certainly should be, an ongoing process. ADR is still at an early stage as far as its use in administrative agencies is concerned. Indeed, as one article regarding ADR in general put it, "[W]e have only begun to identify the kinds of disputes likely to be amenable to the techniques of ADR."[112] One task for administrative law judges will be to aid in realizing the potential of ADR for the administrative process.

III. DISCOVERY

If authorized by statute and agency rule, the ALJ may require the parties to submit to discovery. This may consist of subpoenas *ad testificandum* and *duces tecum*, depositions, written interrogatories, cross-interrogatories, inspections, physical or mental examinations, requests for admissions, production of documents or things, or permission to enter upon land or other property, or the preparation of studies, summaries, forecasts, surveys, polls, or other relevant materials.

Discovery rulings may be made if the ALJ finds it necessary to apply compulsion to obtain the necessary information[113]. Supplemental discovery orders may be issued as needed. The ALJ should be attentive, throughout the discovery stage, to the possibility of delay resulting from abuse of the discovery process.

A. Subpoenas

In some agencies, the ALJ must issue a subpoena upon request, subject to a motion to quash[114]. In other agencies, the ALJ may refuse to issue a subpoena absent a showing of relevance

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[112] Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

[113] *See,* Freije, *The Use of Discovery Sanctions in Administrative Agency Adjudication*, 59 IND. L. J. 113 (1983); Tomlinson, *Discovery in Agency Adjudication*, Report in Support of Recommendation [70-4], 1 ACUS 37, 571, 577 (1971); 1 CFR § 305.70-4 (1993).

[114] See for example 29 CFR § 2200.57 (2000) (Occupational Safety & Health Review Commission).

or related requirements[115]. In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, a witness who is required to travel far from home will be inconvenienced at best, and may undergo severe hardship. Furthermore, subpoenas duces tecum may compel the transportation of bulky documents and may deprive a business of records and files needed for its daily operation. These burdens should not be lightly imposed[116]. The ALJ may in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspecting and copying of them on the premises where they are regularly kept. The ALJ also may encourage agreements between the parties providing for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the ALJ has previously ruled need not be produced. Upon learning of this, the ALJ should deny the request unless it appears that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy prehearing conference or other prehearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash.

Sooner or later an ALJ will encounter a party who refuses to comply with a subpoena. When that happens, the agency probably will have to file an enforcement action in federal district

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[115] See for example, 7 CFR § 1.149 n4(2000)(Department of Agriculture); 10 CFR § 2.720(a) (2000)(Nuclear Regulatory Commission, domestic licensing proceedings); 12 CFR § 19.26(a)(2000) (Comptroller of the Currency); 16 CFR § 3.34(b) (2000) (FTC, rules of practice for adjudicative proceedings). The relevant provision of the APA states: "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. § 555(d) (1994).

[116] *Cf.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 213 (1946)(dicta).

court[117]. The ensuing litigation can delay the agency's adjudication considerably,[118] but Supreme Court precedents strongly tend toward upholding an agency's subpoenas[119]. Moreover, the APA states, "On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law."[120] Once the agency's statutory authority to issue the challenged subpoenas is established, the subpoena generally will be found to be in accordance with law "if the inquiry is within the authority of

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[117]For an example of an agency rule pertaining to enforcement of subpoenas, see 29 CFR § 2200.57(d) (2000).

[118]See for example FTC v. Anderson, 631 F.2d 741 (D.C. Cir. 1979). Although not within the scope of this Manual, agency enforcement of administrative subpoenas can, in addition to creating substantial delays in the proceedings, create serious problems and complications for ALJs in conducting proceedings. For example, there may be serious questions about the ALJ's authority to issue subpoenas, which the ALJ and the agency may need to address in the first instance, a matter which may involve statutory interpretation. For example, although agreeing with the agency, the court in U.S. v. Florida Azalea Specialists, 19 F. 3d 620, 622-23 (11th Cir. 1994) still addressed the statutory interpretation argument which the subpoenaed party raised.

[119] *See*, CAB v. Hermann, 353 U.S. 322 (1957) (production of all books and records covering a period of three years); United States v. Morton Salt, 338 U.S. 632 (1950). However, it should be noted that challenges to the agency in actions to enforce agency subpoenas can present complications and problems, which if not handled properly, can lead to delay and even reversal of the agency's position. For example, in NLRB v. Detroit Newspapers, 185 F. 3d 602, 605-06 (6th Cir. 1999), a court ruled that the ultimate authority to decide whether subpoenaed material was privileged from disclosure is a matter for the Article III Judiciary. Of course, an ALJ and the agency will rule on such questions in the first instance, but the ultimate decisional authority would seem to be in the courts, if the party refuses to comply with the agency subpoena.

