying his own curiosity stands on the same footing under the Act as does the respondent in an agency enforcement action. Certainly a private party in an adjudicatory proceeding has a greater need to obtain agency records than does the casual inquirer. In addition, private parties in agency adjudications should be able to obtain discovery of documents which fall within the exemptions of the FOIA and which are thus not available to the public at large.<sup>148</sup> Fairness may require that an agency

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145. Sky, *Agency Implementation of the Freedom of Information Act*, 20 AD. L. REV. 445 (1968).

146. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967). For example, the scope of the exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (Supp. V, 1970), is particularly uncertain. The Attorney General has taken the position that this provision exempts non-commercial and non-financial information which is privileged or received in confidence by the agency even though the plain words of the exemption seem to cover only trade secrets and information that is "commercial or financial." ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 32 (1967). Dicta in recent court decisions have provided little clarification of the issue. Compare *Consumers Union, Inc. v. VA*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), with *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967). Professor Davis has suggested that a clarifying amendment is necessary to straighten out the tangle. Davis, *supra*, at 811.

147. Normally the request is to be directed to the Secretary or other administrative official of the agency who has authority to rule on the request on behalf of the agency. If the request is refused, the person seeking the records may bring an action in Federal District Court asking that the agency be enjoined from withholding agency records and be ordered to produce any agency records improperly withheld from the person bringing suit. 5 U.S.C. § 552(a)(3) (Supp. V, 1970).

148. Adoption of Recommendation 6 may be particularly helpful in avoiding the FOIA exemption covering "investigatory files compiled for law enforcement purposes except to the

produce, upon the request of a private party in an adjudication, records which the agency quite rightly and quite legally wants to keep from the public at large. This is particularly true when third persons who supplied the agency with information have an interest in keeping the agency records confidential.<sup>149</sup> In such cases, protective orders may be framed under Recommendation 8 which will allow the agency to provide the respondent with adequate discovery while protecting the interests of third persons from whom the agency obtained the information. It should be clear, then, that the FOIA by itself is not sufficient to allow adequate discovery by parties in a proceeding. Recommendation 6 is therefore not meant to amend the FOIA but to supplement it in order to accomplish the purposes of discovery.

*Privileged Documents in Agency Files.* Recommendation 6(b), like all the other recommendations, only provides for the discovery of relevant, unprivileged information and material. The agency may therefore raise any recognized claim of privilege in response to a

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extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (Supp. V, 1970). Investigatory files are often the most likely location of the documents which private parties want the agency to produce, yet this exemption has been broadly construed to restrict the amount of information that must be produced. *Clement Bros. v. NLRB*, 282 F. Supp. 540 (N.D. Ga. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). While it may be sensible to restrict the general public's access to investigatory files to protect the confidentiality and smooth functioning of the investigation, a private party in an adjudicatory proceeding has a strong interest in obtaining relevant, unprivileged documents and tangible things in investigatory files so that he can learn the basis for the case against him and prepare his defense. The statute recognizes that there may be exceptions to the exemptions; the exemption for investigatory files makes an exception for portions of those files that may be made "available by law to a party" to an agency proceeding, 5 U.S.C. § 552(b)(5) (Supp. V, 1970). Congress probably had only the Jencks Act in mind when it mentioned investigatory files available "by law" to a party, see ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 38 (1967), but surely an agency may make further exceptions and grant individual parties access to investigatory files that are exempt from the public disclosure requirements of the Act.

149. The FTC, for example, collects a great variety of economic data from businessmen which the businessmen do not want to fall into the hands of their competitors. Often this data becomes relevant to restraint of trade or deceptive practices proceedings brought against one of those competitors. While the competitor-respondent is generally entitled to obtain discovery of that data under the FTC's rules, 16 C.F.R. §§ 3.34, 3.36 (1970), the FTC has developed an elaborate system of protective orders to insure that the respondent does not disclose the confidential data or put it to his own advantage in some manner unconnected with the proceeding. Often discovery of the data is limited to respondent's outside counsel, who may not share it with the respondent and must return it at the end of the proceeding. *Crown Cork and Seal Co.*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,828, at 23,201 (FTC 1967). For a thorough discussion of the FTC practice, see E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968).

production request. Recommendation 6(b) does not attempt to define the law of privilege but leaves it to the presiding officer and to the courts on review to determine what agency records are privileged and thus not subject to discovery. Applicable privileges would include the attorney-client privilege, the informer's privilege, the protection accorded "work product," the privilege for trade secrets and comparable confidential data, and the executive privilege to withhold military and diplomatic secrets and other information whose disclosure would be detrimental to the public interest.<sup>150</sup> The scope of these privileges, although by no means clear, must be left to a case-by-case determination. The government's claim of privilege should not be accepted without question; in each case the presiding officer and reviewing court must scrutinize the claim to determine its validity.<sup>151</sup> Furthermore, since most privileges are not absolute, the presiding officer and reviewing court must in each case balance competing interests in reaching a decision on privilege. The Supreme Court adopted this balancing approach in determining whether the government in a criminal case must disclose the identity of an informer:

We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.<sup>152</sup>

A similar balancing of the agency's need to keep the material secret with the private party's need for disclosure is also necessary in civil and administrative proceedings.<sup>153</sup>

A privilege peculiar to administrative agencies is one that renders inter-agency and intra-agency documents which reflect the government's decisional and policy-making functions immune from disclosure.<sup>154</sup> Normally this privilege has been designated as part of

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150. See generally C. McCORMICK, EVIDENCE, §§ 143-50 (1954); Carrow, *Government Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958).

151. *Roviaro v. United States*, 353 U.S. 53 (1957) (informer's privilege); *United States v. Reynolds*, 345 U.S. 1 (1953) (military secrets).

152. *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

153. *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769-70 (D.C. Cir. 1965) (informer's privilege).

154. See, e.g., *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub. nom. Carl Zeiss Stiftung v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).



the executive privilege; it also serves as a corollary to the rule of *United States v. Morgan*<sup>155</sup> that an executive or administrative officer should not be examined concerning his mental and decisional processes. The privilege is based on a recognition that frank expression and discussion within the government would not be possible if all deliberative communications were subject to outside scrutiny.<sup>156</sup> Once again Recommendation 6(b) makes no attempt to delineate the boundaries of this privilege but leaves those determinations to be made on a case-by-case basis.<sup>157</sup> No doubt difficult cases will arise, but there should be many other instances where the presiding officer can readily determine that the documents sought contain only information which is not privileged. Agency production of these documents should enhance the fairness of adjudicatory proceedings and alleviate the commonplace complaint of lawyers practicing before administrative agencies that too much in agency files is kept secret. The FOIA already broadly provides for public disclosure of this type of material. The Act's fifth exemption excludes from public disclosure only those "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party other than an agency in litigation with the agency."<sup>158</sup> This provision was intended to make available to the general public internal memorandums and correspondence "which would routinely be disclosed to a private party through discovery process in litigation with the agency."<sup>159</sup> The few judicial decisions on this point have carried out this intent by interpreting the exemption narrowly. Apparently an agency must produce internal memorandums or letters which would be available to *any* party in *any* litigation in which the agency having the records might become involved. The test for "availability" is the discovery practice in the federal courts; only privileged documents are exempt.<sup>160</sup> An agency

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155. 313 U.S. 409, 422 (1941).

156. See notes 115-16 *supra* and accompanying text.

157. Recent decisions have recognized that inter-agency and intra-agency documents that contain factual information or observations are not privileged; the executive privilege only covers the statements of informers and the deliberations and recommendations of agency members of employees. *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

158. 5 U.S.C. § 552(b)(5) (Supp. V, 1970). See note 144 *supra*.

159. HOUSE COMM. REPORT ON THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966).

160. *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union of United States, Inc. v. VA*, 301 F. Supp. 796 (S.D.N.Y. 1969).

must, therefore, disclose to the general public a broad category of internal documents regardless of whether it adopts formal discovery rules.