[120] 5 U.S.C. 555(d) (1994).

the agency, the demand is not too indefinite and the information sought is reasonably relevant."[121]

B. Discovery and Confidential Material

When it is desirable to have an advance written exchange of confidential material, the ALJ should develop appropriate safeguards to assure confidentiality. The ALJ may, for example: (1) obtain the commitment of the parties receiving the material to limit its distribution to specific persons; or (2) ask unaffected parties to waive the receipt of certain material; or (3) issue appropriate orders. As an additional safeguard, ALL copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the ALJ.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the ALJ[122]. The need for such an order often arises during prehearing discovery when a party refuses to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefitting competitors. To guard against misuse of the information the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if offered in evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the

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[121] United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

[122] *See* Exxon Corp.; v. Federal Trade Commission, 665 F.2d 1274 (D.C. Cir. 1981). For examples of agency regulations related to various protective orders, see 10 CFR § 2.734 (2000) (Nuclear Regulatory Commission; confidential informant); 10 CFR § 501.34(d)(2000) (Department of Energy); 14 CFR § 13.220 (h) (2000) (FAA civil penalty actions); 15 CFR § 25.24 (2000)(Department of Commerce, Program Fraud Civil Remedies); 16 CFR § 3.31(d) (2000) (FTC).

pertinent portions of the record, briefs, and decisions[123]. In some situations the ALJ may find it easier to allow the parties to draft a proposed order for his signature.

The ALJ must realize that protective order procedures could be inimical to the concept of a proceeding which is a matter of public record. Consequently, extreme care must be exercised in the issuance and application of the order to insure that the integrity of the record is preserved and the rights of the parties and the public are duly considered.

Moreover, the order should make clear that it does not constitute a ruling that any material claimed by a party to be covered is in fact confidential and entitled to be sealed and withheld from examination by the general public.[124]

C. Testimony of Agency Personnel and Production of Agency Documents

Testimony of agency personnel and the production of documents in agency custody must sometimes be restricted to protect the agency's investigative or decisional processes[125]. Consequently some agencies provide special procedures applicable to discovery requests for materials in the agency's custody, such as requiring that they be referred to the agency either initially

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[123]Forms 19-a-d in Appendix I are sample protective orders.

[124] For further discussion of confidential material and administrative proceedings, see text *infra* accompanying notes 242-48.

[125] *See*, 5 U.S.C. § 552(b) (1994 & Supp. V 1998). The cited statutory provision is part of the Freedom of Information Act (FOIA), which deals with public access to federal government records, rather than discovery by private litigants. FOIA and discovery pertaining to government records sought by private litigants obviously are related. At least some cases indicate that precedents construing one of the FOIA exemptions are not always irrelevant to issues involving discovery. *See*, McClelland v. Andrus, 606 F.2d 1278, 1285, n. 48 (D.C. Cir. 1979), Washington Post Co. v. U.S. Dept. of Health & Human Services, 690 F.2d 252, 258 (1982).

or upon interlocutory appeal by the agency staff[126]. The ALJ should assure that these procedures are not used frivolously or for clearly improper purposes.[127]

In *Jencks v. United States* [128] it was held that the defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and activities to which a prosecution witness testifies at trial. This principle has been extended to administrative proceedings in which the agency is an adversary[129]. Some agencies have adopted procedural rules specifically directed to the "Jencks" problem.[130]

In ruling upon such requests, the ALJ does not occupy precisely the same position as did the court in *Jencks*. The Administrative Law Judge is not a court, or the representative of a separate branch of government who is being asked to compel unwilling disclosure by the agency. The Administrative Law Judge is an employee of the agency, who is making the initial decision for the agency itself as to what it shall voluntarily disclose. Accordingly, in the absence of agency policy to the contrary, and within the scope of sound discretion, the ALJ should be guided by agency policies and a sense of fair play rather than by a narrow

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[126] For an example, see FTC regulations, 16 CFR §§ 3.23(a), 3.36 (2000).

[127] *See* Domestic Cargo-Mail Service Case, 30 CAB 560, 651 (1960).

[128] 353 U.S. 657, 672 (1957). The principle of this case, with some modifications, was later codified, 18 U.S.C. § 3500 (1994). This provision is applicable only to criminal cases.