Problems associated with interpreting the exemption of the FOIA dealing with internal memorandums should not arise when a party to an adjudicatory proceeding applies for a production order under Recommendation 6(b). Under the recommendation, the presiding officer should determine whether the internal agency documents requested by the party are relevant and unprivileged. If they are, he should order the agency to produce them unless he finds that for some other reason the party does not have good cause for their production. If the presiding officer determines that public disclosure of the documents would be undesirable, he can arrange for a protective order as provided for in Recommendation 8. The presiding officer is particularly well suited to make these determinations because of his thorough knowledge of the case.<sup>161</sup>

Since agency files are likely to contain large numbers of documents obtained in confidence from private persons outside the agency, the presiding officer must remember that there is a vast difference

between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential . . . . But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure . . . . That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean that such documents must be produced upon every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown.<sup>162</sup>

Recommendation 6 therefore applies to documents in the agency's files which have been obtained in confidence from third persons, as long as they are not otherwise privileged and are relevant to the proceeding for which they have been requested.<sup>163</sup>

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161. The FCC has recognized this fact in providing by rule that a request under the FOIA for identifiable agency records which is made by a party to a pending adjudicatory proceeding should be ruled on by the presiding officer rather than by the FCC's Executive Director, as is the usual practice. *Compare* 47 C.F.R. § 0.46(e) (1970), *with id.* § 0.461.

162. *Communist Party v. Subversive Activities Control Bd.*, 254 F.2d 314, 321 (D.C. Cir. 1958).

163. The fact that confidential documents may be made public under Recommendation 6 should not cause the agencies any severe harm or difficulty in obtaining the information they need to function properly. Agencies today generally have the power to issue investigatory subpoenas; private persons cooperate with these agencies chiefly because they realize that if they do not supply the information voluntarily the agency can obtain it by compulsory process. No

There is one final problem on discovery from the agency of documents obtained by the agency from third persons. At least one agency requires that a respondent first attempt through voluntary means and through the agency's discovery rules to obtain the documents from the persons who supplied them to the agency before obtaining discovery from the agency's confidential files. Only if the documents are unavailable elsewhere may the respondent obtain them from the agency.<sup>164</sup> To require a party to seek discovery from many sources when the material is already collected by the agency and compiled in one place is inefficient and burdensome.<sup>165</sup> The public interest is not served by delaying the prehearing process in this manner. Since the respondent will eventually obtain any relevant, unprivileged documents from one source or another, there seems to be no valid reason why the agency should not supply them to him in the first place.<sup>166</sup> Recommendation 6(b) rejects this aspect of agency practice and requires the agency to produce any relevant, unprivileged documents and tangible things in its possession or control. The agency cannot force a party to first seek discovery from third persons of documents which are in the agency's files. In the absence of a recognized privilege, a party cannot resist the production of documents on the grounds that he obtained the documents in confidence from third persons.<sup>167</sup>

#### DISCOVERY RECOMMENDATION 7: ROLE OF THE PRESIDING OFFICER

Recommendation 7(a) authorizes the presiding officer to impose time limitations on discovery; Recommendation 7(b) restricts

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doubt some agency informants would prefer that their contributions to agency files remain hidden from view. Their concern may be met in great part through limiting discovery of this material to parties to adjudicatory proceedings conducted by the agency and by framing stringent protective orders in appropriate cases. Relevant evidence could be received at the hearing *in camera* where necessary. On the other hand, many persons who supply information to an agency are not particularly concerned with obtaining confidential treatment. Agencies too often promise confidential treatment as a routine matter and stamp as confidential material that need not be so classified.

164. *Crown Cork & Seal Co.*, FTC Docket No. 8687 (Interlocutory Order, Feb. 8, 1967) (unreported).

165. E. Gellhorn, *supra* note 149, at 163-64.

166. The interests of third parties can be protected, if necessary, by requiring that they be given notice that a party is seeking production of their documents. This allows the third party to seek a protective order when necessary without being directly involved in the discovery process. *Id.* at 165.

167. *See* *FTC v. Tuttle*, 244 F.2d 605, 611-12 (2d Cir. 1957) (FTC investigatory subpoena directed to trade association).

interlocutory appeals from the presiding officer's rulings on discovery. These provisions recognize the vital role played by the presiding officer at the discovery stage of the proceeding. He must exercise firm control over the discovery process if the parties are to obtain adequate discovery without unduly delaying the course of the proceeding. Of course, the parties will often be able to agree among themselves on the timing and scope of discovery. Recommendation 7(a) does not prohibit such agreements but recognizes that they will not always be possible. In such cases the presiding officer must have the power to resolve disputes. Under these Discovery Recommendations the presiding officer should assume responsibility for the satisfactory functioning of the discovery process. He should be prepared to intervene if discovery is taking too long or if the parties are wandering too far afield. Recommendation 7, in conjunction with the other recommendations, gives the presiding officer adequate authority to assert this control whenever necessary. Under Recommendation 7(b) the presiding officer may prevent interlocutory appeals from his rulings on discovery except in those unusual situations where he orders the deposing of an agency employee under Recommendation 2(6).

#### DISCOVERY RECOMMENDATIONS 8: ORDERS

Protective orders are an essential part of any system of discovery; Recommendation 8 accordingly authorizes the presiding officer to formulate appropriate protective orders. Its provisions do not break any new ground but closely follow the Federal Rules of Civil Procedure and the ABA's suggested Standards for criminal trials. Recommendation 8(a) is derived largely from rule 26(c) of the Federal Rules. The variety of protective orders outlined should prove adequate for administrative adjudications. Subdivision 8(a)(7) should prove especially useful by allowing agencies to limit disclosure of sensitive information to a party's outside counsel or to other designated persons.<sup>168</sup> Recommendations 8(b) and 8(c), on the other hand, derive from Standards 4.4 and 4.6, respectively, of the ABA's suggested standards for criminal trials.<sup>169</sup> Recommendation 8(b) authorizes the presiding officer to enter protective orders restricting or deferring the disclosure of the names of witnesses, while Recommendation 8(c) authorizes the presiding officer to hold *in camera* proceedings on the

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168. See note 149 *supra*.

169. ABA DISCOVERY STANDARDS 18-19.

issuance of protective orders. The latter provision seems non-controversial because cases frequently arise where requiring a party to make the necessary showing of good cause in a public hearing would defeat the purpose of a protective order. The former provision is essential because in a minority of proceedings there is a real danger that a witness whose name is disclosed prior to the hearing will be subject to intimidation, harrassment, or other forms of pressure or influence.<sup>170</sup> The general provisions on protective orders in Recommendation 8(a) do not specifically treat this problem because those provisions derive from the Federal Rules of Civil Procedure, which do not expressly authorize the pre-trial discovery of witness lists. Recommendations 1 and 3, however, require the parties to disclose their witness lists prior to the hearing; this requirement creates a need for a special provision on protective orders in such situations. Recommendation 8(b) therefore gives the presiding officer the power to protect a witness by restricting or deferring disclosure by a party of the witness' name. The presiding officer may also restrict or defer production of the narrative summary of the expected testimony of a witness and the production by the agency of a prior statement of an agency witness. These additional provisions coordinate Recommendation 8(b) with Recommendation 3 and are expected to give the presiding officer sufficient authority to protect a witness whenever necessary.

#### DISCOVERY RECOMMENDATION 9: SUBPOENAS

The effective functioning of discovery procedures depends on the authority of the presiding officer to enforce discovery requests through the issuance of subpoenas. Recommendation 9 accordingly provides that the presiding officer should have authority to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding.<sup>171</sup> Under section 7(b)(2) of the APA,<sup>172</sup> any authority which the agency has to issue subpoenas automatically vests in an officer presiding at a hearing covered by that section. The great majority of agencies which conduct adjudicatory proceedings already

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170. See notes 49-61 *supra* and accompanying text.

171. Currently, the exclusive route for enforcement of an administrative subpoena is by agency application for a judicial order of compliance which can in turn be enforced by the court's power of contempt.

172. 5 U.S.C. § 556(c)(2) (Supp. V, 1970).

have statutory authority to issue subpoenas;<sup>173</sup> those few agencies which do not must obtain it from Congress.<sup>174</sup> Many of the adjudicatory proceedings conducted by agencies without subpoena power are not subject to sections 5, 7, and 8 of the APA and therefore are not directly affected by Recommendation 9. However, if the proceeding is within the scope of these recommendations, the presiding officer should have the power to issue subpoenas.<sup>175</sup>

### CONCLUSION

Nine years ago the Administrative Conference generally recommended that administrative agencies adopt rules of discovery for their adjudicatory proceedings. The premises of the recommendation were that fairness to private parties, administrative efficiency, and the public interest required adequate and full discovery by all parties to the proceeding. Faced with a less than unanimous response in the period since the original recommendation, the Conference last year adopted a detailed and comprehensive set of minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7, and 8 of the APA. The premises of this recommendation were the same as those of the earlier one. Hopefully, this recommendation will meet with greater success than the first one, so that it will be unnecessary to issue still another recommendation nine years hence.