[129] Great Lakes Airlines v. CAB, 291 F.2d 354, 363-365 (9th Cir. 1961), *cert. denied*, 368 U.S. 890 (1961); NLRB v. Adhesive Product Corp., 258 F.2d 403, 408 (2d Cir. 1958); Communist Party of the United States v. SACB, 254 F.2d 314, 327-328 (D.C. Cir. 1958).

[130] See for example, 7 CFR § 1.141 (2000) (Department of Agriculture, providing that production of such documents "shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act"); 17 CFR § 201.231(a)(2000)(SEC).

legal analysis of whether, under *Jencks*, the Constitution would force the agency grudgingly to provide the information requested.

In the absence of good reasons to the contrary, the ALJ should seriously consider requiring production of all relevant and material factual statements, whether or not covered in the witness' testimony. (If nothing else, disclosure could prevent a court from later reversing and remanding the case, with an attendant waste of time for everyone concerned.) In deciding this question the ALJ, to the extent permitted by agency rules, may examine the statements *in camera*. To avoid delay at the hearing the ALJ may require the parties to submit such statements before the hearing.

D. Reports, Estimates, Forecasts, and Other Studies

Although most discovery questions which an Administrative Law Judge may encounter will be fairly analogous to discovery issues confronting courts, there are some situations which have few or no counterparts outside of administrative agency proceedings. For instance, historical data, statistical or technical reports, forecasts, or estimates may have to be prepared, sometimes by more than one party. If so, it is frequently necessary for the ALJ to establish standard bases and time periods. In addition, it is sometimes necessary to specify in some detail the manner of preparation -- by requiring, for example, that the parties use certain specified methods in preparing cost estimates. Use of such procedures should not prevent a party from supplementing its data with similar material in other forms, subject to the ALJ's discretion.

E. Polls, Surveys, Samples, and Tests

As with reports, estimates and forecasts, information may be needed about habits, customs, or practices for which little reliable information is available -- for example, the method of loading trucks, the volume of traffic along a particular route, or the percentage of travelers who prefer non-smoking areas. Polls, surveys, samples, or tests may be the most feasible methods of obtaining the needed data. These may have been previously prepared by a party or an independent source for other purposes or they may be prepared specifically for the pending proceeding -- either by one or more of the parties independently or with the consent and knowledge of the ALJ and the other parties as a part of the prehearing procedure.[131]

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[131] *Cf.*, 18 CFR § 156.5 (2000) (FERC, Application for Orders under Section 7(a) of the Natural Gas Act).

Polls, surveys, samples, and tests frequently raise serious questions of objectivity and reliability, especially if they have been prepared specifically for the proceeding in question. The ALJ should require the methods by which they were produced to be described in sufficient detail to permit a fair evaluation of these factors. If a poll, survey, sample, or test is proposed, and prior approval is requested, the ALJ should seek agreement among the parties on the methods to be used. The ALJ may grant such approval, subject to the parties having an opportunity to raise objections during the course of the hearing.

IV. PREHEARING TECHNIQUES FOR EXPEDITING AND SIMPLIFYING THE COMPLEX PROCEEDING

The formal administrative hearing often is quite similar to a trial before an ALJ sitting without a jury. One party may have a claim against another, as in workers' compensation. Or, a government agency may be proceeding against a private party who allegedly has not complied with some law or regulation, as in enforcement proceedings under the National Labor Relations Act,[132] or the Occupational Safety and Health Act,[133] or any of a large number of other laws under which sanctions can be imposed and violations remedied. Then of course there are cases involving claims for benefits or entitlements payable by the government, such as Social Security disability benefits or veterans' benefits. A word often used to describe such proceedings is "quasi-judicial." Typically, these quasi-judicial proceedings are nearly identical to a formal adjudication without a jury. Pleadings of some sort -- complaint, charge, answer, response, etc. -- are filed[134]. There are adverse parties and pre-hearing discovery often is available. Witnesses testify orally on direct and cross-examination. The ALJ or other presiding officer usually disposes of the case by a decision, ruling, or order, with appeal to higher authority generally being available. In fact, the quasi-judicial, formal adjudicative model has been incorporated into administrative law and institutionalized by

[132] 29 U.S.C. §§ 151-68 (1994).

[133] 29 U.S.C. §651 *et seq.* (1994).

[134] *See, e.g.*, 29 CFR §§ 2200.30 -.41 (2000) (Occupational Safety & Health Review Commission).