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173. The principal agencies that do not presently have the subpoena power for certain of their adjudicatory proceedings are the FDA, the Post Office Department, HEW (in proceedings under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964)), the Civil Service Commission, and most contract appeal boards.

174. Recommendation 13(1)(1) of the temporary Administrative Conference went further than this and provided that "[o]fficers presiding at adjudicatory hearings should have the authority to issue subpoenas requiring the attendance of witnesses or the production of evidence, whether or not the proceedings are governed by sections 7 and 8 of the Administrative Procedure Act." Recommendation No. 13, S. Doc. No. 24, 88th Cong., 1st Sess. 209, 219 (1963). The coverage of that recommendation is broader than that of Recommendation 9 because all of the present discovery recommendations are limited to adjudicatory proceedings subject to section 5, 7, and 8 of the APA. The narrower coverage of Recommendation 9 does not reflect, however, any intent to reject or depart from the broader recommendation of the temporary Conference.

175. There are also a handful of little known proceedings scattered through the federal establishment where the agency lacks the power to issue subpoenas. Sometimes the absence of subpoenas has not proved to be a serious problem because all the relevant evidence is a matter of public record or is in reports filed by the respondent with the agency. An example of this type of proceeding is the revocation of the license of a customhouse broker by the Department of the Treasury. See 19 C.F.R. §§ 31.51-.80 (1970). This situation is atypical; the general rule is still that the presiding officer should have the authority to issue subpoenas.

## APPENDIX

## RECOMMENDATION 21: DISCOVERY IN AGENCY ADJUDICATION

(As Approved by the Administrative Conference at its Plenary Session, June 3, 1970).

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

## RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. §§ 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

*1. Prehearing Conferences*

The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

*2. Depositions*

A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceedings, who should be

given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

### 3. *Witnesses*

#### *(a) Prior Statements*

At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

#### *(b) Narrative Summaries of Expected Testimony*

At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3(a) as all or part of the narrative summary of that witness's expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

### 4. *Written Interrogatories to Parties*

#### *(a) Availability*

A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of an answer. The



party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

*(b) Interrogatories Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

*5. Requests for Admissions*

*(a) Availability*

A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

*(b) Requests Directed to the Agency*

Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

*6. Production of Documents and Tangible Things*

*(a) From Non-Parties*

A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

*(b) From Parties*

A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection,

copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

*(c) From the Agency*

For the purposes of Recommendation 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*

*(a) Control Over Discovery*

The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

*(b) Interlocutory Appeals*

Except as provided by Recommendation 2(6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*

*(a) Authority of Presiding Officer in General*

The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

*(b) Names of Witnesses*

The presiding officer should have the authority, upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

*(c) In Camera Proceedings*

The presiding officer should have the authority to permit a party or person seeking a protective order to make all or part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

*9. Subpoenas*

The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by these Recommendations that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

Earlier drafts of these recommendations prepared by the author contained an additional recommendation dealing with discovery of exculpatory material. That recommendation, which was not approved by the Committee on Compliance and Enforcement Proceedings and therefore not submitted to the full conference, read as follows:

*10. Exculpatory Material*

Agency rules should provide that an attorney or employee appearing in the proceeding on behalf of the agency has a duty to disclose to the other parties to the proceeding relevant material or information which supports the position of any other party where the value of the material or information to that party is or should have been apparent or where disclosure of the material or information is specifically requested by a party. The duty of the attorney or employee under this recommendation extends to material or information within his personal knowledge or possession or in the possession or control of or known by any person who assisted the agency in the investigation or preparation of the proceeding and who either regularly reports to or with reference to the particular proceeding has reported to the attorney or employee.

